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Michael Ferguson, Benjamin Unger, Sheldon Bruck, Chaim Levin, Jo Bruck, Bella Levin, Plaintiffs, v. JONAH (Jews Offering New Alternatives for Healing f/k/a Jews Offering New Alternatives to Homosexuality), Arthur Goldberg, Alan Downing, Alan Downing Life Coaching, LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - HUDSON COUNTY DOCKET NO. L-5473-12 Civil Action **DEFENDANTS' TRIAL MEMORANDUM**

On the Brief
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I.

NATURE OF THE CASE

The Plaintiffs filed their Complaint in this action in November, 2012. Shortly thereafter, Plaintiffs' counsel, the Southern Poverty Law Center ("SPLC"), held a press conference and publically stated that this case was the "opening salvo" against some seventy organizations, most of them religious ministries, that provide assistance to people with unwanted same-sex attractions ("SSA"). The Plaintiffs' Complaint, which is admittedly part of a "campaign to end conversion therapy," alleges that Defendants violated the New Jersey Consumer Fraud Act ("CFA") by falsely claiming that homosexuality is changeable, that sexual orientation change efforts ("SOCE") are well-grounded in science and effective, and that homosexuality is a "mental disorder."

Plaintiffs' claims have always been an unwise attempt to convert a very broad consumer protection statute into a means of targeting and suppressing viewpoints with which they disagree. "The [CFA] is aimed at promoting truth and fair dealing in the market place." *Feinberg v. Red Bank Volvo, Inc.*, 331 N.J. Super. 506, 512 (App. Div. 2000). The CFA was not intended to be a way for activists to deny people their right to self-determination and personal moral beliefs. The CFA was not intended to make unpaid volunteers, running a faith-based nonprofit, liable for consumer fraud for representations which were not commercial inducements, but rather mere words of encouragement to people engaging in a holistic healing process.

Accordingly, the Court has been clear that this case should remain a consumer fraud case and that it should not morph into anything else. Citing the American Psychiatric and Psychological Associations, the Court ruled that neither Plaintiffs nor Defendants may argue that people are born gay, that gay people cannot change, that sexual orientation change efforts

("SOCE") in general do not work, or that homosexuality is a diagnosable mental disorder. Rather, Plaintiffs are limited to, and Defendants only have to defend against, evidence concerning seven proffered CFA violations. Of these seven alleged violations, six are that Defendants in general made an affirmative misrepresentation, and the seventh is that Defendant JONAH engaged in unconscionable commercial practices. The alleged affirmative misrepresentations are:

(1) homosexuality is a mental illness or disorder;

(2) JONAH could cure or treat that disorder;

(3) JONAH could do so within some specified time period, such as two to three years, which differed from person to person;

(4) JONAH's program had specific success rates, sometimes one-third and other times two-thirds or 70-75%;

(5) JONAH's program theories and techniques were scientifically based and valid; and

(6) JONAH's program was capable of changing people from homosexual to heterosexual.

This Court has previously ruled that homosexuality is not a mental disorder, and that consequently representing it as such is a violation of the CFA. The Court then noted that "the DSM defined a mental disorder as having at least one of two elements: (1) the illness must regularly cause subjective distress; and/or (2) it must regularly be associated with some generalized impairment in social effectiveness or functioning." Consequently, "homosexuality, *per se*, does not meet the requirements for a psychiatric disorder since many homosexual people are satisfied with their orientations and suffer no generalized impairment in social effectiveness

or functioning." Opinion on Party's Motion to Exclude Experts, p.22, FN 3. Here, the four male Plaintiffs came to JONAH expressing concerns over their SSA which was causing them (1) subjective distress; and (2) impairment in social effectiveness or functioning. Therefore, their specific situations did fit within the DSM definition of mental disorder, and Defendants should not be liable for using the term disordered with respect to them or anyone else expressing similar concerns over their unwanted SSA.

This Court has also ruled that advertising using specific success statistics, when those statistics are made up, is a cognizable violation of the CFA. The Court also noted, however, that it is jury question as to whether the bases offered for the statistics are sufficiently reliable so as to not make the statistics false. This permits the jury to find that the use of anecdotal evidence or non-scientific surveys are sufficient bases for the statistics used here.

Plaintiffs' proffer regarding whether Defendants' mental health practices are scientific should also be taken in the proper light. Although "scientific," the mental health field is one wherein wide disagreement and the quick evolution of ideas are not strange, but the norm. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) ("Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness."); *Medina v. California*, 505 U.S. 437, 451 (1992) (quoting *Addington v. Texas*, 441 U.S. 418, 430 (1979)) ("Our cases recognize that 'the subtleties and nuances of psychiatric diagnosis . . . is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician.'")

Additionally, the Court has accepted Plaintiffs' assertion that they are not alleging that either JONAH, Alan Downing, Arthur Goldberg, or Thaddeus Heffner engaged in any negligent acts. Plaintiffs have also stipulated that they will only pursue claims for subsequent medical treatment on the part of Plaintiff Unger. Defendants agreed to that stipulation, but still intend to call an expert, Dr. Joseph Berger, to testify that there is no evidence in the medical records that any Plaintiff, including Plaintiff Unger, was caused any harm by Defendants.

II.

FACTS.

In 1999, Defendant Arthur Goldberg and Elaine Silodor Berk, both actively involved in the Jewish communities of New Jersey (Orthodox and Reformed Judaism, respectively), decided to come together and form Defendant JONAH, "Jews Offering New Alternatives for Healing," a nonprofit organization. The mission of JONAH is to perform outreach to Jewish individuals world-wide, and to help them with any kind of sexual issues that they perceive to be a problem for themselves, including unwanted SSA. Mr. Goldberg and Ms. Berk formed JONAH as a nonprofit organization because their mission was to provide a desperately needed public service for the Jewish community, a mission which they envisioned would continue in their retirement and for the rest of their lives. JONAH presently serves people of all faiths or no faith.

JONAH does not operate to make money, or for the purpose of criticizing certain sexual practices or identities. JONAH does recognize, however, that many Jews and other individuals cannot recognize all sexual practices as morally licit or spiritually fulfilling. For those individuals, JONAH operates to help them self-determine how they want to experience and express their sexuality by providing them with material on how to reconcile their sexual

preferences with their moral, religious, and life values. JONAH also operates a listserv to provide the Jews who come to them with a place where they can confidentially voice issues they are dealing with and hear from others who have experienced or resolved similar issues.

Since founding JONAH, Mr. Goldberg and Ms. Berk have each donated between 20 and 40 hours of their time weekly to the organization. They have worked entirely for free. Mr. Goldberg has also authored a book concerning the intersection of Judaism and sexuality, including same-sex attractions, the proceeds of which he donates to JONAH. Neither Mr. Goldberg nor Ms. Berk have any commercial motive or personal benefit in their operation of JONAH.

In 2007, Defendant Alan Downing began a life-coaching practice. He was a graduate student in clinical counseling and viewed counseling as a path that would be satisfying. He realized that he was particularly talented at various modalities within sexual orientation change efforts ("SOCE"), and that the work was rewarding. Mr. Downing has coached numerous clients in reaching their goals. Many of those individuals have experienced SSA, and he has helped some of those individuals come out as proud gay men. He has helped other individuals diminish their SSA and cultivate their opposite-sex attractions ("OSA").

Between 2007 and 2009, Plaintiffs Chaim Levin and Benjamin Unger, as well as Sheldon Bruck, approached JONAH in order to pursue counseling or life coaching concerning their unwanted SSA. Prior to coming to JONAH they had dated women and desired to eventually get married and have children. Consequently, they were anxious and distressed about their SSA. JONAH referred Plaintiffs Levin and Unger, and former Plaintiff Bruck, to Mr. Downing and Thaddeus Heffner, respectively. Mr. Heffner is a licensed therapist in Tennessee with whom they were familiar. They also provided them with access to the educational materials on the JONAH

website, groups hosted by Mr. Downing, their own personal knowledge of the field, and a listserv community of supportive and caring individuals who also struggled with SSA.

During the same time period, Plaintiff Michael Ferguson approached Mr. Downing in order to pursue life-coaching regarding gender wholeness issues and unwanted SSA. Plaintiff Ferguson was provided with access to similar resources as the other Plaintiffs through his independent retention of Mr. Downing. Like the other Plaintiffs, Plaintiff Ferguson had dated women and wanted help in pursuing his life's goals but, since he was not Jewish, he did not have access to the JONAH listserv.

When Plaintiffs approached JONAH and Mr. Downing, they were each informed by Mr. Goldberg, Mr. Downing or Mr. Heffner, in writing and verbally, about the potential outcomes of, and the time-frames required for, engaging in efforts to change their SSA. Plaintiffs then decided, for themselves, that they wanted to set the goals of decreasing their SSA and increasing their OSA. They also signed consent forms which explicitly stated that such change may not be possible, that there were no guarantees, and that they were largely responsible for creating the change they could experience. They did not envision themselves as "gay" but rather as men who were interested in having wives and families, and who struggled with same-sex attractions.

Eventually, Plaintiffs chose to abandon their efforts to diminish their same-sex attractions. They ended those efforts long before it was realistic for them to have accomplished their goals. Despite their early departure, however, their personal decisions were not criticized by Mr. Goldberg, Ms. Berk, Mr. Downing or Mr. Heffner. The Plaintiffs themselves considered the termination of their respective relationships with Defendants to have been on good terms.

After saying farewell to Defendants, Plaintiffs then began, one after the other, to adopt a gay identity. They became influenced by activists such as Wayne Besen, Erez Harari, and Lee

Beckstead, and became associated with activist groups such as Jewish Queer Youth, and Truth Wins Out. They left their religious communities and became interested in forging their own activist paths. As part of that activism, they filed the present lawsuit to stop SOCE nationwide.

III.

PLAINTIFFS CANNOT MEET THEIR BURDEN OF PROOF FOR ANY ELEMENT OF A NEW JERSEY CONSUMER FRAUD CAUSE OF ACTION.

Plaintiffs allege one cause of action against Defendants: violation of the New Jersey Consumer Fraud Act. An individual can violate the CFA through: (1) affirmative acts; (2) knowing concealments; and (3) violations of the specific-situation statutes. The CFA states:

> The act, use or employment by any person of any **unconscionable commercial practice** . . . [or] **misrepresentation** . . . in connection with the sale or advertisement of any merchandise . . . whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice. . . .
>
> Any person who suffers any ascertainable loss . . . **as a result of** the use or employment by another person of any method, act, or practice declared unlawful under this act . . . may bring an action or assert a counterclaim therefor in any court of competent jurisdiction.

N.J. Stat. § 56:8-2; N.J. Stat. § 56:8-19 (emphasis added). The CFA defines "person" as including both natural persons and corporations. N.J. Stat. § 56:8-1. It also defines "merchandise" as "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale" and "advertisement" as "the attempt directly or indirectly by publication, dissemination, solicitation, indorsement or circulation or in any other way to induce directly or indirectly any person to enter or not enter into any obligation or acquire any title or interest in any merchandise or to increase the consumption thereof." *Id.*

The elements of a Consumer Fraud Act violation are: (1) unlawful conduct; (2) an ascertainable loss by the plaintiff; and (3) a proximate causal connection between the unlawful conduct and the ascertainable loss. *D'Agostino v. Maldonado*, 216 N.J. 168, 184 (2013).

A. Unlawful Conduct Element.

Plaintiffs have alleged that Defendants violated the "affirmative acts" prong of the CFA by making both affirmative misrepresentations and engaging in an unconscionable commercial practice.

1. Affirmative Misrepresentations.

To constitute an "affirmative misrepresentation" in violation of the CFA, the offending representation must meet several sub-elements, including that it was: (a) made with the intent to induce an individual to enter into a commercial transaction, material to the proposed transaction, and contemporaneous with the decision to enter into the transaction; (b) advertising an offer to sell merchandise to the public at large; (c) offering a mass-produced item of merchandise; (d) misleading or misrepresentative when taken in its total context; (e) a factual representation made by Defendants; and (f) a baseless representation made by Defendants. *See Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 607 (1997); *Princeton Healthcare Sys. v. Netsmart N.Y., Inc.*, 422 N.J. Super. 467, 473 (App. Div. 2011); *Chattin v. Cape May Greene, Inc.*, 243 N.J. Super. 590, 607-08 (App. Div. 1990), *aff'd* 124 N.J. 520, 521 (1991); *Baughman v. United States Liab. Ins. Co.*, 662 F.Supp.2d 386 (D.N.J. 2009).

a. Material to the transaction; made with the intent to induce the completion of the transaction; contemporaneous with the transaction

The CFA states:

> The term "advertisement" shall include **the attempt** directly or indirectly by publication, dissemination, solicitation, indorsement or circulation or in any other way to **induce directly or indirectly any person to enter or not enter into any**

> **obligation** or acquire any title or interest in any merchandise or to increase the consumption thereof or to make any loan.

N.J. Stat. § 56:8-1 (emphasis added). Moreover, the case law notes that "[n]ot just 'any erroneous statement' will constitute a misrepresentation prohibited by [the CFA]. The misrepresentation has to be one which **is material to the transaction** and which is a statement of fact, found to be false, **made to induce the buyer to make the purchase.**" *Gennari, supra*, 148 N.J. at 607 (emphasis added); *see also Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267 (1978) (the CFA "is aimed at unlawful sales and advertising practices designed to **induce** consumers to purchase merchandise or real estate.") (emphasis added); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 35 (3d Cir. 2011) ("[the plaintiff] has failed to state a claim under the NJCFA because his complaint is not based on [the defendant's] marketing or sale of merchandise or services to him.")

The requirements of the intent to induce and the materiality of the misrepresentation are plainly necessary from the legislative intent which "was over sharp practices and dealings in the marketing of merchandise and real estate whereby the consumer could be victimized by being lured into a purchase through fraudulent, deceptive or other similar kind of selling or advertising practices." *Daaleman, supra*, 77 N.J. at 271; *see also Joe Hand Promotions, Inc. v. Mills*, 567 F. Supp. 2d 719, 723-24 (D.N.J. 2008) ("[the defendant's] allegedly fraudulent conduct, embodied in the February 15th letter, did not induce [the plaintiff] to purchase anything. Instead, the letter was allegedly a threat to sue [the plaintiff] if it did not pay [the defendant] a settlement. Thus . . . the CFA does not apply.") The test for whether a statement is material is based upon a reasonable person standard. Moreover, the seller can only be liable if he knows, or has reason to know, that the buyer actually unreasonably views a specific immaterial and erroneous statement as material. *Ji v. Palmer*, 333 N.J. Super. 451, 462 (App. Div. 2000) (citing Restatement (Second) of Torts §

538(2) (1977)). To be material, a representation must also be made at the time of the transaction and not afterwards. *See Cole v. Laughrey Funeral Homes*, 376 N.J. Super. 135, 144 (App. Div. 2005).

Plaintiffs have to prove that Defendants' alleged misrepresentations were material to their purchase of SOCE, contemporaneous with their decision to purchase SOCE, and that they were made with the intent to induce them to purchase Defendants' services. Moreover, Plaintiffs cannot merely argue that Defendants run an organization which promotes itself, and consequently every statement was made with such an intent to induce. Rather, Plaintiffs must prove that any advertisement, email or verbal discussion upon which they rely as containing a misrepresentation was made with the specific intent to induce them to purchase services, material to their decision, and contemporaneous with their decision. This would exclude all of the e-mails that plaintiffs seek to misuse from the JONAH listserv as being the basis of actionable misrepresentations.

b. Advertising an offer to sell merchandise to the public at large.

As a general rule, in order to be subject to the CFA, the allegedly unlawful conduct must involve a sale of goods, services, or real estate to the **general public**. Thus, the sale of specialized equipment to a business may not be covered by the Consumer Fraud Act. This is a fact sensitive question that is decided on a case-by-case basis. For example, a wholesaler who sells inkjet cartridges to a retail store for resale to the general public cannot be liable under the CFA for that transaction because the wholesale transaction did not involve a sale to the public. However, if the wholesaler sells inkjet cartridges to that same retail store, this time for use in its own office printers, it can be liable under the CFA because the retail store was acting as a consumer in the transaction. *Papergraphics Int'l, Inc. v. Correa*, 389 N.J. Super. 8 (App. Div.

2006). "'[T]he public,' as used in [the CFA's] definition of 'merchandise,' refers to 'the public at large.' Thus, '[i]t is the character of the transaction, not the identity of the purchaser, which determines whether the CFA is applicable.'" *Princeton, supra*, 422 N.J. Super. at 473 (internal citations omitted). "Furthermore, **'[t]he entire thrust of the Act is pointed to products and services sold to consumers in the popular sense.'**" *Finderne Mgmt. Co., Inc. v. Barrett*, 402 N.J. Super. 546, 570 (App. Div. 2008) (internal citations omitted).

Here, Plaintiffs must prove that Defendants' offering of SOCE referrals or SOCE therapy constitute services offered to the public at large. Plaintiffs must prove that Defendants' primary solicitation of Jewish individuals is dissimilar to the situation in which a wholesaler primarily solicits retailers.

c. Offering a standardized service.

Transactions which do not concern the sale of a "standardized" product or service, but rather "the design of a custom-made program to satisfy . . . unique needs" are not transactions which fit within the contours of the CFA. *Princeton, supra*, 422 N.J. Super. at 474. The CFA is directed at "deception, misrepresentation and unconscionable practices engaged in by professional sellers seeking mass distribution of many types of consumer goods." *Id.* at 473 (citing *Kugler v. Romain*, 58 N.J. 522, 536 (1971)).

Within this sub-prong, the Courts have regularly noted the need to limit the CFA to a reasonable understanding of services or products sold to the public, in the popular sense, which specifically does not include every business transaction. *Finderne, supra*, 402 N.J. Super. at 572-73; *see also Jones v. Sportelli*, 166 N.J. Super. 383, 388 (Super. Ct. 1979) (finding sale of custom made tax avoidance schemes not actionable under the CFA); *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259, 1273 (3d Cir. 1994) (finding CFA

inapplicable to purchase of commercial restaurant franchise); *A.H. Meyers & Co. v. CNA Ins. Co.*, 88 Fed. Appx. 495 (3d Cir. 2004) (finding CFA inapplicable to insurance agency agreement); *Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co.*, 226 F. Supp. 2d 557, 561 (D.N.J. 2002) (holding plaintiff's use of defendant's accounting, inventory and chargeback processing services not covered by CFA); *Werner & Pfleiderer Corp. v. Gary Chem. Corp.*, 697 F. Supp. 808, 815 (D.N.J. 1988) (holding commercial contract for purchase of a plastics processing machine not covered by CFA); *D'Ercole Sales, Inc. v. Fruehauf Corp.*, 206 N.J. Super. 11, 23-24 (App. Div. 1985) (holding defendant's breach of warranty in purchase of custom tow truck not covered by CFA); *Boc Group v. Lummus Crest*, 251 N.J. Super. 271, 277 (Law Div. 1990) (finding problems in the design, engineering, and operation of a $125 million refining process plant not covered by CFA).

Here, Plaintiffs must also prove that Defendants sold Plaintiffs services which were not "custom-made" to satisfy their unique needs, but rather were standardized services sold to the public at large. Plaintiffs must also prove that the patient or client of SOCE services is a "consumer in the context of the ordinary meaning of that term in the market place," and that the receipt of therapy is similar to the receipt of any other consumer service.

d. Misleading when taken in the total context.

Alleged CFA violations have to be viewed in their total context. *Chattin*, *supra*, 243 N.J. Super. at 607-08, *aff'd* 124 N.J. at 521 ("The Legislature could not have intended to impose Consumer Fraud liability upon a party whose statement is not misleading in context but is rendered misleading when taken out of context."); *Belmont Condo. Ass'n, Inc. v. Geibel*, 432 N.J. Super. 52, 80 (App. Div. 2013) (quoting *Miller v. Am. Family Publishers*, 284 N.J. Super. 67, 86 (Super. Ct. 1995) ("To determine whether an advertisement or solicitation makes a false

or misleading representation, the court must consider the effect that the advertisement, taken as a whole, would produce on one with an ordinary and unsuspecting mind.")); *see also Smajlaj v. Campbell Soup Co.*, 782 F. Supp. 2d 84, 98 (D.N.J. 2011) (referring to the "context" of the advertisement). Consequently, Plaintiffs have to prove that Defendants' representations "taken as a whole" would "produce on one with an ordinary . . . mind" "the effect" of "a false or misleading representation." In the present case, all of the allegedly false representations or unconscionable business practices must be viewed in the context of JONAH being a Torah-based nonprofit organization. As such, Defendants are entitled to the constitutionally protected free exercise of their religious beliefs and practices.

e. A factual representation made by Defendants.

A New Jersey CFA action cannot be based on a difference of opinion:

> The distinction between fact and opinion is broadly indicated by the generalization that what was susceptible of exact knowledge when the statement was made is usually considered to be a matter of fact. Representations in regard to matters not susceptible of personal knowledge are generally to be regarded as mere expressions of opinion, and this is held to be so even though they are made positively and as though they are based on the maker's own knowledge. Usually, also, to say that a thing is only matter of opinion imports that it is unsusceptible of proof.

Baughman, supra, 662 F.Supp.2d 386 (quoting 37 Am.Jur.2d, Fraud and Deceit, § 46 at 74).

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) ("An honestly expressed opinion is not fraudulent because later scientific knowledge proves the opinion to have been erroneous.")

Lastly, a CFA action cannot be based on representations which are mere puffery. *N.J. Citizen Action v. Schering-Plough Corp.*, 367 N.J. Super. 8, 13-14 (Super. Ct. App. Div. 2003) (internal citations omitted). Prime examples of puffery include those statements which represent

generally that any individual can achieve a desired result, and statements which have conditional clauses attached to them. *See, e.g., Citizen Action, supra,* 367 N.J. Super. at 13-14 ("*you . . . can* lead a normal nearly symptom-free life again") (emphasis added); *Loreto v. P&G,* 515 Fed. App'x. 576, 582 (6th Cir. 2013) ("Consider taking extra vitamin C, vitamin A, and zinc, all of which *may* help you.") (emphasis added). Further, puffery includes statements made using marketing tools which should not be taken at face value, such as websites. *Victaulic Co. v. Tieman,* 499 F.3d 227, 236 (3d Cir. 2007); *Ispec, Inc. v. Tex R.L. Indus. Co.,* 2013 U.S. Dist. LEXIS 139138, 8 (D.N.J. Sept. 27, 2013).

Plaintiffs have to prove that the alleged misrepresentations were neither mere differences of opinion (*e.g.*, whether JONAH's program theories and techniques were scientifically based and valid), mere honest interpretations in an area of scientific ambiguity (*e.g.*, whether certain modalities are effective, whether abnormal and distressful homosexual attractions are disordered) nor mere puffery (*e.g.*, whether Defendants could help people overcome SSA within a specified time period). It is not enough for Plaintiffs to just attack the validity of the various scientific studies that Defendants reasonably relied upon.

f. A baseless representation made by defendants.

The Court has suggested that Defendants are entitled to rely on representations by third parties concerning the efficacy of their program and the scientific nature of SOCE.

> MR. WOLFE: [S]ay the defendants respond to our discovery request and say, look, here's a list of the hundred people who have been cured or have -- have changed from gay to straight, here's the list. And so, in turn, often their -- their representations are very different from the reality. And so in order -- if we had that list and they -- they produce it to us, then in turn, the third-party communication on the Listserv would be very relevant in terms of --
>
> THE COURT: I just -- **I want to understand something. You lost me a minute. Their representations may be very different than reality[?]**
>
> MR. WOLFE: Right.

THE COURT: **Well, all the defendant can rely upon would be their representations. If they've represented that this program was a success, where's the misrepresentation by the defendant?** You're saying, in reality, it may not have been a success, or -- but where does that inculpate the defendant? **If a -- if a third party claims it was a success, and it really wasn't, how does that affect the consumer fraud statute?**

MR. WOLFE: Well, it affects the consumer fraud statute because, basically, essentially all we have here is the defendant hiding behind these privacy claims. And so they're saying, look, our program works, it's this, it's that. And at the same time, they -- they are saying that we can't have --

THE COURT: **But if they get a representation from someone, they have a letter from a former client who says, this was the best program I've ever participated in and it's made my life different, they get that letter from me, why can't they use that? How is that a material misrepresentation? Whether it's true or not, it's a letter. I wrote the letter, they didn't.**

MR. WOLFE: Right. And they can bring forth --

THE COURT: **So you're saying in reality, I may not be fine and wonderful. But I'm -- I'm at a loss as to how that's a misrepresentation by the defendant. Now if they don't have that letter and they just make it up, I agree with you, that's a different issue. That's false advertising.**

Transcript of June 7, 2013 Motion to Quash Hearing, 21:2-22:20.

Defendants will demonstrate to the jury that none of their representations were baseless. In fact, Defendants will be calling nine success story witnesses who will demonstrate that their program is effective in changing sexual orientation. Defendants will also show that their representations regarding success rates are supported by evidence.

2. Unconscionable Commercial Practice.

"[T]he standard of conduct contemplated by the unconscionability clause [in the CFA] is good faith, honesty in fact and observance of fair dealing.'" *D'Ercole*, *supra*, 206 N.J. Super. at 25 (quoting *Kugler*, *supra*, 58 N.J. at 544).

> Good faith is a concept that defies precise definition. The Uniform Commercial Code, as codified in New Jersey, defines good faith as honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. Good

> faith conduct is conduct that does not violate community standards of decency, fairness or reasonableness. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. The covenant of good faith and fair dealing calls for parties to a contract to refrain from doing anything which will have the effect of destroying or injuring the right of the other party to receive the benefits of the contract.
>
> **Proof of bad motive or intention is vital** to an action for breach of the covenant. The party claiming a breach of the covenant of good faith and fair dealing must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties.

Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224-25 (2005) (quotations, citations and brackets omitted); *see also Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 20 (1994) ("because we do not detect any **bad faith** . . . on the part of [the defendant] we conclude that the breach of contract does not rise to the level of an 'unconscionable commercial practice' in violation of the [Consumer Fraud] Act") (emphasis added). "Unconscionability of an act or practice is a question of law for the court but the parties are given a reasonable opportunity to present evidence as to the setting, purpose, and affect to aid the court in making its determination." *D'Ercole*, *supra*, 206 N.J. Super. at 29.

Not all breach of contract actions involve a CFA violation. *Cox*, *supra*, 138 N.J. 2; *D'Ercole*, *supra*, 206 N.J. Super. at 28. "In consumer goods transactions, unconscionability must be equated with the concepts of deception, fraud, false pretense, misrepresentation, concealment and the like which are stamped unlawful under [the CFA]." *Id.* at 31. "The [following] deceptive acts and practices and the criteria therefore are consonant with the type of consumer transactions and the nature of the conduct contemplated by the Consumer Fraud Act."

> (1) that he took advantage of the inability of the consumer reasonably to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement, or similar factors;

(2) that when the consumer transaction was entered into the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by like consumers;

(3) that when the consumer transaction was entered into the consumer was unable to receive a substantial benefit from the subject of the transaction;

(4) that when the consumer transaction was entered into there was no reasonable probability of payment of the obligation in full by the consumer;

(5) that the transaction he induced the consumer to enter into was excessively one-sided in favor of the supplier; or

(6) that he made a misleading statement of opinion on which the consumer was likely to rely to his detriment.

D'Ercole, *supra*, 206 N.J. Super. at 29-30. Lastly, "[t]o constitute consumer fraud sufficient to trigger the actual-malice standard [necessary for unconscionability], the business practice in question must be 'misleading' and stand outside the norm of reasonable business practice in that it will victimize the average consumer." *Turf Lawnmower Repair v. Bergen Record Corp.*, 139 N.J. 392, 416 (1995); *see also Fenwick v. Kay Am. Jeep, Inc.*, 72 N.J. 372, 378 (1977) ("The capacity to mislead is the prime ingredient of deception or an unconscionable commercial practice.")

Plaintiffs have to prove that Defendants acted in bad faith, were dishonest, and that they did not observe fair dealing. Although Plaintiffs do not have to prove that Defendants intended to deceive them or intended to commit an unlawful act, Plaintiffs still have to prove that Defendants actions were in bad faith – that Defendants' conduct violated community standards of decency, fairness or reasonableness, was not faithful to Plaintiffs' justified expectations, and had the effect of injuring Plaintiffs' right to receive the benefits of their relationship with Defendants. Plaintiffs cannot even begin to meet that high standard in this case. Indeed, it took Plaintiffs over a year

before they left Defendants' program before they even "realized" that they had allegedly been harmed by it.

B. Ascertainable Loss Element.

The CFA states:

> Any person who suffers any **ascertainable loss** of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor in any court of competent jurisdiction.

N.J. Stat. § 56:8-19 (emphasis added). To constitute an "ascertainable loss" under the CFA, the relevant loss must be "quantifiable or measurable." *D'Agostino*, *supra*, 216 N.J. at 185. Ascertainable loss is not exclusively limited to an "out-of-pocket loss to the plaintiff." *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 248 (2005). Rather, "[a]n estimate of damages, calculated within a reasonable degree of certainty will suffice to demonstrate an ascertainable loss." *Id.* at 249 (internal citations and quotations omitted). But the loss cannot be "hypothetical or illusory." *Id.* at 248. "[T]he existence of ascertainable loss resulting from a defendant's CFA violation should be determined on the basis of the plaintiff's position following the defendant's unlawful commercial practice." *D'Agostino*, *supra*, 216 N.J. at 197.

Amounts paid for a service, and amounts paid to remedy a faulty service, both qualify as ascertainable losses under the CFA. *Cox*, *supra*, 138 N.J. at 22-24. **Non-economic damages, however, are not recoverable under the CFA.** *Gennari*, *supra*, 148 N.J. at 612-613.

Plaintiffs have to prove that they suffered an actual, quantifiable and measurable loss, and not merely an hypothetical or illusory loss, as a result of their interactions with Defendants – they must prove that they did not receive a fair service for the money they paid. Moreover, Plaintiffs cannot rely on any non-economic damages they may have sustained.

C. Proximate Causation Element.

1. The Misrepresentation Must Have Caused the Harm.

When the CFA was first enacted, it only permitted the Attorney General to bring cases, and, unlike common law fraud, it did not require the Attorney General to prove that the consumer had "in fact been misled, deceived or damaged" by the alleged fraud. N.J. Stat. § 56:8-2. Nor did the CFA require that the Attorney General prove that a consumer had relied upon the allegedly fraudulent conduct. *Lee v. Carter-Reed Co., L.L.C.*, 203 N.J. 496, 522 (2010). Soon, however, the CFA was amended to permit private parties to bring CFA actions. N.J. Stat. § 56:8-2.12. Under the new standard for private parties, however, plaintiffs were required to show that the unlawful conduct was the proximate cause of their injury:

> The New Jersey Supreme Court has concluded that the 1971 amendment to the Act permitting a private right of action imposes a higher standard of proof than that applicable to enforcement of proceedings brought by the state Attorney General, holding that while the Attorney General does not have to prove that the victim was damaged by the unlawful conduct, a private plaintiff must show that he or she suffered an ascertainable loss as a result of the unlawful conduct. **The burden imposed upon a private plaintiff on the issue of proximate cause has been held to require proof that said person has been misled and damaged as a proximate result of a violation of the act** in order to have standing to sue. Thus, the "causal nexus" requirement requires proof that the prohibited act must in fact have misled, deceived, induced or persuaded the plaintiff to purchase defendant's product or service. In order to meet the test of proximate cause, there must [be] some direct relation between the unlawful conduct and the injury asserted. Therefore, it has been held that proximate cause must be limited to those cases which are so closely connected with the result and of such significance that the law is justified in imposing liability. The above cases appear to adopt the "but for" test of proximate cause in cases arising under the NJCFA.

Fink v. Ricoh Corp., 365 N.J. Super. 520, 573-74 (Super. Ct. 2003) (internal citations, quotations, and ellipses omitted; emphasis added); *see also Knapp v. Potamkin Motors Corp.*, 253 N.J. Super. 502, 505 (Super. Ct. 1991) ("the only logical interpretation of sections 2 and 19 is that the Attorney General has the authority to seek to redress and enjoin violations of the act

whether or not any person has been misled, damaged or deceived thereby, but that **a private person must be misled and damaged as a proximate result of a violation of the act in order to have standing to sue.**"); *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 473 (1988) (internal citations, quotations, and ellipses omitted) ("a private plaintiff must show that he or she suffered an ascertainable loss as a result of the unlawful conduct.")

Here, Plaintiffs must prove that the alleged misrepresentations were the proximate cause of the damage of them paying for JONAH's and Mr. Downing's services. In addition, Plaintiff Unger – the only Plaintiff seeking post-JONAH damages – must prove that the alleged misrepresentations were the proximate cause of those alleged damages. This requires proof that the representations which Defendants made, and not other representations, caused them to purchase Defendants' services. For example, numerous religions – including the Orthodox Jewish and Mormon faiths – teach or have taught that, regardless of what science says, homosexuality is an objective disorder. Lubavitcher Rebbe, Rabbi Menachem M. Schneerson, *"Rights" or Ills*, http://asknoah.org/healthy_relations (Jewish: Homosexuality "is a case of **healing a malady**. When a person is **ill** and someone volunteers to help him get well, there is no disrespect involved"); Spencer W. Kimball, *New Horizons for Homosexuals*, Deseret News Press, July 1971, http://www.connellodonovan.com/horizons.html (Mormon: "Homosexuality CAN be cured"); *see also* Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons*, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html (Catholic: "the inclination itself must be seen as an **objective disorder**"); Bahá'u'lláh et al., *Lights of Guidance (second part): A Bahá'i Reference File*, §§ 1222, 1223, http://bahai-library.com/hornby_lights_guidance_2.html&chapter=2 (Bahà'i: Homosexuality is a

"**handicap**" which should be "overcome"). Since Plaintiffs were observant members of their respective religions when they approached Defendants, they must prove that Defendants' representations, and not the representations of their religions, were the proximate cause of their desire to change their homosexuality and to seek out Defendants' services. For example, Plaintiff Ferguson testified that he only sought out Mr. Downing because he was the nearest SOCE provider, and had already known that he wanted to engage in SOCE due to his Mormon faith and prior experience with SOCE.

2. Plaintiffs Must Have Encountered the Misrepresentation.

To prove the causal nexus between the alleged misrepresentation and the alleged harm, Plaintiffs must prove that they read, saw, heard, or otherwise encountered the alleged misrepresentation:

> While reliance need not be proven under the NJCFA, **plaintiffs must nevertheless demonstrate that each . . . read one or more of the advertisements upon which plaintiffs rely** and that one or more of the false advertising and material factual concealments which they allege were contained therein constituted a proximate cause of "an ascertainable loss" of money or property.

Fink, *supra*, 365 N.J. Super. at 545.

It is not sufficient for Plaintiffs to prove that somewhere, in some advertisement or solicitation which they did not personally encounter, Defendants made a misrepresentation. "**Not just 'any erroneous statement' will constitute a misrepresentation prohibited by [the CFA].** The misrepresentation has to be one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase." *Gennari*, *supra*, 148 N.J. at 607. Rather, Plaintiffs must prove that they encountered the alleged misrepresentation, either in a advertisement, email or verbal discussion. *Chattin*, *supra*, 243 N.J. Super. at 607-08, *aff'd* 124 N.J. at 521 (CFA claim properly dismissed because "[t]here is no testimony by any of

the sixteen plaintiffs that they saw any [of the defendants'] literature"); *Int'l Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 192 N.J. 372, 392 (2007) (fraud on the market theory insufficient to prove necessary causal link between violation of the CFA and ascertainable loss); *Lee, supra*, 203 N.J. at 526-528 (the only possible way to prove the necessary causal link in a class setting would be show that the fraudulent product is only available through encountering an advertisement, and every claim made in the advertisement is false); *Fink, supra*, 365 N.J. Super. at 545 ("While reliance need not be proven under the NJCFA, plaintiffs must nevertheless demonstrate that each class member read one or more of the advertisements upon which plaintiffs rely"); *Zebersky v. Bed Bath & Beyond, Inc.*, 2006 U.S. Dist. LEXIS 86451, 9 (D.N.J. Nov. 28, 2006) ("Thus, the causal nexus requirement requires proof that the prohibited act must in fact have misled, deceived, induced or persuaded the plaintiff to purchase defendant's product or service.") (quotations omitted).

Plaintiffs have alluded that they will rely on testimony about verbal representations made to them, and will offer written evidence of representations to the public or other third parties merely to bolster their credibility. *See Chattin, supra*, 216 N.J. Super at 641 (CFA applies to both oral and written representations). While verbal representations are actionable under the CFA, it is important to note that liability must rest on them, and not on other representations made to other parties. As this Court has explained: "**What's consumer fraud is what JONAH represented to this individual.**" "That's what this lawsuit's about, not what Peter Bariso says or not what anybody else says. 'Cause it doesn't matter, my representations. **It matters what representations they make to me[, the Plaintiff].**" Transcript of Motion to Quash Hearing, June 7, 2013, 46:12-13, 54:20-24 (emphasis added).

3. Lack of Demand for Reimbursement.

It is not a prerequisite to filing a CFA claim for the plaintiff to have sought a refund from the defendant. *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 547 (2009). However, a plaintiff's failure to seek reimbursement prior to filing suit is strong evidence of the lack of a causal nexus between the alleged unlawful conduct and the ascertainable loss. *See Feinberg*, *supra*, 331 N.J. Super. at 511-12 ("There is absolutely no proof in this record that plaintiff demanded cancellation of this charge or reimbursement by defendant prior to filing suit. We consider that a necessary element of proof in a matter such as this.") Especially where the plaintiff himself has acted unscrupulously, the failure to seek reimbursement prior to filing suit is strong evidence that there is no causal connection between the alleged unlawful conduct and the alleged harm. *Heyert v. Taddese*, 431 N.J. Super. 388, 418 (App. Div. 2013).

IV.

AFFIRMATIVE DEFENSES.

A. First Affirmative Defense: The Complaint fails to assert a claim upon which relief can be granted against these defendants.

New Jersey Courts have held that "before the CFA can be applied the consumer must show that the nature of the transaction was consumer oriented, and . . . that the alleged violator was acting in a **professional, commercial capacity**." *Heyert v. Taddese*, 431 N.J. Super. 388, 412-13 (App. Div. 2013) (quotations omitted); *see also Byrne v. Weichert Realtors*, 290 N.J. Super. 126, 135 (App. Div. 1996) ("the purpose of the Act, to protect consumers against 'commercial' practices, clearly applies to professional . . . agents who . . . are acting in a professional, 'commercial' capacity."); *Di Bernardo v. Mosley*, 206 N.J. Super. 371, 376 (App. Div. 1986) (citing *Kugler*, *supra*, 58 N.J. at 536) (quotations omitted) ("the Act was intended as

a response only to the public harm resulting from the deception, misrepresentation and unconscionable practices engaged in by professional sellers"); *48 Horsehill, LLC v. Kenro Corp.*, 2006 N.J. Super. Unpub. LEXIS 707, 19-20 (App. Div. Feb. 22, 2006) ("A seller of commercial property is, therefore, not the equivalent of a professional seller to whom the Consumer Fraud Act is applicable. . . . Absent proof that defendants were commercial sellers of realty, plaintiff's . . . Consumer Fraud Act [violation] was properly dismissed.")

Consequently, New Jersey courts have held that many public interest organizations are simply not liable under the Consumer Fraud Act. *See Daaleman*, *supra*, 77 N.J. at 272 (privately owned public utility not subject to the CFA); *Barry by Ross v. N.J. State Highway Auth.*, 245 N.J. Super. 302, 308 (Super. Ct. 1990) (New Jersey Highway Authority not subject to the CFA); *Hampton Hosp. v. Bresan*, 288 N.J. Super. 372, 383 (App. Div. 1996) (hospital not subject to the CFA); *B.K. v. Saddle River Day Sch.*, 2014 N.J. Super. Unpub. LEXIS 1006, 28-29 (Law Div. Mar. 10, 2014) (nonprofit educational institution not subject to the CFA); *Ramapo Brae Condo v. Bergen County Hous. Auth.*, 328 N.J. Super. 561, 575 (App. Div. 2000), *aff'd* 167 N.J. 155 (2001) (Government entities not subject to the CFA); *Schlichtman v. New Jersey Highway Auth.*, 243 N.J. Super. 464 (Law Div. 1990) (same). Moreover, those courts have explicitly noted that the not-for-profit nature of the organizations, which leads them to not be engaging in commercial activity, is precisely the reason why they are not subject to the CFA. *Barry by Ross*, *supra*, 245 N.J. Super. at 308 (holding that the sale of Parkway tokens is not actionable under the CFA because "their sale is not for profit"); *B.K.*, *supra*, 2014 N.J. Super. Unpub. LEXIS 1006, 28-29 ("a non-profit institution of primary and secondary education . . . is closer to a charitable organization than a commercial business operating for profit by providing goods and services to the general public, for purposes of the CFA.")

Indeed, New Jersey courts have explicitly noted that in educational and religious settings, the CFA is at significant risk of simply being inapplicable:

> Plaintiffs' argument is if you pay a fee for any service, educational or religious, and the services you receive form [sic] the rabbi, priest, minister or teacher do not meet your personal standards, you should be able to sue for treble damages and get your attorney fees paid. That view has not been accepted by any of the three branches of government of this state. Our courts have no role in arbitrating these disputes as they are palpably beyond even the CFA's broad protections on the "sale or advertisement of any merchandise or real estate."

B.K., *supra*, 2014 N.J. Super. Unpub. LEXIS 1006, 32-33. Of course, there is no *per se* rule which exempts nonprofit institutions from the CFA. However, the lack of a *per se* rule suggests that the question of whether a particular transaction fits within the CFA is best made on a case-by-case basis. In many states with consumer protection statutes similar to New Jersey's, nonprofit organizations are simply not liable because they are not merchants and are not engaging in commercial practices. *See, e.g.*, *Schiff v. AARP*, 697 A.2d 1193, 1196-1197 (D.C. 1997). The CFA is intended to be interpreted liberally to protect consumers, but it does have limits; it does not cover every sale in the marketplace, and its applicability hinges on the nature of a particular transaction. *B.K.*, *supra*, 2014 N.J. Super. Unpub. LEXIS 1006, 32-33.

JONAH is a nonprofit corporation incorporated under N.J. Stat. § 15A2:8. It is specifically exempt from New Jersey taxes because it is organized and operated exclusively for educational purposes. N.J. Stat. § 15A:2-1 ("A corporation may be organized under this act for any lawful purpose other than for pecuniary profit".) Because it is a nonprofit, JONAH is not permitted to, and does not, engage in any commercial activity or it will lose its tax exempt status. Defendants could not locate any case where a court explicitly held that the New Jersey Consumer Fraud Act covered nonprofit organizations similar to JONAH. Defendants also found no cases where a nonprofit was found liable under the CFA, and Plaintiffs have cited none.

Defendant JONAH does engage in collateral sales which are incidental to its performance of free educational and referral services. These include selling the book "Light in the Closet" authored by Mr. Goldberg, the infrequent hosting of Jewish religious retreats called Shabbatons, and the reception of minor referral fees from counselors to whom JONAH refers individuals for both individual and group sessions. Courts are clear, however, that transactions which are collateral to the primary relationship, are not covered by the CFA. *See Bracco, supra*, 226 F. Supp. 2d at 561; *Windsor Card Shops v. Hallmark Cards*, 957 F. Supp. 562, 567 n.6 (D.N.J. 1997). No individual comes to JONAH primarily to purchase JONAH's collateral services. JONAH advertises itself as an educational and referral service, and that is the service which it provides – these free noncommercial services control the nature of JONAH's practices and show why JONAH should not be covered by the CFA. *B.K., supra*, 2014 N.J. Super. Unpub. LEXIS 1006, 32-33 ("This court further refuses to [find the CFA applicable] where a non-profit organization engages in collateral sales of merchandise, such as school apparel and other memorabilia.")

Plaintiffs have to prove that each of the alleged violations of the Consumer Fraud Act was made with a commercial intent and for a commercial purpose, otherwise, the alleged violations are simply not actionable under the CFA. Specifically, Plaintiffs must prove that any advertisement, email or verbal discussion upon which they rely as containing a misrepresentation, was made to them with commercial intent. Plaintiffs also have to prove that JONAH is not a legitimate nonprofit institution, but rather a for-profit enterprise masquerading as a nonprofit; otherwise JONAH simply cannot have the commercial intent required by the CFA.

B. Second Affirmative Defense: The harm alleged in the Complaint was caused by the acts or omissions of plaintiffs and/or other persons and/or entities not subject to the control of these defendants.

Journey into Manhood ("JiM") is a beginners' experiential weekend offered by People Can Change ("PCC") for individuals who seek to move in the direction of overcoming their unwanted same-sex attractions ("SSA"). Similarly, Journey Beyond is an advanced experiential weekend offered by PCC for individuals who have already attended several experiential weekends, either offered by PCC or other organizations, have engaged in separate counseling with regard to their unwanted same-sex attractions, and who seek to take a more definitive step in the direction of resolving their unwanted SSA.

JONAH recommends to individuals that attending PCC's weekends, or other similar experiential weekends, can be helpful to an individual seeking to resolve their unwanted SSA. PCC, however, is a separate organization from JONAH, run by different individuals, and with different theories regarding homosexuality. Defendants do not unequivocally endorse all of PCC's representations, and it is not a faith based program. PCC does not speak for Defendants, and Defendants cannot be held liable for any alleged misrepresentations which PCC makes. This Court has been clear that the representations at issue are only those made by Defendants to Plaintiffs. Transcript of the June 7, 2013 Hearing, 8:24-9:2, 46:10-13, 54:23-24 ("Otherwise, what would have enticed the plaintiffs to sign on? There had to be something that led them to sign on, whatever that is." "The fact that the person has engaged JONAH for whatever services they render and it hasn't worked for 15 years is not consumer fraud. What's consumer fraud is what JONAH represented to this individual." "It matters what representations they make to me [the Plaintiff].").

Plaintiffs' Complaint lists various activities undertaken at JiM which they allege caused them harm, including group nudity, healthy male touch, bioenergetics (*i.e.*, hitting a pillow to release anger), psychodramatic scenarios (therapy which uses dramatic reenactments of past events), participating in team sports, and getting in touch with their masculinity. Defendants did not draft the script of the JiM weekend, and are not the authors of any representations made at JiM. During discovery, Plaintiffs complained about alleged misrepresentations made by PCC at those JiM weekends, including PCC's success rates. Those representations were not made by Defendants and Defendants cannot be held liable for them.

In addition, none of the Plaintiffs attended Journey Beyond and consequently any statements made at Journey Beyond cannot form the basis of a claim for fraudulent misrepresentation in violation of the CFA for which Defendants can be held liable. *Fink*, *supra*, 365 N.J. Super. at 545 ("plaintiffs must . . . demonstrate that **each** class member read one or more of the advertisements upon which plaintiffs rely"); *Chattin*, *supra*, 243 N.J. Super. at 607-608 ("The trial court correctly found that there was no evidence that any of the homeowners with consumer fraud claims had seen, read, or relied upon Capitol's brochure."); *Zebersky*, *supra*, 2006 U.S. Dist. LEXIS 86451, 9 ("The causal nexus requirement stems from the portion of the statute requiring a private plaintiff to show that he or she suffered an ascertainable loss *as a result* of the use or employment of any method, act, or practice declared unlawful under this act. Thus, the causal nexus requirement requires proof that the prohibited act must in fact have misled, deceived, induced or persuaded the plaintiff to purchase defendant's product or service.") (citations and quotations omitted). Therefore, Plaintiffs cannot hold Defendants liable for any alleged misrepresentation made by PCC.

C. **Third Affirmative Defense: The harm alleged in the Complaint was caused by conditions not subject to the control of these defendants.**

It is Defendants' religious belief, and the basis for their ministry, that everyone suffers from some spiritual and emotional wounds in their life, regardless of their sexual orientation. When those wounds are left unhealed, they can cause shame and guilt as well as distress and anxiety. In that sense, everyone is in need of God's healing power and mercy. The JONAH defendants refer to resolving this spiritual brokenness as "teshuvah," which means that we are all called to some degree of repentance and healing.

The failure of Plaintiffs to resolve their SSA, and Plaintiff Unger's needing to continue therapy, were caused by Plaintiffs' co-morbid addictions and unhealed spiritual and emotional wounds, and were not caused by Defendants. These other issues largely impacted their reasons for seeking Defendants' services initially, and affected their experiences with those services. The people who come to Defendants for help, both heterosexuals and homosexuals, do so for a variety of sexual and non-sexual issues, and frequently have unhealed wounds and addictions that are causing them distress. This includes the Plaintiffs, who came to Defendants because they were confused over the fact that they experienced both SSA and OSA, and were distressed because their SSA conflicted with their religious values and visions for their lives at that time. Plaintiffs' unhealed wounds and addictions were the proximate cause of their alleged harms, and not any representations or actions undertaken by Defendants. For example, Plaintiff Levin testified explicitly, and documents verify, that during his participation in SOCE he impeded his own progress by not following Defendants' recommendations and only erratically attending his counseling and group support sessions. His own failure to perform the work prescribed is the best explanation for why he was not successful in achieving his counseling goals.

D. Twelfth Affirmative Defense: The plaintiffs seek to have the Court improperly enforce the New Jersey Consumer Fraud Act in a manner that would violate the defendants' right to freedom of religion under the First Amendment to the United States Constitution and Article I, Paragraphs 3 and 4 of the New Jersey Constitution.

The alleged misrepresentations cannot form the basis of a New Jersey CFA action to the extent that they violate the Religion Clauses of the Federal and New Jersey Constitutions. The New Jersey constitutional religion clauses do not directly mirror the Federal constitutional religion clauses. *Compare* N.J. Const., Art. I, ¶¶ 3-4 *with* U.S. Const. Amend. 1. Nevertheless, the New Jersey Courts have bound the interpretation of the New Jersey constitutional religion clauses to the interpretation of the Federal constitutional religion clauses, either because New Jersey jurisprudence closely matches Federal jurisprudence, or falls below the floor that Federal jurisprudence mandates. *See Right to Choose v. Byrne*, 91 N.J. 287, 313-14 (1982); *Ran-Dav's Cnty. Kosher v. State*, 129 N.J. 141 (1992); *Clayton v. Kervick*, 56 N.J. 523, 526 (1970).

1. The Free Exercise of Religion.

"The right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (internal citations omitted). Therefore, a generally applicable and otherwise valid law which is not specifically intended to regulate religious conduct or belief and which only incidentally burdens the free exercise of religion – such as the CFA – is not subject to a strict scrutiny analysis under the Free Exercise Clause of the First Amendment. *S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elem. Sch.*, 150 N.J. 575, 597 (1997).

However, when a statute "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 religious conduct, the religious conduct cannot be covered unless it is the least restrictive means of achieving a compelling governmental interest. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004); *see also FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999). The Religion Clauses of the First Amendment also prohibit the Court from making an inquiry into the plausibility of a religious claim. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2778 (2014) (quoting *Emp't Div., supra*, 494 U.S. at 887) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim."); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). Consequently, if the jury finds that Defendants' assertions on sexuality which form the basis of the present CFA claim were religiously motivated, Defendants cannot be liable under the CFA.

2. Religious Questions and Religious Autonomy Issues.

The Court has held that regardless of what any religion teaches, homosexuality is not a "mental disorder." The Court noted: "[h]ow is it challenging religion to say you cannot represent to the public that homosexuality is a mental disease or a medical condition that needs treatment? What religion does that violate? Because what religion has the right to tell the public what a medical condition is?" Transcript of February 5, 2015 Hearing on Motions for Summary Judgment, 31:24-32:4.

While religious beliefs may seem absurd or implausible to some, the Court is prohibited from making an inquiry into the plausibility of a religious claim, *Burwell, supra*, 134 S.Ct. at

2778, and numerous religions do teach that, regardless of what science finds, homosexuality is a disorder. Lubavitcher Rebbe, Rabbi Menachem M. Schneerson, *"Rights" or Ills*, http://asknoah.org/healthy_relations (Jewish); Spencer W. Kimball, *New Horizons for Homosexuals*, Deseret News Press, July 1971, http://www.connellodonovan.com/horizons.html (Mormon); Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons*, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html (Catholic); Bahá'u'lláh et al., *Lights of Guidance (second part): A Bahá'i Reference File*, §§ 1222, 1223, http://bahai-library.com/hornby_lights_guidance_2.html&chapter=2 (Bahá'i).

This Court ruled that "[i]t is a misrepresentation in violation of the CFA, in advertising or selling conversion therapy services, to describe homosexuality, not as being a normal variation of human sexuality, but as being a mental illness, disease, or equivalent thereof." Order Granting Plaintiffs' Motion for Partial Summary Judgment, Feb. 10, 2015. The Court also held, however, that "a jury could find, based on evidence presented at trial that JONAH represented homosexuality not as a mental disorder, but as disordered and prohibited by its religion." Statement of Reasons for the Court's February 10, 2014 Orders, pp. 11-12. This is not actionable under the CFA because of the rights of individuals and organizations under the religion clauses of the First Amendment. *Id.*

This distinction is particularly important because for many – if not the overwhelming majority – of religious adherents and religious organizations, it is impossible for them to speak about human sexuality without speaking of it in a religious context – for them all of sexuality is a religious question. For devoutly religious persons, including Defendants, sexual morality is based on conforming sexual behavior to their religious understanding of the natural sexual order.

Consequently, from a religious perspective, religious individuals in general, and Defendants in particular, speak about certain sexual behaviors, and the desire to engage in those behaviors, as outside that natural sexual order. *See* Rabbi Barry Freundel, *Homosexuality and Judaism*, available at http://jonahweb.org/religious_commentary/view/homosexuality-and-judaism-2001.html; Arthur A. Goldberg, Elaine Silodor Berk, *JONAH's Psycho-Educational Model for Healing,* available at http://jonahweb.org/library_article/view/jonah-39-s-psycho-educational-model-for-healing-homosexuality.html; *see also* Catholic Church, *Catechism of the Catholic Church* §§ 2331-2400, available at http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm.

In this context, there is significant overlap between the religious and medical uses of the words "not normal," "unnatural," and "disordered." There is also great potential to abuse the rights of religious individuals since they have the right to believe that their understanding of what is "not normal," "unnatural," or "disordered" represents objective reality. *United States v. Ballard*, 322 U.S. 78, 86-87 (1944) (reversed on a different issue in *Ballard v. United States*, 329 U.S. 187 (1946)) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.")

The distinction here is that Plaintiffs contend that Defendants do not merely hold their religious beliefs as true. Instead, Plaintiffs allege that Defendants present their absurd religious beliefs as secular and true to the public as a means of deceiving and inducing the public to enter

into a commercial obligation with them. These assertions remain vigorously contested, and are contrasted by Defendants' assertion that they are a religious nonprofit, offering primarily free religious services. Defendants also offer some free non-religious services which are still primarily for members of their own faith, but are also available to other individuals who – although of a different faith – share Defendants' religious understanding of sexuality. In this latter situation, the issue of Government interference with the autonomy of religious organizations becomes a key issue. The United States Supreme Court has held that:

> In this country the full and free right to entertain any religious belief, to practice any religious principle and to teach any religious doctrine . . . is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-29 (1871). The Supreme Court later noted that its jurisprudence on this issue "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters . . . of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church,* 344 U.S. 94, 116 (1952). This principle of religious autonomy has been repeatedly reaffirmed by the Supreme Court primarily because:

> it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336 (1987). Most recently, the Supreme Court reaffirmed these principles despite recognizing that they may conflict with other noble aims:

> In a case like the one now before us--where the goal of the civil law in question . . . is so worthy--it is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws. To safeguard this crucial autonomy, we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs.

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694, 712 (2012) (Alito, J., concurring).

It is generally not a proper defense to argue that the consumer would not have been misled if he had been different, if he had been more astute or more sophisticated. *Pioneer Nat'l Title Ins. Co. v. Lucas*, 155 N.J. Super. 332, 342 (App. Div. 1978). But the Courts do look to the nature of the parties in analyzing the true nature of the transaction. *Papergraphics*, *supra*, 389 N.J. Super. at 14 (CFA analysis dependent on reality that both parties were sophisticated commercial entities); *Diamond Life Lighting MFG (HK) Ltd. v. Picasso Lighting, Inc.*, 2010 U.S. Dist. LEXIS 132582, 16 (D.N.J. Dec. 14, 2010) (same). Courts have explicitly held that the nature of the parties is highly relevant to whether a specific practice, in the specific situation, is unlawful under the CFA. *Hundred E. Credit Corp. v. Eric Schuster Corp.*, 212 N.J. Super. 350, 357 (App. Div. 1986) ("It may well be, of course, that certain practices unlawful in a sale of personal goods to an individual consumer would not be held unlawful in a transaction between particular business entities; the Act largely permits the meaning of 'unlawful practice' to be determined on a case-by-case basis.")

Here, the evidence shows that Defendants are a religious nonprofit making statements about homosexuality in the context of their Jewish faith and most often to other members of that

faith. It is also irrelevant that Defendants are not technically a church but only a religious organization; even purely secular, for-profit, organizations have religious liberty rights, and Defendants are far from purely secular. *Burwell*, *supra*, 134 S.Ct. at 2768. Defendants' entire therapeutic approach is a holistic one. It incorporates scientific methods which match their core religious beliefs into one cohesive "psycho-educational model for healing." Interference in the internal affairs of the Jewish religion, by permitting Jewish individuals to sue a Jewish organization for representing Jewish beliefs as true violates the Constitutional principles of religious autonomy and non-interference.

E. Fifteenth Affirmative Defense: Each of the plaintiffs was informed in writing that there was no guarantee as to the result of the services provided by defendants, and each of the plaintiffs consented in writing to accept those services on such terms.

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*, *supra*, 139 N.J. at 416. More specifically, at the heart of an unconscionable commercial practice is its capacity to mislead. *See*, *e.g.*, *Island Mortgages of New Jersey v. 3M (Minnesota Min. and Mfg. Co.)*, 373 N.J. Super. 172, 177 (Law Div. 2004); *Fenwick*, *supra*, 72 N.J. at 378; *Citizen Action*, *supra*, 367 N.J. Super. 8, 13 (Super. Ct. App. Div. 2003); *Leon v. Rite Aid Corp.*, 340 N.J. Super. 462, 470 (Super. Ct. App. Div. 2001).

Alleged CFA violations have to be viewed in their total context. "To determine whether an advertisement or solicitation makes a false or misleading representation, the court must consider the effect that the advertisement, taken as a whole, would produce on one with an ordinary and unsuspecting mind." *Belmont*, *supra*, 432 N.J. Super. at 80 (quoting *Miller*, *supra*,

284 N.J. Super. at 86); *see also Smajlaj*, *supra*, 782 F. Supp. 2d at 98 (referring to the "context" of the advertisement).

The prior disclosure of the information on which a consumer was allegedly misled is sufficient to find that the actions of the business were not misleading as a matter of law. *See Ciser v. Nestlé Waters N. Am., Inc.*, 2013 U.S. Dist. LEXIS 152815 (D.N.J. Oct. 24, 2013) (dismissing New Jersey CFA claim over imposition of late fees which were disclosed in the contract). The literal veracity of one or more statements is not determinative in itself of whether the practice in total is misleading. *See, e.g., In re Shack*, 177 N.J. Super. 358, 363 (Super. Ct. App. Div. 1981); *Belmont*, *supra*, 432 N.J. Super. at 79-80; *Smajlaj*, *supra*, 782 F.Supp.2d at 98. Further, the mere fact that a consumer can read certain statements and interpret them in a misleading way, does not bind the Court to similarly interpret them if the statements in context are not susceptible of a misleading interpretation. *See Adamson v. Ortho-McNeil Pharm., Inc.*, 463 F. Supp. 2d 496, 503 (D.N.J. 2006).

Here, Defendants' representations have to be viewed within the total context of any specific email chain or discussion that Plaintiffs had with Defendants – and in the total context of Plaintiffs' engagement with Defendants. Consequently, Plaintiffs have to prove that Defendants' representations taken as a whole would produce on one with an ordinary mind the effect of a false or misleading representation. The informed consents which Plaintiffs each signed speak directly to this total context.

V.

DAMAGES.

As a preliminary matter, it is important to note that the business relationship between JONAH, Inc. and Alan Downing Life Coaching, LLC, do not permit them to be jointly and severally liable for Plaintiffs' damages. JONAH, Inc. is a nonprofit organization directed by Mr. Goldberg and Ms. Berk. Alan Downing Life Coaching, LLC is a for-profit business run by Mr. Downing. JONAH refers clients to Alan Downing Life Coaching as an independent contractor to provide life-coaching services including, but not limited to, SOCE. However, neither JONAH nor Mr. Goldberg ever hired Mr. Downing, who has his own practice, as an employee. Consequently, neither JONAH or Alan Downing Life Coaching can be held liable for misrepresentations or unconscionable practices allegedly made by the other party. They are simply not responsible for them. The same applies to Arthur Goldberg and Alan Downing as individuals.

Related to this is the fact that Plaintiff Ferguson was only a client of Alan Downing Life Coaching and has never had any relationship with JONAH or Mr. Goldberg. Mr. Ferguson's life-coaching, both privately and in two group sessions, did take place in rented space on the JONAH premises, but he was always an Alan Downing Life Coaching client and not a JONAH client. Similarly, Plaintiff Jo Bruck and her son Sheldon Bruck were only clients of JONAH and Mr. Thaddeus Heffner, and never had any relationship with Mr. Downing. Consequently, neither JONAH nor Mr. Goldberg can be held liable for any alleged misrepresentations or unconscionable practices made by either Alan Downing Life Coaching or Mr. Downing to Mr. Ferguson, and neither Alan Downing Life Coaching nor Mr. Downing can be held liable for any

alleged misrepresentations or unconscionable practices made by either JONAH or Mr. Heffner to Mrs. Bruck.

More broadly, Mr. Goldberg cannot be personally liable under the CFA for statements made by either Ms. Berk or Mr. Downing, and Mr. Downing cannot be personally liable for statements made by Mr. Goldberg, or JONAH.

A. Permanently enjoining Defendants and JONAH's officers, directors, founders, managers, agents, servants, employees, representatives, independent contractors and all other persons or entities directly under their control, from engaging in, continuing to engage in, or doing any acts or practices in violation of the CFA, including, but not limited to, the acts and practices alleged in this Complaint.

The Complaint asks the Court to "permanently enjoin[] Defendants . . . and all other persons or entities directly under their control, from engaging in, continuing to engage in, or doing any acts or practices in violation of the CFA, including, but not limited to, the acts and practices alleged in this Complaint . . . ." Complaint ¶ 112(c).

New Jersey courts have identified several factors to weigh in assessing whether to grant injunctive relief, including:

(1) the character of the interest to be protected;

(2) the relative adequacy of the injunction to the plaintiff as compared with other remedies;

(3) the unreasonable delay in bringing suit;

(4) any related misconduct by the plaintiff;

(5) the comparison of hardship to the plaintiff if relief is denied, and hardship to the defendant if relief is granted;

(6) the interests of others, including the public; and

(7) the practicality of framing the order or judgment.

Sheppard v. Twp. of Frankford, 261 N.J. Super.5, 10 (Super. Ct. App. Div. 1992). These factors apply best to a public or private nuisance situation, wherein monetary relief is not sufficient. *See Rose v. Chaikin*, 187 N.J. Super. 210, 218 (Super. Ct. 1982). Further, "claims for injunctive relief cannot normally be maintained where monetary damages are a sufficient remedy. *Med. Soc. of N.J. v. AmeriHealth HMO, Inc.*, 376 N.J. Super.48, 62 (Super. Ct. App. Div. 2005).

Here, the factors clearly weigh against the enjoinment of JONAH's, Mr. Goldberg's and Mr. Downing's conduct as alleged in the Complaint. *See Sheppard, supra*, 261 N.J. Super. at 10. The only interest which Plaintiffs seek to protect is in no longer receiving counseling from Mr. Downing or any other JONAH-affiliated counselor, which is in their own control. Monetary relief provides a significantly greater remedy than injunctive relief because, regardless of whether injunctive relief is granted or not, Plaintiffs will not pursue again the voluntary counseling which they undertook with JONAH because they allegedly do not believe it is efficacious, and is unnecessary. Plaintiffs' four year delay in bringing their suit until years after they had terminated their relationships with Defendants shows that an injunction is not necessary to regulate any ongoing relationship.

Plaintiffs will suffer no hardship if they receive only monetary and not injunctive relief because they have no continuing relationship with JONAH, Mr. Goldberg or Mr. Downing. On the other hand, Defendants would suffer significantly if their SOCE referral service and life-coaching practices were enjoined because they are their religious missions and vocations. Finally, the granting of an injunction would negatively impact the public, including JONAH's and Mr. Downing's other clients who greatly benefit from their SOCE. Moreover, it is clear from the face of the Complaint, and Plaintiffs' strategy in the case, that this negative impact on the public has always been Plaintiffs' primary goal.

B. Directing the assessment of restitution amounts to Plaintiffs for all of their payments to Defendants for individual and group conversion therapy.

The New Jersey Supreme Court explained that in cases involving misrepresentation under the CFA, Plaintiffs must show either an out-of-pocket loss or a demonstration of loss in value to meet the ascertainable loss requirement. *Thiedemann, supra*, 183 N.J. at 248. Here, Plaintiff Levin and Plaintiff Unger cannot demonstrate either an out-of pocket expense or a loss in value against Defendants because neither of them paid for Defendants' services. Rather, Bella Levin's deposition testimony demonstrates that she and her husband paid for the costs of Defendants' services and therefore it is they who could demonstrate an underlying loss of property. Plaintiff Unger does not allege ascertainable loss based on costs paid to Defendants. Plaintiff Levin did submit a self-serving certification in which he claims that he paid "two cash payments of $100 each that were recorded by Mr. Downing." This self-serving evidence is unsupported by any other evidence and is contradicted by Plaintiff Bella Levin's deposition testimony.

C. Directing the assessment of restitution amounts to Plaintiffs for reasonable costs of repairing damage resulting from Defendants' unlawful acts.

In its analysis of ascertainable loss, this Court explained that existence of ascertainable loss "resulting from a defendant's CFA violation should be determined on the basis of the plaintiff's position following the defendant's unlawful commercial practice. Accordingly, the Court found that the cost of therapy caused by the alleged CFA violations may properly constitute an ascertainable loss under the CFA." *Ferguson v. JONAH*, 2014 N.J. Super. Unpub. LEXIS 1334, 15 (Law Div. June 6, 2014) (citations omitted).

Plaintiffs have stipulated that they are pursuing a claim for subsequent medical treatment only for Plaintiff Unger. Plaintiffs have stipulated that they will not call Dr. Steven Phillipson, Plaintiff Unger's treating psychologist, but instead only read the following stipulation:

> As the billing records reflect, Dr. Phillipson met with Benjy Unger for a total of 63 sessions. Dr. Phillipson has notes of only one of these sessions, specifically, the session that took place on May 8, 2010. Dr. Phillipson estimates that half of his sessions with Mr. Unger involved discussion of JONAH-related material, and that such discussion took up 70% of each such session. As the billing records also reflect, Mr. Unger paid Dr. Phillipson $250 per session, for a total cost of $15,750. The proportion of that total corresponding to Dr. Phillipson's estimate is $5,512.50.

This stipulation speaks to the anticipated testimony which Dr. Phillipson would have provided. It proves that Dr. Phillipson violated the American Psychological Association's ethical guidelines by failing to keep adequate records of his sessions with Plaintiff Unger. *See* American Psychological Association, *Record Keeping Guidelines*, https://www.apa.org/practice/guidelines/record-keeping.pdf. Defendants also intend to call Dr. Berger to testify that there is no evidence in the medical records that any Plaintiff, including Plaintiff Unger, was caused any harm by Defendants.

Here, Plaintiff Unger cannot demonstrate either an out-of pocket expense or a loss in value because he did not pay any costs for medical treatments to repair the alleged damage caused by Defendants. His position following Defendants' alleged unlawful conduct remains unchanged as he did not bear any costs to repair any alleged damage caused by Defendants. The costs for these treatments, which under this Court's analysis may constitute ascertainable loss, were incurred only by his parents. Plaintiff Unger testified that his parents nevertheless chose to not participate as plaintiffs in this lawsuit and stated that his father prefers to remain "indifferent."

Despite specific formal discovery requests, including a specific supplemental request made in an email sent to Plaintiffs' counsel on March 30, 2015, Plaintiff Unger has not produced any evidence of payments made by him to any third parties for medical treatments. Plaintiff Unger has provided Dr. Phillipson's billing records, but has failed to produce any other evidence. Plaintiff Unger has not produced any receipts from Dr. Phillipson's office for any payment for any of the 63 sessions that are the subject of the stipulation; any bank statements and credit card statements reflecting those payments; any credit or debit card receipts reflecting such payments; or any copies of any check register and/or other documents reflecting those payments. There is simply no evidence that Plaintiff Unger made any payments to Dr. Phillipson.

D. <u>Directing the assessment against Defendants, jointly and severally, of treble Plaintiffs' ascertainable losses.</u>

The CFA states:

> In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, **award threefold the damages sustained** by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

N.J. Stat. § 56:8-19 (emphasis added). "Ascertainable loss" and "damages sustained" have separate functions under the CFA. *D'Agostino*, *supra*, 216 N.J. at 192. Ascertainable loss is a prerequisite to determining damages sustained under the CFA: "[t]here is no calculation of 'damages sustained' unless the ascertainable loss requirement is first satisfied." *Id.* at 192 (quoting *Thiedemann*, *supra*, 183 N.J. at 247). However, non-economic damages are not recoverable under the CFA as damages sustained, and the damages sustained are actually limited to the ascertainable loss:

> One reading of the Act is that a party who suffers any ascertainable loss has standing to sue and can recover three times "any and all damages sustained." The alternative, and we believe more appropriate, interpretation is that "damages" are

> limited to "ascertainable loss." At common-law an injured party could recover only for the injuries sustained. Absent a clear expression of legislative intent changing the common law rule, we are reluctant to read the Act to encompass non-economic losses.

Gennari, supra, 148 N.J. at 612-13; *see also D'Agostino, supra*, 216 N.J. at 192-93. The CFA does, however, "contemplate[] that courts will fashion individualized relief appropriate to the specific case, combining legal and equitable remedies in some settings." *D'Agostino, supra*, 216 N.J. at 185. Here, the only potential damages which can be the subject of trebling include the amounts paid by Plaintiffs for Defendants' services, and the amounts allegedly paid by Plaintiff Unger to Dr. Phillipson to repair damage allegedly resulting from Defendants' services. Plaintiffs have also alleged the transportation costs which they incurred in traveling to see Defendants as ascertainable losses. For the most part, however, Courts have held that those costs constitute mere inconvenience costs which cannot be recovered or trebled under the CFA. *Ivans v. Plaza Nissan Ford*, 2007 N.J. Super. Unpub. LEXIS 2481, 23 (App.Div. May 3, 2007).

Importantly, the jury is entitled to be informed whether Plaintiffs are seeking treble damages and attorney fees. This knowledge helps the jury best determine how to allocate its award and prevents the jury from awarding damages based on a misunderstanding of the CFA. As the New Jersey Supreme Court held:

> [W]e believe that [knowledge of the trebling of damages and the awarding of counsel fees] will assist the jury in its fact-finding role and will avoid confusion especially among those jurors who may already have some notion concerning the mandates of the [Consumer Fraud] Act.
>
> Like those in a comparative-negligence context, jurors sitting in a consumer-fraud case should be informed of the legal effect of their actions so that their deliberations will not be had in a vacuum, or possibly based on a mistaken notion of how the statute operates.

Wanetick v. Gateway Mitsubishi, 163 N.J. 484, 494-96 (2000) (original quotations, brackets and citations omitted). The New Jersey Supreme Court has already held that the jury should be

informed in a jury instruction about the trebling of damages and the award of counsel fees. *Id.* at 496. Consequently, Defendants should be permitted to discuss in their case how the CFA operates and how a finding in favor of Plaintiffs will result in treble damages and potentially missions of dollars in attorneys' fees.

E. <u>Directing the assessment of costs and fees against Defendants, including Plaintiffs' investigation costs and attorneys' fees, jointly and severally, as authorized by the CFA.</u>

The CFA states unambiguously, "[i]n all actions under this section . . . the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit." N.J. Stat. § 56:8-19. Similar to above, the jury is entitled to be informed that Plaintiffs are seeking attorneys' fees, and to be informed about the consequences of those fees. *Wanetick, supra,* 163 N.J. at 494-96. This is because the CFA's "provisions in respect of . . . awarding of counsel fees are integral and essential to the Act itself." *Id.* "[T]those provisions are punitive in nature and reflect the Legislature's sense of outrage over marketplace fraud. . . ." *Id.* "[T]he jury's sense of outrage" may inspire them to "believe that something more than making the consumer whole is warranted," and thus it is crucial "for the jury to know that its purely compensatory award will trigger an automatic [attorneys' fees] remedy." *Id.*

It is particularly important for the jury to understand the purposes of the CFA and whether this case fits those purposes, in order to "enhance[] the prospect that jurors will arrive at the correct verdict for the right reasons." *Id.* at 496.

> [T]wo of the three main purposes of the Act are "to punish the wrongdoer through the award of treble damages, and, by way of the counsel fee provision, to attract competent counsel to counteract the community scourge of fraud by providing an incentive for an attorney to take a case involving a minor loss to the individual." The third purpose is to compensate victims for actual losses.

Id. at 490 (quoting *Lettenmaier v. Lube Connection, Inc.*, 162 N.J. 134, 139 (1999)). The jury is entitled to understand these main purposes, and to decide for themselves whether the retention of a dozen or more attorneys, whose fees will either intentionally or unintentionally bankrupt Defendants, satisfies the aim of the CFA to "attract competent counsel to counteract the community scourge of fraud." *Id.* This is particularly true because attorneys' fees may be recoverable in situations where the plaintiff can only prove the existence of an unconscionable commercial practice, and cannot prove damages resulting therefrom. *Weinberg v. Sprint Corp.*, 173 N.J. 233, 237 (2002) ("even if the factfinder ultimately determines that the loss has not been proven, a private plaintiff may obtain . . . attorneys' fees when **unconscionable conduct** is found to exist") (emphasis added); *Performance Leasing Corp. v. Irwin Lincoln-Mercury*, 262 N.J. Super. 23, 33-34 (1993) ("Where, as here, a jury finds that a defendant has committed an **unconscionable commercial practice** as defined in the Consumer Fraud Act, no damages attributable to that practice need be found in order to invoke the attorneys' fees provision of the Act") (emphasis added).

The same reasoning which makes attorneys' fees recoverable for violating the CFA through unconscionable conduct makes attorneys' fees recoverable for violating the CFA through the specific-situation statutes. *Cox, supra*, 138 N.J. at 19-20, 24-25 (holding that attorneys' fees must be granted in the situation of a violation of a specific-situation statute); *BJM Insulation & Const., Inc. v. Evans*, 287 N.J. Super. 513, 517 (1996) (same). This reasoning does not apply to violations of the CFA through affirmative misrepresentations, however, because only those misrepresentations which are material are actually unlawful under the CFA, and materiality depends in large part on whether the representation caused actual harm. *See Gennari, supra*, 148 N.J. at 607 ("Not just 'any erroneous statement' will constitute a misrepresentation

prohibited by [the CFA]. The misrepresentation has to be one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase."); *Ulokameje v. Steven Content*, 2012 N.J. Super. Unpub. LEXIS 59, 17 (App. Div. Jan. 11, 2012) (alleged affirmative acts CFA violation was not a violation because it was "of no consequence").

The jury must be informed about the full consequences of its verdict. As the New Jersey Supreme Court stated: "**We simply see no compelling policy reason to justify shielding jurors from the consequences of their own actions in the jury box. To the contrary, we have always emphasized that juries must understand the import of their findings.**" *Wanetick*, *supra*, 163 N.J. at 494-95.

VI.

WITNESSES INTENDED TO BE CALLED.

The following is a list of witnesses Defendants intend to call at trial.

	WITNESS	DESCRIPTION	LIVE/VIDEO	EDUCATION
1.	Arthur Goldberg	Named Defendant.	Live	New Jersey
2.	Alan Downing	Named Defendant.	Live	New Jersey
3.	Elaine Berk	Co-Director of Defendant JONAH.	Live	New Jersey
4.	Thaddeus Heffner	JONAH referral counselor who worked with Sheldon Bruck.	Live	Tennessee
5.	Rich Wyler	Founder of People Can Change, which puts together the Journey into Manhood ("JIM") weekends.	Live	Virginia
6.	Dr. Joseph Berger	Defendants' Expert Witness on Plaintiffs' alleged harm.	Live	Canada

	WITNESS	DESCRIPTION	LIVE/VIDEO	LOCATION
7.	Preston Dahlgren	Mr. Dahlgren is a success story witness who knows Plaintiff Benjamin Unger and attended a JIM weekend with him. Mr. Dahlgren also knows Plaintiff Michael Ferguson. Defendant Alan Downing facilitated processes for Mr. Dahlgren during his JIM weekend, and Mr. Dahlgren also knows Defendant Arthur Goldberg. During his JIM weekend, he participated in exercises involving the use of nudity, anger transference exercises, and healthy touch. Mr. Dahlgren is currently happily married with children and involved in other groups similar to JONAH.	Live	Utah
8.	Jeffrey Bennion	Mr. Bennion is a success story witness who knows Plaintiff Michael Ferguson and exchanged emails with him. He also knows Defendant Downing, who facilitated processes for him and who staffed JIM weekends with him. Mr. Bennion participated in processes at JIM involving anger transference, including hitting pillows, and Father-Son holding. Mr. Bennion is currently happily married with children and is involved in groups similar to JONAH.	Live	Utah
9.	Jeremy Schwab	Mr. Schwab is a success story witness who worked with a JONAH referral therapist. Mr. Schwab has also worked with Defendant Downing and has staffed JIM weekends with Defendant Downing. In addition, Defendant Goldberg has been a "mentor" for him. During his JIM weekend, he participated in processes involving body imaging work, psychodrama, and Father-Son holding. He also created, and currently runs, a group similar to JONAH. Mr. Schwab formerly identified as "gay" and was actively involved in the gay rights movement. He previously lived with his male partner for almost 2 years. Mr. Schwab now identifies as heterosexual.	Live	Texas

	WITNESS	DESCRIPTION	LIVE / VIDEO	LOCATION
10.	Chandler Duncan	Mr. Duncan is a success story witness who has attended and staffed JIM weekends, attended events at JONAH's headquarters, and who has worked with both Defendants Downing and Goldberg. At JIM, Mr. Duncan participated in the gauntlet and Defendant Downing led a "healthy touch" process for him as well as a lesson regarding "core emotions." Mr. Duncan previously identified as "gay" but now identifies as "straight." Mr. Duncan, who was formerly very active in the gay rights movement, is currently happily married.	Live	Massachusetts
11.	Jeddy Stailey	Mr. Stailey is a success story witness who has attended and staffed JIM weekends and worked with Defendant Downing. Mr. Stailey was sexually abused as a child. He is now happily married.	Video	Texas
12.	Blake Smith	Mr. Smith is a success story witness who has worked with Defendant Downing, was the victim of childhood sexual abuse, attended and staffed JIM weekends, and has benefited from therapy with an unlicensed counselor. Mr. Smith has participated in processes involving nudity as well as the gauntlet. He is currently happily married.	Video	California
13.	Sean Hennigan	Mr. Hennigan is a success story witness who worked with a JONAH referral therapist and has also worked with both Defendants Downing and Goldberg. He has attended JIM and staffed 6 JIM weekends. Mr. Hennigan was previously actively involved in the gay life, but he now identifies as straight and experiences no residual same sex attraction.	Video	Arizona
14.	Jonathan Hoffman	Mr. Hoffman is a success story witness who is a former client of Defendant Alan Downing and was referred to Mr. Downing by JONAH. He is an Orthodox Jew who knows Plaintiffs Levin (attended the same JIM weekend), Unger (through participation	Video	Israel

	WITNESS	IDENTIFICATION	LIVE / VIDEO	LOCATION
		in JONAH), and Ferguson. Mr. Hoffman knows Defendant Goldberg, attended activities at JONAH's office, and staffed 9 JIM weekends. He participated in the gauntlet process and engaged in nudity processes with Defendant Downing. He is currently happily married with children.		
15.	David DeJiacomo	Mr. DeJiacomo is a success story witness and former client of JONAH who completed therapy with a JONAH referral counselor. He previously identified as "gay" for 25 years and had sex with over 1,000 men. However, he is now dating women and feels no arousals towards men. Mr. DeJiacomo knows Defendant Arthur Goldberg.	Video	Colorado

VII.

ANTICIPATED EVIDENTIARY ISSUES.

A. Prior Criminal Convictions.

The prior criminal conviction of Defendant Goldberg is irrelevant to whether he presently has the disposition of one who would engage in committing misrepresentations or unconscionable commercial practices. N.J.R.E. § 404(b) ("evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such a person acted in conformity therewith"). The history of that prior criminal conviction is relevant only to his current credibility. N.J.R.E. § 609(a) ("For the purpose of affecting the credibility of any witness, the witness's conviction of a crime . . . must be admitted"). Consequently, Plaintiffs may only introduce evidence about Mr. Goldberg's criminal conviction, and may not engage in a probing inquiry about its underlying facts. *State v. Parker*, 216 N.J. 408 (2014); *State v. Thomas*,

76 N.J. 344, 361-62 (1978) (N.J. Stat. § 2A:81-12 authorizes proof by cross-examination only of the factual components of prior conviction); *State v. Burgos*, 262 N.J. Super. 1, 5 (App. Div. 1992) ("although the factual components of the prior conviction may be inquired into, the underlying facts of the crime itself may not"); *see also Young v. James Green Mgmt., Inc.*, 327 F.3d 616, 625-26 (7th Cir. 2003) (as a general rule, impeachment of a witness with prior convictions is restricted to elicitation of the crime charged, the date, and the disposition); *United States v. Osazuwa*, 564 F.3d 1169, 1175 (9th Cir. 2009) (same). Further, Plaintiffs may be able to impeach Mr. Goldberg about the legal disbarment which followed his conviction, but they cannot use his disbarment as a means of circumventing N.J.R.E. §§ 404(b), § 609(a). *See Parker*, 216 N.J. at 421 (impermissible for "the State [to] use[] defendant's prior use of false names to impeach his credibility as a witness in a way that violates N.J.R.E. 405(a) and 608-[609].")

In addition, when a prior criminal conviction is similar to the present offense, the risk of unfairness to the Defendant through the jury using the prior conviction as evidence of disposition and not credibility, is highly increased. Consequently, courts have adopted a rule which confines the evidence admissible about such a conviction to only the degree of the crime and the date of the offense, particularly excluding the nature of the offense and any underlying facts about it. N.J.R.E. § 609(a)(2)(i); *State v. Brunson*, 132 N.J. 377 (1993). Although this "sanitization" rule is primarily a criminal one, it also applies in civil cases. *Perez v. A-1 Prop. Mgmt., L.L.C.*, 2009 N.J. Super. Unpub. LEXIS 1707, 31-33 (App. Div. June 26, 2009).

B. <u>Provision of SOCE for Minors.</u>

In 2013, New Jersey passed a statute prohibiting licensed mental health practitioners from "engag[ing] in sexual orientation change efforts with a person under 18 years of age." N.J. Stat. § 45:1-55. The Third Circuit held that the legislation was constitutional. *See King v.*

Governor of N.J., 767 F.3d 216 (3d. Cir. 2014). It is important to note that N.J. Stat. § 45:1-55 does not apply in the present case because: (1) the legislation is not retroactive; (2) Defendants are not licensed mental health practitioners; and (3) all of the Plaintiffs are adults. Therefore the jury needs to be informed that this statute simply does not apply in this case.

C. Potential Rebuttal Witnesses.

The Court recently ruled that Dr. Lalich is permitted to testify that Defendants' practices were coercive, unethical, not effective, not mainstream and potentially harmful to clients, especially those with a homosexual sexual orientation. Statement of Reasons for the Court's Order Denying Defendants Motion in Limine to Preclude Certain Expert Witness Testimony, p. 25. As a result of this ruling, and depending on her actual testimony at trial, Defendants may call as a rebuttal witness one or more of their satisfied former clients who are now openly gay men.

VIII.

CONCLUSION.

In sum, Plaintiffs cannot meet their burden of proof on any of the elements of a Consumer Fraud Act claim and, even if they could, Defendants' affirmative defenses should shield them from liability under the unique factual circumstances of this case.

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Dated: May 1, 2015 By: Michael P. Laffey, Esq.
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