

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

Plaintiffs,

v.

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

Defendants.

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY, LAW DIVISION

Docket No. L-5473-12

CIVIL ACTION

JURY INSTRUCTIONS

1.12(A) We have now reached that portion of the trial in which it is my function and duty to explain to you, hopefully in understandable language, the principles of law governing this case. You are required to accept my instruction as the law. You should consider these instructions as a whole, and do not pick out any particular instruction and place undue emphasis upon it. Any ideas you have of what the law is or what the law should be or any statements by the attorneys as to what the law may be, must be disregarded by you, if they are in conflict with my charge.

1.12(B) In a trial such as this, the function of the court is to instruct the jury with respect to the principles of law governing the case, and you the jury are required to accept and be controlled by the law as I now state it to you.

1.12(D) On the other hand however, you are the sole judges of the facts of the case. You alone have the responsibility of deciding the factual issues in this case. It is your recollection and evaluation of the evidence that controls. You alone decide the weight of the testimony, you alone decide the inferences to be drawn from the testimony, you alone decide the credibility of the witnesses, and you alone must make the ultimate conclusions necessary based upon all of the facts of the case.

1.12(C) The lawyers are here as advocates for their clients. In their opening statements and in their summation, they have given you their views of the evidence and their arguments in favor of their client's position. While you may consider their comments, nothing that the attorneys say is evidence and their comments are not binding upon you.

1.12(E) Even though it is proper for me to comment on the evidence or parts of the evidence during these instructions to you, I am going to try to avoid doing that now except if necessary for the purpose of illustration or example. However, you should understand that, if I have already in any way commented on the evidence during the course of the trial, or if I should do so now, any such comments by me as to the facts or evidence are not binding on you in any sense, because it is your exclusive function, not mine, to decide and determine the actual facts of the case. Also, understand that even if I did or were to comment on the facts or evidence, the best I could do would be to relate my recollection

of the testimony or evidence, and then my recollection should only be accepted by you if it coincides with your own individual and collective recollection. Otherwise, even my recollection of the testimony or evidence should be disregarded and you should then rely on your own remembrance of the testimony and evidence.

Now, during the trial, certain motions and/or objections have been made by counsel. I have ruled on these motions and/or objections, and you are bound by the rulings I made and the instructions that I gave, if any, and, if I excluded evidence or told you to disregard something, then that particular item of offered proof must not play any part in your deliberations. However, the actions taken by me with regard to these motions and/or objections should not be taken by you, in any way, as an indication of how I feel this case should be decided. As I indicated to you at the beginning of the trial, I care absolutely nothing about how this case is decided by you, except that it be decided by you fairly and impartially, only in accordance with the evidence I have permitted to be presented to you, and in accordance with these instructions as to the applicable law.

Also, I specifically instruct you that the fact that I may have seen fit in some instances to direct questions to certain of the witnesses in the case must not influence you, in any way, in your deliberations. The fact that I may have seen fit to direct such questions does not indicate any

opinion of mine, one way or the other, as to the testimony given by such witness. Understand clearly that the credit and belief to be given to the testimony of each witness must be determined by you and you alone.

Finally, any remarks by me to counsel, or by counsel to me, or any remarks between counsel themselves; those remarks are not evidence and should not affect or play any part in your deliberations.

The evidence in this case consists of:

- (1) The testimony that you have heard from the witnesses;
- (2) The exhibits that have been marked into evidence;
- (3) The deposition testimony that was played or read into the record;
- (4) The stipulations that were placed on the record. As you recall, the stipulations are facts that the parties agree are true. Therefore, you can accept all stipulations as true in your deliberations.

Any testimony that I have stricken from the record is not evidence and should not be considered by you in your deliberations. This means that even though you may remember the testimony, you are not to use it in your discussions or deliberations.

Further, if I gave a limiting instruction as to how to use certain evidence, that evidence must be considered by you for that purpose only. You cannot use it for any other purpose.

Specifically, you have heard evidence that Defendant Arthur Goldberg has previously been convicted of fraud. This evidence may only be used in determining the credibility or believability of his testimony. You may not conclude that he violated the Consumer Fraud Act in this case, or that he is more likely to have violated the Consumer Fraud Act, simply because he committed fraud on another occasion.

A jury has a right to consider whether a person who has previously failed to comply with society's rules as demonstrated through a criminal conviction would be more likely to ignore the oath requiring truthfulness on the witness stand than a person who has never been convicted of any crime. You may consider in determining this issue the nature and degree of the prior criminal conviction and when it occurred.

Our law permits a conviction to be received in evidence only for the purpose of affecting the credibility of the defendant and for no other purpose. You are not, however, obligated to change your opinion as to the credibility of the defendant simply because of his prior fraud conviction. You may consider such evidence along with all the other factors I will discuss later in determining the credibility of Arthur Goldberg.

1.12(F) Now, as it pertains to this particular case, the Plaintiffs contend that the Defendants violated the New Jersey Consumer Fraud Act in two ways: first, by making misrepresentations in connection with the sale,

advertisement, or the subsequent performance of the JONAH Program which includes all the representations and services and activities provided or recommended by the Defendants that Plaintiffs sometimes have called “conversion therapy,” and Defendants sometimes have called “gender affirming processes” or “reparative therapy;” and second, by engaging in unconscionable commercial practices in connection with the sale, advertisement, or the subsequent performance of the JONAH Program.

Specifically, the Plaintiffs contend that the Defendants made the following misrepresentations:

- (1) the Defendants misrepresented and falsely described homosexuality not as being normal but as being a mental illness, disease, disorder, or equivalent thereof;
- (2) the Defendants misrepresented that the JONAH Program is capable of effectively healing or treating the mental illness, disease, disorder, or equivalent thereof of homosexuality;
- (3) the Defendants misrepresented that the JONAH Program is scientifically based;
- (4) the Defendants misrepresented the JONAH Program by using specific “success” statistics in advertising or selling the

JONAH Program when there is no factual basis for calculating such statistics;

- (5) the Defendants misrepresented that the JONAH Program would change a person from gay to straight within some specified timeframe, for example between two and five years; and
- (6) the Defendants misrepresented that the JONAH Program is capable of changing clients from gay to straight, in that clients would no longer experience homosexual desire (no longer be gay), but instead would experience heterosexual desire (be straight).

Second, the Plaintiffs contend that the Defendants violated the New Jersey Consumer Fraud Act because the JONAH Program is an unconscionable commercial practice. The Plaintiffs contend that the Defendants' conduct in advertising, selling, or performing the JONAH Program is basically unfair or unjust and materially depart from standards of good faith, honesty in fact and fair dealing in the public marketplace and that the Defendants were dishonest in making factual statements and did not deal fairly with the Plaintiffs. The Plaintiffs contend that the Defendants' unconscionable commercial practice harmed the Plaintiffs.

Plaintiffs further contend that, as a result of the Defendants' misrepresentations, they purchased and participated in the JONAH

Program. Plaintiffs also contend that as a result of the Defendants' misrepresentations or unconscionable commercial practice, Plaintiffs Bella Levin, Chaim Levin, Jo Bruck, and Michael Ferguson suffered an ascertainable loss in the form of the amount of money they paid for the JONAH Program and Plaintiff Benjamin Unger suffered an ascertainable loss in the form of the amount of money he paid for treatment and counseling to address the harm caused by the JONAH Program after he received services from the Defendants.

The Defendants contend that they made no misrepresentations or engaged in any unconscionable commercial practices.

With respect to the alleged misrepresentation of homosexuality as a disorder (but no other alleged misrepresentation), Defendants contend that each time they referred to homosexuality as a "disorder," they described homosexuality as disordered from a religious perspective and not as a mental illness, disease, disorder or equivalent thereof.

1.12(G) The burden of proof is on the Plaintiffs to establish their claim by a preponderance of the evidence. In other words, if a person makes an allegation then that person must prove the allegation. The person making the claim also has the burden of proof with proximate causation between the misrepresentation or unconscionable commercial practice, if found by the jury, and the harm complained of for which damages are sought.

In this action, the Plaintiffs have the burden of establishing by a preponderance of the evidence all of the facts necessary to prove that the Defendants made any of the alleged misrepresentations of fact or engaged in unconscionable commercial practices in advertising, selling, or performing the JONAH Program; that as a result of Defendants' misrepresentations or unconscionable commercial practices Plaintiffs purchased and participated in the JONAH Program. Plaintiffs also have the burden of showing that, for Plaintiffs Bella Levin, Chaim Levin, Jo Bruck, and Michael Ferguson, they suffered an ascertainable loss in the form of the amount of money they paid for the JONAH Program and for Plaintiff Benjamin Unger, he suffered an ascertainable loss in the form of the amount of money he paid for treatment and counseling to address the harm caused by the JONAH Program after he received services from the Defendants.

So that you better understand what I have just told you, let me define or explain some of the terms or legal principles which I have just instructed you must be applied in your deliberations and in reaching your ultimate verdict.

“***Proof***,” very simply, is all of the evidence before you the jury, regardless of which party presented it, which is relevant to the facts that are in dispute and which tends to prove the existence or non-existence of such facts.

“Burden of Proof” is the obligation of a party to come forward with sufficient facts so as to prove the claim or claims being made by what we call the greater weight or preponderance of the believable or credible evidence. To put it simply, I mean that, in order to prevail or win the case on a particular issue in dispute, you must determine whether or not the plaintiff, who has made the claim of wrongdoing against the defendant, has tipped the balance of “proof” in his or her favor.

1.12(I) What do I mean by tipping the balance, by proving the claim by the preponderance or greater weight of the believable or credible evidence? (**SCALES OF JUSTICE EXAMPLE**).

Remember that, unless I specifically tell you otherwise, the party who has the burden of proof, the burden of tipping the scale to its side of the balance, is the plaintiff, the person making the claim or claims, the person bringing the lawsuit. As I have just indicated to you in the example of the scales, it would follow that, if the evidence is in equal balance, on a particular issue in dispute, then the party having the burden of proof on that issue would not have sustained the burden and the claim would fail.

Also, bear in mind that the right of the person against whom a claim is made to have the person asserting the claim meet this required burden of proof is a substantial right and is not merely a matter of form.

The law does not allow the party having the burden of proof to meet this burden by evidence that is based on a “possibility,” nor does the law require that the party having this burden of proof meet the burden by evidence that is absolutely certain. Rather, the law requires that the party having the burden of proof meet this burden by evidence based on a reasonable degree of “probability” as to what did occur, in essence the middle ground between “possibility” and “absolutely certain.” To sustain the burden, the evidence supporting the claim must weigh heavier and be more persuasive in your minds than the contrary evidence. It makes no difference if the heavier weight is small in amount. As long as the evidence supporting the claim weigh heavier in your minds, then the burden of proof has been satisfied and the party who has the burden is entitled to your favorable decision on that claim.

EVIDENCE

1.12(J) Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eyewitness.

Circumstantial evidence, (sometimes called inferences), consists of a chain of circumstances pointing to the existence of certain facts.

Circumstantial evidence is based upon deductions or logical conclusions that you reach from the direct evidence. (Let me give you an example of direct and circumstantial evidence. If a witness testified that he/she observed snow falling last night, that would be an example of direct

evidence. On the other hand, if a witness testified that there was no snow on the ground upon going to sleep and then when he/she arose in the morning the ground was snow covered, you could infer from these facts that it snowed during the night. That would be an example of circumstantial evidence.) You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

In this case, you have seen and heard certain evidence in the form of written and oral representations by the Defendants to persons other than the Plaintiffs in this lawsuit. If the Plaintiffs did not see or hear such representations, those representations in and of themselves cannot be the basis for a Consumer Fraud Act violation. However, that evidence is an example of circumstantial evidence that you may consider in determining whether you believe the direct testimony given by witnesses about what representations were made by the Defendants and in assessing the credibility or believability of the witnesses in this case.

When deciding this case, you are permitted to draw inferences from the evidence. Inferences are deductions or logical conclusions drawn from the evidence. Use logic, your collective common knowledge and your common sense when determining what inferences can be made from the evidence.

In deciding the facts of this case, you will have to decide which witnesses to believe and which witnesses not to believe. You may believe everything a witness says or only part of it or none of it. Believable or credible evidence means evidence which, in the light of reason and common sense, is worthy of your belief. In order to be worthy of belief, I would suggest to you that you should require that testimony not only be given by a credible witness, but also that what the credible witness has to say be credible in and of itself. Credible evidence is such that, in the light of the common experience of men and women such as yourself, it can be approved as “probable” in the circumstances of the case, as to what actually did or did not occur.

CREDIBILITY

1.12(L) How do you determine credibility?

Again, with due respect to your own common sense and experience, I would suggest that, in determining the weight of the credible or believable testimony, you should take into consideration matters relating to the credibility of the various witnesses. In deciding what to believe, here are some factors you may want to consider:

- (1) Does the witness have an interest in the outcome of this case?
- (2) How good and accurate is the witness’ recollection?
- (3) The witness’ ability to know what he or she was talking about?

- (4) Was there any bias or prejudice of any witness who has testified?
- (5) Were there any contradictions or changes in the witness' testimony; did the witness say one thing at one time and something different at some other time? If so, you may consider whether or not the discrepancy involves a matter of importance or whether it results from an innocent mistake or willful lie.
- (6) You may consider the demeanor of the witness. By that I mean the way the witness acted, the way the witness talked, or the way the witness reacted to certain questions.
- (7) Use your common sense when evaluating the testimony of a witness. If a witness told you something that did not make sense, you have a right to reject that testimony. On the other hand, if what the witness said seemed reasonable and logical, you have a right to accept that testimony.
- (8) Is the witness' testimony reasonable when considered in light of the other evidence that you believe?

Although not all inclusive, these are the kinds of considerations that I suggest are open to you in making your determination as to how much weight or credence or belief you are going to give to the testimony of any witness who has testified before you.

EXPERT TESTIMONY

1.13 You have heard testimony from witnesses who were called as experts. Generally, witnesses can testify only about the facts and are not permitted to give opinions. However, an exception to this rule exists in the case of an expert witness. An expert witness may give an opinion on

a matter in which the witness has some special knowledge, education, skill, experience or training. In this case you heard from Dr. Carol Bernstein, an expert in psychiatry, Dr. Janja Lalich, an expert in sociology and social psychology, Dr. Lee Beckstead, an expert in the field of psychology with an emphasis in sexual orientation, and Dr. Joseph Berger, an expert in psychiatry. An expert witness may be able to assist you in understanding the evidence in this case or in performing your duties as a fact finder. But, I want to emphasize to you, that the determination of the facts in this case rests solely with you as jurors. In examining each expert's opinion, you may consider the person's reasons for testifying, if any. You may also consider the qualifications of the individuals and the believability of the expert, including all the considerations that generally apply when you are deciding whether or not to believe a witness' testimony. The weight of the expert's opinion depends on the facts on which the expert bases his opinion. You as jurors must also decide whether the facts relied upon by the expert actually exist. Finally, you are not bound by the testimony of an expert. You may give it whatever weight you deem is appropriate. You may accept or reject all or part of an expert's opinion.

1.13(B) It is for you the jury to resolve any conflicts in the testimony of the experts using the same guidelines in determining credibility that I mentioned earlier.

1.13(C) The amount of the expert witness' fee is a matter that you may consider as possibly affecting the believability of an expert. However, there is nothing improper in the expert witness being paid a reasonable fee for his work and for his time in attending court.

CONSUMER FRAUD ACT

INTRODUCTION

4.43 Many of us have heard the Latin phrase *caveat emptor*: "let the buyer beware." That statement allows little relief to a customer. That statement does not reflect current law in New Jersey. Here, we have a more ethical approach in business dealings with one another. Therefore, each of us may rely on representations made by another in a business transaction. This approach is reflected in a statute, New Jersey's Consumer Fraud Act.

The Consumer Fraud Act makes "any unconscionable commercial practice, deception, fraud, false pretense, false promise or misrepresentation" unlawful. These are considered affirmative acts, and are the acts at issue in this trial. An "affirmative act" is something done voluntarily by a person. The act may be physical but also may be any steps taken voluntarily by a person to advance a plan or design or to accomplish a purpose.

Here, the Plaintiffs claim that JONAH, Arthur Goldberg, and Alan Downing—the Defendants—committed a consumer fraud either when they made misrepresentations or when they engaged in unconscionable commercial practices in the advertisement, sale, and performance of the JONAH Program to the Plaintiffs. The Consumer Fraud Act says that anyone who makes “any unconscionable commercial practice, deception, fraud, false pretense, false promise or misrepresentation” commits a consumer fraud.

AFFIRMATIVE ACTS

Specifically, the Defendants allegedly used, by means of an affirmative act, an unconscionable commercial practice or misrepresentation in connection with the advertising, sale, or provision of the JONAH Program.

An “unconscionable commercial practice” is an activity which is basically unfair or unjust which materially departs from standards of good faith, honesty in fact and fair dealing in the public marketplace. To be unconscionable, there must be factual dishonesty and a lack of fair dealing.

A “misrepresentation” is an untrue statement made about a fact which is important or significant to the sale/advertisement, and is communicated to another person to create the possibility that other

person will be misled. A “misrepresentation” is a statement made to deceive or mislead.

A “sale” includes transfer of ownership; rental; distribution; offer to sell, rent, or distribute; and attempt to sell, rent or distribute, either directly or indirectly.

An “advertisement” is a notice designed to attract public attention. Modes of communication include the attempt, directly or indirectly, by publication, dissemination, solicitation, endorsement, circulation or in any way to induce any person to enter or not enter into an obligation, acquire any title or interest in any merchandise, increase the consumption of any merchandise or make any loan.

It is not necessary for liability under the Act that a person actually be misled or deceived by another’s conduct. It is not necessary for any of the Plaintiffs to show that any of the Defendants intended that their conduct should deceive. What is important is that the affirmative act (that is, the misrepresentation or unconscionable commercial practice) must have had the potential to mislead or deceive when it was performed. The capacity to mislead is the prime ingredient of the alleged affirmative consumer fraud here of advertising, selling, and performing the JONAH Program by misrepresenting and falsely describing homosexuality not as being normal but as being a mental illness, disease, disorder, or equivalent thereof; misrepresenting that the

JONAH Program are capable of effectively healing or treating the mental illness, disease, disorder, or equivalent thereof of homosexuality; misrepresenting that the JONAH Program is scientifically based; misrepresenting the JONAH Program by using specific “success” statistics in advertising or selling the JONAH Program when there is no factual basis for calculating such statistics; misrepresenting that the JONAH Program would change a person from gay to straight within some specified timeframe, for example between two and five years; and misrepresenting that the JONAH Program is capable of changing clients from gay to straight. Intent is not an essential element. Consumer fraud consisting of an affirmative act does not require a showing of intent to mislead—simply the potential or capability to mislead or deceive.

DISEASE/DISORDER

In an earlier phase of this trial before you became jurors, I determined that it is a misrepresentation in violation of the Consumer Fraud Act, in advertising or selling the JONAH Program, to describe homosexuality, not as being normal, but as being a mental illness, disease, disorder, or equivalent thereof.

What this means is, if you determine that the Plaintiffs have demonstrated that any of the Defendants said that homosexuality was a mental illness, disease, disorder, or something equivalent when advertising, selling, or providing the JONAH Program to the Plaintiffs, then you must find that the Defendants have violated the Consumer Fraud Act.

This does not mean that the Defendants must have used the precise words “mental disease” or “mental illness” or “mental disorder” in describing homosexuality; rather, if you find that the Plaintiffs have shown, by a preponderance of the evidence, that the Defendants described homosexuality even as something equivalent to a mental illness, disease, or disorder, then you must find that the Defendants have violated the Consumer Fraud Act.

On the other hand, with respect to the alleged misrepresentation of homosexuality as a “disorder,” if you find that every time the Defendants described homosexuality as a “disorder,” they described homosexuality as disordered from a religious perspective and not as a mental illness, disease, disorder, or equivalent thereof, then the Defendants did not violate the Consumer Fraud Act with respect to this alleged misrepresentation.

STATISTICS

In an earlier phase of this trial before you became jurors, I determined that it is a misrepresentation in violation of the Consumer Fraud Act, in advertising or selling the JONAH Program, to include specific “success” statistics when there is no factual basis for calculating such statistics.

What this means is, if you determine that the Plaintiffs have demonstrated by a preponderance of the evidence that any of the Defendants told the Plaintiffs that the JONAH Program has a specific success rate, and if you determine that the Plaintiffs have demonstrated by the preponderance of the evidence that the Defendants that there is no factual basis for calculating such statistics, then you must find that the Defendants have violated the Consumer Fraud Act.

In addition, the price Defendants charged is only one factor in your consideration. For example, if you find that the services sold have little or no value to the Plaintiffs for the purpose for which they were persuaded to buy the services and which it appeared those services would serve, the price paid by the Plaintiffs becomes one factor relevant to weighing the wrong which the statute seeks to prevent and which it prohibits.

A consumer who has been victimized by a practice which the Consumer Fraud Act is designed to remedy is not required to seek a

refund from the offending merchant as a prerequisite to filing a lawsuit under the Consumer Fraud Act. The Defendants can be found to violate the Consumer Fraud Act regardless of whether the Plaintiffs requested a refund. Furthermore, a provision of a contract or agreement in and of itself cannot relieve the Defendants of liability or limit the Plaintiffs' potential damages under the Consumer Fraud Act.

The Consumer Fraud Act encourages private citizens to bring lawsuits against perpetrators of consumer fraud. As a result, consistent with what I previously instructed you with respect to assessing credibility, evidence regarding the motives of the Plaintiffs in bringing this case may only be considered in making your determination as to how much weight or credence or belief you are going to give to their testimony.

Using those definitions outlined earlier, you must decide whether the Plaintiffs have shown or proven to you that the Defendants used a misrepresentation or unconscionable commercial practice in connection with the advertisement, sale, or performance of the JONAH Program. If the Plaintiffs have shown that those acts took place and that they were misrepresentations or unconscionable commercial practices, you must find that the Defendants violated the Consumer Fraud Act and next decide whether that conduct brought about damage to the Plaintiffs and, if so, how much.

PROXIMATE CAUSE

6.10 If you find that the Defendants violated the Consumer Fraud Act, you must find that the Defendants' violation was a proximate cause of the Plaintiffs' damages before you can find that the Defendants were responsible for the Plaintiffs' ascertainable loss in the form of (a) the amount of money they paid for the JONAH Program or (b) with respect to Plaintiff Benjy Unger, money he paid for treatment and counseling to address the harm caused by the JONAH Program after the Plaintiffs received services from the Defendants. It is the duty of the Plaintiffs to establish, by the preponderance of evidence, that the Defendants' actions were a proximate cause of the ascertainable loss alleged to have resulted from the Defendants' misrepresentations and/or unconscionable commercial practices in violation of the Consumer Fraud Act.

The basic question for you to resolve is whether the Plaintiffs' injuries are so connected with the actions of the Defendants that you decide it is reasonable, in accordance with the instructions I will now give you, that the Defendants should be held responsible for those ascertainable losses.

GENERAL STATEMENT ON DAMAGES

1.12(O) I shall now instruct you on the law governing damages in the event you decide the liability issue in favor of the Plaintiffs.

The fact that I instruct you on damages should not be considered as suggesting any view of mine about which party is entitled to prevail in

this case. Instructions on damages are given for your guidance in the event you find that the Plaintiffs are entitled to a verdict. I am required to provide instructions on damages in all cases where the trial includes a claim for damages.

The Plaintiffs have the burden of establishing by a preponderance of the evidence each item of damages that he or she claims. The plaintiff must also prove that the damages were the natural and probable consequences of the defendants' misrepresentations or unconscionable commercial practices. The misrepresentations or unconscionable commercial practices must have been a proximate cause of the damages. Damages may not be based on conjecture or speculation.

The Plaintiffs claim that they lost money as a result of the Defendants' conduct. If you decide from the evidence in this case that JONAH, Arthur Goldberg, or Alan Downing violated the Consumer Fraud Act, you have decided that they have committed an unlawful practice. If so, the Plaintiffs are allowed to receive an award of money for their loss proximately caused by the Defendants.

To establish damages, or ascertainable loss as they are referred to under the Consumer Fraud Act, the Plaintiffs must prove by a preponderance of the evidence that they suffered an actual, ascertainable loss of money or property. Oral testimony can be sufficient to establish such an ascertainable loss. The ascertainable loss must be quantifiable or

measurable, not hypothetical or illusory. An estimate of damages, calculated within a reasonable degree of certainty will suffice to demonstrate an ascertainable loss. Ascertainable loss does not include noneconomic damages for pain and suffering or emotional distress, and such damages are not recoverable in an action brought under the Consumer Fraud Act. With respect to the claim by Plaintiff Benjy Unger, ascertainable loss may include the cost of mental health treatment received to repair harm done by the JONAH Program.

If you find that the Consumer Fraud Act was violated and you award damages, the law requires me to triple whatever amount of damages you award. The tripling of your award is meant to punish the Defendants for committing fraud. In addition, if you find that the Defendants have violated the Consumer Fraud Act, the law also requires me to compel the Defendants to pay whatever reasonable attorney fees the Plaintiffs incurred in this case. I will determine at a later time what that amount of attorney fees is. These are functions which the court, not the jury, will perform.

NO PREJUDICE, PASSION BIAS OR SYMPATHY

1.12(P) Your oath as jurors requires you to decide this case fairly and impartially, without sympathy, passion, bias or prejudice. You are to decide this case based solely upon the evidence that you find believable and in accordance with the rules of law that I give you.

Sympathy is an emotion which is normal for human beings. No one can be critical of you for feeling some degree of sympathy in this matter.

However, that sympathy must play no part in your thinking and in the decision you reach in the jury room.

Similarly, your decision must not be based upon bias or prejudice which you might have developed during the trial, for or against any party.

Your duty is to decide this case impartially and a decision based on sympathy, passion, bias or prejudice would violate that duty.

DELIBERATIONS

1.12(Q) You are not advocates for either party. You are judges of the facts. Your sole interest is to determine the truth from the evidence in the case.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without compromising your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with the other jurors.

VERDICT

1.12(S) Since this is a civil case, any verdict of 6-1 or 7-0 is a legal verdict. Therefore, it is not necessary that all seven jurors agree on each question. An agreement of any six jurors is sufficient. All seven jurors must deliberate fully and fairly on each and every question, and all seven jurors must determine and vote upon each question. It is not necessary that the same six jurors agree upon the answers to all questions.

Whenever at least six jurors have agreed to any answer, that question has been decided and you may move on to consider the remaining questions in the case if it is appropriate to do so. All seven jurors must participate fully in deliberating on the remaining questions. A juror who has been outvoted on any question shall continue to deliberate with the other jurors fairly, impartially, honestly and conscientiously to decide the remaining questions. Each juror must consider each question with an open mind.

When at least six of you have agreed upon a verdict, knock on the jury room door. Indicate to the attendant that you have reached a verdict and say nothing more. The attendant will escort you back to the jury box so that the court may receive your verdict.

JURY VERDICT SHEET

1.12(T) I have prepared a jury verdict sheet which I believe should make your task simpler. I will be sending that sheet with you to the jury room. The sheet has questions that you must consider and answer within

the framework of the instructions that I have given you. I will now review these questions with you.

Answering the questions on this sheet will be your verdict.

COMMUNICATIONS WITH COURT

1.12(V) If during your deliberations you wish to communicate with the court, or you would like me to repeat any part of the jury instruction, please write your request or question and give the note to the attendant. I will respond as quickly as I can by having you in the courtroom on the record. I should caution you, however, that at no point until you reach your final verdict should you indicate to the attendant or anyone else what your vote has been on any question before you. That is a matter that only members of the jury should know until you have reached a verdict.

THANKING THE JURY

1.12(W) Let me take this opportunity to thank you for your service on this jury. We realize this case has interfered with your daily lives and probably caused you some inconvenience. However, our judicial system could not function without people like you willing to serve on juries. It is a job that has to be done in order that people can resolve their differences by jury trial. We are extremely grateful for the time you have spent here.