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I N D E X6/19/15PageRE: JURY CHARGE

By Mr. McCoy

7, 19, 23, 25, 28, 30

By Mr. LiMandri

15, 21, 25, 29

COURT DECISION

21, 24, 67, 77

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## Colloquy

4

1 THE COURT: Docket No. L-5473-12, Ferguson et  
2 al. v. JONAH, et al. May I have counsels' appearances,  
3 please.

4 MR. GREENBERG: Good afternoon, Your Honor.  
5 Bruce Greenberg, G-r-e-e-n-b-e-r-g, from Lite, DePalma,  
6 Greenberg in Newark, on behalf of the plaintiffs.

7 THE COURT: Good afternoon.

8 MR. MC COY: Good afternoon, Your Honor.  
9 Scott McCoy, M-c-C-o-y, from the Southern Poverty Law  
10 Center, on behalf of the plaintiffs.

11 THE COURT: Good afternoon.

12 MR. BROMLEY: Good afternoon, Your Honor.  
13 James Bromley, B-r-o-m-l-e-y, of Cleary, Gottlieb on  
14 behalf of the plaintiffs.

15 THE COURT: Good afternoon.

16 MR. KESSLER: Good afternoon, Your Honor.  
17 Thomas Kessler, K-e-s-s-l-e-r, Clearly Gottlieb, for  
18 the plaintiffs.

19 THE COURT: Good afternoon.

20 MR. LI MANDRI: Good afternoon, Your Honor.  
21 Charles LiMandri, L-I-M-a-n-d-r-I, of the Freedom of  
22 Conscience Defense Fund on behalf of the defendants.

23 THE COURT: Good afternoon.

24 MR. JONNA: Good afternoon, Your Honor. Paul  
25 Jonna, J-o-n-n-a, Freedom of Conscience Defense Fund on

1 behalf of the defendants.  
2 THE COURT: Good afternoon. Please be  
3 seated.  
4 MR. MC COY: Your Honor, do you need help  
5 setting that up?  
6 THE COURT: No. I don't think so.  
7 MR. MC COY: In order to -- our tech told me  
8 that in order for it to refresh, it should -- we should  
9 log it into the Court's WiFi system. I'm happy to do  
10 that for you.  
11 THE COURT: I think we got to see -- what  
12 happens is, I don't know why, it runs out of power.  
13 MR. MC COY: I don't know if there's a power  
14 cord.  
15 MR. LI MANDRI: Power cords are here.  
16 MR. MC COY: Yeah. I don't know if it's --  
17 THE COURT: Here we go. Now it's good.  
18 MR. MC COY: Do you have it connected to the  
19 WiFi?  
20 THE COURT: I got to connect to the Internet.  
21 Let me just bring it up. Should be able to do it this  
22 way. Here we go. Okay.  
23 MR. MC COY: It should remember the WiFi  
24 network.  
25 THE COURT: Yeah. Well, sometimes you got to

1 -- you can't always do it through utilities.  
2 Okay. All right. Contrary to what you may  
3 believe, I am not a speed reader. And I just keep  
4 getting stuff and getting stuff and getting stuff.  
5 How do you -- what do you want to start with,  
6 since I have several different items here?  
7 MR. MC COY: Your Honor, I would say that we  
8 should probably start with the jury instructions, and  
9 then do the verdict form, and then move on from there.  
10 THE COURT: Okay.  
11 MR. MC COY: And perhaps the most -- maybe  
12 the best way to start off this -- this never is to  
13 maybe talk about what we agree on from your standard  
14 jury charge.  
15 THE COURT: Okay.  
16 MR. MC COY: And I can start by representing,  
17 like, by kind of maybe just walking you through what  
18 the plaintiffs' position is on each one of the things  
19 in your standard charge.  
20 THE COURT: All right. You know what? I got  
21 to -- let me get -- that's the one thing I didn't bring  
22 out. Okay.  
23 MR. MC COY: Here. I have a copy right here,  
24 Your Honor.  
25 MR. LI MANDRI: Your Honor, I --

1 MR. MC COY: Actually, mine has a couple of  
2 reds on it, so --

3 MR. LI MANDRI: I've got four potential items  
4 that we talked about for today. And I think the jury  
5 instructions and verdict forms will take the longest,  
6 so, obviously, I'm amenable to whatever the Court  
7 thinks is best order.

8 THE COURT: All right. We'll do those first.  
9 Let me just get my standard charge. I brought all of  
10 the --

11 My cites may not be totally up to date on the  
12 left side of the standard charge.

13 MR. MC COY: Yes, Your Honor. We -- I just  
14 basically was going to go through this and --

15 THE COURT: Why don't we -- what don't --  
16 what don't we agree on in terms of --

17 MR. MC COY: Well, the first thing from the  
18 plaintiffs' perspective that we saw that is a place  
19 where we would have an issue was in -- well, first in --  
20 -- on Page 3, you have "The evidence of this case  
21 consists of," and there are four items. The only thing  
22 I would note there is that to my knowledge, we have not  
23 had answers to interrogatories nor have we had  
24 stipulations or admissions. And to the extent that  
25 those have not occurred in the case, it might be

1 confusing to the jury. So we would say situationally,  
2 if those don't show up, we don't --

3 THE COURT: All right. The only -- I wrote a  
4 note on that on your revised jury instructions. The  
5 only thing I thought we did have, I thought we did have  
6 a stipulation that the check bounced.

7 MR. LI MANDRI: Correct.

8 THE COURT: My recollection is that when that  
9 came to the forefront --

10 MR. MC COY: We --

11 MR. KESSLER: We did, Your Honor.

12 MR. MC COY: We don't know.

13 THE COURT: You did stipulate that the check  
14 bounced because I, in fact --

15 MR. MC COY: We didn't know that the check  
16 bounced. Chaim Levin didn't --

17 THE COURT: No. But when we -- after the  
18 evidence when Mr. LiMandri kept going into it --

19 MR. MC COY: Oh, if they had a document that  
20 showed that it bounced, we don't dispute that.

21 THE COURT: And he was -- and counsel was  
22 going to continue to question --

23 MR. MC COY: That's right.

24 THE COURT: -- and I said, wait a minute, I  
25 thought this was --

1 MR. MC COY: Oh, okay.  
2 THE COURT: -- stipulated to. And then I  
3 thought the plaintiffs stipulated that it bounced.  
4 MR. MC COY: I understand. Okay. Yes,  
5 that's fine, Your Honor. We don't dispute that the  
6 check bounced.  
7 THE COURT: That was the only stipulation.  
8 But you're right. I mean, as far as the others, I  
9 don't recall any requests for admissions. And you're  
10 right, I have not -- there have not been any. But to  
11 whatever extent when the case ends --  
12 MR. MC COY: Right.  
13 THE COURT: -- we can just take that out. I  
14 agree.  
15 MR. MC COY: Yeah, I just wanted us to be  
16 conscious that if -- that may happen.  
17 THE COURT: I agree.  
18 MR. MC COY: And if it does, we'll deal with  
19 it.  
20 THE COURT: Okay.  
21 MR. MC COY: On that same page, there's a  
22 portion with a line or the paragraph where it starts,  
23 "Further, if I gave a limiting instruction."  
24 THE COURT: I haven't done that yet.  
25 MR. MC COY: Well --

1 THE COURT: I might. I don't --  
2 MR. MC COY: -- the criminal conviction was  
3 the one that I was thinking of as the one limiting  
4 instruction that you've given. And I think the case  
5 law suggests that you give that instruction before the  
6 evidence is introduced, and then you give that --  
7 there's a final instruction that you give.  
8 THE COURT: You gave me a -- okay.  
9 MR. MC COY: So I gave that to you.  
10 THE COURT: All right.  
11 MR. MC COY: Or the plaintiffs gave that to  
12 you. So I was just thinking that that might be a place  
13 to plug that in since you talk about limiting  
14 instructions.  
15 THE COURT: Putting in the instruction about  
16 the conviction?  
17 MR. MC COY: Yeah.  
18 MR. LI MANDRI: No objection.  
19 THE COURT: Okay.  
20 MR. MC COY: The next paragraph which is now  
21 listed here as --  
22 THE COURT: Well, that's -- yeah, that's --  
23 that was just --  
24 MR. MC COY: That -- so that one, I know, is  
25 about the -- this other case. But I think 1.12F and G

1 are places where both parties have proposed competing  
2 options.

3 THE COURT: Yeah. Let's start there.

4 MR. MC COY: Okay.

5 THE COURT: Let's talk about that. Because I  
6 have, which I guess was the most recent submission, is  
7 the revised ones with blue on them? Your most recent  
8 ones are the ones that now have the blue? You have  
9 blue print?

10 MR. MC COY: I'm sorry. My eyes are just  
11 bad, Your Honor.

12 THE COURT: Your changes are in blue, blue  
13 line?

14 MR. MC COY: Yes.

15 THE COURT: This is the most recent one?

16 MR. MC COY: That should be -- I'm just  
17 looking at the cover, the cover. Yeah. So that one  
18 shows the changes from what we submitted originally --

19 THE COURT: Right. This is --

20 MR. MC COY: -- on 5/22.

21 THE COURT: This is the most recent one.

22 MR. MC COY: Correct.

23 THE COURT: You guys give me too many copies.  
24 But that's okay.

25 MR. MC COY: I gave you the black --

1 THE COURT: I'm just saying--

2 MR. MC COY: -- line so you could see the  
3 exact changes. Because I knew that that would be  
4 difficult.

5 THE COURT: So I wanted to talk about --  
6 that's one of the objections. And I want to talk about  
7 the -- I guess where we're at, the section where we are  
8 is the contentions of the parties.

9 MR. MC COY: Correct. That's 1.12G, I  
10 believe.

11 THE COURT: Okay. So --

12 MR. MC COY: No. F.

13 MR. LI MANDRI: F.

14 THE COURT: F. So the problem we have, my  
15 concern is -- looking at your revised charge. All  
16 right. I think that what you have on -- I don't have a  
17 problem with -- I'll tell you my position and then  
18 we'll -- I'll allow the defendants to chime in.

19 I don't have a problem with what you have on  
20 Page 13.

21 MR. MC COY: Starting on 12?

22 THE COURT: Yeah.

23 MR. MC COY: To where?

24 THE COURT: I don't have a problem with 12,  
25 or contentions of the parties, the plaintiffs contend.

1 I don't have a problem with 13.

2 And where I begin to have some issues is when  
3 we start on 14, I don't think it's -- I understand  
4 contentions. But I think we're getting into a little  
5 far once we get past Number 6 --

6 MR. MC COY: Yes, sir?

7 THE COURT: I understand that you're  
8 contending that the defendants violated the New Jersey  
9 Consumer Fraud Act because the program is an  
10 unconscionable commercial practice. I understand that  
11 that is a separate contention from making  
12 misrepresentations.

13 MR. MC COY: Right.

14 THE COURT: But I'm concerned now how much  
15 more we're putting in there. This is almost like what  
16 you're going to say in your summation or what I may  
17 tell them in their charge. And now they have that much  
18 in the -- in contentions, I think begins to drift away  
19 --

20 MR. MC COY: Okay.

21 THE COURT: And begins to make arguments that  
22 I don't know if we -- I don't know if we really need to  
23 say all of that.

24 MR. MC COY: Well, Your Honor, so if the  
25 sentence ended -- the first sentence ended at

1 "practice" and a period was put in, and from "because"  
2 to the end of the sentence were taken out, would that  
3 --

4 THE COURT: Yeah, because I just think --

5 MR. MC COY: -- make you feel better?

6 THE COURT: I think you're getting too -- you  
7 know, you're getting a little too fact specific and I  
8 think you're touching on the areas where defendant has  
9 raised some objections to in terms of these are  
10 contentions.

11 MR. MC COY: Okay. Well, Your Honor, I think  
12 -- I think we could lose that.

13 THE COURT: And normally when I do the  
14 contentions, we just give a general outline.

15 MR. MC COY: Right. I understand. And I  
16 understand that that seems a little too far. I think  
17 the rest of it, thought, tracks fairly closely with  
18 what the definition of unconscionable practice is in  
19 the charge.

20 THE COURT: When you get down to that the  
21 defendants advertising, selling, or performing?

22 MR. MC COY: Right. "Is unfair, unjust, or  
23 materially departs from the standards of good faith and  
24 honesty."

25 THE COURT: Yeah.

1 MR. MC COY: That's from the -- that's from  
2 the definition.

3 THE COURT: Right. But I think that in  
4 between there, I don't think you need that. I think  
5 you can put a period --

6 MR. MC COY: That's fine, Your Honor.

7 THE COURT: -- after practice.

8 MR. MC COY: We agree that would be  
9 appropriate to delete.

10 THE COURT: What's the defendants' position  
11 with the revised G?

12 MR. LI MANDRI: Well, I had some, you know,  
13 comments even before we got to the unconscionability  
14 provisions, Your Honor.

15 THE COURT: Okay.

16 MR. LI MANDRI: With regard to the use of the  
17 term -- I understand we have to have, of course,  
18 misrepresentation and unconscionable practice. I'm not  
19 sure about the appropriateness of putting in the  
20 definition of misrepresentations and subsequent  
21 performance.

22 I understand that's in the CFA, but the only  
23 case on point we found talking about it was repairing  
24 some type of boat engine or something. And it really  
25 sounds to me like that's more of a negligence issue, if

1 they're going to start talking about how my clients  
2 performed certain practices.

3 THE COURT: All right. What are we talking  
4 about?

5 MR. LI MANDRI: Well, it shows up repeatedly,  
6 but on Page 12, the last line. They talk about --

7 THE COURT: By making misrepresentations.

8 MR. LI MANDRI: In connection with the sell  
9 advertisement, which is fine. And then it goes, "or  
10 the subsequent performance." And, again, it strikes me  
11 that we start to talking about how you perform on a  
12 particular service, it's really something different.  
13 You're talking about conduct now, as opposed to the  
14 misrepresentation itself. I don't --

15 MR. MC COY: Your Honor, the CFA uses the  
16 language, so --

17 THE COURT: Wait, wait. Let him finish.

18 MR. MC COY: Oh, I'm sorry. I thought you  
19 were finished.

20 MR. LI MANDRI: And we haven't found any  
21 legal authority to approximate that in a case like  
22 this, that's supposedly based upon verbal  
23 misrepresentations as opposed to something like the  
24 repair of a product or something like that.

25 THE COURT: But one of the issues in the

1 case, at least from the testimony, if they believe the  
2 testimony, is some of the allegations plaintiff are  
3 making arose out of the performance, if you will, of  
4 the program. There are allegations of what occurred  
5 with Mr. Downing, there are allegations of what  
6 occurred in the weekends. That -- isn't that the  
7 performance?

8 MR. LI MANDRI: Sure. But I think that falls  
9 within the misrepresentation. Either the program works  
10 or it doesn't. I don't think you need to start  
11 focusing on specific acts, as again, you're getting  
12 into a standard of care practice situation.

13 THE COURT: Yeah. But if you take out, all  
14 you then have is misrepresentations in connection with  
15 the sale and advertisement.

16 MR. LI MANDRI: And I think it still applies.  
17 I mean, if the --

18 THE COURT: Yeah, but if you make  
19 misrepresentations during the performance, which is a  
20 lot of the allegations in the case. The allegations in  
21 the case, I mean, they're talking about being naked in  
22 front of a mirror with Mr. Downing. That's not a sale  
23 or advertisement. That's the performance of the  
24 program. Or that's Mr. Downing's actions.

25 MR. MC COY: It also goes to --

1 THE COURT: Isn't that -- isn't that a  
2 misrepresentation? If they believe that disrobing has  
3 nothing to do with psychology or science or anything  
4 else -- I'm not saying that they're going to be able to  
5 prove all of this. But there's certainly testimony  
6 that a jury could find that these misrepresentations  
7 occurred during the performance, that he's telling them  
8 this exercise will help you, this exercise will help  
9 you overcome -- you call it a same sex attraction, the  
10 argument of going gay to straight. But he's making  
11 these representations during the actual performance.  
12 How do I take that out?

13 MR. LI MANDRI: Because it's my understanding  
14 of the Consumer Fraud Act is intended to address --

15 THE COURT: That's when it's --

16 MR. LI MANDRI: -- the situation --

17 THE COURT: -- a product. These are  
18 services.

19 MR. LI MANDRI: I understand. But it's still  
20 in the sale or advertisement of the services.

21 THE COURT: It's not --

22 MR. LI MANDRI: Not anything that you might  
23 say anywhere along the line in a relationship with a  
24 potential client or customer after you've consummated a  
25 service. If that's the case, it's no longer a consumer

1 fraud case dealing with trying to stop people from  
2 false advertising. Now you're talking about a  
3 negligent misrepresentation situation where you can  
4 make a statement anywhere in the terms of the  
5 relationship that may go on for two or three years.

6 I don't believe that's what the Consumer  
7 Fraud statute is intended to address here. It's just  
8 an advertising. It's an inducement to enter into a  
9 commercial transaction, not the performance of the  
10 commercial transaction, on what could be a multi-year  
11 contract.

12 MR. MC COY: Your Honor, I think the ultimate  
13 controlling authority on the subject should be the CFA  
14 itself. And I'm going to hand you, if I may, Cox,  
15 which quotes the CFA, and uses the term "subsequent  
16 performance after sale and advertisement" --

17 MR. LI MANDRI: It's my understanding that --

18 MR. MC COY: -- itself. In addition to that,  
19 I was looking through one of the cases the defendants  
20 had found to support one of their new jury  
21 instructions, and I came across a case, Weiss v. First,  
22 now this is the Third Circuit, but it said that the CFA  
23 covers fraud both in the initial sale where the seller  
24 never intends to pay, or fraud in the subsequent  
25 performance. And I think they're drawing on just the

1 plain language of the statute.

2 THE COURT: See, I think the difficulty --  
3 and, Counsel, I agree with you that it sounds --  
4 there's some overlap. But in this case, they're not  
5 arguing that Downing deviated from a certain standard  
6 of care in a sense that it's a negligence action. What  
7 they're saying is he continued during his performance  
8 to continue to make these misrepresentations. And I  
9 know it sounds somewhat convoluted, but the statute  
10 uses the words "or with the subsequent performance."  
11 And in this case, there are allegations that he  
12 continued to reinforce these techniques, telling them  
13 this is going to work.

14 MR. LI MANDRI: I'm sure that what they  
15 intend is if you're continuing to make sales pitches,  
16 and not in the course of a treatment situation. Any  
17 representation that you make, all of the sudden now  
18 harkens back to the original advertisement or sale.  
19 That can't possibly be what they mean or else the  
20 Consumer Fraud Act will swallow up the entire law of  
21 fraud or negligent misrepresentation.

22 THE COURT: No, I have to disagree with that.  
23 I think when they're talking about the subsequent  
24 performance, and in this case, the jury could conclude  
25 from the testimony that the statements made by Downing

1 and others during counseling sessions continue to make  
2 misrepresentations about whether this was  
3 scientifically based, whether this was religious,  
4 whether this was psycho-educational, and I think I'm  
5 going to -- I understand. Your objection is noted.  
6 But I think the language will say.

7 MR. LI MANDRI: All right, Your Honor. Thank  
8 you. Can I move on to my next area of concern? Is  
9 with the first proffer. It seems to me there's been, I  
10 think, different ways of saying this that I have seen  
11 even in the -- most recently, in the opening statement.

12 And what I understood of Your Honor's ruling  
13 is that my clients should not be making medical  
14 statements, something you'd find in the DSM, for  
15 example, a diagnostic opinion. That's kind of a clear  
16 enough distinction. And I get that. When they say  
17 that something is a mental disease or disorder,  
18 something that you need to be a licensed professional  
19 to diagnose, it would be found in the DSM, that's clear  
20 enough.

21 Once you start loading it up with things that  
22 are found in maybe an official APA statement, but not a  
23 DSM designation, like a normal variant of human  
24 sexuality, that becomes awful murky when you're talking  
25 about someone's religious beliefs being expressed.

1 So that's why I thought it would be cleaner  
2 and better and simpler to call it, any representations  
3 the defendants made or misrepresentation with regard to  
4 homosexuality being a mental disease or mental  
5 disorder, mental defect, but once you start talking  
6 about what's a normal variant, normal really is by --  
7 I'm not trying to reargue the summary judgment. I'm  
8 trying to get a clear, crisp proffer here.

9 And I really think, as the Court indicated on  
10 the transcript when we argued this, it should be mental  
11 illness, mental disease, mental disorder, or equivalent  
12 thereof. Because every time they have disorder by  
13 itself, obviously, now we're going to run into, well,  
14 see, they used the word disorder. And it's not any use  
15 of the word disorder. It is, as the Court has made  
16 clear, a mental disorder.

17 And then when you get into or equivalent  
18 thereof. Well, what does that -- what does that mean?  
19 Again, it makes it sound like anytime my clients talked  
20 about conduct as disordered or unnatural, even in a  
21 religious context, all of the sudden now they're going  
22 to fall potentially within this proffer, which I really  
23 believe should be limited to something that is clearly  
24 identified as something that would be a diagnostic type  
25 of statement relating to something like the DSM.

1                   Because they took it out of the DSM in '73.  
2 I get that. And my clients can't put it back in. But  
3 talking about what's normal or what's natural is too  
4 murky and too easily treads on my clients' religious  
5 liberty rights.

6                   So I prefer they leave it mental disease,  
7 mental disorder, mental illness type of statement.

8                   MR. MC COY: Your Honor, if I may hand you --  
9 this is your order on summary judgment. And we took  
10 that language from your order on summary judgment.

11                   MR. LI MANDRI: I understand. But now we're  
12 instructing a jury.

13                   MR. MC COY: And the order on summary  
14 judgment is the law. And so if our contention matches  
15 the law, I don't see that we're doing anything  
16 argumentative. We're just simply saying that we  
17 contend that they described it as Your Honor has said  
18 in his order, and if they did do that, then they have  
19 violated the CFA.

20                   MR. LI MANDRI: Well, you're the law, to be  
21 sure. But this is not an appellate court making the  
22 statement. We're now instructing a jury. The Court  
23 and counsel understood that. But now we have to be  
24 cognizant of how a jury is going to look at it. And  
25 I'm trying to avoid having an appellate court look at

1                   it. Because we're going to have something we're  
2 instructing lay people with that they will not be able  
3 to parse out. And that's my concern, Your Honor. And  
4 this would be the time to do it.

5                   MR. MC COY: And you'll also see, as to  
6 Number Four, that's also from your order.

7                   THE COURT: I see the language in the order.  
8 What I'm going to do in Number One, Counsel, I'm  
9 satisfied that we can just simply say not as being  
10 normal. We don't need the words in parenthesis.

11                   MR. MC COY: All right, Your Honor. We can  
12 take that out.

13                   THE COURT: And I think I'm going to leave it  
14 just the way it says, "mental illness, disease,  
15 disorder, or equivalent thereof." We'll have language  
16 in the charge about religious --

17                   MR. LI MANDRI: Okay.

18                   THE COURT: I think that that is the point  
19 that was needed to be made. I recognize my order does  
20 use the terminology "a normal variation of human  
21 sexuality." But I have to be honest, and I don't mean  
22 this in any disrespectful way, after three weeks of  
23 testimony, I'm not sure what that means anymore.

24                   So I'd rather just leave it that if they  
25 represented that homosexuality was not normal, and was

1 equated to a mental illness, disease, disorder, or  
2 equivalent thereof, I think that meets the ruling that  
3 I made in the case.

4 MR. MC COY: That's fine, Your Honor. We  
5 will accept that.

6 THE COURT: All right.

7 MR. LI MANDRI: Number Two of the proffer is  
8 the same thing. Can't we use mental disorder instead  
9 of keeping using disorder?

10 THE COURT: Well, you're using the word  
11 "healing or treating the disorder of homosexuality."  
12 Is it a big deal if we put mental there? I don't think  
13 it's a big deal. I mean, it's -- what other disorder  
14 is there going to be? No one's alleging it's a  
15 physical disorder.

16 MR. LI MANDRI: My con --

17 MR. MC COY: Our concern here, Your Honor, is  
18 that if -- if Mr. LiMandri is going to get up in  
19 closing and say that mental is the magic word and if  
20 you don't see mental, then --

21 THE COURT: Well, then you can use the word,  
22 the -- then use the same words.

23 MR. MC COY: Okay.

24 THE COURT: Is capable of effectively healing  
25 or treating --

1 MR. MC COY: Mental illness, disease,  
2 disorder, or equivalent thereof?

3 THE COURT: Yeah.

4 MR. MC COY: Okay. No. That's better than  
5 the way it reads.

6 MR. MC COY: All right. We'll do that then.

7 MR. LI MANDRI: I take it --

8 THE COURT: I think it's also fairer because  
9 I think there's going to be some language, I'm not sure  
10 exactly yet, we haven't reached that stage, I think  
11 it's better to put that there because even though we're  
12 using the words healing or treating, which would imply  
13 an illness, depending on what the charge says about  
14 religious disorder, it may be better to have that in  
15 front of the word disorder because then there's going  
16 confusion. Why don't we just stay consistent and take  
17 the same phrase?

18 MR. MC COY: That's fine. We'll move that  
19 down, Your Honor.

20 MR. LI MANDRI: I agree, Your Honor. Thank  
21 you.

22 I don't have a problem with Proffer Three.

23 THE COURT: Okay.

24 MR. LI MANDRI: Proffer Four, Your Honor.  
25 Here's my -- my problem is the example. I understand

1 that's in the order. But one doesn't, in my  
2 experience, typically give examples of how one can  
3 violate the law in a jury instruction. And what we  
4 have here with the example is it makes it sound like  
5 the only way my clients can comply with the proffer is  
6 by tracking client outcomes through their records.

7 But the Court specifically stated in its  
8 opinion on the record that my clients could use  
9 anecdotal reports as well as studies that are generally  
10 known, which have been talked about in a general way.  
11 And anecdotal evidence has been talked about. And I  
12 don't know -- I mean, the defendants can argue that  
13 that's the best and should be the only way. But it's  
14 not what the Court wrote in its order when it  
15 described, it's a factual question for the jury as to  
16 whether the use of anecdotal reports or customer  
17 surveys or general knowledge is sufficient.

18 And this targets the one area where they've  
19 been fighting very hard. And I think this is kind of  
20 one of the most important issues we're going to be  
21 discussing today. Because they've been fighting very  
22 hard, as you know, to keep out anything that would  
23 suggest my clients had a means for tracking. Downing's  
24 survey, and now I thought we should probably start with  
25 the PCC survey for this reason.

1 But I think you understand my concern. Why  
2 do you need to give an example that is the one example  
3 we're going to have the hardest way of meeting that  
4 test?

5 THE COURT: Counsel.

6 MR. MC COY: Your Honor, I mean, I would say  
7 it tracks the language. And the reading from your  
8 summary judgment opinion, for the reasons stated, and  
9 the reasons (indiscernible),

10 "It does not track success rates or establish  
11 a procedure to confirm its representations of  
12 success rates, and it would be misleading to  
13 tell consumers that a specific success rate  
14 for its services exists." Then you cite the  
15 Hyland v. Aquarian case and the Gennari v. Weichert  
16 case.

17 And then you say, "As a result, it is a  
18 misrepresentation and a violation of the CFA  
19 to use specific success statistics in  
20 advertising and selling services when client  
21 outcomes are not tracked and records are not  
22 maintained."

23 That is the language of the opinion. And  
24 then you have the language of the order. And these are  
25 the plaintiffs' contentions --

1 MR. LI MANDRI: However --

2 MR. MC COY: -- which reflect accurately what  
3 your order and opinion said.

4 MR. LI MANDRI: No, you're leaving --  
5 counsel's leaving out -- the opinion specifically  
6 states: "The factual question for the jury," which a  
7 court obviously would not be ruling on summary  
8 judgment, since it's a factual question, as to whether  
9 -- and then the Court lists: "Customer reports or  
10 anecdotal evidence is a legitimate means of assessing  
11 its outcomes, in addition to success rates and  
12 statistics for SOCE therapies in general"

13 The Court lists all those. And I've got the  
14 excerpt from the Court's decision. So just to focus on  
15 the one thing they're fighting hardest to keep us from  
16 being able to present evidence on is the equivalent of  
17 a directed verdict on this issue. Because it makes it  
18 sound like out of the four ways the Court's expressed -  
19 - or three, actually, is the way the Court numbered it.  
20 That only one really matters, and the one that we have  
21 the hardest time meeting.

22 Because I have brought out anecdotal evidence  
23 through Mr. Goldberg that people who stay there two  
24 years, he generally knows who they are, and they're the  
25 ones who generally get the best results. And then I

1 brought out through Dr. Beckstead various studies and  
2 then I brought out through other evidence that referred  
3 to studies, although we could not get the lay witnesses  
4 to identify them, they did -- well, Mr. Heffner was  
5 able to talk about the very same Spitzer study that Dr.  
6 Beckstead had in his report.

7 So I have the evidence on that, but not  
8 tracking customer outcomes because, again, my client's  
9 a referral service and they're not in a position to do  
10 track. JONAH can't track customer outcomes.

11 MR. MC COY: Your Honor, the problem here is,  
12 is if you just -- if you don't give -- like, so, just  
13 saying we have a 70-percent success rate and saying, we  
14 have a factual basis for it and the factual basis is,  
15 is, you know, I flip a coin, you know, a few times to  
16 determine the --

17 THE COURT: Yeah, but --

18 MR. MC COY: -- percentage, that could be a  
19 factual basis. But the point of what makes it consumer  
20 fraud and misleading is not whether or not there is or  
21 isn't a factual basis, but whether or not there is a  
22 factual basis that actually supports the  
23 misrepresentation. And so Mr. Goldberg can say that I  
24 have a basis. But that doesn't mean that all of the  
25 sudden, him saying 70 percent is not misleading. It's

1 not misleading because they have nothing that actually  
2 substantiates the figures.

3 MR. LI MANDRI: Well, we've got Dr. Beckstead  
4 saying 50 percent. We've got Mr. Ferguson --

5 MR. MC COY: No, you don't have Dr. Beckstead  
6 saying 50 percent.

7 MR. LI MANDRI: His own --

8 THE COURT: Counsel, we're not here to argue  
9 the case.

10 MR. LI MANDRI: His own report, he found 50  
11 percent. So I'm saying --

12 THE COURT: It's what -- it's what the jury  
13 recalls him saying is what's important.

14 MR. LI MANDRI: That's correct. But Mr.  
15 Ferguson testified he saw in the PCC survey 60 to 80  
16 percent. That's in the record. So, I mean, we have  
17 percentages, regardless.

18 But to limit -- the only way my clients can  
19 prove it by this one example, it's one thing to put it  
20 in the order so counsel knows what we're talking about,  
21 but it's another thing, and it would be highly  
22 misleading to put it in a jury instruction as if it's  
23 the most important or the only way my clients could do  
24 it.

25 MR. MC COY: Well, the jury will be asked

1 whether or not anecdotal surveys are qualified as  
2 client tracking outcomes. So the reference to it is  
3 not misleading.

4 THE COURT: All right. Let's hold off on  
5 that one. Because we'll revisit that when we discuss  
6 the PCC survey.

7 Number Five.

8 MR. LI MANDRI: I don't have a problem with  
9 that, Your Honor.

10 THE COURT: And Number -- Number --

11 MR. MC COY: Well, that -- Your Honor, he  
12 doesn't have a problem with the "For example" on that  
13 one?

14 MR. LI MANDRI: Well, no, wait.

15 THE COURT: Number Six?

16 MR. LI MANDRI: Is there a "For example"?  
17 Well, that -- if you want to take out the two to five  
18 years, that's fine.

19 MR. MC COY: No. I just want you to be  
20 consistent.

21 THE COURT: Number Six.

22 MR. LI MANDRI: Now that goes against what  
23 the Court did rule. We're not required to limit the  
24 concept of change to just one of those three levels  
25 that all the experts have agreed go into what would

1 constitute a change. It can be identity, behavior, or  
2 desire. And desire is the one that's most difficult  
3 for most people to completely change. And that --

4 THE COURT: Well, I understand that. But  
5 what plaintiff is saying -- this is their contention.  
6 They are saying that you -- they have to prove that you  
7 misrepresented that. This is not the charge that I'm  
8 giving to the jury. This is their contention. They're  
9 contending that you misrepresented to them that you  
10 were capable of changing clients from gay to straight.  
11 This is their understanding. This is what the  
12 plaintiffs testified to. If the jury believes their  
13 testimony.

14 That's what the plaintiffs said. They signed  
15 this because they were told, represented to them that  
16 they would change and live a normal, healthy,  
17 heterosexual life, be married and have children.  
18 That's their contention.

19 Didn't the plaintiffs says that? You may not  
20 believe them.

21 MR. LI MANDRI: No, no.

22 THE COURT: You may disagree with them.  
23 That's what this section of the charge is. The jury's  
24 told, this is what the plaintiffs are contending. This  
25 isn't telling them what the law is.

1 MR. LI MANDRI: Yeah. What they said was  
2 consistently, as I understood it, and I believe the  
3 Court will too, that they were told they'd change from  
4 gay to straight. They're going further and picking --  
5 it said one of the three ways to do that, and focusing  
6 just on that, and that wasn't even the evidence that my  
7 clients ever focused, yeah, yeah, you're going to lose  
8 all homosexual desires.

9 They're arguing that's how they understood  
10 it. But that's again a factual question. There's no  
11 evidence my client --

12 THE COURT: Well, right. But that's their --  
13 what I'm saying is that's their contention.

14 MR. LI MANDRI: I get it.

15 THE COURT: But so why would I change what  
16 their contention is? It's not -- it's not misleading.  
17 That's what they said on the stand. That's what the  
18 mother said on the stand. Isn't that?

19 MR. LI MANDRI: If it's -- yes. If it's  
20 coming off just as a contention and not --

21 THE COURT: Well, that's --

22 MR. LI MANDRI: -- that's what my client --

23 THE COURT: Counsel, that's where we are.  
24 We're like in the very beginning of the charge.

25 MR. LI MANDRI: I get it.

1 THE COURT: And it says specifically, "The  
2 plaintiffs contend that the defendants made the  
3 following misrepresentations." I'm not telling them  
4 that that's the law. This is what they're saying the  
5 misrepresentations are.

6 MR. LI MANDRI: Understood, Your Honor.

7 THE COURT: I understand your argument about  
8 the "For example" because that is a big issue. And I'm  
9 going to think about that when we talk about the PCC  
10 survey.

11 But as far as Number Six, that is their  
12 contention. That's what they testified to.

13 MR. LI MANDRI: Okay. Then --

14 THE COURT: In fact, those are almost their  
15 exact words.

16 MR. LI MANDRI: You've satisfied me, Your  
17 Honor --

18 THE COURT: All right.

19 MR. LI MANDRI: -- that I was looking at it  
20 more as a statement of law as --

21 THE COURT: No, no. These are the --

22 MR. LI MANDRI: -- opposed to contention.

23 THE COURT: It starts off by saying, "These  
24 are plaintiffs' contentions."

25 MR. LI MANDRI: But the second major

1 contention in the paragraph the Court identified, I do  
2 believe really is argumentative in that it's --

3 THE COURT: Well, they're going to take out -  
4 - they're taking about "Because the defendants target  
5 prospective clients" down to --

6 MR. MC COY: The end of the sentence.

7 THE COURT: -- "unjustifiable price."

8 MR. MC COY: Right.

9 MR. LI MANDRI: What line is that? I'm  
10 sorry.

11 Okay. I got it.

12 THE COURT: So they're going to put a period  
13 --

14 MR. MC COY: After "practice."

15 THE COURT: -- after "commercial practice."  
16 And they're going to take out everything after  
17 "Because" down to "price."

18 MR. LI MANDRI: That's fine, Your Honor.

19 THE COURT: And then what they're contending  
20 there is pretty much taking the language right from the  
21 consumer fraud action -- act. And that these actions  
22 harmed the plaintiffs.

23 Then they go on to say that, "As a result of  
24 these misrepresentations, they purchased and  
25 participated in the program." They list the plaintiffs

1 who suffered an ascertainable loss. And then I guess  
2 this is Mr. Unger, who has the --

3 MR. MC COY: He has the special --

4 THE COURT: For the treatment. Okay.

5 MR. MC COY: -- ascertainable loss, so we  
6 separated him out.

7 THE COURT: And you're striking -- you have a  
8 line through all of that other stuff.

9 MR. MC COY: That's correct, Your Honor.  
10 Then the next sentence is the beginning of the  
11 paragraph, which we took from the defendants'  
12 contention which is that they deny they made  
13 misrepresentations or engaged in unconscionable  
14 business practices.

15 THE COURT: Is that your contentions?

16 MR. MC COY: That's part of their  
17 contentions.

18 THE COURT: What other contentions did you  
19 want to include?

20 MR. LI MANDRI: Defendants contend they made  
21 no misrepresentations or engaged in any unconscionable  
22 commercial practices.

23 THE COURT: Do you also have a contention --  
24 let me get yours out.

25 MR. LI MANDRI: Yes. That it was based on

1 religious liberty, but no we're getting into the whole  
2 question, you know, whose burden is that to prove. And  
3 I believe after we did further research, it's not the  
4 defendants' burden, it's not an affirmative defense.  
5 It's part of the plaintiffs' burden to prove that it's  
6 not within religious liberty.

7 THE COURT: No, I disagree. I read the case  
8 you gave me. I disagree with that.

9 MR. LI MANDRI: Why is --

10 THE COURT: It's not so much an affirmative  
11 defense. Your contention is that when you used the  
12 term disorder, you meant it in a religious context, not  
13 in a medical, scientific, or whatever the language you  
14 want to use. That's your contention.

15 MR. LI MANDRI: Correct. But what that goes  
16 to, Your Honor, is it's simply not consumer fraud. The  
17 plaintiffs have to show my clients committed consumer  
18 fraud.

19 THE COURT: That's what their contention is.

20 MR. MC COY: Exactly.

21 THE COURT: They're that you misrepresented  
22 homosexuality to be a mental disease, disorder, or the  
23 equivalent thereof.

24 MR. LI MANDRI: Right.

25 THE COURT: Your contention is we didn't do

1 it, and anytime we used the word disorder, it was in a  
2 religious context.

3 MR. LI MANDRI: But that's a carve-out from  
4 their burdens. I mean, it's still -- still part of  
5 their burden to show whether it was consumer fraud.  
6 This can't be consumer fraud. So what it is, is it's  
7 more of an exception to the consumer fraud rather than  
8 a separate burden that I have to prove. They have to  
9 prove that --

10 THE COURT: No.

11 MR. LI MANDRI: Because it can't be consumer  
12 fraud if it's a religious statement.

13 THE COURT: No.

14 MR. LI MANDRI: Am I making any sense?

15 THE COURT: No. Yes, but I disagree. The  
16 case you gave me that I read, the Oregon case,  
17 Christofferson v. Church of Scientology, Court of  
18 Appeals of Oregon, 58 Or. App. 203, 644 P.2nd 577  
19 (1982).

20 In looking at the free exercise clause  
21 defense, which begins to be discussed on Page 19, gives  
22 the whole highlight of the free exercise clause  
23 defense, talks about that, talks about a defense based  
24 on the free exercise clause,

25 "... presents particular difficulties in an

1 action for fraud." I note that.

2 However, on Page 20, when they get into the  
3 historical significance and the Fathers of the  
4 Constitution, when the language here that's relied upon  
5 at,

6 Man "... was granted the right to worship as  
7 he pleased and to answer to no man for the  
8 verity of his religious views. The religious  
9 views espoused by respondents might seem  
10 incredible, if not preposterous, to most  
11 people. But if those doctrines are subject  
12 to trial before a jury charged with finding  
13 their truth or falsity, then the same can be  
14 done with the religious beliefs of any sect."

15 This trial is not about whether the jury  
16 believes if homosexuality is a disorder under your  
17 religion. We are not trying your religious beliefs.

18 What this jury is going to decide is whether  
19 when you use that term, you expressed that term to the  
20 plaintiffs in the religious context. They are not  
21 going to decide whether or not your beliefs are true or  
22 not.

23 I don't think anybody's disputing, and I have  
24 not heard the plaintiffs dispute that homosexuality in  
25 the Catholic-Christian faith is a sin, and in the

1 Jewish faith is against the Torah. In fact, they took  
2 the stand and said that.

3 So the religious beliefs are not on trial.  
4 This case is not applicable. And they will not be  
5 having the burden of proving that. The jury will not  
6 determine whether the religious belief is right or  
7 wrong. In fact, without stipulating to it, the  
8 plaintiffs have already conceded through their own  
9 testimony. The Christian and Catholic people who took  
10 the stand said it was a sin. And the Jewish  
11 individuals who took the stand said it was against the  
12 Torah. The case is not applicable. It's not a  
13 religious freedom in that sense.

14 I will afford you the opportunity, if you  
15 want to make the contention, that while you deny using  
16 a medical condition or however word you want to use,  
17 the defendants contend that when they referenced  
18 homosexuality as a disorder, they referenced it in a  
19 religious context. That's what the jury will decide,  
20 whether you meant it as a mental disease or disorder,  
21 or whether you meant it as a religious disorder. Not a  
22 defense that the plaintiff has the burden of proving.

23 MR. MC COY: Your Honor, just on that point.  
24 I think the way that you just said is actually the  
25 accurate way. Because just saying it was -- saying

1 it's a disorder in a religious context, I don't think  
2 is accurate.

3 THE COURT: No, they have to --

4 MR. MC COY: What they're -- what they're  
5 arguing --

6 THE COURT: They have to contend that when  
7 the -- when -- if you find the terminology of mental  
8 disease or disorder was used, defendants contend that  
9 when it was used, it was used in the religious context  
10 and not in the -- whatever word you want --

11 MR. MC COY: Right. In other words, it's not  
12 a mental --

13 THE COURT: I'm not going to draft it.

14 MR. MC COY: It's not mentally disordered.  
15 It's religiously disordered.

16 THE COURT: Yes.

17 MR. MC COY: Right. But I also want to just  
18 make a point here. What the defendants meant is  
19 irrelevant to the CFA.

20 THE COURT: No. I --

21 MR. MC COY: Right? If they --

22 THE COURT: I used the wrong terminology.  
23 The jury --

24 MR. MC COY: I just want to make sure --

25 THE COURT: -- has to find whether or not --

1 MR. MC COY: They said it.

2 THE COURT: -- when they said or if -- first,  
3 the jury's got to determine whether they referenced it  
4 as a disease or a disorder.

5 MR. MC COY: Right.

6 THE COURT: So you have one question, which  
7 we'll have to talk about that when we get to the  
8 questions.

9 I'll allow you to argue to the jury that  
10 point. But it's your burden, not theirs. They don't  
11 have a burden.

12 MR. LI MANDRI: I understand. And I --

13 THE COURT: Well, they have a burden. They  
14 don't have the burden to prove that.

15 MR. LI MANDRI: I think I've made the  
16 argument.

17 THE COURT: Okay. The argument's made.

18 MR. LI MANDRI: I wasn't -- I just want to --

19 THE COURT: I think I gave my reasons.

20 And also just to go further, not that I need  
21 to, I think the reasons I gave are sufficient. But the  
22 other factual differences here and the holding in  
23 Christofferson, they specifically reference that the  
24 mission is incorporated as a tax exempt religious  
25 organization. JONAH's not a tax exempt religious

1 organization. They admitted on the stand that they're  
2 secular and they admitted on the stand that they don't  
3 pray away the gay.

4 MR. LI MANDRI: Just so I can be clear on  
5 that one point, Your Honor, for the record, please.  
6 What they admitted on the stand is they're a faith-  
7 based nonprofit. They don't exclusively use pray away  
8 the gay. But they are a faith-based nonprofit. And in  
9 the recent case of Burwell v. Hobby Lobby, the United  
10 States Supreme Court ruled that the religious liberty  
11 defense even applies to for-profit companies like Hobby  
12 Lobby when dealing with the issue of contraception  
13 being dispensed to employees.

14 Certainly in this context, when you have a  
15 faith-based nonprofit, which is -- has -- its whole  
16 focus based on its Torah based view of human sexuality  
17 and homosexuality, and Mr. Goldberg's book is 500  
18 pages, it is the most extensive commentary on that  
19 subject from the Jewish perspective probably ever  
20 written and is featured on the website, we believe that  
21 it first squarely within the --

22 THE COURT: But what does it fit in, Counsel?  
23 That's what I don't understand. No one's disputing  
24 that homosexuality is against the Jewish religion.  
25 That's not -- the jury's not asked that question.

1 We're not trying whether or not homosexuality is  
2 against any religious or beliefs. That's my point.  
3 That's not an issue in the case.

4 MR. LI MANDRI: I get that. Because the jury  
5 can't decide that --

6 THE COURT: Exactly. And I agree --

7 MR. LI MANDRI: -- because it is a belief,  
8 it's not a fact.

9 THE COURT: -- with you and nobody's asking  
10 them to.

11 MR. LI MANDRI: But once you start blending  
12 words like disorder used in a religious context and  
13 parsing it out a disorder used in a nonreligious  
14 context, I think that's where we have the problem.

15 THE COURT: All right. That's -- well, your  
16 objection's noted.

17 MR. LI MANDRI: Thank you.

18 THE COURT: But I don't see it. So if you  
19 want to redraft your contentions and have your  
20 adversary look at it, you can.

21 MR. LI MANDRI: I will. You know, the  
22 original one we submitted did, I think, address this.  
23 It simply stated that --

24 THE COURT: Let me see what the original one  
25 is.

1 MR. LI MANDRI: May I approach, Your Honor?

2 THE COURT: No. I have a bunch of them.

3 MR. LI MANDRI: I know. That's why it might  
4 be easier. Because we submitted this and never changed  
5 it. We did the -- may I? That was submitted  
6 (indiscernible) first required sometime in May.

7 MR. MC COY: And we filed objections to that  
8 language, Your Honor.

9 THE COURT: Yeah. That --

10 MR. LI MANDRI: We said we had the burden of  
11 proof at that time. That -- an affirmative defense.

12 THE COURT: Yeah, but see, that's too  
13 general.

14 MR. LI MANDRI: I was limited to the disorder  
15 language.

16 MR. MC COY: No. It says all their practices  
17 and statements.

18 THE COURT: Yeah.

19 MR. LI MANDRI: Is that the original?

20 MR. MC COY: Yeah.

21 MR. LI MANDRI: I have to look at it again.  
22 But I thought that that was limited --

23 THE COURT: No. It says --

24 MR. MC COY: And then "including any  
25 statements that they made." So, I mean, we've said all

1 along that, of course --  
2 THE COURT: Yeah, you can't --  
3 MR. MC COY: -- this defense would only --  
4 no, I'm not going to call it a defense.  
5 THE COURT: No, you can't do that.  
6 MR. MC COY: Only would apply to the one  
7 misrepresentation --  
8 THE COURT: That's it.  
9 MR. MC COY: -- anyway.  
10 THE COURT: The only thing it applies to is  
11 whether is -- you know, when the terminology that  
12 homosexuality was a disorder, it was used within the  
13 religious context and not -- we don't have to -- we  
14 don't have to tell them that they're protected by the  
15 free exercise clause of the First Amendment. If they  
16 answer the question, yes, that it was in the religious  
17 context, then there's no claim for that particular  
18 misrepresentation.  
19 I suggest redraft your contentions so they  
20 can look at --  
21 MR. LI MANDRI: Okay. The way --  
22 THE COURT: I don't think you need to get  
23 into that. I'm not going to get into that about the  
24 free exercise rights under the --  
25 MR. LI MANDRI: I can leave that out. But,

1 otherwise, it simply states, "The defendants contend  
2 that any statements they made that homosexuality is  
3 disordered or abnormal or any similar such statements  
4 that were made in the context of their religious  
5 beliefs are protected."  
6 MR. MC COY: No, they're not protected.  
7 MR. LI MANDRI: Well, then are --  
8 MR. MC COY: What are they protected by?  
9 MR. LI MANDRI: Are not a violation of the  
10 Consumer Fraud Act.  
11 MR. MC COY: And I don't think that's --  
12 THE COURT: I think what you have --  
13 MR. MC COY: -- correct either.  
14 THE COURT: The contention is that -- your  
15 contention is that any of those representations were  
16 made in the religious context and not in the -- you got  
17 to think of the terminology --  
18 MR. LI MANDRI: Okay.  
19 THE COURT: -- medical or psychological.  
20 MR. LI MANDRI: Fine.  
21 MR. MC COY: And again, Your Honor --  
22 THE COURT: That's your contention.  
23 MR. LI MANDRI: Yes.  
24 MR. MC COY: And the issue here is whether or  
25 not a reasonable consumer would interpret them in that

1 way.  
2 THE COURT: Well, that's why I'm saying, we  
3 got to figure out the jury question because they're the  
4 ones who have to answer that.  
5 MR. MC COY: Right.  
6 THE COURT: All right. Burden of proof.  
7 MR. LI MANDRI: I think that the biggest  
8 difference we had, if I'm on the right one here, I may  
9 not be --  
10 THE COURT: Yeah. They crossed out a lot of  
11 the language they had in their original one.  
12 MR. LI MANDRI: Okay. I know we had a  
13 discussion about whether we define substantial factor.  
14 It was whether we --  
15 MR. MC COY: No, no, no. This is burden of  
16 proof.  
17 THE COURT: No, no. We're on burden of  
18 proof.  
19 MR. LI MANDRI: Actually, yeah. That goes to  
20 causation. I'm sorry.  
21 THE COURT: But you have to have -- you took  
22 out the defendants' burden of proof.  
23 MR. MC COY: The defendants don't have a  
24 burden, Your Honor.  
25 THE COURT: Well, technically, they're the

1 ones -- their burden of proof is to prove to them that  
2 they did it in a religious context.  
3 MR. MC COY: No, Your Honor. It's not.  
4 THE COURT: You don't want to --  
5 MR. MC COY: They have -- they have no burden  
6 in this case, Your Honor.  
7 THE COURT: Okay. All right. Okay.  
8 MR. LI MANDRI: That's what I tried to say.  
9 THE COURT: All right. So you --  
10 MR. LI MANDRI: If it's religious, it's not  
11 the CFA.  
12 THE COURT: All right. So you're going --  
13 we'll leave that out. They have no burden -- you have  
14 no burden of proof.  
15 MR. LI MANDRI: Right. I --  
16 THE COURT: Okay.  
17 MR. LI MANDRI: I'm not going to add that.  
18 I'm just going to --  
19 THE COURT: All right.  
20 MR. LI MANDRI: -- argue it.  
21 THE COURT: You can argue it.  
22 MR. LI MANDRI: Right.  
23 THE COURT: All right. Do you have any  
24 problem then with the changes they made, with all of  
25 the -- with the language they took out? They took out

1 conversion therapy services and replaced it with JONAH  
2 program. I think that was one of your objections,  
3 right?

4 MR. LI MANDRI: Yeah. I'm just --

5 THE COURT: All right. Go take --

6 MR. LI MANDRI: I'm troubled if I need to  
7 have something there that, say, whether it's my burden  
8 or not, if they made it as a religious statement.

9 THE COURT: Well, that's a different area.

10 MR. LI MANDRI: Yeah.

11 THE COURT: That's not under burden of proof.  
12 He's saying you don't have a burden of proof. I  
13 wouldn't argue with that.

14 MR. LI MANDRI: Okay. I got it. I got it.

15 THE COURT: If you want to, you can.

16 MR. LI MANDRI: No, no. I got it. I got it.

17 THE COURT: All right.

18 MR. LI MANDRI: I still have to change it on  
19 the contention, but not here. Okay.

20 MR. MC COY: Your Honor, we'll take a look at  
21 what they say in terms of their contentions and then  
22 we'll decide.

23 THE COURT: Well, that's what I mean. You  
24 got to see what --

25 MR. MC COY: Right.

1 THE COURT: Okay. You may want to keep  
2 something there.

3 MR. MC COY: Right.

4 THE COURT: I don't know. You may be right.  
5 It may be other language in the charge. It may not be  
6 a burden of proof language. We'll have to see --

7 MR. MC COY: Your Honor, later in the charge,  
8 specifically with respect to disease and disorder --

9 THE COURT: We talk about that.

10 MR. MC COY: -- we have language where we say  
11 --

12 THE COURT: Okay. Well, then --

13 MR. MC COY: And maybe that's where it gets  
14 sorted out.

15 THE COURT: Maybe we'll put it in there.

16 MR. MC COY: Right.

17 MR. LI MANDRI: But this is the same language  
18 you had before. I don't --

19 MR. MC COY: Yeah. So just by way of  
20 explanation for Mr. LiMandri and the Court. So the  
21 language that appears on Page 15 under "Age Burden of  
22 Proof" was conformed with the language under the  
23 contentions.

24 THE COURT: Right.

25 MR. MC COY: So we just -- so instead of --

1 before we listed all of six misreps again.  
2 THE COURT: Right. You --  
3 MR. MC COY: And now we've collapsed it --  
4 THE COURT: Just --  
5 MR. MC COY: -- "Alleged Misrepresentations  
6 of Fact or Unconscionable Business Practices."  
7 THE COURT: Right.  
8 MR. MC COY: And then the next one is  
9 causation. And the next --  
10 THE COURT: And you took out -- no, but you -  
11 - you took out conversion therapy services and replaced  
12 it with JONAH program.  
13 MR. MC COY: Correct. Because the definition  
14 --  
15 THE COURT: Yeah. Right.  
16 MR. MC COY: -- is included above.  
17 THE COURT: Okay. All right. And then you  
18 have the -- then you -- we go back to mine.  
19 MR. MC COY: Yeah. Then, Your Honor, we go  
20 back to yours. And that -- so back to yours on Page 3,  
21 we have 1.12F and G. That's the contentions and the  
22 burden of proof. And --  
23 THE COURT: Right. Then we get to my  
24 definitions of proof.  
25 MR. MC COY: Right. And we didn't have a

1 problem with your definition of proof or burden of  
2 proof.  
3 THE COURT: Burden of proof.  
4 MR. MC COY: We didn't have any problem --  
5 THE COURT: And what I mean by tipping the  
6 scales, to give you an idea of what we do when I say  
7 that. Basically, what I will tell the jury -- I take  
8 my thing and I put it up here, and I tell them that  
9 when the trial starts, hopefully, they're there, that  
10 the scales are equal. I tell them that it's their job  
11 -- because I talk to them about proof and burden of  
12 proof, and we talk about credible evidence, what's  
13 believable or credible evidence.  
14 I usually say to the jury, you're all  
15 familiar with strainers, colanders. You've sat here  
16 for four weeks. You've heard all of the testimony.  
17 Take your make believe colander in the jury room. Put  
18 all the testimony you've heard, sift it. And only the  
19 credible evidence comes out. And you put the credible  
20 evidence on a scale. Some on one side for the  
21 plaintiff, some on one side for the defendant. They  
22 start off equally. If the scales of justice are tipped  
23 ever so slightly in the plaintiffs' favor, they  
24 recover. If the scales are tipped ever so slightly or  
25 equal or slightly on the defendants' side, then the

1 plaintiff doesn't recover.  
2 That's what it means by the scales of justice  
3 example. I don't type all of that out. That's what it  
4 is. Anybody have a problem with that?  
5 MR. MC COY: That's fine with us, Your Honor.  
6 MR. LI MANDRI: No, Your Honor.  
7 THE COURT: Okay.  
8 MR. MC COY: On Page 5, 1.12I, I think that's  
9 more of the same and we didn't have a problem with any  
10 of that.  
11 THE COURT: Yeah. I just go through --  
12 MR. MC COY: And evidence, we didn't have a  
13 problem with that either.  
14 THE COURT: Okay.  
15 MR. MC COY: Credibility. We did not have a  
16 problem with that. I think this looks very much like  
17 the model charge.  
18 THE COURT: I think it is the model charge.  
19 MR. MC COY: Yeah. And that's what we  
20 suggested as well.  
21 On expert testimony, which is 1.15A, B, C.  
22 We didn't have a problem with that either.  
23 THE COURT: The only think I would like you  
24 to do is -- I know on yours you didn't do it, but I  
25 like to list the expert and their field of expertise.

1 MR. MC COY: Okay. We can -- we can do that.  
2 THE COURT: I think I have that on there.  
3 MR. MC COY: Yeah. It's in parenthesis and  
4 --  
5 THE COURT: Yeah. So if you can just list  
6 their names and --  
7 MR. MC COY: -- we can provide you with --  
8 with what's been determined on each one of those.  
9 And then we get down to, I think, 5.10.  
10 THE COURT: Well, you can get rid of --  
11 MR. MC COY: Now this is the CFA charge.  
12 THE COURT: Yeah, that's all -- yeah, that's  
13 where we get to this -- the CFA charge. Hold on.  
14 MR. MC COY: Right. Should we start -- do  
15 that now?  
16 THE COURT: Yeah. That's what we're up to  
17 now, liability. Instead of negligence now, we're  
18 dealing with the CFA charge.  
19 MR. MC COY: Correct, Your Honor. And,  
20 again, just -- I don't know if you can see it on yours,  
21 but in the (indiscernible) black lined version, the  
22 highlighted -- not the highlighted. The bolded  
23 portions were things that were the fill-in portions of  
24 the model.  
25 THE COURT: Right. I have -- I have --

1 MR. MC COY: And the non-bolded is --  
2 THE COURT: I have the model here.  
3 MR. MC COY: Yeah. And the non-bolded is  
4 from the model.  
5 MR. LI MANDRI: I'm assuming you're not going  
6 to have bolded --  
7 MR. MC COY: No, no, no.  
8 THE COURT: No, no, no. This is --  
9 MR. MC COY: This is purely for this  
10 exercise.  
11 MR. LI MANDRI: Okay. So the bold is what  
12 you added? I'm sorry.  
13 MR. MC COY: Yeah. So, for instance, in the  
14 model charge --  
15 THE COURT: It tells you to describe --  
16 MR. MC COY: Yeah. Put in the -- you know,  
17 the name of the parties and so we're, you know, that  
18 kind of things. And so that's what the bolded language  
19 is. That's where -- I don't want to say departs from  
20 the -- from the -- necessarily from the CFA model  
21 charge.  
22 THE COURT: No. It just says where it says -  
23 - to give you an idea, Mr. LiMandri, if you go into our  
24 model jury charge, it says specifically, "Defendants  
25 allegedly used by means of an affirmative act and," and

1 then you have to say what it is.  
2 MR. MC COY: Right. And then we put our  
3 description in.  
4 THE COURT: In connection with, and then you  
5 have to put in the affirmative act deposition -- not  
6 deposition, definition is right from the model charge.  
7 So an -- oh, that's what I was going to ask  
8 you. Do you have -- yeah, you did not put in -- in the  
9 model jury charge, there is a definition for an  
10 affirmative act.  
11 MR. MC COY: No. We --  
12 THE COURT: That defines it specifically: "An  
13 affirmative act is something done voluntarily by a  
14 person."  
15 MR. MC COY: That --  
16 THE COURT: "The act may be physical, but  
17 also may be any steps taken voluntarily by a person to  
18 advance a plan or design or to accomplish a purpose."  
19 MR. LI MANDRI: Yeah. We have it in the form  
20 we submitted originally.  
21 MR. MC COY: I don't think it was our  
22 intention not to include that. And if it's --  
23 THE COURT: No. I'm just saying I wrote a  
24 note next to yours that you didn't put define -- you  
25 don't need to define omission because we're not

1 alleging any omission.  
2 MR. MC COY: Correct. No --  
3 THE COURT: But there is --  
4 MR. MC COY: Yeah. Our intention was to use  
5 that.  
6 THE COURT: Yeah. If you want to take it,  
7 it's right in the model charge. I didn't see it here  
8 unless it's later on.  
9 MR. MC COY: I'm sorry. What's the --  
10 THE COURT: It's four --  
11 MR. MC COY: I'm sorry, Your Honor. It is on  
12 Page 19. If you look on Page -- well, it's the second  
13 paragraph --  
14 THE COURT: Oh, there it is. I'm sorry.  
15 MR. MC COY: -- under Three. It's just  
16 collapsed in with that paragraph.  
17 MR. LI MANDRI: I see.  
18 MR. MC COY: See, "An affirmative act is  
19 something that voluntarily"?  
20 THE COURT: Paragraph --  
21 MR. MC COY: So if you look under --  
22 THE COURT: Wait a minute. Which one?  
23 MR. MC COY: Under the heading  
24 "Introduction."  
25 THE COURT: Right.

1 MR. MC COY: Second paragraph that begins,  
2 "The Consumer Fraud Act."  
3 THE COURT: Oh, there it is. Okay.  
4 MR. MC COY: It's stuck in there.  
5 THE COURT: I didn't see it there.  
6 MR. MC COY: We can move it if it would be  
7 more clear, but --  
8 THE COURT: No. You could -- that's fine.  
9 MR. MC COY: But we did intend to include it.  
10 THE COURT: Let me just see. Yeah. That's  
11 the language right from the -- right from the model --  
12 okay. That's fine.  
13 And then you go to --  
14 MR. MC COY: Yeah. We took the other  
15 definitions.  
16 THE COURT: -- definitions right from the --  
17 MR. MC COY: From the model.  
18 THE COURT: Misrepresentation of sale.  
19 MR. LI MANDRI: And at the bottom of 20, we  
20 run into the same situation about taking out the  
21 parentheticals.  
22 MR. MC COY: Well, of course, we would take  
23 out the -- we would conform it so that there's not that  
24 issue. We would --  
25 THE COURT: Are you --

1 MR. MC COY: These are taken from above.  
2 THE COURT: Okay.  
3 MR. MC COY: I would conform it.  
4 THE COURT: The other definitions --  
5 MR. MC COY: Your Honor, we did not include  
6 fraud, deception, false pretense, or false promise.  
7 THE COURT: Yeah. You're not --  
8 MR. LI MANDRI: Yeah. They know --  
9 MR. MC COY: Because we had only been talking  
10 misrepresentations and unconscionable business  
11 practices, we --  
12 THE COURT: Okay. So we're limiting it just  
13 to mis -- okay.  
14 MR. MC COY: Yeah. We came --  
15 THE COURT: All right.  
16 MR. MC COY: -- to the conclusion that that  
17 might be confusing.  
18 THE COURT: All right. So those are all out.  
19 Okay.  
20 MR. LI MANDRI: At the top of Page 21, we'll  
21 want to be consistent. I -- do we really need to  
22 relist all of the proffers since we have them listed  
23 previously under contentions?  
24 THE COURT: Which?  
25 MR. LI MANDRI: Well, at the top of Page 21,

1 it relists all of the proffers.  
2 MR. MC COY: So, Your Honor, it actually  
3 starts on 20 to 21. And this is where the charge asks  
4 you to fill in the misconduct. And so these are the  
5 misrepresentations again.  
6 MR. LI MANDRI: It just seems redundant to  
7 me. They just read all these.  
8 THE COURT: I'm -- we're talking about --  
9 okay.  
10 MR. LI MANDRI: I'm just not sure that the  
11 model instructions were intended to have this stated  
12 twice. Because the contentions presumably are for any  
13 case. And then the CFA 4.43 obviously is just for this  
14 type of case. But did they really mean to be repeating  
15 the contentions in two different places, saying the  
16 same thing and potentially drawing unnecessary and  
17 unfair, duplicative emphasis on them?  
18 MR. MC COY: How -- I don't understand how  
19 duplicative is there. These are the misrepresentations  
20 that are alleged in the case.  
21 MR. LI MANDRI: I understand. But saying  
22 them twice --  
23 MR. MC COY: And I think -- is the model  
24 charge actually -- I don't have the model charge in  
25 front of me.

1 THE COURT: No, I have it here. It says the  
2 --

3 MR. MC COY: And what does it say, to fill in  
4 the contentions or --

5 THE COURT: It says, "Specifically,  
6 defendants allegedly used by means of an affirmative  
7 act and," and then it says "unconscionable commercial  
8 practice, deception, false pretense, false promise or  
9 misrepresentation in connection with the sale,  
10 advertisement of any merchandise. State specifically  
11 the factual allegations made by the plaintiff."

12 MR. MC COY: And that's what --

13 MR. LI MANDRI: What we had done because we  
14 already had them listed in our contentions, to just say  
15 they allege that there was a misrepresentation or  
16 unconscionable commercial practice without --

17 THE COURT: Maybe what we should do is I  
18 think it needs to be listed here because the model  
19 charge actually asks for it to be listed there.

20 MR. LI MANDRI: Well, then we'll have to have  
21 it in two places.

22 THE COURT: But maybe we should have -- maybe  
23 we should see whether you need all of that in the  
24 contentions. Or if we're going to list everything  
25 there --

1 MR. MC COY: Well, I guess --

2 THE COURT: Can we say that -- how about if  
3 we use -- think about some language where under  
4 "Plaintiffs' Contentions," we use the general language  
5 of the statute and then say to be elaborated further  
6 when I charge you on the Consumer Fraud Act? Because I  
7 don't know if it really is -- it is intended to be put  
8 here. Because they are the factual allegations.  
9 That's what the model charge says.

10 MR. MC COY: Right. Your Honor, if -- I  
11 guess my question is if -- if --

12 THE COURT: I am sensitive, does it have to  
13 be repeated twice.

14 MR. MC COY: Well, one is the contentions of  
15 the parties. One are the factual allegations. They're  
16 called for in both places. And if they are consistent  
17 in both places --

18 THE COURT: Yeah.

19 MR. MC COY: -- why is having specificity for  
20 the jury a bad thing?

21 THE COURT: No, it's not.

22 MR. MC COY: I would think that that could  
23 not be --

24 THE COURT: As long as they're consistent --

25 MR. MC COY: -- harmful.

1 THE COURT: -- I guess it doesn't matter.

2 MR. LI MANDRI: Well, what I've read is that  
3 when you repeat your things over and over, it places  
4 undue emphasis. And it seems to me you can say simply  
5 in the contentions that -- that's what you can say, the  
6 defendants allegedly misrepresented and/or committed  
7 unfair commercial practices, and then see the CFA, page  
8 whatever for specific contentions. But going through  
9 --

10 THE COURT: Well, you know, it becomes --

11 MR. MC COY: Well, if that were the case, you  
12 wouldn't need contentions of the parties at all.

13 THE COURT: Well, you would. Like, I mean,  
14 in a negligence action, we would say that the  
15 plaintiffs allege that the defendant was negligent, and  
16 that the negligent was a proximate cause of the  
17 accident. And then when we get to the liability  
18 section, we would say, plaintiff specifically alleges  
19 that plaintiff violated -- I mean, I don't know if I --  
20 I'm not aware of a case either way. I'm just saying  
21 that I understand what is being said, but I don't -- I  
22 don't -- I can't sit here and say it's not allowed.  
23 The statute -- the model jury charge specifically  
24 states in its parenthesis (State specifically the  
25 factual allegations made by plaintiff).

1 MR. LI MANDRI: It seems to me it would  
2 somewhat analogous, Your Honor, to if you had an  
3 automobile accident case and you were just going to  
4 state the contentions of the parties, and you would  
5 stay plaintiff contends defendant ran the stop sign.  
6 When you get to the definition of negligence, you don't  
7 restate the defendant ran the stop sign. You just say  
8 negligence is a breach of, you know, standard and  
9 reasonable care.

10 MR. MC COY: But this is not talking -- the  
11 charge does not say what the cause of action is.

12 THE COURT: Yeah. It says -- it says --

13 MR. MC COY: It says the factual -- factual  
14 contentions.

15 THE COURT: -- state the factual allegations.

16 MR. MC COY: I mean, the -- I mean, if the  
17 contentions of the parties is the plaintiffs contend  
18 that the defendants violated the CFA, and the  
19 defendants refute that, what's the point of the  
20 contention of the parties? I mean, that just seems  
21 meaningless.

22 THE COURT: Well --

23 MR. MC COY: And I still don't understand how  
24 giving the jury --

25 THE COURT: Yeah, they're --

1 MR. MC COY: -- the same thing over and over  
2 again necessarily is a prejudice.

3 THE COURT: They are -- and it does say that  
4 they are allegations. They're not -- it's what's being  
5 represented. I don't think -- I don't have a reason to  
6 bar it.

7 MR. LI MANDRI: Well, then where --

8 THE COURT: If you can find a reason to bar  
9 it, you can present it to me. But I'm not aware of a  
10 reason when our model jury charge specifically  
11 requires, and that's what it says, "State specifically  
12 the factual allegations made by plaintiff."

13 MR. LI MANDRI: We'll need to be consistent  
14 with what the Court --

15 MR. MC COY: Yes, we agree.

16 THE COURT: Well, no.

17 MR. MC COY: We don't -- we don't dispute  
18 that.

19 THE COURT: It's got to be the same. It  
20 can't be different.

21 MR. MC COY: That's right. We don't have any  
22 problem once we figure out what the consistency is.  
23 We'll make it consistent. We endeavored to make it  
24 consistent even now.

25 THE COURT: It looks like -- I mean, yeah.

1 You'll take -- they'll take out the same language they  
2 did on the other one. If it's here. I don't know if  
3 it's here.

4 MR. MC COY: So, Your Honor, then the next  
5 two sections. These are actually new because Your  
6 Honor has made specific ruling about two things.

7 THE COURT: Right.

8 MR. MC COY: The disease and disorder issue  
9 and the statistic issue. And so, at this point, on  
10 Page 21 and 22 in the two paragraphs under "Disease" --  
11 or the three paragraphs under "Disease and Disorder,"  
12 and the two paragraphs under "Statistics," these are  
13 specific to this case and are not in the model,  
14 obviously.

15 THE COURT: Right.

16 MR. LI MANDRI: They've got the second to the  
17 last line on Page 21, that they made it to any  
18 potential clients, including but not limited to the  
19 plaintiffs themselves. You know, we've been arguing  
20 all along, you can use the Listserv materials to show a  
21 prior inconsistent statement. But you can't say that  
22 my clients who made a statement to someone ten years  
23 ago that the plaintiffs never heard could in any  
24 possible way be a CFA violation. It seems to me that's  
25 exactly what they're trying to do here.

1 Any statement my clients may have made that  
2 may have been erroneous to any person any time, how  
3 could it be inducing plaintiffs in a material way to  
4 enter into a transaction with them? That's simply --

5 THE COURT: Where -- where are you reading?

6 MR. LI MANDRI: Second to the last sentence  
7 on Page -- the last line on Page 21 under "Disease or  
8 Disorder."

9 THE COURT: No. I think that must be the  
10 prior. Is that the revised one?

11 MR. MC COY: Your Honor, it is. So what it  
12 says is --

13 THE COURT: My revised 21 at the bottom says,  
14 "Misrepresenting that the JONAH program would change a  
15 person from gay to straight within some specified time  
16 frame."

17 MR. LI MANDRI: No. That's not what I have.

18 MR. MC COY: So, Your Honor, I think maybe --  
19 we're talking about the paragraph that starts with  
20 "What this mean is." Is that the paragraph, Your  
21 Honor?

22 THE COURT: That's under "Disease and  
23 Disorder."

24 MR. LI MANDRI: Exactly.

25 MR. MC COY: Correct. That's where we are.

1 THE COURT: Oh, I have that on Page 22.

2 MR. MC COY: That's because that's a black  
3 line and it shows the addition and the subtraction.  
4 And so we're on a different page. So --

5 THE COURT: All right.

6 MR. MC COY: So if you go to the --

7 THE COURT: "What this means if you determine  
8 that the plaintiffs have demonstrated that any of the  
9 defendants" -- isn't that what I ruled?

10 MR. LI MANDRI: To potential clients?

11 THE COURT: Or anybody. If you made that  
12 misrepresentation, it's a misrepresentation as a matter  
13 of law, if they believe you did that. Isn't that my  
14 ruling?

15 MR. LI MANDRI: I'm not sure. I mean, does  
16 that mean if someone has no standing to bring a claim,  
17 the plaintiffs can still base the claim on what they  
18 heard. So if I made a misrepresentation to Mr. McCoy  
19 that Mr. Dinielli never heard, Mr. Dinielli can sue me  
20 for what I said to Mr. McCoy? Is that what we're  
21 saying the Consumer Fraud Act stands for?

22 THE COURT: Is that what you're saying?

23 MR. MC COY: Your Honor, I think that the  
24 focus is on whether or not the misstatement was true or  
25 not. And if the misstatement -- I mean, the

1 misstatement is true whether or not he says it to me or  
2 Mr. Dinielli.

3 THE COURT: Right. But what counsel said is  
4 if he said it to Mr. Dinielli after you were in the  
5 program, how does that impact your claim? Or are you  
6 saying overall because it's --

7 MR. MC COY: Well --

8 THE COURT: -- a consumer fraud claim --

9 MR. MC COY: Well, Your Honor --

10 THE COURT: -- if it's a misrepresentation --

11 MR. LI MANDRI: But more to the point, again,  
12 they're trying to rely on private emails that were sent  
13 two years --

14 THE COURT: Well, that's a different issue.

15 MR. LI MANDRI: Yeah.

16 THE COURT: That's already been ruled on.

17 MR. LI MANDRI: Okay.

18 MR. MC COY: Right. Well, Your Honor, also,  
19 this is -- this is an issue. So in this analogy,  
20 right, so the defendants are contending that in their  
21 conversation with our clients that they did not say  
22 these things, right? Now if I show you statements from  
23 before when they said it, and I show you statements  
24 from without -- or after when they said it, that makes  
25 it more likely than not than what they said --

1 THE COURT: Yes, well, you're -- right, but  
2 you're using it --

3 MR. MC COY: -- to us.

4 THE COURT: You're using it as circumstantial  
5 evidence.

6 MR. MC COY: Correct. That's circumstantial  
7 evidence of a violation of the CFA --

8 MR. LI MANDRI: Or impeachment. Or  
9 impeachment. But it's not in --

10 MR. MC COY: Well, impeachment is the second  
11 purpose.

12 THE COURT: No, no. But it can be --

13 MR. MC COY: But what I'm saying is  
14 circumstantial evidence.

15 THE COURT: -- circumstantial evidence to  
16 buttress the plaintiffs' testimony.

17 MR. MC COY: Correct.

18 THE COURT: But the question -- well, the  
19 problem is -- well, this has to be addressed in what  
20 the questions in the verdict sheet say.

21 MR. MC COY: Right now, the questions to the  
22 verdict sheet, Your Honor, are as you specified or  
23 talked about.

24 THE COURT: Yeah, we're going to have to --

25 MR. MC COY: What it says there, at least the

1 way that we --  
2 THE COURT: This just says that -- what this  
3 means is if you determine that the plaintiffs have  
4 demonstrated that any of the defendants --  
5 MR. MC COY: All right. Your Honor --  
6 THE COURT: -- say that homosexuality was a  
7 mental --  
8 MR. MC COY: I think we can solve this. If  
9 we take out "potential clients including, but not  
10 limited to" and then "themselves."  
11 THE COURT: Okay.  
12 MR. MC COY: And just leave it "providing the  
13 JONAH program to the plaintiffs." If that solves this  
14 issue, then we can do that.  
15 THE COURT: All right. Let me -- in other  
16 words --  
17 MR. MC COY: So we would take out --  
18 THE COURT: "When advertising, selling, or  
19 providing JONAH program" --  
20 MR. MC COY: To take out "potential clients  
21 including, but not limited to" and then so "the JONAH  
22 program to the plaintiff." And then take out  
23 "themselves" because you wouldn't need themselves.  
24 THE COURT: Oh. All right.  
25 MR. MC COY: And then the rest of it.

1 THE COURT: "Then you must find." That's  
2 fine.  
3 MR. LI MANDRI: That's fine.  
4 THE COURT: All right. Okay. Statistics.  
5 MR. MC COY: So, Your Honor, the next  
6 paragraph is where I think we tried to deal with the --  
7 THE COURT: Yeah. Let's see. You have here,  
8 "This does not mean that the defendants must have used  
9 the precise words mental disease or mental illness or  
10 mental disorder."  
11 "Described homosexuality even as something  
12 equivalent to a mental illness, disease, disorder."  
13 MR. LI MANDRI: Strikes me as fatally  
14 ambiguous, Your Honor. It really does. They --  
15 MR. MC COY: Which part is --  
16 MR. LI MANDRI: -- can argue that can mean  
17 anything.  
18 MR. MC COY: -- fatally ambiguous?  
19 MR. LI MANDRI: What does it mean is,  
20 "something equivalent to a mental illness" --  
21 MR. MC COY: I don't know. It was in the  
22 judge's order.  
23 MR. LI MANDRI: -- "disease"? Well, now's  
24 the time to decide if that's what we want to instruct  
25 the jury so we don't end up on appeal. Because we have

1 something so vague that my clients could be found  
2 liable for violating the Consumer Fraud Act for having  
3 said darn near anything.  
4 MR. MC COY: No. It's an "equivalent of a  
5 mental illness, disease, disorder."  
6 MR. LI MANDRI: So if they said you're going  
7 to be healing emotional wounds, you're going to argue  
8 that's automatically a violation --  
9 MR. MC COY: I'm arguing that --  
10 THE COURT: Counsel --  
11 MR. MC COY: -- the jury will determine  
12 whether or not that that counts --  
13 THE COURT: The jury will determine --  
14 MR. MC COY: -- as equivalent above.  
15 THE COURT: -- whether when someone uses the  
16 words "emotional wounds," whether that's done in a  
17 religious context.  
18 MR. MC COY: Or a psychological disorder.  
19 THE COURT: Or a psychological disorder.  
20 MR. LI MANDRI: Or it's because we're all  
21 broken as a result of sin --  
22 THE COURT: Counsel, don't go there. Be  
23 careful about being broken because that requires  
24 fixing.  
25 MR. LI MANDRI: Yes. But we all need --

1 MR. MC COY: And your --  
2 MR. LI MANDRI: -- fixing because of sin  
3 entered the world. That's all --  
4 MR. MC COY: And, Your Honor, the --  
5 MR. LI MANDRI: -- the Judeo-Christian  
6 tradition views it, Your Honor.  
7 THE COURT: We're not deciding whether or not  
8 homosexuality is a sin or against the Torah. That was  
9 not how this program -- this is not plaintiffs'  
10 allegations. They are not questioning whether or not  
11 homosexuality may be against religious beliefs.  
12 MR. LI MANDRI: Oh, no, I understand. But I  
13 was saying if they're going to now argue any time my  
14 clients talked about having to heal emotional wounds  
15 that's automatically a person --  
16 THE COURT: Well, they can argue whatever  
17 they want. It's what the jury believes, not what we  
18 say. They have the right to argue that. There's  
19 nothing wrong with them getting in front of a jury  
20 saying, when you use terms like emotional wounding,  
21 psycho-educational, these are not religious concepts.  
22 They can argue that. Now whether the jury accepts that  
23 is up to the trier-of-fact.  
24 MR. LI MANDRI: I agree entirely. And that's  
25 not my point, but I appreciate --

1 THE COURT: But your concern is you're saying  
2 -- let's get to the language that you're concerned  
3 about.

4 MR. LI MANDRI: Whenever they --

5 THE COURT: You're concerned about "something  
6 equivalent to a mental illness, disease, or disorder."  
7 What's wrong with that?

8 MR. MC COY: And, Your Honor, may I just also  
9 add? There was testimony from Dr. Beckstead, the  
10 expert, about this issue.

11 THE COURT: Yeah, I don't know --

12 MR. MC COY: And he testified as to a list of  
13 things that are equivalent.

14 THE COURT: Yeah. So what's -- I don't know  
15 why that's --

16 MR. MC COY: To aid the jury.

17 THE COURT: I don't know what's wrong with  
18 that. "Something equivalent to a mental illness,  
19 disease, or disorder." It's got to -- I mean, that's  
20 the case. That's what I said.

21 That's fine. I don't have a problem with  
22 that. I don't think it's ambiguous.

23 All right. Now but I think in this section  
24 is where you need some language, something along the  
25 lines -- and you'll have to draft this because I'm not

1 going to do the work for the defendant, but something  
2 along the lines, on the other hand, if you find -- then  
3 you're going to have to come with the language that you  
4 --

5 MR. LI MANDRI: Well, I'd be content with the  
6 language from the Court's prior ruling where you list  
7 out the various ways we could potentially meet that  
8 particular proffer. Because --

9 THE COURT: No, no. We're not talking about  
10 statistics.

11 MR. LI MANDRI: Isn't that the section we're  
12 on?

13 THE COURT: No. I'm talking about under  
14 "Disease or disorder."

15 MR. LI MANDRI: Oh, I see. So what are you  
16 asking?

17 THE COURT: I think you're going to need --  
18 if you want, that's the section where there should be,  
19 I think --

20 MR. LI MANDRI: Oh, I see,

21 THE COURT: -- something that says, on the  
22 other hand --

23 MR. LI MANDRI: Right. I would be --

24 THE COURT: If you believe or if you find by  
25 the credible evidence that the defendants used --

1 whatever words you want to say they used.  
2 MR. LI MANDRI: Yeah. Used --  
3 THE COURT: I think you got to come up with a  
4 -- you have to come up with something there. This is  
5 the point where I think it should go because this is  
6 the only misrepresentation that it would apply to. So  
7 if you want some language, I think this is where it  
8 goes.  
9 MR. LI MANDRI: You're right. We will do  
10 that.  
11 THE COURT: And I would suggest something  
12 along the lines of, on the other hand, or whatever  
13 language. And then send it to your adversary.  
14 MR. MC COY: We'll take a look at it.  
15 THE COURT: And then we can see.  
16 Now if we get to statistics --  
17 MR. MC COY: Well, Your Honor, I will go  
18 ahead and make a correction based on our last paragraph  
19 where -- because here we also had "or other potential  
20 clients."  
21 THE COURT: Right. You'll take that out?  
22 MR. MC COY: Yeah.  
23 THE COURT: And I think we're going to, again  
24 --  
25 MR. MC COY: Again, that -- from your order.

1 THE COURT: Again, we're going to have to --  
2 we're going to wait on that language, again, as I said  
3 before.  
4 MR. LI MANDRI: Yeah. I just don't know why  
5 we can't put a period at statistics.  
6 THE COURT: We might. I'm going to see how I  
7 -- when we make the rulings or what we're going to do  
8 on the People Can Change things. I don't know yet.  
9 We're going to hold off on that.  
10 MR. LI MANDRI: Okay. It just --  
11 THE COURT: That's the same language that I  
12 said we're holding off on --  
13 MR. LI MANDRI: Right.  
14 THE COURT: -- in the beginning. And we're  
15 going to take out "told the plaintiffs," period.  
16 MR. MC COY: Right.  
17 THE COURT: Take out "or other potential  
18 clients."  
19 All right. So that's where you want to  
20 include some additional language, you said. Where it  
21 says "By the preponderance of evidence that the  
22 defendants collect no records of client outcomes to  
23 support this assertion." You say you want -- that's  
24 where you want to put in that language you said from  
25 the transcript?

1 MR. LI MANDRI: Yes, Your Honor.  
2 THE COURT: All right. So, again, I think  
3 what you should do is send that -- that's another thing  
4 that you should send to plaintiff's attorneys.  
5 MR. LI MANDRI: Yes, Your Honor.  
6 THE COURT: I think it's more than just that.  
7 MR. LI MANDRI: I'm not sure I understand  
8 what you mean. More than just --  
9 THE COURT: Well, more than just that if they  
10 prove the defendants collect no records.  
11 MR. LI MANDRI: Right, right.  
12 THE COURT: That's all they have to do. I  
13 agree with some of what you said before.  
14 MR. LI MANDRI: Right. I'll just use the  
15 language in the order.  
16 THE COURT: There has been other testimony.  
17 MR. LI MANDRI: Right.  
18 THE COURT: And then in addition --  
19 MR. MC COY: So that now we're back into  
20 Model CFA language?  
21 THE COURT: Yeah. So that's the end of  
22 Statistics.  
23 MR. MC COY: Yes. Correct.  
24 THE COURT: So "in addition" goes back to the  
25 model charge.

1 MR. MC COY: Right. Now then after that  
2 paragraph, there's another paragraph that starts, "A  
3 consumer who." This is -- we're getting into a section  
4 --  
5 THE COURT: Right. Where they ask you --  
6 MR. MC COY: -- of new charges.  
7 THE COURT: -- to put in --  
8 MR. MC COY: No, no, no. This is something  
9 that -- not quite yet. There are two paragraphs here  
10 where we have --  
11 THE COURT: Right. The --  
12 MR. MC COY: -- asked for new --  
13 THE COURT: Right.  
14 MR. MC COY: -- language given things that  
15 have been taking place in the case.  
16 THE COURT: Right. The Supreme Court says  
17 you don't have to ask for a refund in order --  
18 MR. MC COY: Right.  
19 THE COURT: -- to file a -- as a  
20 prerequisite.  
21 MR. MC COY: Right.  
22 THE COURT: And I think that's appropriate  
23 because of the argument being made.  
24 MR. LI MANDRI: I'm sorry. We're on the top  
25 of Page 23 now?

1 MR. MC COY: Yes, Mr. LiMandri. "A consumer  
2 who has been victimized" --

3 MR. LI MANDRI: Let me read this to myself.

4 MR. MC COY: That paragraph. Footnote 8.

5 MR. LI MANDRI: I thought that the law was  
6 that's something they could consider. That's --  
7 obviously, it's not a per se defense.

8 THE COURT: Well, they can consider it. But  
9 I think the jury needs to be told that they're not  
10 required to seek a refund before they file suit. You  
11 can argue that in your summation, that they didn't do  
12 that. But they can't be left with the impression that  
13 that's the law, that if they don't ask for a refund --

14 MR. LI MANDRI: Right.

15 THE COURT: -- they can't file a consumer  
16 fraud action.

17 MR. MC COY: That's our concern and what --

18 THE COURT: And that's their concern. And  
19 that's what the case says.

20 MR. LI MANDRI: Well, then I think they  
21 should take out "It does not matter whether the  
22 plaintiff asked for a refund." It might matter. It's  
23 just not determinative.

24 THE COURT: You have here -- let me see it.  
25 "Consumer who has been victimized by the Consumer Fraud

1 Act is not required to seek a refund from the offending  
2 merchant as a prerequisite to filing a lawsuit."

3 MR. LI MANDRI: Period. And that's okay.  
4 But to say it doesn't matter, it does -- it's something  
5 I can argue, that -- because Mr. Dinielli said in  
6 opening statement, that's all they wanted, their money  
7 back.

8 THE COURT: I think you can put the next  
9 sentence. "The defendants can be found to violate the  
10 Consumer Fraud Act regardless of whether the  
11 plaintiff's requested a refund."

12 MR. LI MANDRI: It's the next one that  
13 bothers me.

14 THE COURT: Yeah.

15 MR. MC COY: We can take out the "therefore."

16 THE COURT: We'll take out "therefore, it  
17 does not matter."

18 MR. MC COY: That's fine. We can take out  
19 the "therefore" sentence.

20 THE COURT: They'll take out that sentence.

21 MR. LI MANDRI: Well, it may be true that you  
22 can't waive a right to the CFA by a contract, although  
23 I'm not even certain of that. It's certainly another  
24 factor to consider.

25 THE COURT: Right. We got it -- it certainly

1 can be circumstantial evidence, I guess.  
2 MR. LI MANDRI: Because and we've cited cases  
3 that is --  
4 THE COURT: If you're arguing that. But you  
5 got to be careful because that's true. They -- they  
6 have to somehow be told that the fact that there's an  
7 agreement in and of itself does not relieve --  
8 MR. MC COY: And, in fact, your Honor, Mr.  
9 Jonna got up with Jo Bruck and said, look at this hold  
10 harmless clause language. And that, frankly, legally  
11 does not matter.  
12 MR. LI MANDRI: Well, no, it -- it does.  
13 You're not going to have a mis --  
14 MR. MC COY: No, hold harmless does not. The  
15 --  
16 MR. LI MANDRI: Not the hold --  
17 MR. MC COY: -- part about no guarantee --  
18 THE COURT: How about -- why don't we --  
19 MR. MC COY: -- is a different thing.  
20 MR. LI MANDRI: That's what I --  
21 MR. MC COY: Yeah.  
22 THE COURT: Why don't we say -- let's think  
23 about this. How about, "Furthermore, a provision of a  
24 contract or agreement cannot, in and of itself"?  
25 MR. LI MANDRI: Yes. I think that's okay.

1 MR. MC COY: I'm fine adding that, Your  
2 Honor.  
3 THE COURT: Okay.  
4 MR. MC COY: And -- yeah.  
5 THE COURT: And the same thing with the  
6 motives.  
7 MR. MC COY: Same thing with what, your  
8 Honor?  
9 THE COURT: The motives are irrelevant.  
10 MR. MC COY: The -- and so --  
11 MR. LI MANDRI: Where do we get the --  
12 MR. MC COY: -- are in and of themselves.  
13 THE COURT: The next paragraph. No, no, I'm  
14 saying, the next paragraph --  
15 MR. LI MANDRI: You know, can we -- can we  
16 just say "The Consumer Fraud Act encourages private  
17 citizens to bring lawsuits," without saying "such as  
18 plaintiffs"? We're not supposed to be personalizing  
19 these standard jury instructions.  
20 MR. MC COY: That's fine. We can take out  
21 "such as plaintiffs."  
22 THE COURT: Yeah. You can say, "The Consumer  
23 Fraud Act" --  
24 MR. MC COY: That's fine.  
25 THE COURT: -- "law encourages private

1 citizens."

2 MR. MC COY: That's fine.

3 THE COURT: That's fine. Because that's  
4 redundant. They are private citizens.

5 MR. LI MANDRI: But "The motives of the  
6 plaintiff's bringing this case are" -- well, they're  
7 not irrelevant because they go to bias and credibility.  
8 So they're not irrelevant. But --

9 THE COURT: Do you want to use the same  
10 language, "in and of themselves," or -- they really can  
11 go to bias.

12 MR. LI MANDRI: Right.

13 THE COURT: But I understand that the motives  
14 are not -- that's -- that's a tough one. I'm going to  
15 have to think about that.

16 MR. MC COY: Your Honor, the -- just to -- to  
17 -- to let you know our thinking -- what guided our  
18 thinking on this. At the pretrial hearing, there was a  
19 colloquy between you and Mr. Li Mandri about this very  
20 issue of plaintiffs' motives. It starts on Page 30,  
21 and goes through 30 -- Page 32. I'm happy to provide  
22 it to you.

23 But Your Honor essentially said to Mr. Li  
24 Mandri that the plaintiffs' motives are irrelevant.  
25 And that's when -- that's what kind of -- and then, of

1 course --

2 THE COURT: Well, I agree with that. The  
3 question becomes, however, they can be collateral in  
4 term of potential bias in -- in interpreting  
5 credibility. So I'm saying we've got to be careful.  
6 I'm not suggesting it shouldn't be -- it's out. I'm  
7 just a little uncomfortable with that -- leaving that  
8 language the way it is --

9 MR. LI MANDRI: Particularly, since --

10 THE COURT: You could -- you -- maybe --  
11 maybe either add something along the lines that --

12 MR. MC COY: What about, "are only relevant  
13 to" --

14 THE COURT: How about when we go --

15 MR. MC COY: -- "determining the plaintiffs"  
16 --

17 THE COURT: Yeah, something in there --

18 MR. MC COY: -- "credibility or  
19 believability"?

20 THE COURT: Well, how about -- wait a minute.  
21 Let's go back to credibility. Don't we say motives in  
22 there?

23 MR. LI MANDRI: I'm not sure. But --

24 THE COURT: Let me --

25 MR. MC COY: Yeah. Yes, Your Honor, there's

1 -- there's -- there's a line in there that says, you  
2 can consider -- number one is "Do they have an interest  
3 in the outcome of the case?"  
4 THE COURT: Yeah. So maybe some language in  
5 there with that sentence where you say, "As a result,  
6 the motives of the plaintiffs bringing this case are  
7 irrelevant, and you are not to consider their motives  
8 in your deliberation as to a violation of the Consumer  
9 Fraud Act, but may be considered in assessing  
10 credibility."  
11 MR. LI MANDRI: Right.  
12 THE COURT: Something like that?  
13 MR. LI MANDRI: Because the -- the plaintiffs  
14 were asked by their own counsel --  
15 THE COURT: No, no, no.  
16 MR. LI MANDRI: -- why they brought the  
17 lawsuit.  
18 THE COURT: I'm saying, something --  
19 MR. MC COY: Yeah, yeah, yeah, Your --  
20 THE COURT: Something like that.  
21 MR. MC COY: Your Honor, our -- we understand  
22 that issue --  
23 THE COURT: Yeah. See --  
24 MR. MC COY: And our intention is not to --  
25 THE COURT: No. We want to be fair because

1 --  
2 MR. MC COY: -- cut that off.  
3 THE COURT: -- You don't want to go this far  
4 and --  
5 MR. MC COY: Our fear was -- was --  
6 THE COURT: No, I think I can --  
7 MR. MC COY: -- the other way.  
8 THE COURT: -- say what you said there. But  
9 I think the qualifier would be, "However, as I  
10 indicated in my charge under credibility, you may  
11 consider that" -- "may consider that in your  
12 credibility determinations."  
13 MR. MC COY: Right.  
14 THE COURT: Something like that.  
15 MR. MC COY: We can propose some language to  
16 try to --  
17 THE COURT: All right.  
18 MR. MC COY: -- to tie it back to that.  
19 THE COURT: Okay.  
20 MR. MC COY: Then, Your Honor, the next  
21 paragraph, we get back into the model.  
22 THE COURT: Those are back to the model. And  
23 you just filled in --  
24 MR. MC COY: Right. On the issue of  
25 proximate cause. So the model CFA charge --

1 THE COURT: It says to use 6.10.

2 MR. MC COY: Right. It says to use 6.10, and  
3 that's what we did. And the only debate or controversy  
4 we're having is that the defendants are desirous of  
5 including 6.12, which is another proximate cause for  
6 negligence. And our position is --

7 THE COURT: No, we don't have the concurrent.  
8 We're not asking the jury to assess the type of damages  
9 in which there would be that charge. There's not --

10 MR. LI MANDRI: Just so you know what our  
11 thinking is, Your Honor --

12 THE COURT: I know you're thinking about the  
13 one with the \$17,000.

14 MR. LI MANDRI: That, and the plaintiffs have  
15 other concurrent causes of harm when they came to my  
16 clients. And they did get treatment for things other  
17 than sexual orientation change efforts. You know,  
18 nicotine addiction, or marijuana, or whatever --

19 THE COURT: Yeah, but wouldn't that be your  
20 argument, that they have no harm? That that's  
21 something they had when they came?

22 MR. LI MANDRI: Right.

23 THE COURT: It's not a -- you can argue to  
24 the jury that your clients' actions were not a  
25 substantial factor involving any of those claims. You

1 can argue that to the jury. I don't --

2 MR. LI MANDRI: Exactly. And that's my only  
3 point.

4 THE COURT: But the proximate cause you want,  
5 that charge is going to be --

6 MR. LI MANDRI: I hear you. The reason why I  
7 liked it was because it had the substantial factor  
8 language in it. This one, for whatever reason,  
9 doesn't. 6.11 did not have the substantial factor  
10 language. And I think it's --

11 THE COURT: Because this is the one that the  
12 model charge for the consumer fraud says to use.

13 MR. MC COY: Because it's simple, but for  
14 causation.

15 THE COURT: Because we're not looking for --  
16 they're not seeking emotional distress damages, or it's  
17 not a negligence or a tort recovery. They're not  
18 entitled to those damages. Their damages are limited  
19 to ascertainable loss and any harm that they proved,  
20 that they've quantified to the jury. Although there's  
21 been some testimony that we'll have to see what is  
22 argued in summations. But --

23 MR. LI MANDRI: Well, if that's what --

24 THE COURT: I mean, I'm just --

25 MR. LI MANDRI: -- the instruction says --

1 THE COURT: -- saying, I'm looking, and I  
2 understand what you're saying. But I think when we  
3 bring that in, it -- I think it makes things too  
4 confusing. That normally -- that charge normally is  
5 when we have like this Scafidi case (phonetic), and a  
6 malpractice case, where an argument is being made that  
7 this person had a preexisting condition that may have  
8 been exacerbated by the surgeon, and then you get into  
9 that type of assessment. Or a person has a preexisting  
10 herniated disc, then there's an -- an insult, whether  
11 it's in the aggravation or a --

12 MR. LI MANDRI: But that's kind of what I  
13 think we're talking about unfortunately.

14 THE COURT: Well, but you're not because  
15 we're not talking about an aggravation. They have to  
16 find that this program actually caused harm. The only  
17 harm -- I mean, look. I don't know -- my view is the  
18 damages are really the ascertainable loss, with the  
19 exception of --

20 MR. LI MANDRI: Unger.

21 THE COURT: -- Unger.

22 MR. MC COY: Right.

23 THE COURT: But, I don't know. I want to --

24 MR. MC COY: Your Honor, the causation that  
25 is --

1 THE COURT: Yeah. This is the causation for  
2 --

3 MR. MC COY: -- contemplated by the CFA is a  
4 misstatement is made --

5 THE COURT: And did it --

6 MR. MC COY: And as a result of that  
7 misstatement, someone buys a product.

8 THE COURT: Did they pay them. Yes.

9 MR. MC COY: It couldn't be more simple  
10 causation.

11 THE COURT: No. But I think what counsel's  
12 concerned about is -- well, I don't want to speak for  
13 him. What I'm concerned about is I had someone take  
14 the stand who said -- and I have my notes back there,  
15 so this is off the top of my head, \$17,000, 50 percent  
16 related to JONAH --

17 MR. LI MANDRI: Right.

18 THE COURT: -- and of that 50 percent, 70  
19 percent is the harm caused by JONAH.

20 MR. LI MANDRI: Dr. Phillipson.

21 MR. MC COY: Right.

22 THE COURT: It's a little tricky because  
23 what's been -- you know, now I understand. The  
24 argument that you're making is, we're only -- we're not  
25 asking for anything else other than what he says the

1 harm was caused, if the jury accepts that.

2 MR. MC COY: Right. And there's no multiple  
3 --

4 THE COURT: But -- but what that implies --

5 MR. MC COY: -- causation for that.

6 THE COURT: What that implies is 50 percent  
7 of the things he treated him for had nothing to do with  
8 JONAH.

9 MR. MC COY: Right. And we don't dispute  
10 that.

11 THE COURT: So you -- you know --

12 MR. MC COY: We're not trying to recover for  
13 that.

14 THE COURT: No, no. But I'm just saying -- I  
15 understand the argument. But I don't think it rises to  
16 the level where we need to get into that part of the  
17 proximate cause. You certainly are free to -- you can  
18 argue anything you want in front of the jury based on  
19 his testimony, but I'm not going to give him the -- the  
20 other proximate cause.

21 MR. LI MANDRI: Understood, Your Honor.

22 THE COURT: Because I just think it's too --  
23 it could ruin it because that's not the standard for  
24 ascertainable loss.

25 MR. LI MANDRI: Right.

1 THE COURT: It may be a standard, and I'm not  
2 saying it is. I don't think it is. But it's possibly  
3 the standard for the way Unger's -- was it Unger?

4 MR. MC COY: Unger, you're right, Judge.

5 THE COURT: But I think it would not be fair  
6 to the plaintiffs if I gave them the other proximate  
7 cause. Because now they're going to sit back and say,  
8 conceivably there could have been a misrepresentation,  
9 but we don't believe it was a substantial factor.  
10 That's not fair.

11 MR. LI MANDRI: Why -- why couldn't we just  
12 say as to the one plaintiff, Mr. Unger, he has to prove  
13 that whatever portion of the bills that Dr. Phillipson  
14 that are caused by JONAH, that Jonah was a substantial  
15 factor?

16 THE COURT: Well, I -- you know, when I --  
17 let me see when we get to damages. I think you can  
18 argue that in summation just from what the -- the  
19 language is for damages.

20 (Continuation of day's proceedings in Volume  
21 2)  
22  
23  
24  
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## CERTIFICATION

1  
2  
3 I, Patrice Mezzacapo, the assigned transcriber, do  
4 hereby certify that the foregoing transcript of  
5 proceedings in the Hudson County Superior Court, Law  
6 Division on June 19, 2015 on CD No. 6/19/15, Index Nos.  
7 1:31:32 to 2:59:44 is prepared in full compliance with  
8 the current Transcript Format for Judicial Proceedings  
9 and is a true and accurate compressed transcript of the  
10 proceedings as recorded.  
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15 Patrice Mezzacapo, AD/T #214  
16 METRO TRANSCRIPTS, L.L.C.  
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18 Date:  
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