Michael P. Laffey, Esq.
Messina Law Firm, P.C.
961 Holmdel Road
Holmdel, NJ07733-2103
Tel: (732) 332-9300; Fax: (732) 332-9301

Charles S. LiMandri (*Pro hac vice*)
Teresa L. Mendoza (*Pro hac vice*)
Paul M. Jonna (*Pro hac vice*)
Freedom of Conscience Defense Fund
P.O. Box 9520
Rancho Santa Fe, CA 92067
Tel: (858) 759-9948; Fax: (858) 759-9938

Attorneys for Defendants

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 LAW DIVISION - HUDSON COUNTY DOCKET NO. L-5473-12 Civil Action **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** Date: January 30, 2014 Time: 10:00 a.m.

On the Brief
Charles S. LiMandri, Esq.
Teresa L. Mendoza, Esq.
Paul M. Jonna, Esq.
Michael P. Laffey Esq.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Jersey Cases

N.J. Supreme Court

TABLE OF AUTHORITIES

N.J. Superior Court

U.S. Supreme Court

TABLE OF AUTHORITIES

U.S. Supreme Court

TABLE OF AUTHORITIES

U.S. Supreme Court

U.S. Circuit Courts

TABLE OF AUTHORITIES

U.S. Circuit Court

Other Cases

Statutes & Rules

I.

PRELIMINARY STATEMENT.

Plaintiffs' motion for partial summary judgment reveals their ultimate motive in this litigation: to use the judicial system as a tool to bludgeon all who disagree with them, and particularly those who do so on religious grounds. Plaintiffs want the Court to rule that describing homosexuality as "disordered" or a "mental disorder" is false **as a matter of law**.

But Plaintiffs' argument is untenable for several reasons. First, any statement that homosexuality is disordered is a protected and legitimate (and non-actionable) opinion in the areas of science, religion, and philosophy, among others. For that reason, the statement is also protected under *Acuna v. Turkish* 192 N.J. 399, 930 A.2d 416 (2007), because the issue is a matter of scientific, philosophical and theological dispute that has divided, and continues to divide, American society. In addition, the right of individuals to answer that question for themselves, without fearing reprisal or compulsion – either from the state directly, or from agents co-opting the power of the state – is protected by the inviolable Rights of Religion, Privacy, Self-Determination and Speech.

Plaintiffs also rely on a series of statements which are not binding on this Court, including the legislative findings of Assembly Bill No. A-3371 and statements by the APA – which are obviously and unapologetically political. Tellingly, Plaintiffs cite no scientific studies to support their argument that homosexuality is "normal and natural" and that calling it disordered is "false." The reason is simple: the question of whether something is disordered is ultimately value-laden, not scientific.

Plaintiffs also ask the Court to rule that Defendants used the word change in a manner that violated the CFA – again, as a matter of law. But this argument is also meritless. Plaintiffs

offer a narrow and self-serving understanding of the term "change" which is inconsistent with both how it was used by the Defendants and understood by the Plaintiffs at the time. Plaintiffs also contend that Defendants referred to statistics in a manner that violates the CFA as a matter of law. But Defendants' anecdotal evidence is valid and Defendants' cited studies accurately represent the results of the SOCE community at large – which is precisely the community to which Defendants refer clients.

Finally, Plaintiffs contend that Defendants' First Amendment and other affirmative defenses do not apply, but several of those defenses, outlined in Defendants' Cross Motion for Summary Judgment ("Defendants' MSJ"), actually dispose of Plaintiffs' claims.

What Plaintiffs ultimately seek through this motion, and indeed through this litigation, is a ruling that (1) affirms that their lifestyle and sexual preferences are "normal and natural" and (2) silences into submission all those who dare to disagree with their extremist political agenda. But this is a misuse of the judicial system that the Court should not sanction. The Court is not required to sacrifice common sense and religious freedom on the altar of political correctness. Indeed, the Constitution forbids it. Plaintiffs' motion must be denied.

II.

LEGAL ARGUMENT.[1]

A. The Allegation that Defendants Misrepresented that Homosexuality is a Mental Disorder is Not Actionable Under the CFA.

Plaintiffs ask the Court to rule that, if they can prove at trial that Defendants called homosexuality a mental disorder, such a statement would violate the New Jersey Consumer

[1] For purposes of this Motion, Defendants will cite to exhibits attached hereto as "Ex.", exhibits attached to Defendants' Cross Motion for Summary Judgment as "MSJ Ex.," and exhibits attached to Defendants' Motion to Exclude Plaintiffs' Expert as "Expert Ex.". All exhibits cited as "Ex." are attached to the accompanying Jonna Certification.

Fraud Act ("CFA") **as a matter of law**. Plaintiffs' request is baseless and must be rejected for at least six reasons.

1. The Statement that Homosexuality is a Mental Disorder is a Protected Opinion.

First, as set forth in Defendants' MSJ, the statement that homosexuality is a mental disorder is a protected opinion.[2] Any claim of fraud must be based on a misrepresentation of presently existing fact; fraud cannot be based on a difference of opinion. *Baughman v. United States Liab. Ins. Co.*, 662 F.Supp.2d 375, 386 (D.N.J. 2009). Furthermore, **in an area of scientific ambiguity, the expression of an honest interpretation of the facts cannot be the basis for an alleged factual misrepresentation**. *Diaz v. Johnson Matthey, Inc.*, 869 F.Supp.1155, 1165 (D.N.J. 1994).

Several large mental health organizations and numerous professionals in the United States and internationally, as well as major religions like the Catholic Church, share Defendants' view that unwanted same sex attraction is a mental disorder; and that homosexual acts are "intrinsically disordered."[3] Consequently, the allegation that Defendants misrepresented that homosexuality is a mental disorder is a non-actionable opinion.

[2] *See* Defendants' MSJ at pp.25-32.

[3] *See, e.g.*, MSJ Ex. 76, Deposition of Dr. Joseph Nicolosi, October 30, 2014, 80:2-12 (homosexuality is a mental disorder); MSJ Ex. 77, Deposition of Defendants' Expert Dr. Joseph Berger, November 3, 2014, 72:11-15 (homosexuality is a mental disorder for some individuals); MSJ Ex. 45, *The ICD-10 Classification of Mental and Behavioral Disorders*, World Health Organization, F66-F66.8 (maintaining that ego-dystonic homosexuality, or unwanted same-sex attraction, is a mental disorder); MSJ Ex. 75, Catholic Church, *Catechism of the Catholic Church* § 2357, available at http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm ("homosexual acts are intrinsically disordered"); *see also* MSJ Footnote 202 (discussing various major religions' positions on homosexuality).

2. <u>Plaintiffs' Attempt to Subject Defendants to Liability Under the CFA for Referring to Homosexuality as a Mental Disorder Fails under *Acuna v. Turkish*</u>.

Second, Plaintiffs' attempt to subject Defendants to liability under the CFA for referring to homosexuality as a mental disorder fails under *Acuna v. Turkish* 192 N.J. 399, 930 A.2d 416 (2007).[4] Here, like in *Acuna*, the Court is being asked to "drive public policy in one particular direction by the engine of the common law when the opposing sides, which represent so many of our citizens, are arrayed along a deep societal and philosophical divide." *Acuna*, 192 N.J at 419. Plaintiffs point to several organizations that maintain that homosexuality is a normal variation of human sexuality and that it is not disordered. In contrast, however, several other organizations, including the World Health Organization (WHO),[5] maintain that egodystonic sexual orientation (in other words, unwanted sexual orientation) is a diagnosable and treatable condition.[6] This division also reaches into every segment of American society, and visibly divides the mental health profession.[7]

---

[4] *See* Defendants' MSJ at pp.36-44.

[5] As noted in Defendants' MSJ, the WHO represents 194 member states, all Member States of the United Nations except Liechtenstein, as well as the Cook Islands and Niue. MSJ Ex. 80, World Health Organization, *Countries*, http://www.who.int/countries/en/ (last visited November 11, 2014). The ICD-10, the WHO'S diagnostic manual, is also used by seventy percent of the world's psychiatrists. MSJ Ex. 81, Geoffrey M. Reed, et al, *The WPA-WHO Global Survey of Psychiatrists' Attitudes Towards Mental Disorders Classification*, (June 2011) World Psychiatry, 10(2), pp.1, 8, 124, 129, available at http://www.wpanet.org/uploads/WPA-WHO_Collaborative_Activities/The-WPA-WHO-Global-Survey-Report.pdf.

[6] *Compare* MSJ Ex. 45, *The ICD-10 Classification of Mental and Behavioral Disorders*, World Health Organization, F66-F66.8 (maintaining that ego-dystonic homosexuality is a mental disorder), *with* MSJ Ex. 46, American Psychological Association, *Use of Diagnoses "Homosexuality" and "Ego-Dystonic Homosexuality"* (Aug. 27 and 30, 1987), http://www.apa.org/about/policy/diagnoses.pdf (last visited October 21, 2014) (adopting policy resolution condemning the proposed inclusion of ego-dystonic homosexuality in the ICD-10).

[7] *See* MSJ Footnote 182 (comparing the positions of professional organizations which approve of SOCE, including: the National Association for the Research and Therapy of

Plaintiffs allege that "it is beyond dispute that homosexuality is not a mental illness or disorder but is a normal variation of human sexuality."[8] In contrast, Defendants' expert Dr. Nicolosi testified that **there is simply no consensus in psychology regarding whether homosexuality is normal or disordered**, and that the answer to that question for any particular psychologist largely depends on his own worldview.[9] Dr. Nicolosi further testified that empirical research, scientific literature, and his own extensive clinical experience, support the following views: heterosexuality is the normal expression of human sexuality, homosexuality is a disordered expression of human sexuality, persons are not "born gay," and homosexuality is susceptible to change through therapy.[10] This is precisely the type of societal dispute which *Acuna* holds that the Court should not adjudicate. *Acuna*, 192 N.J at 419. Therefore, the Court should reject Plaintiffs' attempt to resolve, through litigation, the issue of whether homosexuality is disordered because the issue is a matter of scientific, philosophical and theological dispute that has divided, and continues to divide, American society.

3. <u>Any Statement that Homosexuality is a Mental Disorder is Protected Under the Inalienable Rights of Religion, Privacy, Self-Determination and Speech</u>.

Third, any statement that homosexuality is a mental disorder is protected under the inalienable rights of religion, privacy, self-determination and speech as guaranteed by the Federal and New Jersey Constitutions.[11] Plaintiffs state that "[t]he core premise of Defendants'

Homosexuality, Positive Alternatives to Homosexuality, the Catholic Medical Association, Christian Medical and Dental Associations, the American College of Pediatricians, the American Association of Christian Counselors, with professional organizations which disapprove of SOCE, including the American Psychological Association, the American Psychiatric Association, and the American Psychoanalytic Association).

[8] Plaintiffs' Brief, p.1.

[9] MSJ Ex. 76, Deposition of Dr. Joseph Nicolosi, October 30, 2014, 80:19-82:13.

[10] *Id*. at 128:16-129:12, 187:10-22.

[11] *See* Defendants' MSJ at pp.44-72; Section II.C.1.a. and II.C.1.d. below.

conversion therapy program is that there is something psychologically abnormal, deficient, or wrong with people who experience homosexual desire."[12] Regardless of whether the assertion itself is true, it is a prime example of the assertion of a religious belief. Consequently, it is true that Defendants have exercised their inviolable religious rights to assert their belief that homosexuality itself, and engaging in homosexual acts, represent a disorder in the person and the choice to engage in disordered behavior, respectively. These are not novel beliefs, but legitimate and historical religious beliefs.[13] The Court cannot adjudicate the validity of those beliefs precisely because of the importance of maintaining the separate spheres of religion and the law. Moreover, the Court must not adjudicate the issues because of the threat, as here, that such an adjudication would be undertaken precisely to make the Court the agent of targeting and suppressing religious beliefs.[14]

Further, Defendants' participation in SOCE and Plaintiffs' threat to bring it forward for public ridicule and condemnation, is precisely the type of private sexual activity and government sanctioned reprobation, which the U.S. Supreme Court has found disfavored through its evolving understanding of the right to privacy: "our laws and traditions in the past half century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003).[15]

Defendants are also protected by the right to self-determination of the Federal Constitution and New Jersey Common Law. Plaintiffs seek to shut down an entire field of psychological treatment merely to advance their political agenda. However, they cannot, in the

[12] Plaintiffs' Br. at p.6.
[13] *See* Defendants' MSJ at Footnote 202.
[14] *Id*. at Section IV.E.1.
[15] *Id*. at Section IV.E.2.

process, remove the right of individuals to self-determine their own medical treatment and their own sexuality.[16]

Lastly, any statement that homosexuality is disordered is protected free speech. As noted above, Defendants' statements are neither false nor misleading – but are rather plain opinions. As such, the restriction of Defendants' statements would represent impermissible viewpoint discrimination.[17]

4. <u>Legislative Findings and Statements by Political Organizations are Not Dispositive</u>.

Fourth, in order to justify their arguments regarding the nature of homosexuality, Plaintiffs improperly rely on legislative findings and self-serving statements by political organizations.

a. The preamble of Assembly Bill No. A-3371 is not authoritative.

Plaintiffs cite to the preamble of Assembly Bill Number A-3371, the New Jersey bill that banned SOCE for minors, which states that homosexuality is not a disease, disorder, or deficiency, to support their argument that Defendants are "out of synch . . . with the law of State [sic] of New Jersey."[18] First and foremost, the preamble of a statute is not part of the law and should not be given substantive effect. *See Asbury Park Press v. Ocean Cnty. Prosecutor's Office*, 374 N.J. Super. 312, 323-24 (Super. Ct. 2004) ("the preamble of a legislative act is not part of the law, and it cannot be used to discern legislative intent"); *PRB Enters., Inc. v. S. Brunswick Planning Bd.*, 105 N.J. 1, 506 (1987) ("a preamble consists of statements 'giving

[16] *Id*. at Section IV.E.3.
[17] *Id*. at Section IV.E.4.
[18] Plaintiffs' Br. at p.2.

reasons for the operative provisions which follow.' . . . Ordinarily, the contents of the preamble are not given substantive effect").

Legislative findings are most appropriately used as a means of finding a rational basis for a law, and here the legislative findings were most probably included in anticipation of constitutional challenges to the law. While legislative determinations in enacting a law are presumed rational, they need not be presumed true. *See Gonzales v. Raich*, 125 S. Ct. 2195, 2208 (2005) (Congress's resolution of the issue need not be correct-and certainly not demonstrably correct beyond a reasonable doubt – when findings-based statutes are at issue, mere rationality will suffice); *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting) ("Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied.").

In that context, strict scrutiny mandates a skeptical evaluation of legislative fact-finding, while rational basis review requires a more deferential approach. *See Heller v. Doe*, 509 U.S. 312, 333 (1993) ("It could be that the assumptions underlying these rationales are erroneous, but the very fact that they are arguable is sufficient, on rational-basis review, to immunize the legislative choice from constitutional challenge.") (internal quotations omitted). Indeed, however, the fact that legislative findings can be reviewed by Courts and found wanting, indicates that legislative findings are not somehow themselves determinative of the truth or falsity of any proposition. *See, e.g.*, *Lamprecht v. FCC*, 958 F.2d 382, 393, n.3 (D.C. Cir. 1992) (reviewing and finding insufficient evidence to support legislative finding that women who own radio or television stations are more likely than white men to broadcast distinct types of programming); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985)

(reviewing and finding insufficient evidence to support legislative finding that mentally handicapped individuals create unique population density problems and require unique regulation).

In addition, and as the Court knows, **A-3371 does not apply to any of the claims in this case** because: (1) the law was enacted on August 19, 2013, almost one year after this action commenced, and it is not retroactive; (2) the law only applies to minors and all of the Plaintiffs in this action are adults; and (3) the legislature was not making any statements with respect to alleged misrepresentations made under the CFA, nor was it seeking to usurp the function of a judge or jury in such cases. Moreover, to suggest some sort of consensus, Plaintiffs erroneously imply that the New Jersey findings included a finding of some sort of consensus, which they did not, and point to the fact that California enacted similar legislation. However, Plaintiffs fail to mention that laws banning SOCE for minors have been rejected in the fourteen subsequent states that considered them.[19]

b. Plaintiffs rely on a series of political statements regarding homosexuality that are not authoritative.

Plaintiffs also point to a series of political statements made by the American Psychological Association ("ApA"), the American Psychiatric Association ("APA"), the

[19] *See, e.g.*, MSJ Ex. 93, Christopher Doyle, *Beating the Bans*, Citizen (Oct. 2014) (discussing how fourteen states have rejected bans on SOCE for minors due to the testimony of Ex-Gays and realization that there is a significant divide of opinion regarding SOCE); MSJ Ex. 94, Michael Bryboski, *Majority of States Are Blocking Bills That Seek to Ban Conversion Therapy for Gay Youth*, Christian Post Reporter (July 29, 2014), http://www.christianpost.com/news/majority-of-states-are-blocking-bills-that-seek-to-ban-conversion-therapy-for-gay-youth-123953/ (discussing rejection of bans on SOCE in majority of states); Expert Ex. 15, Michael Gryboski, *Nation's Capital Bans Conversion Therapy for Gay Youth*, December 3, 2014, Christian Post Reporter, available at http://www.christianpost.com/news/nations-capital-bans-conversion-therapy-for-gay-youth-130605/.

American Medical Association ("AMA"), and other similar groups to support their position that homosexuality is not disordered and that any contrary beliefs are **false as a matter of law**, and ask the Court take judicial notice of those statements.[20] However, Plaintiffs fail to realize that the concept of "mental disorder" has no coherent meaning within the mental health field, that the ApA, APA, and AMA are not authoritative, binding or in any way the final say on disputed matters, and moreover, Plaintiffs' cited cases concerning judicial notice are inapposite.

i. There is no coherent concept of the phrase "mental disorder."

It is important to briefly address the concept of a "mental disorder." Defendants' MSJ and Motion to Exclude Plaintiffs' Experts ("Expert Motion") both address this point, but it must be briefly addressed here as well. It may be tempting to distinguish the term "disordered" as understood by the layman, from the term "mental disorder" as understood by the mental health community. Such a distinction, however, has neither basis in logic nor utility, and would in fact do nothing than further confuse the definition of "mental disorder." There is no agreed upon definition of "mental disorder" within the mental health community.[21] Indeed the scientific literature is replete with attempts at defining or explaining the term "mental disorder," several of which contradict each other. Some of these theories include that: (1) the idea of the mental disorder is an incoherent concept, and that mental disorders do not exist; (2) the idea of the mental disorder is a pure value concept based purely on societal values; (3) the idea of the mental disorder is purely utilitarian, and defined by whatever mental health professionals treat; (4) the

[20] Plaintiffs' Br. at pp.3-6.

[21] *See* Ex. 1, Jerome C. Wakefield, *The Concept of Mental Disorder: On the Boundary Between Biological Facts and Social Values,* March 1992, American Psychologist, pp.373-374 (Rutgers professor commenting that: "Despite a vast literature spanning philosophy, psychology, psychiatry and medicine devoted to the concept of mental disorder, there currently exists no widely accepted analysis that adequately explains even generally agreed upon, uncontroversial judgments about which conditions are disorders.").

idea of the mental disorder is based on statistical deviance, and any mental deviance is a mental disorder; (5) the idea of the mental disorder is based on biological disadvantage, so that any mental disadvantage is a mental disorder; (6) the idea of the mental disorder is based on dysfunction which leads to harm, with harm based on evolutionary principles; (7) the idea of the mental disorder is based on dysfunction which leads to subjective distress or disability;[22] and (8) the idea of the mental disorder is determined by whatever is included in the DSM, the ICD or the CCMD.

Number (7) above is the definition of mental disorder promulgated by Dr. Spitzer as part of the movement to replace "Homosexuality" with "Ego-Dystonic Homosexuality" in the DSM-III.[23] Number (8) above appears to be the definition of "mental disorder" offered by Plaintiffs, who rely extensively on the DSM in their argumentation.[24] However, with regard to Number (8), it is a definition constantly in flux. For example, in the 1970s, Dr. Spitzer's definition of "mental disorder" justified the removal of homosexuality from the DSM.[25] It did not, however, justify the removal of "Ego-Dystonic Homosexuality" from the DSM a decade later (since it was the primary motivation for including "Ego-Dystonic Homosexuality"). Further, if Plaintiffs' reliance on diagnostic manuals to define mental disorder is valid, it suffers from the fact that

[22] Numbers (1)-(7) are those identified in Ex. 1, Jerome C. Wakefield, *The Concept of Mental Disorder: On the Boundary Between Biological Facts and Social Values,* March 1992, American Psychologist, pp.374-385.

[23] *See* Ex. 1, Jerome C. Wakefield, *The Concept of Mental Disorder*, pp.379-380; Ex. 2, Robert Spitzer, *The Diagnostic Status of Homosexuality in DSM-III: A Reformulation of the Issues,* February 1981, American Journal of Psychiatry, p.212.

[24] Plaintiffs' Br. at p.4.

[25] Ex. 3, Position Statement (Retired), *Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM-II, 6th Printing, page 44*, The American Psychiatric Association.

ego-dystonic homosexuality remains in other well-respected, even superior, diagnostic manuals, such as the World Health Organization's ICD.[26]

In practice, the term "mental disorder" means little more than dis-order relating to the mind. Consequently, the determination of whether something constitutes a "mental disorder" becomes a value-laden determination of whether the absence or presence of any mental attribute is positive or negative.

> In my judgment, the question of whether or not heterosexual functioning should be used as the norm – so that inability to function heterosexually is impairment in a major area of functioning – is a value judgment and not a factual matter. It should be understood that there is always a value judgment in deciding that a particular area of functioning is important."[27]

[26] MSJ Ex. 45, *The ICD-10 Classification of Mental and Behavioral Disorders*, World Health Organization, F66-F66.8.

[27] Ex. 2, Robert Spitzer, *The Diagnostic Status of Homosexuality in DSM-III: A Reformulation of the Issues*, February 1981, American Journal of Psychiatry, pp.211, 212, 214-215); *see also* Ex. 3, Position Statement (Retired), *Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM-II, 6th Printing, page 44*, The American Psychiatric Association, p. 2 ("Nor is [the DSM's] purpose to imply certainty about the nature of conditions when there is not a consensus in the profession."); Ex. 1, Jerome C. Wakefield, *The Concept of Mental Disorder: On the Boundary Between Biological Facts and Social Values,* March 1992, American Psychologist, p.376 (listing the vast literature which views "mental disorder" as a pure value concept), p.386 ("Because of the complexity of the inferences involved in judgments of dysfunction and our relative ignorance about the evolution of mental functioning, it is easy to arrive at differing judgments about mental dysfunction even on the basis of the same data."); Ex. 4, Vivek Datta, *When Homosexuality Came Out (of the DSM)*, December 1, 2014, Made in America, http://www.madinamerica.com/ 2014/12/homosexuality-came-dsm/ ("The 'coming out' of homosexuality from the DSM-II allows us to reflect on the following: (1) change in the concept of mental disorder is slow; (2) diagnosis-making is a social act; (3) the construct of illness and disorder, 'mental' or otherwise is a social one; (4) the construct of illness has social consequences; and (5) shifts in the concept and nature of disorder reflect wider social, political and economic forces more than scientific advancement.").

Such a determination is also by definition not scientific, but based upon only whether a consensus can be reached in the mental health profession of the positive or negative nature of any attribute, and the usefulness of labeling it as a mental disorder.[28]

What might appear as confusion as to the definition of "mental disorder" is actually explained by the accepted practice in the mental health community that there need not be any single definition of "mental disorder," and that disagreements will always exist. This is elucidated by the fact that the ICD lists different mental disorders from the DSM and still includes egodystonic homosexuality (or unwanted same-sex attraction) as a mental disorder.[29] In addition, the ICD-10 is used in preference to the DSM by over 70% of the world's mental health

[28] Indeed, as noted in Defendant's Expert Motion, during the period in which the "general acceptance" standard primarily applied to expert testimony certain commentators worried that expert testimony by psychiatrists and psychologists based purely on their experience would be inadmissible because it is by definition non-scientific, and opinions by mental health professionals are rarely generally accepted, which leads to many treatable and treated conditions not being labeled "disordered." *See* Expert Ex. 7, David E. Bernstein, *The Science of Forensic Psychiatry and Psychology*, 2 Psychiatry, Psychology and Law, April 1995, available at http://psychrights.org/Expertwitnesses/ScienceofForensicPsychiatryand Psychology.htm, pp.2, 4; Ex. 1, Jerome C. Wakefield, *The Concept of Mental Disorder: On the Boundary Between Biological Facts and Social Values*, March 1992, American Psychologist.

[29] MSJ Ex. 45, *The ICD-10 Classification of Mental and Behavioral Disorders*, World Health Organization, F66-F66.8 (maintaining that ego-dystonic homosexuality is a mental disorder); *see also*, Ex. 5, Jerrold S. Maxmen, Nicholas G. Ward, Mark Kilgus, *Essential Psychopathology & Its Treatment*, Third Edition, 2009, W.W. Norton & Company, Inc., p.468 (internal citations omitted). ("Although homosexuality . . . by itself is no longer listed as a mental disorder, individuals with 'persistent and marked distress about sexual orientation' . . . are diagnosed with 'sexual disorder not otherwise specified' using the *DSM-IV-TR*, and diagnosed as 'Egodystonic Sexual Orientation' in the *International Classification of Diseases (ICD)* published . . . by the American Medical Association and World Health Organization. Egodystonic sexual orientation is used in the *ICD* when the individual desires that his or her orientation 'were different because of associated pathological and behavioral disorder, and may seek treatment in order to change it"). ("While many mental health care providers and professional associations have expressed considerable skepticism that sexual orientation could be changed with psychotherapy and also assumed that therapeutic attempts at reorientation would produce harm, recent empirical evidence demonstrates that homosexual orientation can indeed be therapeutically changed in motivated clients, and that reorientation therapies do not produce emotional harm when attempted.").

professionals,[30] and the latest version of the DSM, the DSM-5, is not used by one third of American psychiatrists, many of whom think it lacks scientific credibility due to the political jockeying of various interest groups.[31] Many of these psychiatrists reported that the DSM-5 is simply not relevant.[32]

Further, as explained by an APA Position Statement:

> Decisions about the labeling problem in [the DSM] require an understanding of the function of a manual of mental disorders. Its purpose, as its name clearly implies, is to list and define mental (psychiatric) disorders. **Its purpose is not to list and describe all of the forms of human psychological functioning which are judged by the profession or some members of the profession as less than optimal. Nor is its purpose to imply certainty about the nature of conditions when there is not a consensus in the profession.**[33]

The DSM's understanding of what constitutes a mental disorder is not binding on psychiatrists and psychologists,[34] and it is certainly not binding on the legal profession.

---

[30] *See* MSJ Ex. 81, Geoffrey M. Reed, et al, *The WPA-WHO Global Survey of Psychiatrists' Attitudes Towards Mental Disorders Classification*, (June 2011) World Psychiatry, 10(2), pp. 1, 8, 124, 129.

[31] *See* Expert Ex. 9, Caroline Cassels, *One Third of Psychiatrists Not Using DSM-5*, August 19, 2014, MedScape, www.medscape.com/viewarticle/830099_print; Expert Ex. 17, Jeffrey Satinover, *Homosexuality and the Politics of Truth*, 1996, Baker Books, p.32 ("The APA vote to normalize homosexuality was driven by politics, not science."); *accord* Expert Ex. 18, Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis*, 1987, Princeton University Press, pp.3-4 (describing how the delisting of homosexuality from the DSM was motivated not by science but "the ideological temper of the times.")

[32] *See* Expert Ex. 9, Caroline Cassels, *One Third of Psychiatrists Not Using DSM-5*.

[33] Ex. 3, Position Statement (Retired), *Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM-II, 6th Printing, page 44*, The American Psychiatric Association, p.2.

[34] Expert Ex. 14, Joseph P. Gudel, *Is Homosexuality an Illness?*, Christian Research Institute, http://www.equip.org/articles/is-homosexuality-an-illness/ (noting that four years after the removal of homosexuality from the DSM, 69% of mental health practitioners believed that homosexuality is usually a pathological adaptation, as opposed to a normal variation); Expert Ex. 19, Evelyn Pringle, *DSM Billing Bible – Big Pharma Best Seller*, December 27, 2006, Lawyers and Settlements (noting that the DSM is merely considered the "billing bible" for therapists, that it is the diagnostic coding guide for insurance claims, that most licensed clinicians either bill a patients' health insurance company directly or provide the client with a statement permitting

Perhaps more importantly, if the issue must be adjudicated, the determination of whether homosexuality is disordered is unquestionably the role of the jury (although it is the Defendants' position that this question is also improper for the jury).[35] Although no jury has yet tried the specific question of whether homosexuality is disordered, juries have been found to be the ideal fact-determiner for similar but less controversial questions. *State v. Hackett*, 166 N.J. 66, 83 (2001) (the "determination of whether specific conduct has the tendency to impair or debauch the morals of the average child" is a question for the jury). Like the determination of morals in *Hackett*, the determination of whether homosexuality is disordered "is well within the abilities of the average jury, and **allows the jury to fulfill its role as arbiter of community standards** when applying the laws of our State." *Id*.

ii. The APA is not authoritative.

It is simply the case that the APA, although respected by many, is not a binding regulatory body, has acted under political pressure in the past, continues to do so, and has lost credibility in the eyes of many mental health professionals. Its decisions to delist homosexuality and ego-dystonic homosexuality from the DSM were completely political, and its current policy statements are transparent in their political slant. Plaintiffs' reliance on the APA is simply unfounded.

(1) The APA is not a binding regulatory body.

As an initial matter, it is important to note that the APA is not a regulatory authority; it is merely advisory and political and not binding on anyone.[36] Plaintiffs' expert, Dr. Bernstein, a

---

him/her to claim reimbursement after payment, and that unless a formal DSM diagnosis exists, neither the mental health counselor nor the client can receive third-party reimbursement.")

[35] See Defendants' MSJ, Section IV.D.

[36] Illustrative of this is the fact that in many statements by the APA and the ApA, the nonbinding nature of their policy initiatives is explicitly stated. Ex. 6, Christopher W. Loftis,

former President of the APA, admitted that the APA is political and that she even signed a letter on behalf of the APA when she was President, supporting same-sex "marriage" in Hawaii.[37] Moreover, the New Jersey regulatory authority for psychologists does not regulate any aspect of SOCE. *See* N.J.A.C. § 13:42. Indeed, no professional association of mental health care practitioners has ever stated that it is unethical to provide SOCE,[38] and no state regulatory bodies hold that it is unethical to provide SOCE to adults.[39]

(2) The decision to delist Homosexuality from the DSM was political.

Plaintiffs point to the removal of homosexuality, and later ego-dystonic homosexuality, form the DSM as evidence that homosexuality has been definitively determined to not be a

---

Kristi Sands Van Sickle, *Supporting Early Career Psychologists: Advocating for Licensure Upon Completion of Doctoral Degree*, Spring 2007, Florida Psychological Association (noting that the ApA recommendation that state regulatory bodies grant licensure earlier to doctoral graduates is not binding); Ex. 7, American Psychiatric Association, *Documentation of Psychotherapy by Psychiatrists: Resource Document*, March 2002 ("What follows is a consideration of the issues involved; it is not a standard of practice and is not binding on members of the APA.")

[37] Expert Ex. 1, Bernstein Dep., 82:15-24, 83:5-23; Expert Ex. 22, Autumn Sandeen, *American Psychiatric Association to Hawaii Legislature: Keep Trying for Civil Unions*, July 9, 2010, Pam's House Blend; *see also* Expert Ex. 20, Benjamin Kaufman, *Why Narth? The American Psychiatric Associations Destructive and Blind Pursuit of Political Correctness*, Regent University Law Review, p.425, http://www.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/docs/issues/v14n2/Vol.%2014,%20No.%202,%207%20Kaufman.pdf. For more evidence of the political nature of the APA and how it is extremely slanted, *see* Ex. 8, American Psychological Association, *APA Member Characteristics & Division Report*, November 9, 2014 (listing 1,246 members of the APA who are unable or unwilling to even define their own gender).

[38] *See* Expert Ex. 3, Beckstead Dep. II, 358:3-359:10, 417:11-18.

[39] Three such regulatory bodies do provide that it is unethical to provide SOCE to minors, due to state legislation, but none hold that SOCE is itself always unethical, and permit SOCE to be provided to adults. *See* Ex. 19, Michael Gryboski, *Nation's Capital Bans Conversion Therapy for Gay Youth*, December 3, 2014, Christian Post Reporter, available at http://www.christianpost.com/news/nations-capital-bans-conversion-therapy-for-gay-youth-130605/. Moreover, fourteen states have expressly rejected the attempt to dictate ethical practice through legislative fiat, even as to SOCE for minors.

mental disorder. While superficially noteworthy, the history of the removal of homosexuality from the DSM indicates that the decision was not at all based on science, but rather politics, and the desire to move the APA from being solely a professional organization, and towards more of a social institution which can help lobby for social change.[40]

This is made clear, not merely by the recounting of individuals who disagreed with the decision, **but by the engineers and formulators of the decision themselves**. For example, Dr. Ronald Bayer described the process as follows:

> The entire process, from the first confrontations organized by gay demonstrators at psychiatric conventions to the referendum demanded by orthodox psychiatrists, seemed to violate the most basic expectations about how questions of science should be resolved. Instead of being engaged in a sober consideration of data, psychiatrists were swept up in a political controversy. The American Psychiatric Association had fallen victim to the disorder of a tumultuous era, when disruptive conflicts threatened to politicize every aspect of American social life. A furious egalitarianism that challenged every instance of authority had compelled psychiatric experts to negotiate the pathological status of homosexuality with homosexuals themselves. The result was not a conclusion based on an approximation of the scientific truth as dictated by reason, but was instead an action demanded by the ideological temper of the times.[41]

This refusal to look at the pathology of homosexuality objectively, and from a scientific standpoint, has been maintained by the APA to the present day because of the pseudo-scientific,

[40] Ex. 9, Dale O'Leary, Dean Byrd, Richard Fitzgibbons, *The Non-Factsheet* ("the members of the Coalition are, of course, free to have whatever social, political, moral, ethical, and religious views they choose. To present these as supported by science and therefore the only acceptable view is willfully to deceive. This is one more attempt by the left to use the schools to present their political agenda as scientific fact.").

[41] Expert Ex. 18, Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis*, 1987, Princeton University Press, pp.3-4; *see also* Ex. 10, A. Dean Byrd, Shirley E. Cox, Jeffrey W. Robinson, *The Innate-Immutable Argument Finds No Basis in Science, In Their Own Words: Gay Activists Speak About Science, Morality, Philosophy*, NARTH, pp.2-3 (quoting Simon Levay, *Queer Science*, 1996, MIT Press) ("Gay activism was clearly the force that propelled the APA to declassify homosexuality").

and ultimately value-laden determination that no consensual sexual activity should ever be discouraged.[42] As Defendants' expert Dr. Nicolosi testified:

> Q. Have you ever said that you have to be anti-intellectual to be gay?
> A. Yes.
> Q. What do you mean by that?
> A. Because there's no rational explanation for gay. To be gay you have to do a lot of denial. You have to deny the anatomy of the body. You have to deny causation. You have to deny consequences. You have to deny the male/female design. You have to deny all the great religious traditions that have condemned homosexuality. Take all of that, wrap it up, and call it homophobia. That is anti-intellectual. The American Psychological Association, when it made its decision, the American Psychiatric Association, it was not a scientific discussion, it was political."[43]

Consequently, numerous mental health practitioners continue to view homosexuality, or ego-dystonic homosexuality, as a pathological condition deserving of treatment, and continue to pursue a better scientific understanding of homosexuality. Plaintiffs' specific reliance on the removal of homosexuality and ego-dystonic homosexuality from the DSM, as evidence that homosexuality and ego-dystonic homosexuality are not mental disorders, is simply misplaced. It would not be determinative for any fair-minded student of contemporary history, and should not be determinative for the Court.

(3) The "Just the Facts" opinion piece is not determinative.

Plaintiffs also cite to a factsheet produced by the APA and several other organizations titled "Just the Facts about Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personal."[44] As noted above and in Defendants' Expert Motion, the APA is a highly politically motivated organization which frequently disseminates opinion pieces concerning

[42] MSJ Ex. 23, Nicholas Cummings, *Psychology's War on Religion*, p.194, Zeig, Tucker & Theisen (Feb. 2, 2009), pp.74-75 (discussing how APA has adopted a worldview that all sexual behavior cannot be considered immoral").

[43] Ex. 11, Deposition of Joseph Nicolosi, November 17, 2014, 362:18-363:8.

[44] Plaintiffs' Br. at p.5.

sexuality which have no scientific basis and which can best be described as policy statements.[45] The "factsheet" fits neatly into this category. Although peppered with scientific jargon and scientific citations, it retains significant factual errors – so much so that it has been labeled "The Non-Factsheet" by other mental health professionals who have reviewed it, and authored a report of the same-name.[46]

Those professionals note that: (1) the "factsheet" relies on political statements from other professional organizations who in turn cite to the political decision to remove homosexuality from the DSM for the proposition that homosexuality cannot be pathological; (2) the false facts peppered throughout the "factsheet" minimize the health risks associated with homosexuality and place young individuals with SSA at significantly increased risk of related mental or physical diseases; and (3) the "factsheet" takes the absurdly unethical position that public schools should promote heterodox and novel religious beliefs which mirror the APA's moral determinations concerning sexuality. This third position, that orthodox religions should be discouraged and heterodox religions affirmed in public schools as a means of not distressing homosexual students, has, in fact, already been found unconstitutional. *Citizens for a Responsible Curriculum v. Montgomery County Pub. Schs.*, 2005 U.S. Dist. LEXIS 8130 (D. Md. May 5, 2005) (finding proposed school curriculum unconstitutional).

Similarly, Plaintiffs' specific reliance on the "Just the Facts" propaganda piece for the proposition that homosexuality cannot be a mental disorder, or disordered in any way, is misplaced. Any individual who understands how to check citations can easily determine that the

---

[45] *See, e.g.*, Expert Ex. 22, Autumn Sandeen, *American Psychiatric Association to Hawaii Legislature: Keep Trying for Civil Unions*, July 9, 2010, Pam's House Blend.

[46] Ex. 9, Dale O'Leary, Dean Byrd, Richard Fitzgibbons, *The Non-Factsheet*; Ex. 12, Factsheet, *What You Should Know About Sexual Orientation of Youth*, Facts about Youth, available at http://factsaboutyouth.com/getthefacts/quickfacts/.

"factsheet" does not rely on scientific studies, but rather in a convenient circle, cites to other professional organizations, who in turn have cited to older APA political policy statements or decisions.

(4) Recent statements by the APA and ApA are not determinative.

Plaintiffs' cite to numerous other statements by organizations like the APA, ApA, ACA and AMA for the proposition that "a consensus exists in the scientific community that there is nothing unhealthy, disordered, or pathological about a non-heterosexual sexual orientation" and that "[e]very prominent medical and mental health professional association has reaffirmed that homosexuality is a normal variation of human sexuality."[47] Again, the policy statements of those organizations are not at all determinative of the issue. Indeed, the fact that they rely on continually issuing policy statements, instead of letting the science speak for itself, is indicative both of the political nature of those groups and the weakness of the science upon which they wish to rely.

Further, Plaintiffs' attempt to create a false consensus in the field is evident through their use of the superlative "prominent"[48] as a means of excluding every professional organization which chooses to honestly look at the scientific studies, and which consequently disagrees that homosexuality can never represent a disorder or deficiency – including the 50,000 members of the AACC. [49] The absurdity of their attempt is perhaps made most obvious through the counter proposition which Defendants would offer: "a consensus exists in the scientific community that

[47] Plaintiffs' Br. at p.3.
[48] Plaintiffs' Br. at p.3.
[49] MSJ Ex. 87, Tim Clinton, *A Response to California Senate Bill 1172*, American Association of Christian Counselors (Dec. 3, 2012), http://www.aacc.net/2012/12/03/a-response-to-california-senate-bill-1172/ (discussing how California's proposed ban on SOCE for minors violates the religious rights of minors and their parents)

there are unhealthy, disordered, or pathological aspects associated with a non-heterosexual sexual orientation" and that "[e]very *scientifically honest* medical and mental health professional association has reaffirmed that homosexuality is not a normal variation of human sexuality."

The political nature of these organizations is well documented and accepted in the mental health community. As noted in Defendants' MSJ, Dr. Nicholas Cummings, **the former President of the APA**, has written about numerous instances in which the APA acted out of pure political convenience and fear, with little regard for science. For example, out of a fear that homosexual rights might be negatively impacted, the APA: (1) declassified homosexuality as a mental disorder; (2) switched out the traditional pedophilia diagnostic criteria so that now the pedophilic attractions must be unwanted, or have been acted upon (similar to egodystonic homosexuality); (3) actively conflagrates the idea that a belief that homosexual behavior is immoral is mere homophobia; (4) encourages the belief that homophobia itself is a pathology; and (5) desires that religions change their moral teachings to accept homosexuality.[50]

Indeed, the APA leadership actively prevents individuals who disagree with their political positions from having their voices heard within the APA. This is perhaps best evidenced by the APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation. The task force was given the mandate of determining whether SOCE is effective and whether it should be encouraged. However, its authors were culled only from individuals who were openly homosexual and/or who had already publicly spoken out against SOCE as inefficacious, harmful, immoral and unethical. Numerous individuals who practiced SOCE applied to be on the task force in order to provide information regarding their legitimate and effective SOCE practices, but their applications were disregarded. This was because the director of the APA's Lesbian, Gay

[50] MSJ Ex. 23, Nicholas Cummings, *Psychology's War on Religion*, p.194, Zeig, Tucker & Theisen (Feb. 2, 2009), pp.12-13, 192-195

and Bisexual Concerns Office, Clinton Anderson stated: "[w]e cannot take into account what are fundamentally negative religious perceptions of homosexuality – they don't fit into our world view."[51]

iii. Plaintiffs' cases concerning judicial notice are inapposite.

Plaintiffs cite to several inapposite cases for the proposition that the political statements of the ApA and the APA are judicially noticeable, including *Planned Parenthood of Cent. N.J. v. Farmer*, 165 N.J. 609, 640 n.10 (2000), *Lindquist v. City of Jersey City Fire Dep't*, 175 N.J. 244 (2003), and *Lomando v. United States*, 2011 U.S. Dist. LEXIS 28116 (D.N.J. Mar. 18, 2011). These cases, however, are easily distinguishable and are not readily interpretable to mean that the court can judicially notice that homosexuality is not disordered.

In *Planned Parenthood of Cent. N.J.*, the Court found that a statue did not have sufficient justification because the government's proffered justification was false. 165 N.J. 609, 641 (2001). In so doing, the Court did judicially notice the findings of an AMA report that suggested that intra-familial communications are not served by legal requirements that minors receive parental consent before undergoing an abortion. *Id.* Indeed, the Court noted, the reason why the minor is not informing her parents is probably because the intra-familial lines of communication are already broken, and the present legal requirement would not fix them. *Id*. The Court stressed, however, the ample amount of other evidence present in the record, and the importance of the fact that the AMA had no interest in the litigation. *Id.*

Here, Defendants do not assert that every statement by the ApA, APA and AMA is so politically motivated as to be invalid. In situations like *Planned Parenthood of Cent. N.J.*, where the proposition judicially noticed concerns the actual expertise of the professional organization,

[51] MSJ Ex. 23, Nicholas Cummings, *Psychology's War on Religion*, p.194, Zeig, Tucker & Theisen (Feb. 2, 2009). pp.74-75.

it is proper to judicially notice that organization's academic journal. *Id*. Here, however, the opinion which Plaintiffs ask the Court to judicially notice – that homosexuality can never represent a deficiency – is highly controversial and not universally accepted. Moreover, the ApA and the APA do have a strong interest in this litigation through their active political lobbying against SOCE, for which this case represents a potential watershed moment.

In *Lindquist v. City of Jersey City Fire Dep't*, the Court heard testimony from an expert who testified that he was unaware of any studies which could answer a specific question the Court had asked. 175 N.J. 244 (2003). The Court then proceeded to perform some cursory research on its own, and found studies directly on point, whose existence and credibility – and not conclusions – it then proceeded to judicially notice. *Id*. Here, Plaintiffs are asking the Court to go the extra step which *Lindquist* did not feel free to take – Plaintiffs ask the Court not merely to judicially notice that many professional organizations believe that homosexuality is not disordered, but further, that it is therefore factually the case. That is beyond the holding of *Lindquist* and beyond the role of the Court. *Id*.

Lastly, in *Lomando v. United States*, the court again did not reach as far as Plaintiffs would desire. 2011 U.S. Dist. LEXIS 28116 (D.N.J. Mar. 18, 2011). In *Lomando*, the statute at issue referenced a medical guide, the ABMS, in order to define its medical terms. *Id*. The court was tasked with defining "emergency medicine" for the purpose of determining whether a proffered expert was a specialist in the field and could testify thereto. *Id*. The ABMS definition, however, was brief and unhelpful, so the court looked to another medical guide, the ABEM – not to replace the ABMS definition of "emergency medicine," but to help explain the ABMS definition. *Id*. The court then judicially noticed the ABEM definition of "emergency medicine" merely for the purpose of noticing that it did not contradict and indeed helped explain the ABMS

definition. *Id*. The court did not, however, attempt to judicially notice the ABMS definition of "emergency medicine" as a means of explaining the objective truth of what constitutes "emergency medicine," merely what constitutes "emergency medicine" for purposes of the statute at issue.

Here, Plaintiffs are asking the Court to judicially notice that "a statement that homosexuality is not a normal variation of human sexuality but rather is a mental illness, disorder, defect, or an equivalent thereof, is [an objective and literal] misrepresentation."[52] This is far beyond the holding of *Lomando*, and again outside the discretion of the Court.

5. <u>The Minority View of a Particular Scientific Discipline Is Entitled To Be Considered Along with the Majority Rule</u>.

Fifth, as noted in Defendants' Expert Motion, in New Jersey a scientific theory, although not generally accepted, may be admitted if it is based on a sound, adequately-founded scientific methodology, relying on data and information of the type reasonably relied upon by experts in the particular scientific field involved. *Rubanick v. Witco Chemical Corp.*, 125 N.J. 421 (1991); *Clark v. Safety-Kleen Corp.*, 179 N.J. 318, 421 (2004). Indeed, the key for admitting expert testimony is the validity of the expert's reasoning and the expert's methodology. *Landrigan v. Celotex Corp.*,127 N.J. 404 (1992); *Clark v. Safety-Kleen Corp.*, 179 N.J. 318, 337 (2004) ("*Rubanick* changed the focus of the inquiry from the scientific community's acceptance of the substance of the opinion to its acceptance of the methodology and reasoning underlying it.").[53]

Further, as noted in Defendant's Cross-Motion for Summary Judgment, there is no true consensus in the mental health as to whether homosexuality is disordered or whether it is

[52] Plaintiffs' Br. at p.7.
[53] Defendants' Expert Motion at Section III.A.3.

changeable.[54] Defendants' expert Dr. Nicolosi testified that there is simply no consensus in psychology regarding whether homosexuality is normal or disordered, and that the answer to that question for any particular psychologist largely depends on his own worldview.[55] Dr. Nicolosi's view, although apparently the minority view, is held by tens of thousands of therapists in the following organizations: National Association for the Research and Therapy of Homosexuality,[56] Catholic Medical Association,[57] Christian Medical and Dental Associations,[58] Positive Alternatives to Homosexuality,[59] American Association of Christian Counselors (representing over 50,000 Christian counselors),[60] and the American College of Pediatricians,[61] who all reject the politically correct "majority view" of the APA leadership. Moreover, the ICD-10, the

[54] Defendants' MSJ at Section IV.C.1. and IV.D.

[55] MSJ Ex. 76, Deposition of Dr. Joseph Nicolosi, October 30, 2014, 80:19-82:13.

[56]MSJ Ex. 82, NARTH, *NARTH SOCE Statement*, (Jan. 25, 2012) http://www.narth.com/#!about1/c1wab (last visited October 21, 2014) (stating that many individuals who pursue SOCE will be able to achieve meaningful, and satisfying shifts in their sexual attractions, fantasy, and arousal).

[57] MSJ Ex. 84, Maricela P. Moffitt, *CMA Protests California Bill*, Catholic Medical Association (May 7, 2012) http://cathmed.org/issues_resources/publications/press_releases/cma_protests_california_bill/ (last visited September 29, 2014) (press release reporting letter sent to California Senate criticizing proposed ban on SOCE for minors).

[58] MSJ Ex. 85, House of Representatives, *Homosexuality Ethics Statement*, Christian Medical and Dental Associations (June 11, 2003) http://cmda.org/library/doclib/homosexuality.pdf (discussing importance of encouraging and supporting individuals in all of their attempts to cease engaging in homosexual behavior)

[59] MSJ Ex. 83, PATH, *Is change possible?*, http://www.pathinfo.org/is-change-possible.html (last visited October 21, 2014) (offering evidence of profound change in sexual identity, behavior, interests and desires).

[60] MSJ Ex. 87, Tim Clinton, *A Response to California Senate Bill 1172*, American Association of Christian Counselors (Dec. 3, 2012), http://www.aacc.net/2012/12/03/a-response-to-california-senate-bill-1172/ (discussing how California's proposed ban on SOCE for minors violates the religious rights of minors and their parents).

[61] MSJ Ex. 86, American College of Pediatricians, *Empowering Parents of Gender Discordant and Same-Sex Attracted Children*, (April 2008), http://www.acpeds.org/the-college-speaks/position-statements/parenting-issues/empowering-parents-of-gender-discordant-and-same-sex-attacted-children (last visited September 29, 2014) (discussing importance of sexual abstinence in same-sex attracted adolescents to increase likelihood of disappearance of same-sex attractions).

diagnostic manual used by the majority of the world's therapists,[62] maintains that egodystonic homosexuality, unwanted same-sex attraction, is a diagnosable and treatable condition.[63]

Defendants' view, although apparently the minority view, is entitled to be heard in court, and precludes the Court from judicially noticing Plaintiffs' viewpoints regarding homosexuality as true.

6. <u>The Right to a Jury Trial.</u>

Sixth, if the present action proceeds to a jury trial, Defendants have an unequivocal right to have the jury determine all of the factual questions relating to whether Defendants' conduct violated the CFA. *See Zorba Contractors, Inc. v. Housing Authority, City of Newark*, 362 N.J. Super, 124, 138-139 (App. Div. 2003) ("a legislative intent to allow jury trials can be reasonably implied from the fact that the relief authorized by this provision is legal in nature."). This does not merely include the determination of whether certain statements were made, but the combined question of whether those statements were false, misleading or otherwise misrepresentations under the CFA. *Hassler v. Sovereign Bank*, 644 F.Supp.2d 509, 514 (D.N.J. 2009) (citing *New Jersey Citizen Action v. Schering-Plough Corp.*, 367 N.J. Super. 8, 13 (App. Div. 2003) ("the determination of whether business conduct 'stand[s] outside the norm of reasonable business practice' presents a jury question."); *Wilson v. GMC*, 2006 N.J. Super. Unpub. LEXIS 2615 (App.Div. June 29, 2006) *36-37 (internal citations and quotations omitted) ("The standard of conduct demanded by the unconscionable commercial practice clause is good faith, honesty in

[62] MSJ Ex. 81, Geoffrey M. Reed, et al, *The WPA-WHO Global Survey of Psychiatrists' Attitudes Towards Mental Disorders Classification*, (June 2011) World Psychiatry, 10(2), pp. 1, 8, 124, 129, available at http://www.wpanet.org/uploads/WPA-WHO_Collaborative_ Activities/The-WPA-WHO-Global-Survey-Report.pdf.

[63] MSJ Ex. 45, *The ICD-10 Classification of Mental and Behavioral Disorders*, World Health Organization, F66-F66.8 (maintaining that ego-dystonic homosexuality, or unwanted same-sex attraction, is a mental disorder).

fact and observance of fair dealing. That issue must be determined on a case-by-case basis. When disputed, it is a jury question."); *Petrillo v. Bachenberg*, 263 N.J. Super. 472, 482 (App. Div. 1993) (the question of whether failing to furnish complete testing data constitutes fraud is a jury question).

Here, Plaintiffs improperly seek to remove from the jury the question of whether Defendants' statements were false, and permit the jury only to determine whether Defendants actually made those statements – many of which are undisputed.[64] This is impermissible. *See Zorba Contractors, Inc. v. Housing Authority, City of Newark*, 362 N.J. Super, 124, 138-139 (App. Div. 2003).

B. Defendant's Use of the World "Change" Does Not Violate the CFA.

With regard to Defendants' use of the word "change", it cannot form the basis of a CFA claim because: (1) Plaintiffs' definition of "change" is absurd; (2) Plaintiffs had actual knowledge that change in homosexuality existed on a continuum; (3) Defendants' definition of "change in sexual orientation" comports with the mental health profession's understanding; (4) Defendants' use of the word "change" constitutes puffery; (5) and Defendants have the right to have a jury determine whether their use of the word "change" was misleading.

1. <u>Plaintiffs' Definition Of "Change" Is Absurd.</u>

Plaintiffs' re-definition of the word "change" and allegation that Defendants' commonsensical understanding of the word has no basis in linguistics or common culture would be comical if its consequences might not be so stark. Plaintiffs state that the definition of the word "change" is "to make different," and that consequently, Defendants' "claim that [their] service[s] *can* 'change' sexual orientation from gay to straight is naturally and reasonably

[64] Plaintiffs' Br. at pp.2-7.

understood by prospective customers to mean that they *will* no longer experience homosexual desire and instead experience heterosexual desire."[65] Defendants' agree that a reasonable definition of "change" is "to make different." Defendants further agree that their alleged assertions that their services *can* change sexual orientation from gay to straight would be naturally and reasonably understood by prospective clients that *some* individuals would will no longer experience homosexual desire and instead experience heterosexual desire. However, no reasonable person could interpret Defendants' offer of help in referring individuals to professionals who engage in SOCE, as a promise that *all* persons who engage in SOCE will no longer experience any residual homosexual desire.

Implied within Plaintiffs' rejection of the commonsensical definition of change is a rejection of all the evidence which indicates that some individuals can and have met Plaintiffs' definition of complete change. Indeed Defendants' provided the testimony of numerous individuals who underwent SOCE, many of which reported that they "no longer experience homosexual desire and instead experience heterosexual desire."[66] When that testimony is accepted, what is left is merely the assertion that the use of the word "change" is somehow a guarantee of the greatest possible change and not merely the change of being "made different" by: (1) diminishing same-sex attraction; (2) increasing opposite-sex attraction; (3) changing one's identification with political labels such as "gay" or "straight;" or (4) no longer needing to compulsively seek out homosexual sex, which is the kind of potential change which Defendants actually offer.[67]

---

[65] Plaintiffs' Br. at p.8 (emphasis added).

[66] *See* Defendants' MSJ, Footnote 157.

[67] Ex. 13, Deposition of Arthur Goldberg, February 19, 2014, 369:6-21 (homosexuality can be associated with addictions), 397:5-398:4 (using the language "journey out of homosexuality", "growing out of homosexuality" and "overcoming homosexuality"), 398:5-9

2. Plaintiffs Had Actual Knowledge That "Change" Could Be Partial.

Philosophizing on whether a reasonable person would interpret the word "change" to come with such a guarantee, however, is unnecessary when the factual record evidences that in all such instances Defendants' next sentence would explain that "change" in homosexuality would sometimes be complete, sometimes be partial, and sometimes not occur.[68] Plaintiffs seem

---

("gay" and "straight" are political terms), 399:20-400:5 ("Q. . . . is there ever an end to the process of journeying out of homosexuality? Are you ever done? A. Yes. Q. When you are done, what does that mean? What has happened? What are you like? A. He or she is at peace with the fact, with their sexual attractions and finds them primarily heterosexual in nature or not erotically same sex in nature."); Ex. 14, Berk Dep., 280:15-20 (using the terms "reduce same sex attraction" and "increase opposite sex attraction").

[68] *See, e.g.*, MSJ Ex. 34, Jonah Institute of Gender Affirmation Consent to Treat and Financial Agreement with signatures of Sheldon Bruck and Jo Bruck; MSJ Ex. 35, Alan Downing Life Coaching Client Service Agreement with signature of Chaim Levin; MSJ Ex. 37, Alan Downing Life coaching Client Service Agreement with signature of Benjamin Unger; Ex. 13, Deposition of Arthur Goldberg, February 19, 2014, 223:4-12 ("Q. How do you typically respond to the question is change possible? A. I say yes, it is possible if somebody is involved and does the work. That there are no guarantees that it can happen, but the fact that people have the ability to change, that they have the capacity to change if they do the work, if they are consistent at it, that kind of thing."), 399:20-400:5 ("Q. . . . is there ever an end to the process of journeying out of homosexuality? Are you ever done? A. Yes. Q. When you are done, what does that mean? What has happened? What are you like? A. He or she is at peace with the fact, with their sexual attractions and finds them primarily heterosexual in nature or not erotically same sex in nature."); Ex. 15, People Can Change, *What We Mean By "Change"*, http://peoplecanchange.com/change/whatwemean.php ("Some skeptics erroneously assume that by change we always mean (or should mean) a 180 degree shift from 100% homosexual to 100% heterosexual in all behaviors, interests, attractions and thoughts, forever after. Anything less than that, some critics argue, isn't real change. Some look for evidence of 'only' a 170 degree shift or 'only' a 90 degree shift, and cry 'failure!' The truth is that any degree of change toward greater peace, satisfaction and fulfillment, and less shame, depression and darkness, is change well worth pursuing."); Ex. 16, People Can Change, *It's Not About Shame*, http://peoplecanchange.com/change/notshame.php ("The truth is: you are good and valuable just as you are, today, unchanged . . . and even if you never change . . . – Pursuit of change isn't about becoming valuable as a person. You already are. – Pursuit of change is about surrendering all that is negative about same-sex attractions: the lust, obsession, buried emotional pain, the secrecy, loneliness and conflict . . . while embracing all that is positive: the drive to heal past hurts, to love and be love [sic], to accept and be accepted, to embrace masculinity fully and completely, to connect and belong. – Pursuit of change is about aligning our values, beliefs, identity, true needs, and behavior . . . and for many of us, aligning our lives with God's will for us individually, as we perceive it.").

to imply that Defendants were required to include their helpful explanation of the word "change" in the same run-on sentence wherein they explained that change was possible, and not in the immediately following sentences. Such a requirement would be both unrealistic and unhelpful.

The fact that Defendants widely published and disseminated any modifiers on the word "change" is perhaps made most evident through the fact that "change" is explicitly discussed in the informed consents which Plaintiffs Jo Bruck, Benjamin Unger, and Chaim Levin all signed.[69] This is evidence both that the working understanding of "change" was not hidden, as Plaintiffs would have the Court believe, and indeed that Plaintiffs themselves understood what "change" meant. Furthermore, Defendants did not only use the word "change" when describing SOCE, but used various other terms, such as "grow out homosexuality", "walk away from homosexuality", "develop heterosexual potential", "experience heterosexual feelings", which together explicate how their use of the word "change" was neither unreasonable nor confusing.[70] Indeed, the active explanation of "change" is sufficient in itself to avoid any claims that Defendants were misleading Plaintiffs. *Onyx Acceptance Corp. v. Trump Hotel & Casino Resorts, Inc.*, 2008 N.J. Super. Unpub. LEXIS 1095 (App.Div. Mar. 12, 2008) *35 ("We do not conclude that the CFA prohibits [a merchant] from applying its own unique definition of the term guaranteed. In such a case, however, in order to comply with the CFA's obligation of truth in the marketplace, [the merchant] is obliged to advise its customers of that unusual definition so they may make a fully-informed decision.").

Moreover, Plaintiffs Michael Ferguson, Benjamin Unger and Chaim Levin had all seen mental health counselors in the past, and consequently it is patently unreasonable for them to

[69] *See* Defendants' MSJ, Sections IV.A.

[70] Ex. 13, Deposition of Arthur Goldberg, February 19, 2014, 397:5-398:4 (using the language "journey out of homosexuality", "growing out of homosexuality" and "overcoming homosexuality").

assert that they understood that therapy, counseling or life-coaching would result in the complete elimination of all their numerous problems, including their discomfort with their homosexuality.

3. Mental Health's Definition of "Change In Sexual Orientation."

Plaintiffs' single focus on the definition of the word "change" is besides the point. Instead, the relevant question concerns how to define "change in sexual orientation." This carries with it the necessity of defining "sexual orientation." As Defendants have already noted, Plaintiffs have attempted to redefine "sexual orientation" in a manner that is self-serving and which is ultimately unavailing and simply false.[71] The APA is clear that sexual orientation can refer to either: (a) a person's attractions; (b) a person's sexual behavior; or (c) a person's sexual identity.[72]

The disjunctive nature of the feelings, behavior, identity framework is made evident from the fact that there are easily identifiable individuals who fit into only one of the three categories. Perhaps the majority of individuals who engage in homosexual sexual activity do so because of their sexual attractions, but many do so despite the absence of sexual attractions to the same-sex. For example, Defendants' have provided the testimony of one formerly homosexual man, Mr. De Jiacomo, who testified that for a period of time he was not attracted to men as men, but engaged in compulsive homosexual sex because the touch itself felt good and the opportunity to have sex was often convenient.[73] Mr. De Jiacomo is the classic example of an individual who had a

---

[71] Defendants' Expert Motion at Section II.C.2.

[72] MSJ Ex. 32, American Psychological Association, *Answers to Your Questions: For a Better Understanding of Sexual Orientation & Homosexuality*, http://www.apa.org/topics/lgbt/orientation.pdf; Ex. 17, American Psychological Association, *Sexual orientation and homosexuality* (both stating that: "Sexual orientation also refers to a person's sense of identity based on those attractions, related behaviors, and membership in a community of others who share those attractions.")

[73] *See* Ex. 18, Deposition of David de Jiacomo, February 27, 2014, 97:23-24, 99:15-25, 100:10-23.

homosexual sexual orientation but neither identified as homosexual, nor had homosexual attractions, but still engaged in homosexual sex.

There are also numerous cases where the motivation for homosexual sexual conduct comes neither from deep-seated homosexual attractions, or the appreciation of the behavior itself. The majority of these examples can be most easily culled from instances wherein influential lesbian leaders have stated that they chose to be lesbian as a means of advocating for women's rights.[74] Although for many of those women, the behavior and attraction followed, the impetus for their homosexuality was the identity itself.[75]

Defendants adhere to this widely accepted definition of homosexual sexual orientation, which accurately describes many of the motivations for homosexual sexual behavior.[76]

---

[74] MSJ Ex. 79, Suzanna Danuta Walters, *The Power in 'Choosing to be Gay'*, The Atlantic (June 3, 2014), http://www.theatlantic.com/health/archive/2014/06/whats-wrong-with-choosing-to-be-gay/371551/ (Professor of Sociology and Director for Women's, Gender, and Sexuality Studies at Northeastern University criticizing the "ideology of immutability" as scientifically inaccurate and harmful to sexual minorities); Ex. 19, Claudia Dreifus, *A Conversation With – Anne Fausto-Sterling; Exploring What Makes Us Male or Female*, January 2, 2011, New York Times, Science Section (Dr. Anne Fausto-Sterling of Brown University describing how engagement in the feminist movement opened up the opportunity for her to be a lesbian).

[75] An unfortunate example of engaging in homosexual sexual conduct first, and then developing homosexual attractions after, is perhaps most evident with Plaintiff Chaim Levin who was the victim of homosexual child sexual abuse for a lengthy period of time. Ex. 20, Reuven Blau, *Activist wins $3.5M molestation lawsuit against cousin for childhood abuse claims*, June 12, 2013, New York Daily News. Like Dr. Walters above, and numerous other homosexual persons, Plaintiff Chaim Levin's homosexual sexual orientation is considered no less legitimate by the homosexual community or the mental health profession merely because the homosexual conduct occurred before the homosexual attractions. *See also* Ex. 21, Allison Rudd, *Sexual orientation link to past: study*, July 23, 2010, Otago Daily Times (noting the high number of individuals with a homosexual orientation who also suffered childhood sexual abuse).

[76] Ex. 22, American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (Aug. 2009), http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf, p.2 ("Same-sex sexual attractions and behavior occur in the context of a variety of sexual orientations and sexual orientation identities, and for some, sexual orientation identity (i.e., individual or group membership and affiliation, self-labeling) is fluid or has an indefinite outcome.")

Consequently, a "change in sexual orientation" is most reasonably defined as a change in *either* sexual feelings, behavior *or* identity.[77] Plaintiffs would have the Court believe that "mere" change in homosexual identity or homosexual behavior, without a complete change in homosexual attractions is both meaningless, and perhaps even harmful as it leads individuals to living discordant lives. But this understanding is simply not representative of the actual lives of individuals with a homosexual sexual orientation. While many individuals with a homosexual sexual orientation have homosexual feelings, behavior *and* identity, the impetus for acquiring a homosexual sexual orientation for most individuals was originally homosexual feelings, behavior, *or* identity. In a similar fashion, the impetus for acquiring a heterosexual (or losing a homosexual) sexual orientation must begin with either acquiring heterosexual (or losing homosexual) feelings, behavior *or* identity. In the mental health field, the change in any one of those factors can represent a change in sexual orientation, and there is no convincing evidence that a motivated person cannot change their sexual orientation through SOCE.[78]

---

[77] *See also* Ex. 24, Judd Marmor, *Homosexual Behavior: A Modern Reappraisal*, 1980, Basic Books, Inc., p.347 ("In those patients who are motivated to change their sexual orientation, it is important to clarify what is meant as 'cure' or change. In an individual who has the ability to react erotically to both men and women, the patient is helped to clarify his fear of women. He then may become increasingly potent and satisfied in this type of relationship and may be urged to curtail his relationships with men, 'Cure' does not necessarily mean the ability to lose the desire or the ability to react erotically to same-sex partners, but means the ability to derive sufficient satisfaction from heterosexuality that the patient does not overtly practice homosexuality. In addition 'cure' means to be aware of the nonsexual motivations that trigger homosexual yearnings, so that when they arise, they can be analyzed and are of short duration.").

[78] At best, Plaintiffs might point to statements by the APA which attempt to minimize the research on the efficacy of SOCE, but these statements merely reaffirm that this is a scientific arena in which the science is constantly evolving, and consequently reaffirms that Defendants' understanding of "change in sexual orientation" is most reasonable. *See* Ex. 23, Position Statement, *Therapies focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)*, March-May 2000, American Psychiatric Association ("To date, there are no scientifically rigorous outcome studies to determine either the actual efficacy or harm of 'reparative' treatments."); Ex. 25, Position Statement, *Issues Related to Homosexuality*, November-December 2013, American Psychiatric Association ("The American Psychiatric

Consequently, Defendants' definition of "change in sexual orientation" which mirrors that of the relevant mental health community, is neither false nor actionable under the New Jersey CFA.

4. Defendants' Use Of The Word "Change" Is Puffery.

As noted in Defendants Motion for Summary Judgment, many of Plaintiffs' cited "misrepresentations" are pure puffery and not actionable under the CFA.[79] Puffery can best be defined as those "kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity." *Vaz v. Sweet Ventures, Inc*., 2011 N.J. Super. Unpub. LEXIS 3189 (Law Div. July 12, 2011) *1 (citing *Vulcan Metals Co., Inc. v. Simmons Mfg. Co*., 248 F. 853, 856 (2d

---

Association believes that the causes of sexual orientation (whether homosexual or heterosexual) are not known at this time and likely are multifactorial including biological and behavioral roots which may vary between different individuals and may even vary over time."), Ex. 22, American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (Aug. 2009), http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf, p.42 ("We conclude that there is a dearth of scientifically sound research on the safety of SOCE. Early and recent research studies provide no clear indication of the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because no study to date of adequate scientific rigor has been explicitly designed to do so. Thus, we cannot conclude how likely it is that harm will occur from SOCE."), p.90 ("We concluded that research on SOCE (psychotherapy, mutual self-help groups, religious techniques) has not answered basic questions of whether it is safe or effective and for whom. Any future research should conform to best-practice standards for the design of efficacy research. Additionally, research into harm and safety is essential. Certain key issues are worth highlighting. Future research must use methods that are prospective and longitudinal, allow for conclusions about cause and effect to be confidently drawn, and employ sampling methods that allow proper generalization. Future research should also include appropriate measures in terms of specificity of measurement of sexual orientation, sexual orientation identity and outcomes, and psychometric adequacy. Mixed-method research, in which methods and measures with offsetting weaknesses are simultaneously employed, may be especially advantageous."); Ex. 26, Statement, *Royal College of Psychiatrists' statement on sexual orientation*, April 2014, Royal College of Psychiatrists ("The Royal College of Psychiatrists considers that sexual orientation is determined by a combination of biological and postnatal environmental factors . . . . It is not the case that sexual orientation is immutable or might not vary to some extent in a person's life . . . . Bisexual people may have a degree of choice in terms of sexual expression in which they can focus on their heterosexual or homosexual side.")

[79] Section IV.C.2.

Cir. 1918)). Further, puffery is permitted because "neither party usually believes what the seller says about his own opinions, and each knows it" and "are rather designed to allay the suspicion which would attend their absence." *Id*.

Defendants have already made the point that the conditional statements which Plaintiffs cite are puffery. *See, e.g., N.J. Citizen Action v. Schering-Plough Corp*. 367 N.J. Super. 8, 13-14 (Super. Ct. App. Div. 2003); *Loreto v. P&G*, 515 Fed. App'x. 576, 582 (6th Cir. 2013).[80] Plaintiffs assert that Defendants have misrepresented that they "*can* change sexual orientation from gay to straight."[81] However, Defendants' use of the word "change" in this context would be considered non-actionable puffery. Plaintiffs harp on the fact that not all persons who engage in SOCE will receive a complete change in all aspects of their sexual orientation. The fact that some individuals have reported such a complete change, however, is sufficient to permit Defendants to make the puffery statement that Plaintiffs, and others *could* do so. For example, New Jersey courts have explicitly found that the statement "*you . . . can* lead a normal nearly symptom-free life again" is non-actionable puffery. *Citizen Action, supra*, 367 N.J. Super. at 13-14. In exactly the same way, Defendants' assertion that Plaintiffs could change their sexual orientation from gay to straight is non-actionable puffery.

5. <u>The Right To A Jury Trial.</u>

As noted above,[82] if the present action proceeds to a jury trial, Defendants have an unequivocal right to have the jury determine all of the factual questions relating to whether Defendants' conduct violated the CFA. *See Zorba Contractors, Inc. v. Housing Authority, City of Newark*, 362 N.J. Super, 124, 138-139 (App. Div. 2003); *Hassler v. Sovereign Bank*, 644

[80] Defendants' MSJ, Section IV.C.2.
[81] Plaintiffs' Br. at p.8.
[82] Section II.A.6.

F.Supp.2d 509, 514 (D.N.J. 2009). This does not merely include the determination of whether certain statements were made, but also the question of whether those statements were false, misleading or otherwise misrepresentations.

Here, Plaintiffs improperly seek to remove from the jury the question of the definition of change, and permit the jury only to determine whether Defendants actually stated that an individual could change his sexual orientation – which is already undisputed.[83] This is impermissible. *See Zorba Contractors, Inc. v. Housing Authority, City of Newark*, 362 N.J. Super, 124, 138-139 (App. Div. 2003).

C. Defendants' Reference To Statistics Does Not Violate The CFA.

Plaintiffs allege that Defendants' use of statistics concerning their services is an actionable misrepresentation under the CFA. This is simply not the case because Defendants' statistics are not fake and accurately represent the results of SOCE studies. Moreover, Defendants have the right to have a jury determine whether their use of those statistics and studies was misleading under the CFA.

1. <u>Defendants' Statistics Are Valid.</u>

Plaintiffs' attempt to discredit Defendants' studies and statistics is meritless because: (1) the evidence Plaintiffs rely on actually supports Defendants' view; (2) the studies themselves show that they are legitimate representations of Defendants' results and the results of SOCE generally; and (3) the cases Plaintiffs cite are unavailing.

a. Plaintiffs' cited evidence is inapposite.

As an initial manner, it is important to understand that JONAH itself does not offer SOCE, and therefore does not advertise concerning the efficacy of its own SOCE services. This

[83] Plaintiffs' Br. at pp.8-9.

is missed by Plaintiffs who cite to emails sent from Mr. Goldberg to Sheldon Bruck for the proposition that JONAH was advertising concerning the efficacy of its own services,[84] and from Elaine Berk to the JONAH listserv, for the proposition that JONAH advertises using false, easily misinterpreted statistics. The texts of those emails, however, represent good examples of how Mr. Goldberg and JONAH make very few representations concerning the specific outcomes of individuals who have been referred by JONAH to specific counselors, and when they do speak concerning JONAH affiliated SSA-strugglers, they speak in generalizations and lay estimates:

> **The conventional wisdom within the psychological professions for ALL types of therapeutic counseling** is that 33% experience complete change, 33% experience significant change, and 33%, like yourself, do not met [sic] the goals set forth at the beginning of their therapy, often because they decide to leave the therapeutic process along the way and before the goals can be achieved. So the reality is that two-thirds of the people who engage in the therapeutic process achieve their therapeutic goals and thus consider the work they did as successful.[85]
>
> It may always be your Achilles heel during times of stress , [sic] but for many of our men, SSA goes away to the point that is it [sic] no longer a big factor in their lives. Yes, this takes time. Yes it doesn't happen to everyone. But - yes, it does happen quite frequently after 3-5 years of work and the men who have reached that point are thrilled about their progress.[86]

It is hard to fathom how Plaintiffs interpreted the above text to support their assertion that Defendants guaranteed a complete change in homosexuality and provided precise statistics to support it. It is also hard to fathom how the term "quite frequently" is a false statistic.

JONAH does not offer a unique service – it does not purport to have the secret cure to homosexuality – instead JONAH simply refers individuals to SOCE providers, all of which are representative of the SOCE community at large. Consequently, it is patently reasonable for

---

[84] Plaintiffs' Br. at Footnote 14, ("*Compare* Ex. 26, FGSN00000131 (Mr. Goldberg explaining that two-thirds of those who engage in JONAH's program will be successful).").

[85] Plaintiffs' Motion for Summary Judgment, Exhibit 26.

[86] Plaintiffs' Motion for Summary Judgment, Exhibit 27.

JONAH to cite statistics concerning the SOCE community at large in asserting the efficacy rates of "JONAH's program" which merely consists of referring individuals to the SOCE community at large.

b. Defendants' statistics are legitimate.

As noted above, Defendants' statistics are legitimate and are adequately supported by well documented anecdotal evidence and rigorous scientific studies. Consequently, neither Defendants' reliance on anecdotal evidence nor scientific studies for its statistics can constitute an actionable misrepresentation under the CFA.

i. Defendants' anecdotal evidence is legitimate.

Plaintiffs rely on the fact that JONAH itself does not perform rigorous and comprehensive studies concerning the efficacy of SOCE performed by the individual counselors to which they refer clients. Plaintiffs would have this be dispositive, and require Defendants to have interviewed every single individual who had been counseled or coached by each of the counselors to whom Defendants had referred potential clients – even if Defendants wanted to say that JONAH affiliated SSA-strugglers were "quite frequently" successful.

As noted above, this is irrelevant since JONAH's program consists of referring individuals to SOCE counselors generally, and JONAH relies on statistics regarding SOCE generally. In addition to relying on those general statistics, however, JONAH does rely, and is justified in relying, upon its anecdotal understanding of the outcomes of individuals who come to them. The legitimacy of JONAH relying upon this anecdotal evidence was made particularly evident when the anecdotal results were documented for this litigation.

In July 2013, Mr. Downing prepared a chart which summarized the outcomes of all the individuals who participated in his group life-coaching sessions for young men (unmarried,

without children, and under age 30) held at the JONAH offices during the time period when Plaintiffs Benjamin Unger, Chaim Levin and Michael Ferguson also participated.[87] The results of this survey report that 26.1 percent of the total number of individuals left the life-coaching sessions without completing significant work, and 21.7 percent of the total could not be found for purposes of the survey. However, among those who completed Mr. Downing's life-coaching program, 76.5 percent were in relationships with women, 52.9 percent were married, and 23.5 percent were married with children. Mr. Downing relied upon objectively verifiable data to formulate the categories for the survey, including "married", "married with children", "dating women" and "gay." He did this to avoid the allegation that the 76.5 percent of individuals who completed life-coaching sessions and are now interested in pursuing relationships with women were merely lying about their change.[88] The data, however, is strong evidence both that those individuals achieved their self-identified goals and did indeed change their sexual orientation.

ii. Defendants' cited general SOCE studies are legitimate.

As noted previously, JONAH is justified in relying on statistics concerning SOCE generally. These studies are numerous, and listing them all here would be both arduous and unnecessary. Nonetheless, including the conclusions of some illustrative studies is necessary.

[87] Ex. 27, Alan Downing, *JONAH Groups 2007-2008*; *see also* Ex. 28, People Can Change, *Is Change Really Possible?*, http://peoplecanchange.com/change/possible.php ("We testify from our own personal experience that we have experienced profound change in our sexual identity, behavior, interests and desires -- change that has brought us great peace and satisfaction." "Anecdotal evidence that change is possible is abundant. First-person testimonials abound on the Internet, at recovery conferences and in reparative literature.")

[88] *See also*, Ex. 29, JONAH Timeline (Defendants' self-prepared timeline of the average progress of individuals who complete SOCE programs affiliated with them showing Plaintiffs greatly abbreviated participation).

- The studies conclude that with all forms of psychotherapy, including those unrelated to SOCE, participants generally report that one-third do not receive benefit, one-third receive marginal benefit, and one-third receive significant benefit.[89]
- The studies conclude that with SOCE, participants generally report that one-third see little or no change in their homosexual attractions, one-third see some change, and one third see substantial or complete change.[90]

---

[89] Ex. 30, Mary Lee Smith and Gene V. Glass, *Meta-Analysis of Psychotherapy Outcome Studies*, September 1977, American Psychologist, p.752 ("About all we've been able to prove is that a third of people get better, a third of the people stay the same, and a third of the people get worse, irregardless [sic] of the treatment to which they are subjected."); Ex. 31, Martin E.P. Seligman, *The Effectiveness of Psychotherapy, The Consumer Reports Study*, December 1995, American Psychologist, p.8, (reporting that 54% of individuals report treatment making things a lot better, and one-third reporting that treatment made things somewhat better); Ex. 32, Christopher Rosik, *RE: BPA's Expulsion of Dr. Davidson*, October 21, 2013, NARTH ("Extensive research has shown that 5-10% of adult clients across all forms of psychotherapy are worse after treatment and that higher deterioration rates – sometimes exceeding 20% – have been reported for children and adolescents in psychotherapy."); Ex. 33, Barry Duncan and Scott Miller, *"When I'm good, I'm very good, but when I'm bad I'm better": A New Mantra for Psychotherapists*, 2008, Psychotherapy.Net, pp.1, 2 ("In fact, therapist effectiveness ranges from a paltry 20 percent to an impressive 70 percent." "Current estimates suggest that nearly 50 percent of our clients drop out and at least one third, and up to two thirds, do not benefit from our usual strategies."); MSJ Ex. 54, Certification of Nicholas Cummings, ¶ 23 ("Of the approximate 18,000 gay and lesbian patients that we treated through Kaiser in San Francisco, I estimate that about 67% had satisfactory outcomes. The majority of these patients were able to attain a happier and more stable homosexual lifestyle. Of the patients who had sought to change their sexual orientation, hundreds were successful. The remaining one-third of patients had unsuccessful therapeutic outcomes, including continued promiscuity, unhappiness, drug addiction, etc.")

[90] Ex. 34, Gerard van den Aardweg, *Homosexuality & Hope: A Psychologist Talks About Treatment and Chang*e, 1985, Servant Books, pp.105-106 ("Of those who continued treatment – 60 percent of the total group – about two-thirds reached at least a satisfactory state of affairs for a long period of time. By this is meant that the homosexual feelings had been reduced to occasional impulses at most while the sexual orientation had turned predominantly heterosexual, or that the homosexual feelings were completely absent, with or without predominance of heterosexual interests. Of this group, however, about one-third could be regarded as having been changed 'radically.' By this is meant that they did not have any more homosexual interest but had normal heterosexual feelings, and in addition that they showed a fundamental change in overall emotionality from negative to positive – from instability to reasonable, normal stability – with a follow-up period of at least two years."); MSJ Ex. 55, Certification of Michelle Cretella, ¶ 15 ("Regarding change of sexual orientation, Dr. Judd Marmor said, 'There is little doubt that a

With regard to Plaintiffs' assertion that Defendants misrepresented the efficacy of SOCE, the issue is not whether those studies represent literal truth. Instead, the issue is whether they are legitimate studies and conclusions upon which Defendants could have reasonably relied. Although Plaintiffs can, and most probably will, attack the conclusions of those studies, it is impossible for them to deny that many of the studies were performed by legitimate academic researchers, published in peer reviewed journals or books, and that relying on those conclusions is both legitimate and respectable.

Consequently, Plaintiffs' claims that Defendants advertised their services using fake statistics must fail.

---

genuine shift in preferential sex object can and does take place in somewhere between 20 and 50 percent of patients with homosexual behavior who seek psychotherapy with this end in mind.' Similarly Dr. Jeffrey Satinover, a noted psychiatrist, researcher, and author of Homosexuality and the Politics of Truth, reviewed the scientific literature regarding sexual orientation change efforts and found a composite success rate of 50%"); Ex. 35, Irving Bieber, *Homosexuality: A Psychoanalytic Study*, 1962, Basic Books, Inc. pp.276, 301 (reporting that of the 106 patients who undertook SOCE, 27% became exclusively heterosexual, 34% became sexually inactive or bisexual, and 41% remained exclusively homosexual); Ex. 24, Judd Marmor, *Homosexual Behavior, A Modern Reappraisal*, 1980, Basic Books, Inc., p.277 ("Thus although percentage results in toto are difficult to evaluate, there is little doubt, from my own clinical experience and that of other therapists, both behavioral and psychodynamic, that a genuine shift from a state in which heterosexual relations are avoided or feared to one in which they are sought and enjoyed can be achieved in a fraction (somewhere between 20 and 50 percent) of highly motivated male and female homosexuals."); *see also* MSJ Ex. 52, Expert Report of Dr. Joseph Nicolosi (enumerating numerous studies in which SOCE efficacy is reported along the one-third, one-third, one-third paradigm); Ex. 28, People Can Change, *Is Change Really Possible?*, http://peoplecanchange.com/change/possible.php (recounting the New Direction Ministries, "Homosexuality and the Possibility of Change" project which collected and critiqued 31 clinical research studies, case studies and surveys on homosexuality and the possibility of change in books or academic journals between 1952 and 2003 and determined that the published research supports at least: (1) 45 cases of people who were exclusively or predominantly homosexual making a full shift in sexual orientation; (2) 287 cases of people who were exclusively or predominantly homosexual making a partial shift in sexual orientation; and (3) 86 cases of people who were exclusively or predominantly homosexual who transitioned to satisfying heterosexual relationships, measured by external behavior and reports of satisfaction, rather than reports of levels of attraction).

c. Plaintiffs' cited cases are inapposite.

Plaintiffs make the bald assertion that it is a misrepresentation under the CFA to advertise using fake statistics.[91] While arguably true, Plaintiffs fail to cite to a single case which concerns statistics and which can provide useful standards to determine whether the means for collecting data are sufficiently rigorous, or whether the studies relied upon concern services sufficiently similar to Defendants. Plaintiffs cite to *Hyland v. Aquarian Age 2,000, Inc.*, 148 N.J. Super 186, 191 (Ch. Div. 1977) and *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 591-592 (1997), for the proposition that it is a CFA violation for Defendants to advertise using statistics when they have no definition of success and make no effort to track the efficacy of their services. Plaintiffs' also cite to *Lieberson v. Johnson & Johnson Consumer Cos., Inc.*, 865 F.Supp.2d 529, 540-541 (D.N.J. 2011), for the proposition that advertising with the use of statistics leads the reasonable consumer to expect that the advertiser has collected data to underlie those statistics. It is simply not true that Defendants have no definition of success[92] and make absolutely no effort to document the efficacy of their services.[93] Moreover, none of the cases cited by Plaintiffs support their extreme position regarding the collection of data or the use of statistics.[94]

---

[91] Plaintiffs' Br. at pp.10-11.

[92] Ex. 13, Deposition of Arthur Goldberg, February 19, 2014, 399:20-400:5 ("Q. . . . is there ever an end to the process of journeying out of homosexuality? Are you ever done? A. Yes. Q. When you are done, what does that mean? What has happened? What are you like? A. He or she is at peace with the fact, with their sexual attractions and finds them primarily heterosexual in nature or not erotically same sex in nature.").

[93] Ex. 36, Deposition of Arthur Goldberg as the Corporate Representative of JONAH, February 18, 2014, 227:13-228:2 (sending follow up emails to some former clients).

[94] *Hyland v. Aquarian Age 2,000, Inc.*, 148 N.J. Super 186, 191 (Ch. Div. 1977) (merely holding that it is a fraudulent business practice to make promises about the future when it is not within the power of the promisor to ensure that the promises are kept); *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 591-592 (1997) (merely holding that intent is not a requirement for a violation of the CFA).; *Lieberson v. Johnson & Johnson Consumer Cos., Inc.*, 865 F.Supp.2d 529, 540-541 (D.N.J. 2011) (merely holding that the term "clinically proven" is not puffery and the use of that term does require clinical proof).

2. The Right To A Jury Trial.

As noted above, if the present action proceeds to a jury trial, Defendants have an unequivocal right to have the jury determine all of the factual questions relating to whether Defendants' conduct violated the CFA.[95]

Here, Plaintiffs improperly seek to remove from the jury the factual question of whether JONAH's general reliance on the scientific literature concerning SOCE, in its speech concerning the efficacy of its affiliated referral counselors, constitutes statements which were false, misleading or otherwise misrepresentations. This is impermissible. *See Zorba Contractors, Inc. v. Housing Authority, City of Newark*, 362 N.J. Super, 124, 138-139 (App. Div. 2003).

D. Defendants' Affirmative Defenses Should Not Be Stricken.

In their brief, Plaintiffs ask the Court to strike Defendants' affirmative defenses, including: (1) Defendants' Federal First Amendment defenses; (2) Defendants' disclaimer defenses; (3) Defendants' Charitable Immunity Act defenses; and (4) Defendants' Learned Profession Exception defenses. All of these, however, remain valid defenses – particularly now that discovery has closed – and in total easily dispose of Plaintiffs' case.

1. Defendants' First Amendment Defenses Are Valid, And In Fact Dispose of Plaintiffs' Claims.

Plaintiffs' brief, nearly throughout, begs the question with regard to Defendants' Federal First Amendment defenses. Plaintiffs' allege that it is ludicrous to find that a small non-profit with the moniker "*Jews . . .*" could be engaging in religious expression, and so blithely disposes of Defendants' religious rights in one line: "Defendants are not engaging in religious

[95] Section II.A.6.

expression."[96] Plaintiffs also ignore reality when they dispose of Defendants' freedom of association arguments as irrelevant, and Defendants' free speech arguments as merely the attempt to bring false commercial speech under the protection of the first amendment.

The only reasonable interpretation of the facts, however, reveals that Defendants are engaging in religious expression, and that Plaintiffs are improperly attempting to use the courts to restrict Defendants' religious expression, rights of expressive association, and right to express their opinions – all of which are protected under the First Amendment.

a. Freedom of religion.

Plaintiffs disregard Defendants' religious liberty claims because "Defendants are not engaged in religious expression"[97] and because the CFA is a statute of general applicability for which, despite any alleged burden on the free exercise of religion, no exemption need be granted. Both of these arguments, however, are unavailing because Plaintiffs do not have the right to determine what constitutes Defendants' religious expression, and Plaintiffs' own targeting of Defendants' religious conduct for suppression gives Defendants the fullest protection possible under the Free Exercise clause.

i. Defendants' conduct is religious expression.

Plaintiffs conclude that "Defendants are not engaged in religious expression."[98] Defendants understand how it is not surprising that Plaintiffs do not recognize religious expression when they see it. Defendants, however, do find it surprising that Plaintiffs have the audacity to dictate to Defendants what constitutes the expression of Defendants' own religious faith. This has been explicitly prohibited by the United States Supreme Court. *Presbyterian*

[96] Plaintiffs' Br. at 11.
[97] *See* Plaintiffs' Motion for Summary Judgment, III.A.
[98] *See* Plaintiffs' Motion for Summary Judgment, III.A.

Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969); *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 887-88 (1990); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question . . . the validity of particular litigants' interpretations of [their] creeds.")

Plaintiffs assert that Defendants' expression of religious belief is somehow insincere or not protected by the inviolable right to freedom of religion, merely because: (1) JONAH solicits and welcomes non-Jews as clients; (2) JONAH employs non-Jews as counselors; and (3) the JONAH program is based in science. Admittedly, Defendants do not offer a "worship service" in a church or synagogue, but religious expression is not limited to worship within a house of worship. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (not working on Sundays is protected religious expression); *Wis. v. Yoder*, 406 U.S. 205, 215 (1972), (removing children from school after age 14 is protected religious expression).

Indeed, the Third Circuit has developed a test to determine whether an organization is a "religious organization" for purposes of Title VII of the Civil Rights Act of 1964, which is particularly useful in illustrating that JONAH is a legitimate religious apostolate: (1) JONAH does not operate for profit;[99] (2) JONAH offers a service which is both secular and religious;[100] (3) JONAH's articles of incorporation state its purpose is "educating and guiding the Jewish public in their interaction with those individuals with homosexual issues;"[101] (4) JONAH is affiliated with the Jewish community of New Jersey;[102] (5) JONAH's trustees have included

[99] MSJ Ex. 5, JONAH Certificate of Incorporation, August 12, 1999.

[100] MSJ Ex. 8, Deposition of Arthur Goldberg in his personal capacity, February 19, 2014, 451:13-453:18 (religious belief aids in SOCE).

[101] MSJ Ex. 5, JONAH Certificate of Incorporation, August 12, 1999.

[102] MSJ Ex. 44, *JONAH'S History*, https://www.jonahweb.org/ sections.php?secId=11 (last visited September 11, 2014).

Jewish Rabbis;[103] (6) JONAH openly identifies itself as Jewish;[104] (7) JONAH holds regular religious shabbatons and has an exclusively Jewish listserv;[105] (8) JONAH's website includes numerous articles concerning Jewish religious education;[106] and (9) JONAH is run by two staunchly and defiantly Jewish individuals who represent the spectrum of Jewish experience, and refers out non-Jews to other religious apostolates if they so desire.[107] *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007).

(1) JONAH's welcoming of non-Jews as clients.

As Defendants stated in their Cross-Motion for Summary Judgment, "The Jewish law, the Halachah . . . **mandates that every Jew helps heal another person who comes to them for help, if he has the knowledge and means to help heal him**."[108] "Whenever a person can save another person's life, but he fails to do so, he transgresses a negative commandment, as Leviticus 19:16 states: 'Do not stand idly by while your brother's blood is at stake.'"[109] Plainly,

[103] MSJ Ex. 7, Deposition of Arthur Goldberg as corporate representative of JONAH, February 18, 2014, 28:20-29:11.

[104] MSJ Ex. 44, *JONAH'S History*, https://www.jonahweb.org/sections.php?secId=11 (last visited September 11, 2014) ("JONAH is a pioneering organization in tackling this issue from a Jewish perspective. However, consistent with traditional Jewish teachings, its services are available to those of any faith or no faith.").

[105] MSJ Ex. 7, Deposition of Arthur Goldberg as corporate representative of JONAH, February 18, 2014, 49:13-50:9.

[106] *See, e.g.*, MSJ Ex. 122, Letter from Rabbi Shmuel Kamenetsky, March 15, 2000, available at https://www.jonahweb.org/sections.php?secId=89.

[107] MSJ Ex. 7, Deposition of Arthur Goldberg as corporate representative of JONAH, February 18, 2014, 34:14-35:9.

[108] Defendants' MSJ, Footnote 218 (citing MSJ Ex. 118, Leviticus 19:11-16; MSJ Ex. 119, Sanhedrin 73a).

[109] *Id*. citing MSJ Ex. 120, Rotseah uShmirat Nefesh (codification of oral Torah) 1:14.

Defendants believe that they are bound by the Halachah, and believe that it requires them to offer assistance to **all who come to them for help**.[110]

However, of the undisputable language of Defendants' holy texts, plain common-sense dictates that Defendants' actions are religious. It is a common aspect of religions that they form charities or non-profits and charitably serve all individuals, regardless of their religious background.[111] To deny that charitable outreach can be religious expression would be to deny to nearly every religion and religious adherent the right to self-define what it means to live out his or her religion. Further, to deny Defendants JONAH and Mr. Goldberg the right to assert that they are acting from a charitable and morally laudable position completely ignores the fact that Mr. Goldberg has never received a salary or other compensation from JONAH – his ministry is purely an altruistic one.

(2) JONAH's employing of non-Jews as counselors.

Plaintiffs interestingly misstate that Defendant JONAH *employs* the non-Jew Mr. Downing as a counselor, and hold this out as indication that "*Jews* Offering New Alternatives for Healing" is therefore, not truthfully a Jewish organization. It is correct that JONAH does work closely with – and refers clients to – non-Jews, including Mr. Downing. However, the question of whether JONAH employs non-Jews is not determinative of whether JONAH is a religious organization or whether JONAH or Mr. Downing are engaging in religious expression. Indeed, that analysis is completely irrelevant since all organizations retain their religious rights under the

[110] Ex. 36, Deposition of Arthur Goldberg as the Corporate Representative of JONAH, February 18, 2014, 222:17-224:25 (JONAH works with clients and counselors regardless of religion, including atheists).

[111] Ex. 37, Guide Star, *Directory of Charities and Nonprofit Organizations*, http://www.guidestar.org/nonprofit-directory/religion.aspx (listing 1,765 Buddhist charities, 84,706 Christian charities, 793 Hindu charities, 1,271 Islamic charities, 4,421 Jewish charities in America); *see also* Defendant's MSJ, Footnote 207 (concerning religious apostolates which promote or provide SOCE).

First Amendment just as all U.S. citizens do. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2768 (2014) (corporations, like natural persons, are protected by the religious clauses).

All of the evidence indicates that JONAH is a religious apostolate, whose genesis was Mr. Goldberg's exercise of his constitutional rights to freely express his religion. Finding otherwise would eviscerate the rights of religious adherents to perform what is truthfully a significant portion of their religious activity, and represent a false distinction useful only for the purpose of denigrating religion.

(3) JONAH's reliance on science.

Plaintiffs assert that Defendants' basing of their program in science is indicative that somehow JONAH is not engaging in religious expression. The unstated implication is that somehow religion and science exist in completely separate spheres and cannot interact. While not an uncommon belief, it is both logically unsound and practically unworkable, and would result in judicial chaos if endorsed. As stated above and in Defendants' MSJ, Defendants believe they are bound by a religious command to help anyone who comes to them in need. They further believe that they are required to assent to the religious doctrine which holds that God would not place someone in a sinful condition which they could not overcome. In addition to this, Defendants have researched legitimate scientific studies and books which validate Defendants' religious beliefs. Neither the science or religion is caused by the other, but instead are complimentary.

Random House Webster's College Dictionary defines science as "systematic knowledge of the physical or material world gained through observation and experimentation."[112] It further defines religion as "a set of beliefs concerning the cause, nature and purpose of the universe,

[112] *See* Ex. 38, *Random House Webster's College Dictionary*, Random House, Inc., p.1175.

esp[ecially] when considered as the creation of a superhuman agency or agencies, usu[ally] involving devotional and ritual observances, and often containing a moral code for the conduct of human affairs."[113] Neither definition purports to exclude the other, and necessarily requires that if they attempt to answer the same question, that their answers do not match.

Defendants admit that their religious beliefs state that homosexuality can change. Defendants further admit that the conclusions of valid scientific studies bolster their religious beliefs. Further, Plaintiffs seem to indicate that because Defendants beliefs concerning SOCE are also based in science, they are not truly based in religion. Plaintiffs' cite to *GeorgiaCarry.Org Inc. v. Georgia*, 687 F.3d 1244, 1256 (11th Cir. 2012) for the proposition that "The Supreme Court has reiterated time and time again that personal preferences and secular beliefs do not warrant the protection of the Free Exercise Clause" – or that since Plaintiffs' beliefs concerning SOCE are not truly religious, the do not warrant protection under the Free Exercise Clause. This is untenable. As noted above, the Court cannot determine the validity of an asserted religious belief – it is sufficient that it is merely asserted as a religious belief. *Id*. This is not contradicted by *GeorgiaCarry.Org*. In that case, Second Amendment activists alleged that a regulation which precluded gun owners from carrying their firearms into houses of worship violated their freedom of religion. *Id.* The plaintiffs, however, did not allege that the regulation itself violated their religious beliefs (*i.e.*, they did not allege that they believed they had a religious duty to carry a gun with them into church, or that they had a religious duty to be at all times prepared to defend their family, etc.), only that they had a personal preference to carry a gun at all times, including to church, and the inhibition of that preference tended to pressure

[113] *See* Ex. 38, *Random House Webster's College Dictionary*, Random House, Inc., p.1113.

them to not attend worship services. *Id.* The court then rightly concluded that secular preferences do not warrant Free Exercise protection. *Id.*

Here, it is plain that Defendants' conduct regarding SOCE does not represent a "personal preference" but is based on religious beliefs and duties to which they are bound. This is made even more evident through the fact that Plaintiffs themselves approached Defendants due to their religiously motivated desire to change their homosexuality, and the identification of JONAH as a religious organization.[114]

ii. The right to free exercise of religion.

Plaintiffs assert that the Free Exercise Clause does not limitlessly protect any act done in the name of religious practice, *McTernan v. City of York*, 577 F.3d 521, 532 (3d Cir. 2009), and "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Employment Division v. Smith*, 494 U.S. 872, 879 (1990).[115] As noted in Defendants' MSJ, however, while the CFA is a law of general applicability, Plaintiffs' misuse of it in this case to target specific religious conduct for suppression makes its application to Defendants' conduct subject to strict scrutiny. Further, since the CFA does not reach specific categories of speech, such as opinions and puffery, the extension of the CFA to reach religious speech must again survive strict scrutiny. In either case, the application of the CFA to Defendants' representations cannot survive strict scrutiny, and consequently Plaintiffs' attempts to violate Defendants' free exercise rights fail.

[114] As noted in Defendants' MSJ, three of the original four male Plaintiffs, Chaim Levin, Benjamin Unger, and Sheldon Bruck sought out JONAH and were Orthodox Jews. *See* MSJ Exhibit 18, Deposition of Chaim Levin, January 29, 2014, 60:8-13; Ex. 16, Exhibit 16, Deposition of Benjamin Unger, January 30, 2014, 46:14-48:11; Ex. 17, Deposition of Sheldon Bruck, January 28, 2014, 188:2-12. The fourth male Plaintiff, Michael Ferguson, sought out Alan Downing as both of them were practicing members of the Church of the Latter-Day Saints. Ex. 19, Deposition of Michael Ferguson, March 28, 2014, 86:2-19.

[115] Plaintiffs' Motion for Summary Judgment, p.12.

Plaintiffs note that recently the Third Circuit found that legislation prohibiting the aid of SOCE to minors: (1) only requires rational basis review; (2) is not targeting religion; and (3) is constitutional. *See King*, *supra*, 767 F.3d 216; N.J. Stat. § 45:1-55. That case, however, is not dispositive of the situation here. In *King* the Third Circuit found that there was no religious gerrymander with pernicious targeting of religion through the creation of liability for aiding clients in their religiously motivated SOCE, but not: (1) for aiding minors seeking to transition from one gender to another; and (2) for aiding minors in the exploration and development of same-sex attractions, behavior, or identity. *See King v. Governor of N.J.*, 767 F.3d 216 (3d. Cir. 2014). This was due to the fact that there was not sufficient evidence in the record in *King* that transitioning genders or exploring same-sex attractions can cause harm, whereas the record in *King* upheld the legislative presumption that religiously motivated SOCE can cause harm. *Id*. The Court similarly found that the inapplicability of the legislation to individuals over the age of 18 and to unlicensed counselors did not constitute targeting of religion because those provisions had nothing to do with religion. *See id*.

Here, however, the situation is quite different. The record is far more developed with regard to whether aiding individuals through the practice of SOCE can cause harm, and to the legitimate debate within the mental health community regarding SOCE. The Court's ability to recognize that legitimate debate should itself be sufficient for the Court to recognize the existence of pernicious religious targeting here. If not, however, the fact that the positions of individuals in that debate are heavily influenced by religious and political factors, as explained in Defendants' MSJ, is dispositive.[116] Here, also, the prohibition on SOCE would not only apply to

[116] *See also* MSJ Ex. 126, American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (Aug. 2009), http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf (noting

minor clients and licensed counselors, but to all persons generally, and is far beyond the facts of *King*. Arguably, minor clients are less susceptible of having pursued SOCE on genuine religious grounds, due to their ability to be influenced by their parents and other respected adults. Adult clients of SOCE, however, suffer from no such deficiency, and since they are almost always religiously motivated, prohibiting them from engaging in SOCE is a targeting of religious belief and conduct with no adequate justification.

Further, and perhaps most importantly, *King* concerned the constitutionality of a valid and neutral law of general applicability as applied against all licensed mental health practitioners. *See King*, *supra*, 767 F.3d 216. Here, Plaintiffs are specifically targeting a religious apostolate and religiously motivated counselors, and have shown that their aim is to attack all proponents of SOCE, whether they are lay or licensed counselors, lay religious adherents or clergy. Clearly religious individuals and religious organizations are not simply exempt from the law as a result of their nature as religious. However, the strategy of Plaintiffs and their counsel to commence their SOCE campaign with a religious apostolate is itself, perhaps, the best evidence that restrictions on SOCE are motivated by religious animus.

Consequently, Plaintiffs' attempt to extend the CFA in this manner must satisfy strict scrutiny – it must be justified by a compelling interest and narrowly tailored to advance that interest. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533-534 (1993). No court has found that a total prohibition on SOCE, even only for minors, would satisfy strict scrutiny. *King*, *supra*, 767 F.3d 216 (only satisfying intermediate scrutiny); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (only satisfying rational basis review). Further, in *King*, the Court

---

religious motivation of majority of participants in SOCE); MSJ Ex. 127, Robert Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation?*, (noting that 79% of participants in the study were motivated by their religion to change their homosexuality); *See, e.g.*, Ex. 125, PATH, *Resources*, (listing numerous religious SOCE ministries).

acknowledged that an informed consent would be insufficient precisely because the individuals at issue were minors, and consequently, when a prohibition on SOCE is considered for the general public, as here, the signing of an informed consent may be the limit of constitutionally valid restrictions. *See King*, *supra*, 767 F.3d 216. The reasoning of *King* appears valid on its face because signing an informed consent is precisely the narrow tailoring needed to satisfy the government's compelling interest, and with adult citizens, it is difficult to fathom how there can be any more reasonable and useful restriction than simple consent.

b. Freedom of association

Plaintiffs assert that Defendant's freedom of association rights are not at issue in this case because the application of the CFA to Defendants has nothing to do with Defendants' freedom of association.[117] This assertion, however, is simply false.

The Supreme Court in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), outlined the legal analysis for an expressive-association claim. The first step is to "determine whether a group is protected by the First Amendment's expressive associational right." *Id*. at 648. The second step is to determine whether the challenged application of the law "would significantly affect [the group's] ability to [express its] public or private viewpoints." *Id*. at 650. The third step is to determine whether the relevant government interests justify this intrusion on the group's right of expressive association. *Id*. at 658-59.

i. JONAH is protected by the First Amendment's expressive associational right.

To come within the protection of the expressive associational right, an organization must simply engage in some form of expression, either public or private." *Id*. at 648. Consequently, an

[117] Plaintiffs' Br. at pp.13-14.

organization does "not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. [It] must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id*. at 655.

Here, one of the primary purposes of JONAH is actually to engage in expression – its primary purpose is to educate the public about SOCE.[118] JONAH further fulfills its purpose by sending its directors to speaking events, by publishing articles in the press and on its website, advertising in Jewish newspapers, and in many other ways keeping the public generally, and the Jewish community specifically, informed about the relevant developments in the field of SOCE.[119] The organization also is selective in its membership to ensure that its messages concerning the teachings of Orthodox Judaism and sexuality are not diluted or perverted.[120] Plaintiffs harp on the fact that JONAH does receive small referral fees to maintain its operations, but the undisputable fact is that JONAH's primary mission is the dissemination of its message – the mere fact that JONAH's directors have never taken a salary[121] is strong evidence that JONAH is not a money-making operation, but an expressive religious apostolate.

ii. The application of the CFA to JONAH's promotion of SOCE would significantly affect JONAH's ability to express its viewpoints.

The second step in the expressive-association analysis is to consider whether the application of the law "would significantly affect [the organization's] ability to [express its]

[118] MSJ Ex. 5, JONAH Certificate of Incorporation, August 12, 1999.

[119] *See* MSJ Ex. 4, Deposition of Arthur Goldberg in his personal capacity, February 18, 2014, 72:3-73:2, 73:8-10, 73:17-23, 76:12-24.

[120] Ex. 36, Deposition of Arthur Goldberg as the Corporate Representative of JONAH, February 18, 2014, 103:24-104:2 (maintaining an exclusively Jewish listserv); 163:23-164:16 (removing individuals from the Jewish listserv).

[121] Ex. 8, Deposition of Arthur Goldberg in his personal capacity, February 19, 2014, 224:21-225:2; Ex. 3, Deposition of Elaine Berk, February 20, 2014, 87:10-12.

public or private viewpoints. *Id*. at 650. The analysis deferentially assesses an organization's professed views, readily adopting the organizations' characterization of its beliefs, *see id*. at 651, and also "give[s] deference to [the organization's] view of what would impair its expression." *Id*. at 653.

Upon application of the CFA to the expression of Defendants' religious and secular viewpoints concerning homosexuality, if JONAH desired to maintain an organization which helps Jewish men and women with their sexual issues,[122] Plaintiffs would force it to express the viewpoint that homosexuality is a normal variation of human sexuality and not a mental illness, disorder, defect, or an equivalent thereof.[123] The mere requirement that Defendants cease referring to homosexuality as abnormal, and affirm it as normal, would fly in the face of Defendants' past expressions, and be at complete odds with its current desired expression. [124] It is true that JONAH is not required by law to engage in SOCE, or in any counseling concerning sexuality. It is required to do so, however, by its interpretation of the Jewish law, and wishes to continue to do so.[125]

Moreover, the reversal of JONAH's teachings would be associated with Orthodox Judaism in general. This would completely undermine JONAH's and Orthodox Judaism's teaching authority and moral relevance. The extension of the CFA would also make involvement

---

[122] MSJ Ex. 9, JONAH, *JONAH'S History*, https://www.jonahweb.org/sections.php?secId=11 (last visited September 11, 2014) ("Therefore, our scope of services has been broadened to now include issues involving other sexual conflicts (e.g. sexual promiscuity, pornography, sexual abuse, pedophilia or pederasty, compulsive masturbation, fetishes, transvestitism, incest, prostitution, emotional dependency, sexual addictions, etc.).").

[123] *See* Plaintiffs' Br. at p.7.

[124] MSJ Ex. 125, Elaine Silodor Berk, *A Message Co-Director of JONAH :: Elaine Silodor Berk*, JONAH, https://www.jonahweb.org/sections.php?secId=112 (last visited October 21, 2014)

[125] Defendants' MSJ, Footnote 218 (citing MSJ Ex. 118, Leviticus 19:11-16; MSJ Ex. 119, Sanhedrin 73a; MSJ Ex. 120, Rotseah uShmirat Nefesh 1:14).

with JONAH as clients, volunteers, Board Members or donors less desirable to other Orthodox Jews, and would interfere with the composition and mission of JONAH. This is impermissible. *See Rumsfield v. FAIR*, 547 U.S. 47, 69 (2006) (the right of expressive association may be violated by government action that "ma[kes] group membership less attractive"). Expression depends on voices to speak and money to disseminate speech. Consequently, government action that makes membership or involvement less desirable, or that makes raising funds from like-minded contributors more difficult, threatens to significantly adversely affect a group's ability to express its views which is impermissible. *See id*.

iii. There is no relevant governmental interest to justify the intrusion on JONAH's right of expressive association.

The third step is to consider whether the relevant government interests would justify the intrusion on JONAH's right of expressive association. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 658-59 (2000). The Supreme Court has already held that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on [an organization's] rights to freedom of expressive association" through "significantly burden[ing an] organization's right to [engage in its desired expression of] oppos[ing] or disfavor[ing] homosexual conduct." *Id*. at 659.

Further, strict-scrutiny analysis "look[s] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[s] the asserted harm of granting specific exemptions to particular . . . claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (emphasis added); *see also Wis. v. Yoder*, 406 U.S. 205, 221 (1972) (recognizing that the Court "must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from

recognizing the . . . exemption"); *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 238 (Mass. 1994) ("The general objective of [the law] cannot alone provide a compelling State interest that justifies the application of that section in disregard of the defendants' right . . . . The analysis must be more focused.")

Here, the relevant government interest in uniform application of the CFA is in prohibiting the commission of consumer fraud upon the citizens of New Jersey – in whatever form. It is patently, however, not the interest of the government to use the CFA as a means of penalizing all expression which views homosexuality as disordered. This is obvious from the text of the CFA, which limits itself to consumer fraud, N.J. Stat. § 56:8-2, and from the categories of conduct which the CFA does not reach, such as opinion and puffery.[126] While the New Jersey CFA does permit of a liberal interpretation in order to prevent consumer fraud, its exemptions for opinions and puffery do far more potential harm to the purpose of the statute than any exemption for Defendants' unequivocally religious speech ever could.[127] Consequently, the government interest in extending the CFA to cover Defendants' speech and restrict Defendants' right of expressive association is insufficient (and Defendants must be given an exemption from the CFA). *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

c. Freedom of speech.

As noted in Defendants' MSJ, Defendants' descriptions of the features and causes of homosexuality, of the efficacy of SOCE, and the blameworthiness of one who does not change his homosexuality, are protected opinions and puffery,[128] and are not misleading or

[126] Defendants' MSJ at Sections IV.C. and IV.D.
[127] Defendants' MSJ at Section IV.E.1.b.ii.
[128] Defendants' MSJ at Sections IV.C. and IV.D.

misrepresentative under the CFA.[129] Consequently, Defendants' assertions are not "false commercial speech" as alleged by Plaintiffs in their brief.

i. The statements are not false.

Plaintiffs assert plainly that "Defendants' misrepresentations about their ability to turn gay clients straight are false commercial speech, which may be regulated."[130] Although Plaintiffs are correct in asserting that false commercial speech is not protected by the first amendment, Defendants have never represented a falsehood in either advertising or engaging in their religious mission. The literal truth or falsity of Defendants' assertions, however, is irrelevant to the alleged misrepresentations in this case, since they are by definition indeterminable opinions and no reasonable consumer could have misunderstood that they were not opinions.

ii. The statements are not misleading.

To constitute consumer fraud, the New Jersey Supreme Court has held that a business practice "must be 'misleading' and stand outside the norm of reasonable business practice in that it will victimize the average consumer." *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 139 N.J. 392, 416 (1995). The capacity of the practice to mislead the reasonable consumer is the relevant consideration, not whether a reasonable or unreasonable consumer was actually misled. *See Tubbs v. N. Am. Title Agency, Inc*., 531 F.App'x 262, 267-268 (3d Cir. 2013).

Here, the total practice of Defendants, and a review of the allegedly misleading statements themselves precludes, as a matter of law, a finding that Defendants misrepresented the potential outcomes of SOCE. This is because Plaintiffs Jo Bruck,[131] Chaim Levin,[132] and

[129] Defendants' MSJ at Sections IV.A (the signing of consent forms and Plaintiffs' actual knowledge of the mere possibility of change make Defendants' practice not misleading in total).

[130] Plaintiffs' Br. at p.14.

[131] MSJ Ex. 34, Jonah Institute of Gender Affirmation Consent to Treat and Financial Agreement with signatures of Sheldon Bruck and Jo Bruck.

Benjamin Unger[133] all signed informed consent forms which detailed that there was no guarantee that they would be able to change their sexual orientations.[134] Plaintiff Michael Ferguson was also aware before starting sessions with Mr. Downing that some people contend that SOCE is not effective.[135]

iii. The statements are protected opinions.

The logical corollary of the requirement that a business practice not be misleading, is that a New Jersey CFA action cannot be based on non-factual opinions or puffery. *Baughman*, *supra*, 662 F. Supp. 2d at 386 (internal citations omitted) ("A claim of . . . fraud requires, among other things, a material misrepresentation of presently existing or past fact . . . .Consequently, fraud cannot be based on a difference of opinion."), *Citizen Action*, *supra*, 367 N.J. Super. at 13-14 (internal citations omitted) ("[O]ur Supreme Court has also recognized that there is indeed a distinction between misrepresentations of fact actionable under the CFA and mere puffing about a product or a company that will not support relief."). Moreover, for first amendment free exercise purposes, a law must satisfy strict scrutiny "if it burdens a category of religiously motivated conduct but . . . does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004).

Here, all of Defendants' alleged assertions – including those by JONAH and Mr. Goldberg which assert that an individual can change his homosexuality through SOCE, or by Mr.

---

[132] MSJ Ex. 35, Alan Downing Life Coaching Client Service Agreement with signature of Chaim Levin.

[133] MSJ Ex. 37, Alan Downing Life coaching Client Service Agreement with signature of Benjamin Unger.

[134] *See* Defendants' MSJ Section IV.A.

[135] MSJ Ex. 19, Deposition of Michael Ferguson, March 28, 2014, 331:15-332:5.

Downing which allegedly assert that he personally can help an individual change his homosexuality – are protected opinions. All of Defendants' alleged misrepresentations are expressions of an honest interpretation of available information in an area of scientific ambiguity; they are not susceptible of exact knowledge, and are therefore non-factual opinions upon which a CFA action cannot be based. *See Baughman*, *supra*, 662 F.Supp.2d at 400; *Diaz*, *supra*, 869 F.Supp. at 1165.[136]

Further, all of Defendants' allegedly misleading descriptions of their own services, including those which indicate that Defendants exaggerated their own ability to help Plaintiffs change their homosexuality, are non-actionable statements of puffery made precisely to persuade a potential client of the benefits of SOCE, and consequently are not actionable. *Vaz v. Sweet Ventures, Inc*., 2011 N.J. Super. Unpub. LEXIS 3189 (Law Div. July 12, 2011) *1 (citing *Vulcan Metals Co., Inc. v. Simmons Mfg. Co*., 248 F. 853, 856 (2d Cir. 1918)).

iv. The statements are not commercial speech.

Plaintiffs rightly assert that commercial speech may be regulated, and that false commercial speech is not protected by the First Amendment.[137] Plaintiffs, however, appear to confuse commercial speech with private religious speech – a mistake which is not easily made.[138] The distinction between commercial and non-commercial speech is a commonsensical

[136] *Compare* Exhibit 45, *The ICD-10 Classification of Mental and Behavioral Disorders*, World Health Organization, F66-F66.8 (maintaining that ego-dystonic homosexuality is a mental disorder), *with* Exhibit 46, American Psychological Association, *Use of Diagnoses "Homosexuality" and "Ego-Dystonic Homosexuality"* (Aug. 27 and 30, 1987), http://www.apa.org/about/policy/diagnoses.pdf (last visited October 21, 2014) (adopting policy resolution condemning the proposed inclusion of ego-dystonic homosexuality in the ICD-10).

[137] Plaintiffs Br. at pp.14-15.

[138] In their brief, Plaintiffs cite on numerous occasions to private conversations which occurred on the JONAH listserv. Plaintiffs' Br. at Footnote 10. However, those private comments are not covered under the CFA. *See* N.J. Stat. § 56:8-2.The JONAH listserv is a confidential electronic chat room for Orthodox Jews administered by unpaid volunteers as part of

one, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64 (1983), and here it is plainly non-commonsensical to view Defendants' speech as commercial.

Plaintiffs cite to *Porous Media Corp. v. Pall Corp*., 173 F.3d 1109, 1121 (8th Cir. 1999), for the proposition that commercial speech need not originate solely from economic motives. In doing so, however, Plaintiffs attempt to run roughshod over their assertion that the commercial/non-commercial speech analysis is a commonsensical one. They do this by asserting that all of JONAH's and Mr. Downing's speech is commercial since the non-profit JONAH may receive some minor referral fees from counselors to whom JONAH refers interested members of the JONAH community. They further argue that Mr. Downing may receive some marginal increase in the number of his clients from word-of-mouth recommendations of him by individuals who hear him speak concerning SOCE.

This is not, however, the holding of *Porous Media Corp. v. Pall Corp*. That case merely finds that clear commercial speech – for example company speech informing the public about the defects in their competitors' products – cannot be converted into non-commercial speech simply by the company stating that the speech was also undertaken for non-commercial purposes – such as protecting the public against potential harm from using their competitors' products. 173 F.3d 1109, 1121 (8th Cir. 1999).

---

a self-help program. *See* Ex. 39, Deposition of Elaine Berk, February 21, 2014, 293:23-294:4, 294:18-295:11. It is not, as Plaintiffs' experts maintain, a cultic means of maintaining coercive influence over JONAH initiates, *see* Defendants' Expert Motion at Section III.B.3., or as implied by Plaintiffs' assertions, a means of advertising JONAH's services to the public. For purposes of the CFA, an "'advertisement' is a notice designed to attract public attention. Modes of communication include the attempt, directly or indirectly, by publication, dissemination, solicitation, endorsement, circulation, or in any way to induce any person to enter into or not enter into an obligation." *See* Ex. 40, Model Charge 4.43: Consumer Fraud Act, p.6. Consequently, the contents of the JONAH listserv cannot form the basis of a New Jersey CFA claim, and furthermore, the contents are protected by the immovable mandates of Federal Free Speech jurisprudence. *See* Defendants' MSJ section IV.E.4.

Here, Mr. Goldberg does not run a for-profit business, but rather a non-profit religious apostolate.[139] JONAH does have many attributes, but at its heart, it is a community of Jewish individuals with unwanted SSA – its defining feature is its community, and peer-led sharing of information.[140] Plaintiffs cite to JONAH's listserv on numerous occasions for instances wherein "fraudulent representations were made in order to solicit clients."[141] Plaintiffs, however, entirely misunderstand the purpose and nature of the listserv. The listserv is a means by which the community of Jewish individuals with unwanted SSA can confidentially communicate, share ideas and discuss their struggles and evolving knowledge. It is not a commercial forum, and no individuals ever attempt to sell products or services over it.

Understandably, Plaintiffs fail to state who exactly was allegedly soliciting clients over the listserv, because there is no adequate instance to which they could point. Mr. Goldberg is not a counselor, and does not accept clients, and JONAH neither retains a counselor nor in any other way receives clients.[142] Mr. Downing does accept clients, but he is not permitted to be a member of the private religious forum, because he is not Jewish.[143] It is undisputable that

---

[139] MSJ Ex. 7, Deposition of Arthur Goldberg as corporate representative of JONAH, February 18, 2014, 23:16-22 (JONAH is a non-profit because it is performing a public service), 24:10-12 (Mr. Goldberg is not interested in making money from JONAH), 27:17-21 (JONAH's mission was always to help anyone with any sexual issues that they see as a problem for themselves); MSJ Ex. 8, Deposition of Arthur Goldberg in his personal capacity, February 19, 2014, 224:21-225:2 (Mr. Goldberg is not compensated for his work); MSJ Ex. 3, Deposition of Elaine Berk, February 20, 2014, 32:3-33:5 (JONAH works with the Jewish community due to a particular need in that community), 87:9-20 (has spent 20-40 hours a week working at JONAH).

[140] *See* Ex. 39, Deposition of Elaine Berk, February 21, 2014, 293:23-294:4, 294:18-295:11.

[141] Plaintiffs' Br. at p.11.

[142] Ex. 36, Deposition of Arthur Goldberg as the Corporate Representative of JONAH, February 18, 2014, 101:18-22 (JONAH has no full time employees), 111:9-23 (JONAH has never employed a counselor).

[143] Ex. 36, Deposition of Arthur Goldberg as the Corporate Representative of JONAH, February 18, 2014, 104:3-10 (Downing does not have access to the listserv) 115:13-116:6 (other JONAH affiliated counselors do not have access to the listserv).

communications made on the private Jewish listserv are private communications, between private parties, in which they share their unique struggles, and that it is not a vehicle for the dissemination of commercial speech. [144]

Moreover, JONAH merely offers free services – referrals to counselors, books, websites and other educational materials – and infrequently hosts religious events, whose costs are born by the attendees. Plaintiffs point to the small costs which JONAH asks for attending a few of its services as "an economic motivation" which would convert Defendants' private religious speech into commercial speech. The commonsense understanding of "economic motivation", however, does not include within it requesting individuals to pay the cost of services associated with the promotion of religious beliefs, and the explication of religious ideals. *See Porous Media Corp. v. Pall Corp*., 173 F.3d 1109, 1121 (8th Cir. 1999) (clear commercial speech cannot be converted into non-commercial speech merely through dual motivation for the speech).

Mr. Downing, as an individual separate from Mr. Goldberg and JONAH, and with a separate life-coaching practice, Alan Downing Life Coaching, LLC, does have an economic motivation for much of his speech, since clients are referred to him mostly by word of mouth. However, here also the need for a commonsensical approach to defining commercial speech needs to be used. Plaintiffs would have the Court find that everything Mr. Downing says is commercial speech, since he has an economic motivation in all of his encounters – at any time his opinions or descriptions of SOCE could result in a referral or otherwise the reception of business. However, Mr. Downing does not actively solicit clients through his acquaintances, and holding that his entire life is commercial would dismantle his right to have any first amendment private speech protections. He has the right to engage in private speech without Plaintiffs'

[144] *See* Ex. 39, Deposition of Elaine Berk, February 21, 2014, 293:23-294:4, 294:18-295:11.

interpreting it as an advertisement for services. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67, 103 S.Ct. 2875, 2880, 77 L.Ed.2d 469, 477 (1983) (internal citations omitted) ("[Defendants'] informational pamphlets, however, cannot be characterized merely as proposals to engage in commercial transactions. Their proper classification as commercial or noncommercial speech thus presents a closer question. The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that [Defendants have] an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.")

At its heart, JONAH is merely a small religious nonprofit serving the community of Jewish individuals with unwanted SSA, and its defining feature is its listserv restricted to Jews. Despite Plaintiffs' characterizations, JONAH is not a corporate machine which represents itself as able to take in gay men and magically transform them into straight men, and such an assertion has no basis in the factual record.

d. Defendants' First Amendment defenses dispose of this action at this juncture.

Despite Plaintiffs' callous dismissal of Defendants' First Amendment defenses, those defenses, outlined more fully in Defendants' MSJ, actually dispose of this action at this juncture.[145]

[145] Defendants' MSJ, Section IV.E.1.

2. The "No Guarantees" Disclaimer Disposes of Plaintiffs' Claims.

As noted in Defendants' Cross-Motion for Summary Judgment, to constitute consumer fraud, a business practice must have the capacity to mislead the average consumer and stand outside the norm of reasonable business practices.[146] Here, it is patently obvious that Defendants' practices were not misleading because Defendants, on numerous occasions, verbally told Plaintiffs about all of the potential consequences of "change." In addition, all of the Plaintiffs, except Plaintiff Michael Ferguson, who himself already explicitly knew that some people believe that SOCE is ineffective, signed consent forms which they read and understood.[147]

Plaintiffs' rely on *Ocean Cape Hotel Corp. v. Masefield Corp.*, 63 N.J. Super 369, 377-78 (App. Div. 1960), for the proposition that a provision in a written instrument cannot create an absolute defense to fraud in the inducement to contract. While a valid principle of law, Plaintiffs here cannot legitimately assert fraud in the inducement since they each explicitly testified that they read and understood the forms and the nature of SOCE counseling. [148] Plaintiffs also allege that their signing of the informed consents cannot constitute a waiver of a fraud defense since it was undertaken without knowledge that Defendants were misrepresenting that homosexuality is disordered and that SOCE is effective. The cases which Plaintiffs cite, however, *Frick Joint Venture v. Starwood Ceruzzi Union, LLC*, 2006 N.J. Super. Unpub. LEXIS 19 (App.Div. Dec. 6, 2006), and *Chen v. Vigilant Ins. Co.*, 2009 N.J. Super. Unpub. LEXIS 2035 (App.Div. July 31, 2009), merely reinforce how Defendants' assertions are not actionable misrepresentations under the CFA, but merely opinions, puffery and religious statements. *See Frick Joint Venture v. Starwood Ceruzzi Union, LLC*, 2006 N.J. Super. Unpub. LEXIS 19 (App.Div. Dec. 6, 2006) *32

[146] Defendants' MSJ, Section IV.A.
[147] *Id*.
[148] *Id*.

(internal quotation omitted and emphasis added) ("waiver cannot be predicated on consent given under a mistake of *fact*); *Chen v. Vigilant Ins. Co.*, 2009 N.J. Super. Unpub. LEXIS 2035 (App.Div. July 31, 2009) (concerning factual misrepresentation made to insurer that home would be owner occupied).

Further "where a CFA claim is based upon an allegedly incomplete or misleading disclosure, and where the parties' agreement 'contain[s] the very information that Plaintiffs allege was misrepresented, suppressed, or concealed,' dismissal for failure to state a claim is appropriate." *Hassler v. Sovereign Bank*, 644 F.Supp.2d 509, 515 (D.N.J. 2009) (quoting *Delaney v. Am. Express Co.*, 2007 U.S. Dist. LEXIS 34699 (D.N.J. May 11, 2007) *7); *see also Adamson v. Ortho-McNeil Pharm., Inc.*, 463 F.Supp.2d 496, 501 (D.N.J. 2006) (dismissal appropriate where statements "are not misleading or deceptive in any way"); *N.J. Citizen Action v. Schering-Plough Corp.*, 367 N.J. Super. 8, 13 (App. Div. 2003) (where the business practice alleged cannot be considered "misleading" under a favorable reading of the complaint, dismissal of CFA claim is called for).

Here, Plaintiffs rely on their misimpression that the disclaimer consisted of four words "results cannot be guaranteed," and was not conspicuous.[149] The disclaimers, however, are abundantly clear. For example, the disclaimer which Jo Bruck signed stated: "By signing at the bottom of this agreement and initialing this specific paragraph, the client expresses his or her understanding of the nature of the treatment and the fact that success is not guaranteed."[150] It also stated: "Most clients typically find that growth into heterosexuality is an ongoing lifetime process. It is also necessary to be aware that for many people, some homosexual attractions may

[149] Plaintiffs' Br. at pp.16-17.

[150] MSJ Ex. 34, Jonah Institute of Gender Affirmation Consent to Treat and Financial Agreement with signatures of Sheldon Bruck and Jo Bruck.

remain."[151] She also testified that she affirmatively read, understood and signed the form, that she understood the lack of any guarantee, and that she specifically read, understood, and initialed each paragraph.[152]

The forms which Plaintiffs Chaim Levin and Benjamin Unger signed also included plain and conspicuous disclaimers: "you need to be aware that results cannot be guaranteed, and that you're entering into coaching with the understanding that you are largely responsible for your own results."[153] Plaintiff Chaim Levin also testified that he understood the nature of the form and its implications before commencing life-coaching,[154] and Plaintiff Benjamin Unger testified that he understood that the life coaching would proceed in a partnership style.[155] These disclaimers are precisely the type of prior disclosure needed to dispose of this case. *Hassler v. Sovereign Bank*, 644 F.Supp.2d 509, 514 (D.N.J. 2009).

Further, Plaintiffs rely on their supposed ability to prove that SOCE is *per se* inefficacious and so the disclaimers represent a mere attempt to defraud Plaintiffs and disclaim any responsibility, as if "Plaintiffs were sold lottery tickets by a lottery that actually had no money in the pot."[156] It is absurd to assert that Plaintiffs were defrauded of their chance to "win the lottery" when, in fact, they were among the minority who did not "win."[157] Moreover, the question of whether SOCE could change Plaintiffs' sexual orientation is precisely one which the

---

[151] *Id*.

[152] MSJ Ex. 33, Deposition of Jo Bruck, January 27, 2014, 61:5-62:18, 74:16-23, 84:17-85:3.

[153] *See* MSJ Ex. 35, Alan Downing Life Coaching Client Service Agreement with signature of Chaim Levin; MSJ Ex. 37, Alan Downing Life coaching Client Service Agreement with signature of Benjamin Unger.

[154] *See* MSJ Ex. 18, Deposition of Chaim Levin, January 29, 2014, 55:19-25, 91:4-20, 92:22-93:6.

[155] MSJ Ex. 16, Deposition of Benjamin Unger, January 30, 2014, 27:18-28:2, 28:12-29:11.

[156] Plaintiffs' Br. at p.17.

[157] *See* Ex. 27, Alan Downing, *JONAH Groups 2007-2008*.

Court has been understandably reluctant to answer,[158] and indeed one whose adjudication is outside the proper role of the Court.[159]

Plaintiffs' signing of informed consents and their actual knowledge of the potential outcomes of SOCE in fact disposes of this entire action at this juncture.

3. The Charitable Immunity Act Applies.

Plaintiffs' assertion that the Charitable Immunity Act ("CIA"), N.J. Stat. 2A:53:A-7, does not apply to the claims in this case is simply false.[160] While it is true that the CIA does not apply to fraud, and only applies to negligence, *Hardwicke v. Am. Boychoir Sch.*, 188 N.J. 69, 96 (2006), Plaintiffs are not entitled to subvert the CIA by mislabeling their negligence claims as fraud. Plaintiffs' allegations that Defendants' SOCE is ineffective and harmful are actually negligence claims misleadingly labeled as fraudulent conduct as a pretext for avoiding the statutory immunity. This type of wordplay is not sufficient to debase an important and legitimate legislative protective scheme. *O'Connell v. State,* 171 N.J. 484, 496 (2002) (internal quotations omitted) (legislative intent in passing the Charitable Immunity Act was to preserve a charity's assets and because one who accepts the benefit of a charity enters into a relationship which exempts one's benefactor from liability).

4. The Learned Profession Exception Applies.

Plaintiffs assert that the learned profession exception to the CFA is inapplicable to Defendants in the present action.[161] The learned profession exception applies to members of professions that are governed by standards and rules. *Lee v. First Union Nat. Bank*, 199, N.J.

[158] MSJ Ex. 78, Transcript of Hearing on Defendants' Motion to Dismiss, July 19, 2013, 39:18-40:8; 41:17-42:2.

[159] *See* Defendants' MSJ, Section IV.D.

[160] Plaintiffs' Br. at p.17-18.

[161] Plaintiffs' Br. at p.19.

251, 264 (2009); *Finderne Mgmt. Co., Inc. v. Barrett*, 402 N.J. Super. 546, 569 (App. Div. 2008). However, the Complaint alleges that Mr. Goldberg is vicariously liable for the alleged misrepresentations and wrongful conduct of Mr. Heffner.[162] Mr. Heffner is a licensed professional to whom JONAH referred Sheldon Bruck for treatment.

This learned profession exception applies as to those allegations against Mr. Heffner for which Plaintiff Jo Bruck seeks to hold Mr. Goldberg and JONAH vicariously liable. These include allegations of negligent and unprofessional conduct such as Mr. Heffner telling Sheldon Bruck to snap his wrist with a rubber band, [163] and yelling at Sheldon Bruck while allegedly telling him that he is going to "ruin his life."[164]

5. <u>The Affidavit of Merit Requirement Applies</u>.

Plaintiffs assert that the Affidavit of Merit requirement of N.J. Stat. 2A:53A-26 *et seq*., to hold Defendants' vicariously liable for Mr. Heffner's alleged misconduct, is inapplicable in the present case because "such an affidavit is required exclusively in actions for 'damages . . . resulting from an alleged act of *malpractice or negligence* by a licensed person in his profession or occupation.'" (emphasis in original).[165]

The affidavit is required, however, since Plaintiffs seek to hold Defendants vicariously liable for the actions of Mr. Heffner, a licensed Marriage and Family Therapist, and Plaintiffs' claims are nothing more than professional negligence claims dressed-up as a CFA claim.

Once again, Plaintiffs are not entitled to subvert the Affidavit of Merit requirement by labeling their negligence claims as fraud. Plaintiffs' allegations that Mr. Heffner's therapy was harmful, that he misrepresented that homosexuality was a mental disorder, and that he

[162] Complaint ¶¶ 52-53, 89, 93, 96.
[163] Complaint ¶¶ 52-53.
[164] Complaint ¶¶ 89, 93, 96.
[165] Plaintiffs' Br. at p.19.

misrepresented that SOCE is effective, are professional negligence claims mislabeled as fraudulent conduct merely for the purpose of avoiding the legal protections that apply to claims against licensed professionals. Once again, this type of wordplay is not sufficient to debase an important legislative scheme.

III.

CONCLUSION.

Based upon the foregoing, Plaintiffs' Motion for Partial Summary Judgment should be denied in its entirety.

MESSINA LAW FIRM, P.C.

Dated: December 19, 2014 By: _____
Michael P. Laffey, Esq.
Attorneys for Defendants