LITE DEPALMA GREENBERG, LLC
Bruce D. Greenberg (NJ Id#: 014951982)
Jeffrey A. Shooman (NJ Id#: 041512006)
Two Gateway Center – Suite 1201
Newark, NJ 07102
(973) 623-3000

SOUTHERN POVERTY LAW CENTER
Morris Dees (*pro hac vice*)
David C. Dinielli (*pro hac vice*)
Samuel Wolfe (*pro hac vice*)
Scott D. McCoy (*pro hac vice*)
400 Washington Ave.
Montgomery, AL 36104
(334) 956-8200

CLEARY GOTTLIEB STEEN & HAMILTON LLP
James L. Bromley (*pro hac vice*)
Lina Bensman (*pro hac vice*)
One Liberty Plaza
New York, NY 10006
(212) 225-2000

Attorneys for Plaintiffs

Michael Ferguson, Benjamin Unger, Chaim Levin, Jo Bruck, Bella Levin, Plaintiffs, v. JONAH (Jews Offering New Alternatives for Healing f/k/a Jews Offering New Alternatives to Homosexuality), Arthur Goldberg, Alan Downing, Alan Downing Life Coaching LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY HUDSON COUNTY, LAW DIVISION Docket No: L-5473-12 CIVIL ACTION **REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. DEFENDANTS' MISREPRESENTATION THAT HOMOSEXUALITY IS A MENTAL DISEASE OR DISORDER VIOLATES THE CFA 3

A. The Mental Health Profession Affirms The Scientific Fact That Homosexuality Is Not A Disease Or Disorder 4

B. Defendants' Repetition Of Their Prior Arguments Is Fruitless 11

C. This Question Is Appropriate For Summary Judgment 12

II. DEFENDANTS' MISLEADING REPRESENTATIONS AS TO THE EFFICACY OF THEIR CONVERSION THERAPY PROGRAM VIOLATE THE CFA 14

A. Defendants' Use Of The Word "Change" Is Misleading 14

B. Defendants' Purported Efficacy Statistics Are Misleading 17

III. THERE IS NO CONSTITUTIONAL RIGHT TO DEFRAUD 20

A. Defendants Have No Recourse To The First Amendment 21

B. Defrauding Consumers Is Not Protected Religious Conduct 24

C. Defendants' Freedom Of Association Is Not Threatened 26

IV. DEFENDANTS' "NO GUARANTEES" DISCLAIMER IS NOT A DEFENSE 28

V. DEFENDANTS' CHARITABLE IMMUNITY ACT, LEARNED PROFESSION, AND AFFIDAVIT OF MERIT DEFENSES SHOULD BE STRUCK 29

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

Asbury Park Press v. Ocean Cnty. Prosecutor's Office,
374 N.J. Super. 312 (N.J. Super. Ct. Law Div. 2004) 5

Barry v. Arrow Pontiac, Inc.,
100 N.J. 57 (1985) 16

Bolger v. Youngs Drug Prods. Corp.,
463 U.S. 60 (1983) 21, 24

Boy Scouts of Am. v. Dale,
530 U.S. 640 (2000) 26

Brunell v. Wildwood Crest Police Dep't,
176 N.J. 225 (2003) 5

Chiesa v. Levine,
A-4055-11T3, 2013 WL 3284131 (N.J. Super. Ct. App. Div. July 1, 2013) 13

Christofferson v. Church of Scientology of Portland,
57 Or.App. 203 (1982) 25

Ciser v. Nestle Waters N. Am., Inc.,
Civ. No. 2:11-05031 (WJM), 2013 WL 5774121 (D.N.J. Oct 24, 2013) 29

Cox v. Sears Roebuck & Co.,
138 N.J. 2 (1994) 16

Elane Photography, LLC v. Willock,
309 P.3d 53 (N.M. 2013) 26

Emp't Div., Dep't of Human Resources of Or. v. Smith,
494 U.S. 872 (1990) 26

Facenda v. N.F.L. Films, Inc.,
542 F.3d 1007 (3d Cir. 2008) 22

Fargo Women's Health Org., Inc. v. Larson,
381 N.W.2d 176 (N.D. 1986) 23

Ferguson v. JONAH,
No. HUD-L-5473-12, 2014 N.J. Super. Unpub. LEXIS 1334 (Law Div. June 6, 2014) 30

Gallo v. Starland Realty, LLC,
No. BERC35113, 2014 WL 6239787 (N.J. Super. Ct. Ch. Div. Oct. 31, 2014) 14

Gennari v. Weichert Co. Realtors,
148 N.J. 582 (1997) 20

Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore,
721 F.3d 264 (4th Cir. 2013) 23

Hassler v. Sovereign Bank,
644 F. Supp. 2d 509 (D.N.J. 2009) 29

Hill Int'l, Inc. v. Atlantic City Bd. of Educ.,
A-4139-13T3, 2014 WL 7370085 (N.J. Super. Ct. App. Div. Dec. 30, 2014) 31

Hyland v. Aquarian Age 2,000, Inc.,
148 N.J. Super. 186 (Ch. Div. 1977)...20

Milgram v. Comfort Direct, Inc.,
A-360-07T2, 2008 WL 4702810 (N.J. Super. Ct. App. Div. Oct. 28, 2008)..........................13

Miller v. Am. Family Publishers,
284 N.J. Super. 67 (Ch. Div. 1995) 14, 16

Molko v. Holy Spirit Ass'n,
46 Cal. 3d 1092 (1988)..24-25

Muller-Moreno v. Malouf,
A-5722-06T3, 2009 WL 1361699, (N.J. Super. Ct. App. Div. May 18, 2009) 13

Onyx Acceptance Corp. v. Trump Hotel & Casino Resorts, Inc.,
No. L-811-02, 2008 WL 649024 (N.J. Super. Ct. App. Div., Mar. 12, 2008).........................15

Patterson v. Bd. of Trs., State Police Ret. Sys.,
194 N.J. 29 (2008) 4-5

Porous Media Corp. v. Pall Corp.,
173 F.3d 1109 (8th Cir. 1999)...21

PRB Enters., Inc. v. S. Brunswick Planning Bd.,
105 N.J. 1 (1987) 5

Priests for Life v. U.S. Dep't of Health & Human Servs.,
7 F. Supp. 3d 88 (D.D.C. 2013)...27

Rivera v. Salerno Duane, Inc.,
A-5822-05T1, 2007 WL 1790723 (N.J. Super. Ct. App. Div. June 22, 2007) 13

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984)..28

Rumsfeld v. FAIR, Inc.,
547 U.S. 47 (2006)..26, 27

San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.,
483 U.S. 522 (1987)..22

Smajlaj v. Campbell Soup Co.,
782 F. Supp. 2d 84 (D.N.J. 2011)..20

State v. Harvey,
151 N.J. 117 (1997)..14

State v. King,
387 N.J. Super. 522 (App. Div. 2006) 4

State v. Pitts,
116 N.J. 580 (1989)..5

Suarez v. E. Int'l Coll.,
428 N.J. Super. 10 (App. Div. 2012) 14

T.H. v. Div. of Developmental Disabilities,
189 N.J. 478 (2007) 4

Transp. Alts., Inc. v. City of New York,
218 F. Supp. 2d 423 (S.D.N.Y. 2002) 22

United States v. "Hubbard Electrometer",
333 F. Supp. 357 (D.D.C. 1971) 25

Walker v. Giuffre,
209 N.J. 124 (2012) 13

Rules and Statutes

N.J.S.A. 45:1-54 .... 6, 12

N.J.S.A. 56:8-1 23

PRELIMINARY STATEMENT

Defendants' voluminous briefing notwithstanding, there are very few material facts in dispute in this litigation. That is why Plaintiffs filed their motion for partial summary judgment: to eliminate the substantial noise surrounding their straightforward claim that Defendants made misrepresentations in connection with the sale and provision of their ineffective and unconscionable conversion therapy services.

Specifically, Plaintiffs demonstrated in their motion the broad scientific consensus that homosexuality is a normal variation of human sexuality and is not a disease or disorder. Defendants concede in opposition that they tell clients that homosexuality is disordered, but contend that this false statement should be excused because psychology is purportedly hopelessly uncertain, because some religious organizations purportedly believe homosexuality to be disordered, and because the universal scientific consensus around this fact purportedly reflects only political lobbying. These rationalizations are irrelevant, unsupported, and contrary to binding law; none merit sending this issue to a jury. This Court can and should rule that it is a misrepresentation in violation of the CFA to tell potential and/or current clients of conversion therapy services that homosexuality is disordered. The jury then can decide when and to whom such misrepresentations were made.

In addition, Plaintiffs demonstrated that Defendants' representations about the purported effectiveness of their program are misleading as a matter of law in two ways. First, Defendants market their services as capable of "changing" a client's sexual orientation—a representation the average consumer would understand to mean, transforming from gay to straight. But Defendants have admitted to meaning something totally different: that the change they offer includes nothing more than the possibility of restraining homosexual conduct or rejecting a gay identity. This bait-

and-switch is misleading and is a classic example of the kind of sales tactic that the CFA was enacted to combat.

So too is Defendants' use of fake statistics in marketing their services. Defendants tell prospective clients that, in the JONAH program, they have a particular percentage probability of changing their sexual orientation within a set period of time, but Defendants have admitted under oath that there is no factual basis for these sham efficacy rates. It is misleading as a matter of law to lure and retain consumers using bogus numbers. None of Defendants' arguments—that they did not "guarantee" change, that some of their clients were satisfied with the services, that their statements about efficacy were mere "puffing," that other conversion therapy programs may be effective, and that they should not be expected to collect accurate statistics—have any merit. They are the standard responses of a Defendant in any consumer fraud action. Defendants mislead consumers with their fake promises of "change," and the Court should so rule.

Finally, Defendants have failed to offer any persuasive reason to retain their inapt affirmative defenses, which can only distract the jury from the legally relevant issues. First and foremost, Defendants are flatly wrong that the First Amendment's speech, free exercise, or association clauses could insulate them from CFA liability. First, Defendants advertised their conversion therapy in the marketplace of goods and services, not in the marketplace of ideas. Second, the service they sell is secular and marketed as scientific, not religious. Lastly, the CFA of course burdens no one's associational rights. The Court also should strike the "disclaimer," Charitable Immunity Act, affidavit of merit, and "learned profession" defenses. None of these defenses have any application here or could possibly insulate from liability the broad array of illegal conduct Plaintiffs have alleged, including Defendants' use of nudity, "healthy touch," homophobic slurs, or trauma recreation.

ARGUMENT

I. DEFENDANTS' MISREPRESENTATION THAT HOMOSEXUALITY IS A MENTAL DISEASE OR DISORDER VIOLATES THE CFA

Plaintiffs' opening brief in support of this motion demonstrated that statements characterizing homosexuality as disordered are false and, in the context of marketing conversion therapy services, misleading to the average consumer as a matter of law. P-MPSJ at § 1. In their Opposition, Defendants conceded that they in fact made such statements. *See* D-Opp. at 55[1] ("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 odds with its current desired expression."); *id.* at 27 (identifying "many" of the relevant statements as undisputed). There is therefore no reason to postpone the resolution of this straightforward legal question until trial.

Defendants are unable to point to any evidence that contradicts the basic fact, long-recognized in the mental health profession, that homosexuality is a normal variation of human sexuality. Their Opposition instead attempts to manufacture a controversy by relying on inadmissible and self-serving statements from Defendants' expert witnesses, pointing to organizations associated with or run by Defendants themselves, asking the Court to consider the wholly irrelevant views held by religious persons, and otherwise attempting to distract from the fact that every major professional association and official body in the mental health field explicitly affirms that homosexuality is not disordered. Defendants have no real answer to that indisputable consensus. They therefore resort to the false assertion—supported by pure *ipse dixit*—that every single one of these organizations, including the American Psychiatric

[1] For ease of reference, this brief refers to Defendants' opening summary judgment brief as "D-MSJ," to Plaintiffs' opening partial summary judgment brief as "P-MPSJ," and to Defendants' and Plaintiffs' summary judgment opposition briefs as "D-Opp." and "P-Opp.," respectively.

Association ("APA"), the American Psychological Association ("ApA"), the American Medical Association ("AMA"), the World Health Organization ("WHO"), and the Royal College of Psychiatrists, are political and lack all scientific credibility.

Authoritative, scientific sources universally confirm that homosexuality is a normal variation of human sexuality, *see* P-MPSJ at § I. It is appropriate for the Court to determine as a matter of law that misrepresenting homosexuality as disordered in marketing services that purportedly "heal" that disorder is misleading in violation of the CFA.

A. The Mental Health Profession Affirms The Scientific Fact That Homosexuality Is Not A Disease Or Disorder

Defendants assert that the DSM and statements by the prominent mental health professional organizations are not evidence of a scientific consensus that homosexuality is a normal variation of human sexuality. They try to create the impression that a debate exists by simply denying that there is a consensus and then dismissing all views different from their own as politically motivated. Even with those contortions, Defendants tellingly offer no response to the clear statement of New Jersey law set forth in *State v. King*, 387 N.J. Super. 522 (App. Div. 2006). The *King* decision explicitly states that "[p]sychiatric testimony falls within the category of scientific evidence," that there are "scientifically recognized mental disorders," that the DSM is "an authoritative treatise in the field," and that "[g]eneral acceptance of the DSM in the psychiatric community is beyond dispute." *King*, 387 N.J. Super. at 542-44. Defendants also conspicuously ignore that the Supreme Court of New Jersey has repeatedly relied upon the DSM to establish that there are recognized mental disorders. *See, e.g.*, *T.H. v. Div. of Developmental Disabilities*, 189 N.J. 478, 485-86, 492 (2007) (relying on DSM-IV for recognition of Asperger's Disorder); *Patterson v. Bd. of Trs., State Police Ret. Sys.*, 194 N.J. 29, 41-42 (2008) (relying on DSM-IV for recognition of Post-Traumatic Stress Disorder); *Brunell v. Wildwood Crest Police*

Dep't, 176 N.J. 225, 240-43 (2003) (same); *State v. Pitts*, 116 N.J. 580, 608 (1989) (noting mental disorders recognized in DSM III).[2]

Plaintiffs' opening brief in support of this motion cited to the legislative finding in N.J.S.A. 45:1-54 that "[b]eing lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming" and the finding that "[t]the major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years." N.J.S.A. 45:1-54. Defendants attempt to avoid these legislative findings by arguing that they are not controlling authority. D-Opp. at 7-9. This misses the point. Plaintiffs' argument was not that the findings are binding on the Court, or that New Jersey's SOCE ban applies to Defendants in this case.[3] Rather, the legislative findings are further evidence confirming the existence of a legitimate scientific consensus on this point. Critically, Defendants do not, because they cannot, contradict the legislative findings themselves.

Defendants contend that the DSM is unreliable largely through a meandering argument about the purported incoherence of mental disorders as a category. D-Opp. at 10-15. The most striking feature of this argument is that, if it were true, it would amount to an admission that

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[2] *See also* P-MPSJ at 4-5, Pls.' Mot. To Exclude Defs.' Experts ("P-Excl.") at 5, Pls.' Opp. to Defs.' Mot. To Exclude Pls.' Experts at 7.

[3] Regardless, the cases cited by Defendants hold that the Court may consider the legislative findings authoritative. *See Asbury Park Press v. Ocean Cnty. Prosecutor's Office*, 374 N.J. Super. 312 (Law Div. 2004); *PRB Enters., Inc. v. S. Brunswick Planning Bd.*, 105 N.J. 1, 5 (1987). The *Asbury Park* Court relied upon, among other things, the legislative findings in a preamble in holding that the privacy interest acknowledged therein supported withholding material under the New Jersey Open Public Records Act. *Asbury Park*, 374 N.J. Super. at 330-31. Furthermore, *PRB Enterprises* holds "[a]ccording to traditional rules of statutory construction, the body of a statute consists of all that material following the enacting clause, while the preamble consists of statements that precede the enacting clause." *PRB Enters.* at 5 (citations omitted, emphasis supplied). Here, as in *Asbury Park*, the legislative findings come after the enacting clause. *See* Ex. 101, N.J.S.A. 45:1-54. Relatedly, Defendants' arguments about the role of legislative findings under various levels of constitutional scrutiny are irrelevant. This case does not require the use of legislative findings in that way because it does not concern the constitutionality of the CFA.

when Defendants told consumers that science confirms homosexuality to be a mental disorder, their statements were false and violated the CFA.[4] Regardless, it is of course not true that mental disorders are undefined or undefinable, as the numerous cases cited above confirm. *See also* P-MPSJ at § I.

Indeed, the Court need look no further than the sources cited by Defendants themselves for evidence that Defendants' argument is entirely wrong. For example, Defendants repeatedly cite to Professor Wakefield's 1992 academic article that presents his personal view as to how mental disorders should be defined as if it substantiates their position. *See* D-Opp. at 10-13, D-Opp. Ex. 1. Not only does that article not deny the existence of mental disorders as a coherent category, but Professor Wakefield's body of work clearly reflects his commitment to scientifically validated identification of mental disorders.[5] As he wrote in 2010,

> In the 1960s and 1970s, there were vehement criticisms of psychiatry from both professional and nonprofessional sources who argued that there is no such thing as 'mental disorder' at all... There are many reasons why the antipsychiatric movement is no longer a potent force, but one reason is that with the publication of DSM-III (American Psychiatric Association, 1980), many of the antipsychiatrists' criticisms were squarely and systematically addressed by the psychiatric community... The claim that the concept of mental disorder is incoherent or that mental disorders do not exist is rarely heard these days except in postmodernist or radical behaviorist treatises, and it is certainly not a major concern in public discourse about psychiatry.

[4] Similarly unavailing are Defendants' arguments about the purported superiority of the World Health Organization's International Classification of Diseases (10th Edition) ("ICD-10") to the DSM. Like the DSM, the ICD-10 explicitly excludes homosexuality from its list of mental disorders. This further confirms that the consensus as to homosexuality is, in fact, international and contradicts, rather than supports, Defendants' arguments.

[5] *See* Jerome C. Wakefield, http://socialwork.nyu.edu/our-faculty/full-time/jerome-c-wakefield.html (last visited Jan. 7, 2015) (reflecting publications on such topics as "Scientific foundations of the DSM-V and ICD-11," "Reconsidering the empirical and conceptual arguments for proposed grief disorders," and "Translating Conceptual Controversies into Empirical Research: Testing the Validity of DSM Major Depression Diagnostic Criteria.").

See Ex. 81, J. C. Wakefield, *Taking disorder seriously: A critique of psychiatric criteria for mental disorders from the harmful-dysfunction perspective*, in Contemporary directions in psychopathology: Scientific foundations of the DSM-V and ICD-11 275, 278-79 (Theodore Millon, Robert F. Krueger, & Erik Simonsen eds., New York: Guilford Press, 2010) (emphasis added).

Defendants also rely on materials such as Dr. Spitzer's article from 1981, a long-retired statement from the APA that accompanied the DSM-II in 1973, and various books and articles from their fellow NARTH members; all are irrelevant. At best they show that, long ago, there was controversy surrounding the delisting of homosexuality. The existence of decades-past controversy does not mean that the 1973 decision to remove homosexuality from the DSM was political or unscientific or establish that homosexuality is a mental disorder. Today, that homosexuality is a normal variation of human sexuality is no longer a frontier in psychology. It is a well-established, scientifically based fact.

The DSM is meticulously researched and validated by painstaking review of the latest and best science in the field. For example, the APA spent more than a decade preparing the DSM-V, which supplanted the DSM-IV. *See* DSM-V Development, http://www.dsm5.org/Pages/Default.aspx (last visited Jan. 9, 2015). Among other things, the process involved a series of research planning conferences "[to provide] an empirical research base to support revisions in DSM-V." *See* Conference Summaries and Monographs, *DSM-V Development*, http://www.dsm5.org/Research/Pages/ConferenceSummariesand Monographs.aspx (last visited Jan 9, 2015). The decision to remove homosexuality from the DSM-II in 1973 was also based in science. *See* Ex. 78, Beckstead Rpt. ¶¶ 30-31; Ex. 75, Bernstein Rpt. ¶¶ 7; *see also* Ex. 6, Am. Psychiatric Ass'n, *Homosexuality and Sexual*

Orientation Disturbance: Proposed Change in DSM-II, 6th Printing, page 44 (1973) ("Clearly homosexuality, per se, does not meet the requirements for a psychiatric disorder."). Defendants' characterizations of the DSM as invalid and unreliable are nothing more than wishful thinking.

Similarly, Defendants' rejection of the major professional organizations as "not authoritative" and unscientific is baseless. The positions taken by the major professional organizations are scientific and not merely political.[6] The APA, which is the largest psychiatric organization in the world, is a "medical specialty society representing more than 35,000 psychiatrists in the U.S. and from around the world."[7] The APA "works to [p]romote... psychiatric education and research" and its "research efforts are aimed at contributing to psychiatry's science base." *See* Ex. 83, *Am. Psychiatric Ass'n,* What is the American Psychiatric Association? (2014). It is a primarily scientific organization, not a lobbying group. Of like stature is the ApA, "the world's largest association of psychologists, with nearly 130,000 researchers, educators, clinicians, consultants and students as its members."[8] Its mission includes

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[6] The Court may take judicial notice of the statements of each of these professional organizations in support of finding that Defendants' statement that homosexuality is a mental disorder is false and/or misleading. In attempting to distinguish the cases relied upon by Plaintiffs, Defendants concede—as they must—that those courts took judicial notice of materials from professional organizations such as the APA, ApA, and AMA. Defendants incorrectly assert that Plaintiffs request that the Court "judicially notice that homosexuality is not disordered." D-Opp. at 22. That is not the case. Plaintiffs ask this Court to take judicial notice of the statements of the organizations listed above as evidence of the broad consensus that homosexuality is not a mental disorder. This is consistent with the holdings in the cases Plaintiffs cite.

[7] *See* Becoming a Member, *Am. Psychiatric Ass'n*, http://www.psychiatry.org/join-participate/becoming-a-member (last visited Jan. 9, 2015); Ex. 83, *Am. Psychiatric Ass'n,* What is the American Psychiatric Association? (2014); About the APA and Psychiatry, *Am. Psychiatric Ass'n*, http://www.psychiatry.org/about-apa--psychiatry (last visited Jan. 9, 2015).

[8] *See* About the APA, *Am. Psychiatric Ass'n,* http://www.apa.org/about/index.aspx (last visited Jan. 9, 2015).

"[p]romoting research in psychology, the improvement of research methods and conditions and the application of research findings."[9]

Defendants do not address any of this, nor do they dispute the substantial research and other scientific work engaged in by the APA, ApA, and other relevant organizations. Instead, they rest on flimsy reeds, such as the fact that the APA has expressed support for the passage of same-sex marriage laws, as though this negates the substantial scientific work undertaken by the APA. This does not come close to establishing that the APA ignores, or acts contrary to, valid science. The only support Defendants offer for their claims about the major professional associations is Defendants' personal disagreement with the positions those associations take and inadmissible hearsay (and hearsay within hearsay) from Dr. Nicolosi[10] and various NARTH-affiliated persons, such as Dr. Cummings. D-Opp. at 16-18, 21-22. They do not and cannot contradict the fact that the major professional associations have scientific missions, perform scientific functions, and base their policies and publications on the best science available.

Defendants point to a number of religious organizations, as well as several organizations associated with or run by Defendants themselves, as evidence of the purported controversy they attempt to manufacture.[11] Defendants refer to positions taken by organizations such as the Christian Medical and Dental Association, as if the religious views of Christian dentists are relevant or comparable to the considered conclusions drawn by mental health researchers and

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[9] *Id.*

[10] *See* P-Excl. at § III.A, III.D.

[11] For a full discussion of NARTH, see P-Excl. at 6-7. PATH is an umbrella organization that includes as members JONAH, NARTH, and People Can Change. Defendant Arthur Goldberg is the president and point of contact for PATH, and has served on the board of NARTH. *See* Ex. 84, Goldberg Tr. 13:4-23; 72:6-75:15. These small organizations are intimately connected to, and in part run by, Defendants themselves, and are neither scientifically credible nor independent.

professionals upon review of decades of scientific evidence.[12] Religious views of homosexuality are irrelevant to the scientific question of whether or not homosexuality is a mental disease or disorder. It is telling that not one of the organizations named by Defendants as purportedly supporting their views is secular or engages in valid scientific research.

Defendants also assert that their arguments are supported by the fact that the ICD-10, a diagnostic manual put out by the WHO, continues to include "egodystonic sexual orientation" in its list of mental disorders. D-Opp. at 3 n.3, 4, 11-15, 25-26, 60 n.136. "Egodystonic sexual orientation" occurs when a person experiences distress about his or her sexual orientation, and it is the distress that calls for treatment—not the sexual orientation. As the ICD-10 explains, it is characterized by a wish that sexual orientation were different "because of associated psychological and behavioural disorders." *See* Ex. 87, World Health Organization, *International Statistical Classification of Diseases and Related Health Problems 10th Revision* (2010). It is not the same as sexual orientation per se, and listing it is not equivalent to listing a sexual orientation such as homosexuality. More relevant than its inclusion of egodystonic sexual orientation is the

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[12] The Catholic Medical Association is open to "[a]nybody who wants to help integrate Catholic principles into healthcare." *See* Catholic Medical Association Sees Growth In Troubled Times, *Catholic News Agency*, http://www.catholicnewsagency.com/news/catholic-medical-association-sees-growth-in-troubled-times/ (last visited Jan 9, 2015). It has about 2,000 members including dentists, podiatrists, nurse practitioners, and physician assistants. *Id.* The American College of Pediatricians was founded in 2002 by a group of religiously conservative pediatricians as a protest against the American Academy of Pediatrics' support for adoption by gay couples. *See* Pro-Life Pediatric Group Stands Contrary to Established American Academy of Pediatrics, *Catholic Exchange*, http://catholicexchange.com/pro-life-pediatric-group-stands-contrary-to-established-american-academy-of-pediatrics (last visited Jan. 9, 2015). The American Association of Christian Counselors recently amended its Code of Ethics and removed all references to reparative therapy. *Compare* Ex. 85 at 1-120-f, Am. Ass'n of Christian Counselors, *AACC Code of Ethics* 15 (2014) *with* Ex. 86 at 1-126, Am. Ass'n of Christian Counselors, *AACC Code of Ethics* 8 (2004). The Christian Medical and Dental Association is a religious organization and not a research or scientific organization. *See* Our Mission and Vision, *Christian Medical and Dental Association*, http://cmda.org/about/page/our-mission-vision (last visited Jan. 9, 2015).

fact that the ICD-10 does not list homosexuality per se as a disorder. On the contrary, the ICD-10's entry for egodystonic sexual orientation is preceded by a prominent warning—omitted by Defendants—that states that "Sexual orientation by itself is not to be regarded as a disorder." *Id.* The ICD-10 confirms that there is no legitimate scientific dispute on this issue.

There is no dispute in the scientific community that homosexuality is not a mental disorder, despite Defendants' ineffectual attempt to manufacture one. *See* P-MPSJ at § I. Most importantly to the issues in this case, the average consumer would be surprised to learn that, contrary to Defendants' misrepresentations, the DSM and all major mental health professional associations affirm that his experience of homosexual desire was not a mental illness, did not arise from a developmental trauma, and did not require treatment via Defendants' services.

B. Defendants' Repetition Of Their Prior Arguments Is Fruitless

Defendants' contention that their misrepresentation of homosexuality as disordered is a "protected opinion," D-Opp. at 3, adds nothing to Defendants' presentation of the same theory in their D-MSJ, § IV.C. Significantly, Defendants continue to omit any explanation of how "homosexuality is a disorder" is not a statement of fact.[13] Plaintiffs fully addressed this misguided argument in their Opposition. P-Opp. at § III.B.2.

Defendants also repeat their argument that this Court is not competent to adjudicate this issue because of *Acuna v. Turkish*, 192 N.J. 399 (2007). D-Opp. at 4-5. As discussed in prior briefing, there is no "*Acuna* doctrine." *See* P-Opp. at § III.A. Defendants' argument lacks all legal merit and has already been rejected by this Court.

In addition, Defendants regurgitate the constitutional arguments made in their Motion for Summary Judgment. D-Opp. at 5-7; *see* D-MSJ § IV.E. Plaintiffs have already addressed these

[13] Notably, the legislative findings in N.J.S.A. 45:1-54 explicitly describe as a "fact" that homosexuality is not disordered. N.J.S.A. 45:1-54.

arguments in full, *see* P-Opp. at § III.D and P-MPSJ at § III.A, and refer the Court to that discussion in lieu of repeating the same material here. As before, Defendants do not explain how their statements are not classic commercial speech. *See, e.g.*, Ex. 88, JON019398 ("'We have many resources to offer your son that have nothing to do with religion. JONAH offers coaching/therapy which is psychologically based, not based on religious concepts.'"); Ex. 89, JON001655-56 ("The Jonah Institute for Gender Affirmation, is a world-wide, non-denominational, full service clinical and research center working with professionals of many disciplines, including Psychiatrists, Psychologists, Social Workers, Life Coaches, and Mentors, all of whom are trained in gender affirming techniques."). This failure is fatal to their argument.

Finally, Defendants repeat the misreading of *Rubanick v. Witco Chemical Corp.*, 125 N.J. 421 (1991), that pervaded their Motion to Exclude Plaintiffs' Experts. As discussed in Plaintiffs' Opposition to Defendants' Motion to Exclude, New Jersey continues to embrace the *Frye* general acceptance standard. Pls.' Opp. to Defs.' Mot. to Exclude Pls.' Experts at 6. Regardless, Defendants do not explain how the standard on admissibility of expert testimony conceivably relates to their assertion that they are "entitled" to have the jury consider their "minority view" of the science. D-Opp. at 24-26.[14] Nor do they cite any other support for that assertion. None exists—there is no such thing as an entitlement to present scientifically incorrect theories to a jury. N.J.R.E. 702.

C. This Question Is Appropriate For Summary Judgment

Defendants repeatedly assert, based on an incorrect reading of *Zorba Contractors, Inc. v. Housing Auth. of the City of Newark*, 362 N.J. Super. 124, 138-139 (App. Div. 2003), that they

[14] Defendants' admission that the scientific principles they espouse are a "minority view" and not generally accepted is critically significant to the arguments made in the expert exclusion motions now being briefed by all parties.

have "an unequivocal right to have the jury determine all of the factual questions relating to whether Defendants' conduct violated the CFA." D-Opp. at 26-27, 35-36, 43.[15] Defendants overstate the holding of *Zorba*, which does not support the proposition that all questions, including whether a statement has the capacity to mislead, must go to the jury. In essence, Defendants would have this Court exempt CFA claims from *R.* 4:46.[16] That would be unprecedented and contrary to the CFA's broad remedial purpose. Tellingly, the cases relied upon by Defendants all deal with the issue of unconscionable business practices, not affirmative misstatements.[17] Plaintiffs have not moved for summary judgment with respect to their unconscionable business practice allegations. CFA claims involving affirmative misstatements may and have been determined on summary judgment, as Plaintiffs' claims should be here. *See, e.g., Walker v. Giuffre*, 209 N.J. 124, 143 (2012); *Chiesa v. Levine*, A-4055-11T3, 2013 WL 3284131 (N.J. Super. Ct. App. Div. July 1, 2013); *Muller-Moreno v. Malouf*, A-5722-06T3, 2009 WL 1361699 (N.J. Super. Ct. App. Div. May 18, 2009); *Milgram v. Comfort Direct, Inc.*, A-360-07T2, 2008 WL 4702810 (N.J. Super. Ct. App. Div. Oct. 28, 2008); *Rivera v. SalernoDuane, Inc.*, A-5822-05T1, 2007 WL 1790723 (N.J. Super. Ct. App. Div. June 22, 2007); *Gallo v. Starland Realty, LLC*, No. BERC35113, 2014 WL 6239787 (N.J. Super. Ct. Ch. Div. Oct. 31, 2014). Moreover, New Jersey courts regularly are called on to consider scientific

[15] Defendants also rely on *State v. Hackett*, 166 N.J. 66 (2001) to support their argument that "the determination of the question 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.)." D-Opp. at 15. *Hackett*, which concerned community standards, has no bearing on this case. The question of whether homosexuality is a mental disorder is a question of scientific fact, not of community standards.

[16] Even if Defendants were correct that there exists an unequivocal right to a jury trial on all factual questions in this case—which there does not—such a right would negate Defendants' Summary Judgment Motion as well as Plaintiffs'.

[17] *Petrillo v. Bachenberg*, 263 N.J. Super. 472 (App. Div. 1993) is not a CFA case, and therefore, is inapposite.

sources and assess scientific consensus. *See, e.g.*, *State v. Harvey*, 151 N.J. 117, 171-176 (1997) (assessing scientific publications and consensus on DNA testing).

II. DEFENDANTS' MISLEADING REPRESENTATIONS AS TO THE EFFICACY OF THEIR CONVERSION THERAPY PROGRAM VIOLATE THE CFA

Plaintiffs established in their opening brief—and Defendants do not contest in their Opposition—that statements that have the capacity to mislead the average consumer are misrepresentations under the CFA. *See Suarez v. E. Int'l Coll.*, 428 N.J. Super. 10, 32 (App. Div. 2012); *Miller v. Am. Family Publishers*, 284 N.J. Super. 67, 85 (Ch. Div. 1995); P-MPSJ § II. Plaintiffs' Motion asks the Court to hold, as a matter of law, that it is a misrepresentation in violation of the CFA for a merchant to claim that its program can "change" sexual orientation using a definition of change that does not match how "change" is understood by the average consumer and/or to use seemingly precise "success" statistics in advertising without any factual basis for calculating such statistics (and, indeed, without having performed any calculation). *Id.* Defendants' Opposition avoids confronting Plaintiffs' arguments by focusing on irrelevant issues and provides no basis to conclude that Plaintiffs are not entitled to summary judgment on this issue.

A. Defendants' Use Of The Word "Change" Is Misleading

As discussed in Plaintiffs' opening brief, the use of the term "change" in marketing a service violates the CFA when the merchant defines it to include undisclosed and incorrect meanings. P-MPSJ at § II.A. In their Opposition, Defendants admit that their definition of sexual orientation change contains precisely this sort of hidden, backward meaning. D-Opp. at 33 (admitting that Defendants define "change in sexual orientation… as a change in <u>either</u> sexual feelings, behavior <u>or</u> identity") (emphasis in original). Critically, Defendants also concede that their "assertions that their services <u>can</u> change sexual orientation from gay to straight would be

naturally and reasonably understood by prospective clients that some individuals would will [sic] no longer experience homosexual desire and instead experience heterosexual desire." D-Opp. at 28 (emphasis in original).

This is exactly why Defendants' assertions violate the CFA. No average consumer of conversion therapy services would naturally or reasonably understand that a purportedly "changed" individual would (a) continue to experience homosexual desire, (b) not experience heterosexual desire, and (c) "change" only insofar as he adopted the label "straight." This fact pattern is entirely consistent with the one addressed in *Onyx Acceptance Corp. v. Trump Hotel & Casino Resorts, Inc.*, No. L-811-02, 2008 WL 649024. There, the Trump Hotel made an affirmative misrepresentation when it advertised guaranteed room availability but, without telling their prospective guests, used "guaranteed" to include situations where room reservations were not honored. *Onyx* at *12. The *Onyx* court found that the Trump Hotel had used the word "guaranteed" in a manner contrary to any reasonable understanding of the word—even though some guests did get the room they had reserved. In the same way, here Defendants made affirmative misrepresentations when they marketed their services promising "change" but, unbeknownst to their prospective customers, used "change" to include merely adopting a different label. *Onyx Acceptance Corp. v. Trump Hotel & Casino Resorts, Inc.*, No. L-811-02, 2008 WL 649024, at *12, (N.J. Super. Ct. App. Div. Mar. 12, 2008) ("[u]nder the CFA, it is the customer's reasonable expectations that control, not the seller's unreasonable definitions of commonplace terms").[18]

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[18] To extend the analogy introduced in the opening brief, if Defendants represented to consumers that they could "change" lead into gold and that the proof of the representation was a safe full of "changed" gold bars, that would be misleading if that safe contained lead bars painted yellow and labeled "gold." Similarly, it would be misleading regardless of whether a guarantee was provided, or whether the safe contains one gold bar. For this reason, Defendants' claim that they

Defendants rely heavily on the argument that their use of "change" could not have misled Plaintiffs. This is entirely unavailing, as the relevant legal question under the CFA is objective—whether a statement has the capacity to mislead consumers—and New Jersey law is clear that CFA claims can be maintained even by Plaintiffs who were not personally misled. *See Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 17 (1994) ("A practice can be unlawful even if no person was in fact misled or deceived thereby").[19] Defendants simply do not address this fundamental question. To the extent that they contend that their consent forms disclose to consumers that Defendants define "change" to include change of label or behavior alone, this is simply not borne out by the documents themselves, which contain no such disclosure. Defendants' argument that the consent forms' use of phrases such as "grow out of homosexuality" somehow put consumers on notice that Defendants were merely offering to "change" their label is utterly without merit. D-Opp. at 30.

Defendants also argue that their definition of "change" is consistent with how mental health professionals use language in discussing sexual orientation. D-Opp. at 31-34. Defendants' distorted explanation of the ApA's definition of sexual orientation neither justifies nor excuses their contortion of "change" in marketing their conversion therapy. Crucially, Defendants again ignore the relevant inquiry: whether their use of "change" had the capacity to mislead the average consumer. *Miller*, 284 N.J. Super. at 85 (quoting *Barry v. Arrow Pontiac, Inc.*, 100 N.J. 57, 69 (1985)) (the test of whether a statement is an affirmative misrepresentation under the CFA

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can produce witnesses who will testify to having successfully changed (the hypothetical gold bar) is not responsive to Plaintiffs' argument that Defendants misleadingly included the painted and labeled lead bars in the "changed" category. Defendants' assertion that they have disclaimed any guarantee of complete orientation change is likewise beside the point.

[19] Moreover, reasonable reliance is not an element of a CFA claim, and it is improper for Defendants to seek to, in effect, import it here via this argument.

is whether the statement had the "'capacity to mislead' an average consumer"). The test is not whether Defendants' use of "change" would mislead a sophisticated expert.[20]

Defendants' arguments are legally insufficient and factually baseless.[21] Plaintiffs are entitled to summary judgment on this issue.

B. Defendants' Purported Efficacy Statistics Are Misleading

Plaintiffs' opening brief established that it is a CFA violation for a merchant to advertise using seemingly specific statistics about the efficacy of its services in the absence of any data to support the advertised success rates, as Defendants do. *See, e.g.*, Ex. 90, JON018311 (representing that JONAH's "healing rates as Elaine stated approximates 2/3 of those who enter the program"). In their Opposition, Defendants admit that they do not systematically—or in any way—collect data from their clients. They admit that they instead depend on intermittent anecdotal self-reports to estimate how effective their services are, and that they use "statistics concerning the SOCE community at large in asserting the efficacy rates of 'JONAH's program.'" D-Opp. at 38. In other words, there is no factual dispute as to how Defendants come up with the sham success rates they use in marketing their services to consumers.

Because Defendants cannot dispute that the statistics they advertise have no basis in data relating to their own conversion therapy program, they pivot and falsely assert that they do not have a conversion therapy program at all and are nothing more than a conduit to all conversion

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[20] Defendants' argument is also factually incorrect. The APA statement Defendants cite nowhere provides that if a person who has enduring attractions to men refrains from behavior such as holding hands or kissing another man, that would mean he had changed sexual orientation to heterosexual. D-MSJ, Ex. 32. Neither does the APA's statement lend support to Defendants' assertion that merely labeling oneself a heterosexual qualifies as change of sexual orientation. *Id.* (stating that the term heterosexual means "having emotional, romantic, or sexual attractions to members of the other sex.").

[21] Plaintiffs have fully addressed Defendants' misguided puffery argument elsewhere and refer to that discussion to avoid repetition. *See* P-Opp. § III.B.1. Defendants' contention that the Court is unable to judge this and other issues on summary judgment is addressed *supra* at § I.C.

therapy everywhere.[22] Defendants use this false assertion to argue that it is not misleading for them to base the statistics they provide to clients on the efficacy rates of various other conversion therapy programs and adopt the anecdotal findings of decades-old studies. Needless to say, even if this were true, Defendants do not inform consumers that the statistics they present as reflecting the effectiveness of their services are actually based on various reports and studies of other conversion therapists.

As a factual matter, Defendants' assertion that they do not have a conversion therapy program at all is incredible. Not only is this completely inconsistent with their marketing of themselves as direct conversion therapy providers, *see, e.g.*, Ex. 89, JON001655-56 ("The Jonah Institute for Gender Affirmation is a world-wide, non-denominational, full service clinical and research center," that "emphasizes counseling individuals and families"); Ex. 91, JON014677 ("JONAH has indeed helped literally hundreds and hundreds of men and women overcome their same sex attractions"); Ex. 92, JON017475 (Defendant Arthur Goldberg referring to himself as a "[c]ounselor who has counseled innumerable sexually conflicted men and women"), but it is wholly contradicted by such basic and undisputed facts as that JONAH directly offers group therapy services through its "Men's Support Groups" as well as "Shabbaton" weekends that are marketed as providing an "opportunity to participate in a wide range of educational, spiritual and emotional healing activities" for "men resolved to journey out of SSA."[23] Moreover, Defendants

[22] This argument plainly does not apply to Mr. Downing, who indisputably provides conversion therapy in individual and group sessions.

[23] *See* Ex. 93, Support Groups, *JONAH International Institute for Gender Affirmation*, http://jonahweb.org/sections.php?secId=5; Ex. 94, JONAH Shabbaton, *JONAH International Institute for Gender Affirmation*, http://www.jonahshabbaton.com/resources/Jonah%20Flyer%202015.1.pdf; *see also infra* at 23-24.

have admitted that they primarily refer clients to a small number of selected counselors.[24] This is borne out by the fact that each of the male Plaintiffs was referred to Defendant Alan Downing, the JONAH Institute's Director of Counseling and Group Support Services. Ex. 96, Downing Tr. at 113:7-20; Ex. 97, JON009622. Because Defendants indisputably run and market their own conversion therapy program, their argument that they are purely middlemen and can base claims on unreliable statistics relating to other providers fails.

Moreover, not one of the studies Defendants cite (setting aside the question of whether any of these studies is valid) even supports the specific statistics they advertise, which typically break outcomes down into thirds. *Compare* Ex. 98, JON024032 ("[t]wo-thirds of those who start [JONAH's] process have experienced significant growth") *with* D-Opp. at 40-41 n.89-90 (citing studies that report such purported efficacy rates as 54%, 40%, 20-70%, and 20-50%). And Defendants' citations include nothing whatsoever that would support a representation that conversion therapy clients typically experience "change" in just a few years. *See, e.g.*, Ex. 27, JON005667 (Elaine Berk explaining that "for many of our men, SSA goes away…quite frequently after 3-5 years of work"). In other words, even if Defendants could rely on statistics describing general therapeutic effectiveness, or on outdated and questionable reports describing outcomes of other programs, those materials would still not support the actual representations Defendants made about how effective their program is and how quickly it works.

More to the point, Defendants argue that their use of anecdotal evidence is "legitimate." D-Opp. at 29-38. Whether or not the sporadic anecdotal progress reports on which Defendants rely are "legitimate," they are not data that can support the percentage and fraction statistics Defendants provide. Percentages and fractions imply a numerator and a denominator—

[24] Ex. 95, JONAH Tr. 56:12-58:4, (describing JONAH's counselors as "not a huge number…a handful").

Defendants admittedly have neither.[25] Defendants do not explain why it is not misleading to present precise percentages to clients when those percentages are based, not on calculations or data, but only on the subjective memories of irregular client self-reports stretching back over a decade. It is plainly insufficient to respond, as Mr. Goldberg did in his deposition and as Defendants now do in their motion, that the statistics Defendants market are "probably a logical number." *See* Ex. 84, Goldberg Tr. 111:15-112:6.

Defendants' claims as to the efficacy of their services are baseless and insupportable. They constitute affirmative misrepresentations in violation of the CFA. *See Hyland v. Aquarian Age 2,000, Inc.*, 148 N.J. Super. 186, 191 (Ch. Div. 1977) (it is a misrepresentation for a merchant to offer a service without any knowledge of whether it can provide the service as described); *Smajlaj v. Campbell Soup Co.*, 782 F. Supp. 2d 84, 98 (D.N.J. 2011) (it is a CFA violation to use information in a way that misleads a consumer, regardless of the information's purported validity) *accord Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 591-92 (1997).[26] Plaintiffs are entitled to summary judgment on this issue.

III. THERE IS NO CONSTITUTIONAL RIGHT TO DEFRAUD

Defendants' false commercial speech is not insulated from liability by the various Constitutional rights that Defendants invoke; indeed, Defendants' freedom of association, freedom of speech, and religious freedom are not legally relevant to resolving the sole question

[25] Mr. Downing's 2013 compilation of anecdotal, self-reported data, which is a centerpiece of Defendants' opposition "evidence," is patently inadmissible as double hearsay. Moreover, this self-serving document was prepared in response to this litigation; accordingly, neither Mr. Downing nor JONAH could have relied on it when making their misrepresentations to Plaintiffs.

[26] Defendants assert that *Hyland* and *Gennari* are inapposite because they do not address the use of "fake statistics" in connection with advertising or marketing a service. This technical distinction has no impact on the import of those cases: it is a CFA violation for a merchant to make statements in its advertising when it has no way to know whether those statements have any truth with respect to its services, which is precisely what Defendants acknowledge doing.

in this litigation: whether Defendants made misrepresentations and engaged in unconscionable practices in violation of the CFA. Defendants seek to distract from their actual conduct by making their religious faith and their civil liberties the central issue. Their arguments have no legal merit, the defenses they assert are not defenses at all, and they should not be permitted to sidetrack and confuse the jury with these irrelevancies at trial.

A. Defendants Have No Recourse To The First Amendment

As Plaintiffs explained in the opening brief, because the statements at issue are classic commercial speech, the First Amendment will never come into play. Either Plaintiffs will prove that Defendants made misrepresentations, to which the First Amendment is not a defense, or Plaintiffs will fail to prove that, and Defendants will have no need of a defense because they will have won at trial. *See Barry v. Arrow Pontiac, Inc.*, 100 N.J. 57 (1985) ("Inasmuch as we find the advertisement to be misleading, we hold that the regulation does not infringe upon Arrow's First Amendment right to engage in commercial speech.").

In response, Defendants repeat arguments made in their November 24, 2014 Motion for Summary Judgment, including (irrelevantly) that the statements are not false or misleading, as well as that the statements are opinions and/or puffery. D-Opp. at 58-60. Plaintiffs fully addressed these arguments in their Opposition and refer the Court to that discussion in lieu of repeating it here. *See* P-Opp. at § III.B.

Defendants also respond by arguing that the statements they make when selling their services to consumers are not commercial speech but rather "private religious speech." D-Opp. at 60. Defendants' contention that the statements at issue are not commercial speech is wrong and contrary to the law. The relevant analysis under *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) consists of three factors: whether the communication is advertising, whether there is reference to a specific product, and whether there is an economic motivation. *Bolger*, 463 U.S. at

67-68.[27] Conceding the second factor, Defendants argue that they lack an economic motivation due to their non-profit status[28] and dispute that communications made on the JONAH listserv are advertising.[29] Both arguments are incorrect.

Defendants' argument that they lack economic motivation is premised on two facts: that JONAH is a non-profit organization, and that JONAH's conversion therapy services are inexpensive. D-Opp. at 60-64. First, JONAH's non-profit status is irrelevant to whether its advertising and statements to customers are commercial speech. Non-profit organizations are entirely capable of engaging in commercial speech. *See, e.g.*, *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 535 (1987) (non-profit organization's sale of goods branded was commercial speech); *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1017-18 (3d Cir. 2008) (non-profit National Football League's television program promoting its football video game was commercial speech); *Transp. Alts., Inc. v. City of New York*, 218 F. Supp. 2d 423, 436-39 (S.D.N.Y. 2002) (non-profit advocacy and educational organization engaged in commercial speech). Second, the inquiry does not turn on whether the speaker seeks to make a profit but rather on whether the speaker seeks financial or material support—which can include merely covering costs to break even. *See Transp. Alts.*, 218 F. Supp. 2d at 437 ("Transportation Alternatives has an economic motivation for the communication: ...grants, donations or other

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[27] As discussed in the opening brief, and as Defendants concede, commercial speech "need not originate *solely* from economic motives." *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1121 (8th Cir. 1999). Defendants' recounting of their purported religious and educational purposes is therefore entirely irrelevant.

[28] This argument is limited to Mr. Goldberg and JONAH. Defendants concede that Mr. Downing "does have an economic motivation for much of his speech." D-Opp. at 63. They do not deny that Mr. Downing has an economic motivation when speaking to prospective and current clients about Defendants' services.

[29] This argument, of course, does not address the representations made on the JONAH website or in JONAH's newspaper ads or other marketing materials, nor does it address the representations made by Defendants in person, over the phone, or over email.

forms of material support."). JONAH receives referral fees from its counselors, and JONAH and Mr. Downing receive fees from JONAH's group therapy clients. *See* Ex. 28, JONAH Tr. at 234:25-235:3 ("Q. You do sometimes collect referral fees, right? A. Mainly only from counselors."); Ex. 33, Downing Dep. at 129:2-3 ("I mean the clients pay tuition or a fee to participate in the group. JONAH collects that money and then they give me the portion that I am entitled to as the facilitator."). Defendants admit that their statements were "made precisely to persuade a potential client of the benefits of SOCE," which they sell. D-Opp. at 60. This establishes that Defendants' speech had clear economic motivation, and their low prices and non-profit status are not to the contrary.[30]

Defendants' assertion that the listserv is "not a commercial forum, and no individuals ever attempt to sell products or services over it" is simply false. Defendants' statements on the JONAH listserv demonstrably include advertising of their services. Defendants commonly used the listserv to "induce directly or indirectly any person" into purchasing their services. *Cf.* N.J.S.A. 56:8-1 (defining "advertisement"). For example, Defendants recommended that listserv participants enroll in JONAH's group therapy, engage JONAH counselors, and attend JIM weekends. *See* Ex. 100, JON012031 ("Will you be attending the Mens Group starting in Brooklyn? ...It's really important and the group will only cost $60 for a 2 hour session, which is very cheap compared to other counseling."); Ex. 99, JON002759 ("I'd even rather see you come

[30] Additionally, "the potential commercial nature of speech does not hinge solely on whether the Center has an economic motive... context matters." *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 721 F.3d 264, 285-86 (4th Cir. 2013) (non-profit anti-abortion center's discussion of pregnancy options was commercial speech). Speech "placed in a commercial context and [] directed at the providing of services rather than toward an exchange of ideas" is commercial even in the absence of an economic motive. *Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176, 180-81 (N.D. 1986) (holding anti-abortion clinic posing as abortion provider engaged in commercial speech even when inspired by religious motives).

down to meet Dave Matheson at the JONAH building and do a few intense sessions with him once a month than go to a therapist who really doesn't know what he's doing."); Ex. 82, JON002067 ("Also, have you ever been to a Journey Into Manhood (JIM) weekend? We strongly recommend you attend one ASAP."). In short, Defendants' assertion (supported exclusively by their own self-serving statements) that the listserv is never used to market their services is completely contradicted by the listserv communications themselves.[31]

The analysis of commercial speech is, ultimately, "commonsense." *Bolger*, 463 U.S. at 64. Defendants' statements advertising their services to consumers in exchange for direct and referral fees easily fall within the commercial speech category. Therefore, the only legal question relevant to this litigation is whether those statements were false—and the free speech protections Defendants seek to hide behind do not shield them from the CFA.

B. Defrauding Consumers Is Not Protected Religious Conduct

Defendants claim that the Free Exercise Clause is a defense to the fraud claims asserted against them is based on their contention that their challenged conduct (the advertisement and sale of sham services to consumers) constitutes religious expression. Setting aside the hypocrisy of advertising their services to consumers as secular and science-based but defending them against fraud claims as a "religious apostolate," Defendants' argument simply fails as a matter of law regardless of the sincerity of their purported religious belief. There is no religiously motivated exception to fraud. *See Molko v. Holy Spirit Ass'n*, 46 Cal. 3d 1092 (1988) (holding

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[31] Nor does the purported "privacy" of the listserv have any legal significance. Defendants cite to model jury instructions to argue that an advertisement must be "designed to attract public attention." D-Opp. at 60-61 n.138. First, model jury instructions are hardly controlling law and cannot create requirements that are not found in the CFA itself. Regardless, the definition Defendants quote clearly encompasses their use of the listserv, where Defendants make statements by "circulation" to the participants in an attempt to "induce [them] to enter into… an obligation," i.e., to purchase their services. *Id.*

that religiously based misrepresentations of secular fact are a sufficient basis for fraud claims). Even formal churches—which JONAH is not—may be held accountable for fraud. *See, e.g.*, *id.*; *Christofferson v. Church of Scientology of Portland*, 57 Or. App. 203 (1982).[32] Defendants' sale of secular services to the market is not an act of religious expression and is subject to the neutral application of the CFA.

The misrepresentations at issue in this case are unquestionably secular. Defendants entered the marketplace and advertised their services to consumers, and cannot now recast those commercial representations as solely and entirely religious. Specifically, Defendants made secular claims such as "[e]mpirical evidence is clear that homosexuality is changeable." Compl. ¶ 40. Defendants misrepresented scientific facts, not scripture. *See, e.g.*, Ex. 22, JON0003658 ("Homosexuality is not natural, normal and good. It is a same-sex attraction disorder similar to alcoholism, drug addiction, and obesity."). Mr. Goldberg admitted under oath that the services JONAH offers are secular. *See* Ex. 28, JONAH Tr. at 222:14-16 ("Q. JONAH's services are secular in nature, right? A. We went through that. Yes."). The Opposition's lengthy recounting of Defendants' personal religious *bona fides* fails to address those facts, which are dispositive. *See United States v. "Hubbard Electrometer"*, 333 F. Supp. 357, 363-65 (D.D.C. 1971).

The evidence that Defendants made secular claims and offer secular services is uncontradicted. But even if Defendants' religious expression were at issue—which it is not—the CFA is a law of general applicability, and thus its enforcement would not violate the Free Exercise Clause. *Emp't Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 879

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[32] Defendants' argument that they are a religious organization is therefore irrelevant. D-Opp. at 45-46. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217 (3d Cir. 2007) does not have anything to do with immunity from fraud claims, nor do Defendants cite any case, controlling or otherwise, holding that religious organizations are not subject to such claims. *Contrast Molko v. Holy Spirit Ass'n*, 46 Cal. 3d 1092 (1988).

(1990). Defendants' free exercise argument is largely based on the mischaracterization of the relief sought in this case as a "prohibition on SOCE" that would purportedly "apply to... all persons generally." D-Opp. at 51-52; *see also id.* at 53 ("when a prohibition on SOCE is considered for the general public, as here..."). Plainly, the relief Plaintiffs seek runs only against Defendants.[33]

Defendants also argue that strict scrutiny should apply to Plaintiffs' CFA claims because Plaintiffs are purportedly "motivated by religious animus." D-Opp. at 52.[34] Defendants are unable to cite a single case which considers the personal beliefs of the litigants, rather than the law's objective. *Contrast Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (in rejecting a Free Exercise Clause defense, the court analyzed the law plaintiffs invoked, not plaintiffs' individual subjective motivations, and held that because the law was neutral and of general applicability, it did not violate the First Amendment).

The CFA is a neutral law of general applicability and its application does not violate the Free Exercise Clause.

C. Defendants' Freedom Of Association Is Not Threatened

Application of the CFA in this case would not interfere with Defendants' associative rights, and thus this defense should be stricken. Defendants cite *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), and *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47 (2006), to support their argument that holding them liable for making misleading secular claims is unconstitutional. Their argument has no merit, and their reliance on these cases is misplaced.

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[33] To the extent that Defendants engage in non-commercial religious expression or conduct, that is not impacted by this litigation, which only concerns Defendants' commercial speech and activities; the relief sought by Plaintiffs does not extend to Defendants' private, noncommercial speech or conduct.

[34] Plaintiffs reject this baseless and offensive assertion.

First, *Dale* stands for the proposition that anti-discrimination laws cannot compel an expressive association to admit members who would convey a different message than the group. 530 U.S. at 648 ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."). The core concern in *Dale* was compelling an association to speak against its will. In contrast, application of the CFA in this case would not require Defendants to convey any message. Defendants' handwringing notwithstanding, judgment for Plaintiffs would not require JONAH to "express the viewpoint that homosexuality is a normal variation of human sexuality and not a mental illness, disorder, defect, or an equivalent thereof." D-Opp. at 55. It is plain on the face of the Complaint that Plaintiffs seek that Defendants be prevented from making misrepresentations of fact in connection with the sale of their conversion therapy services to consumers and from engaging in unconscionable business practices. Defendants cannot create a constitutional issue by inventing relief that is not actually sought and then objecting to it.

Next, Defendants misinterpret the holding in *Rumsfeld.* Rather than standing for the incredibly broad proposition that any action which "makes group membership less attractive" triggers strict scrutiny, D-Opp. at 56, *Rumsfeld* specifically described only two such actions: requiring disclosure of membership of groups preferring anonymity, and "impos[ing] penalties or withhold[ing] benefits based on membership in a disfavored group." *Rumsfeld*, 547 U.S. at 69. The *Rumsfeld* Court did not create a new standard governing expressive association, but described two ways in which the government might violate the freedom of association.[35] There is

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[35] *See, e.g.*, *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 7 F. Supp. 3d 88, 109 (D.D.C. 2013) (post-*Rumsfeld* case reflecting that *Rumsfeld* did not create a new standard for analysis of freedom of association claims).

no question that neither concern is implicated in this case. If Plaintiffs prevail, Defendants will remain free to speak as they choose and associate as they please. And enforcement of the CFA against Defendants would not impose penalties based on membership in any disfavored group, but rather punish unlawful and fraudulent conduct.

Finally, as explained in Plaintiffs' opening brief, the range of government action that threatens the freedom of association is narrow: "government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group, it may attempt to require disclosure of the fact of membership in a group seeking anonymity, and it may try to interfere with the internal organization or affairs of the group." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984) (citations omitted). Application of the CFA does nothing of the sort, which explains Defendants' inability to support their positions with any cases outside of the compelled association context, which is wholly distinguishable from this litigation. The freedom of association does not permit individuals to perpetrate fraud upon consumers without consequence.

IV. DEFENDANTS' "NO GUARANTEES" DISCLAIMER IS NOT A DEFENSE

As discussed in Plaintiffs' opening brief, *see also* P-Opp. at § III.C, the fact that certain Plaintiffs signed consent forms that contained a disclaimer stating that "results cannot be guaranteed" because "outcomes... are based on your level of commitment" does not bar Plaintiffs' claims that Defendants misrepresented their services as capable of changing sexual orientation. For a disclaimer to be effective, it must match and cure the misrepresentations at issue. Here, the disclaimers to which Defendants point do not inform consumers that their services are ineffective. Instead, Defendants' consent agreements echo and reinforce Defendants' misrepresentation that clients themselves are to blame when Defendants' services fail to result in sexual orientation change. Moreover, Defendants' consent agreements do not disclose any of the

other facts that Defendants misrepresented to consumers, including that Defendants lack evidence to support their claims of efficacy and that homosexuality is not a mental disorder. Nor do the consent agreements inform clients about Defendants' use of nudity, "healthy touch," homophobic slurs, trauma recreation, or other unethical and dangerous practices.

Precedent, including cases cited by Defendants, illustrates the weakness of Defendants' argument. *See Ciser v. Nestle Waters N. Am., Inc.*, Civ. No. 2:11-05031 (WJM), 2013 WL 5774121, at *5 (D.N.J. Oct 24, 2013), *aff'd* --- Fed.Appx. ----, 3rd Cir.(N.J.), Jan. 07, 2015 (dismissing a CFA claim that defendant acted misleadingly by charging plaintiffs $15 late fees where a disclaimer "disclosed that it might charge $15 late fees"); *Hassler v. Sovereign Bank*, 644 F. Supp. 2d 509, 515 (D.N.J. 2009) (a plaintiff could not assert a CFA action based on defendants' "practice of posting charges in a non-chronological manner" where an agreement between the parties explicitly stated that defendant was not required to post charges chronologically). The disclaimers in *Ciser* and *Hassler* exactly matched and cured the alleged misrepresentations, entirely unlike the disclaimers asserted here.

Finally, Defendants assert, without explanation or legal support, that Plaintiffs cannot argue a theory of fraud in the inducement. This is plainly insufficient.

V. DEFENDANTS' CHARITABLE IMMUNITY ACT, LEARNED PROFESSION, AND AFFIDAVIT OF MERIT DEFENSES SHOULD BE STRUCK

As discussed in Plaintiffs' opening brief, the scope of the Charitable Immunity Act ("CIA"), N.J.S.A. 2A:53:A-7, is categorically limited to negligence claims. *See* P-MPSJ at § III.C. In their Opposition, Defendants respond by incorrectly asserting that Plaintiffs' CFA claims are "mislabeled" negligence claims. D-Opp. at 68. Defendants fail to explain how the CFA claims in this case, which have survived a motion to dismiss, are somehow not valid CFA

claims.[36] Defendants offer no support for this assertion, which is contradicted by the clear allegations in the Complaint. Nor do Defendants explain how the allegations are "mislabeled," i.e., how they meet the elements of negligence or fall within the statute of limitations applicable to negligence. Defendants also do not cite to a single case in which a court transformed a properly pled CFA claim into a negligence claim. The CIA is simply not a defense to the CFA claims in this case.

Also as discussed in Plaintiffs' opening brief, the narrow learned profession exception to the CFA does not apply in this case. *See* P-MPSJ § III.D. Defendants' response asserts, incorrectly, that it should apply because Plaintiffs purportedly seek to hold Defendants vicariously liable for Thaddeus Heffner's conduct. This is simply not so. Plaintiffs have never pled a theory of vicarious liability. Plaintiffs seek to hold Defendants responsible for their own misrepresentations and unconscionable business practices. With respect to Jo and Sheldon Bruck, Mr. Goldberg made misrepresentations to them directly, not through Mr. Heffner. *See* Compl. ¶¶ 89-92, 97; *see also* Ex. 84, Goldberg Tr. at 164:7-166:7 (Mr. Goldberg spoke with Ms. Bruck about the causes of homosexuality prior to Mr. Bruck's counseling). Consequently, the learned profession exception to the CFA is not a defense to Plaintiffs' claims.

Likewise, the affidavit of merit requirement embodied in N.J.S.A. 2A:53A-26 is also inapplicable, both because Mr. Heffner's conduct is not at issue in this case (Defendants' incorrect vicarious liability theory notwithstanding) and because, as Plaintiffs explain in their opening brief, the requirement applies only to alleged acts of malpractice or negligence. *See* P-MPSJ at 19; *see also Hill Int'l, Inc. v. Atlantic City Bd. of Educ.*, A-4139-13T3, 2014 WL

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[36] Defendants' argument also ignores this Court's repeated affirmation that Plaintiffs have pled CFA claims. *See, e.g.*, Ex. 54, July 19, 2013 Tr. at 47:19-50:21; *Ferguson v. JONAH*, No. HUD-L-5473-12, 2014 N.J. Super. Unpub. LEXIS 1334, at *1-6 (Law Div. June 6, 2014).

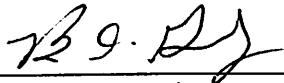
7370085 (App. Div. Dec. 30, 2014). As is apparent on the face of the Complaint, Plaintiffs have not brought negligence or malpractice claims; they have brought CFA claims.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs summary judgment that Defendants misrepresented that homosexuality was a mental disease or disorder and not a normal variation of human sexuality, that Defendants' statements that they could "change" Plaintiffs' sexual orientations were false and misleading, and that Defendants' use of statistics was false and misleading. Furthermore, the Court should grant Plaintiffs summary judgment on Defendants' affirmative defenses and strike them.

Dated: January 9, 2015

LITE DEPALMA GREENBERG, LLC



Bruce D. Greenberg
Jeffrey A. Shooman
Two Gateway Center – Suite 1201
Newark, NJ 07102
Telephone: (973) 623-3000
Facsimile: (973) 623-0858

SOUTHERN POVERTY LAW CENTER
Morris Dees (*pro hac vice*)
David C. Dinielli (*pro hac vice*)
Samuel Wolfe (*pro hac vice*)
Scott D. McCoy (*pro hac vice*)
400 Washington Ave.
Montgomery, AL 36104
Telephone: (334) 956-8200
Facsimile: (334) 956-8481

CLEARY GOTTLIEB STEEN & HAMILTON
James L. Bromley (*pro hac vice*)
Lina Bensman (*pro hac vice*)
One Liberty Plaza
New York, NY 10006
Telephone: (212) 225-2000
Facsimile: (212) 225-3999

Attorneys for Plaintiffs