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

Plaintiffs,

v.

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

Defendants.

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY, LAW DIVISION

Docket No. L-5473-12

CIVIL ACTION

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO ENFORCE PERMANENT INJUNCTION AND FOR DEFAULT JUDGMENT

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PRELIMINARY STATEMENT[1]

On June 25, 2015, a unanimous New Jersey jury determined that Defendants' provision of Conversion Therapy, however characterized, and the misrepresentations they made in connection with the advertisement, sale and subsequent performance of their Conversion Therapy program, constituted consumer fraud and an unconscionable business practice. On December 18, 2015, this Court entered a Permanent Injunction to prevent Defendants from continuing to engage in, advertise or promote this harmful, unlawful conduct. Defendants' public activities over the last two years appear designed to test the boundaries of the Permanent Injunction, and it now is clear that Defendants have far exceeded the limits set by this Court. JONAH did not close its doors; it simply changed its name and continued operating.

Only a few days after the Court ordered JONAH to shut down, Defendants established its successor, recycling an old label—the Jonah Institute for Gender Affirmation or "JIFGA"—that they had previously used to make JONAH's services seem more legitimate. But Defendants' new organization, the "Jewish Institute for Global Awareness," inherited more than just the "JIFGA" acronym: it has JONAH's assets, JONAH's leadership, JONAH's core operations and even JONAH's physical place of business and telephone number. Through JIFGA, Defendants have continued to promote Conversion Therapy and have helped raise money for others who engage in Conversion Therapy and promote Conversion Therapy-related Commerce. Most egregiously, by Defendants' own admission, 95% of JIFGA's 2016 gross receipts came from former JONAH clients, who paid JIFGA for Conversion Therapy they continue to receive from their JONAH-recommended Conversion Therapy providers, who are then paid directly by JIFGA. These actions are indistinguishable from the unlawful,

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[1] Capitalized terms used in the Preliminary Statement have the meaning ascribed to them herein.

unconscionable conduct at the heart of Plaintiffs' lawsuit and are squarely prohibited by this Court's Permanent Injunction.

As a result, Plaintiffs Michael Ferguson, Benjamin Unger, Chaim Levin and Jo Bruck respectfully request that this Court enter an order enforcing its Permanent Injunction and, because Defendants' violation triggers payment obligations under the Parties' Settlement Agreement, granting default judgment with respect to the Fee Award owed to Plaintiffs.

PROCEDURAL HISTORY

On November 27, 2012, Plaintiffs filed their Complaint, alleging four counts of violation of New Jersey's Consumer Fraud Act, which protects consumers from deceptive, false, fraudulent or unconscionable business practices. At the core of Plaintiffs' allegations was that Defendants[2] referred them to Conversion Therapy practitioners who Defendants claimed, among other misrepresentations, could significantly reduce or eliminate Plaintiffs' "same-sex attraction." *See* Ex. 1 ¶¶ 14-16, 40-41, 68, 79, 90, 104.[3] On June 25, 2015, a jury rendered a unanimous verdict for Plaintiffs and, on December 18, 2015, the Court entered its *Order Granting Permanent Injunctive Relief and Awarding Attorneys' Fees* (the "Permanent Injunction"). *See* Ex. 2.

The Permanent Injunction required JONAH to "permanently cease any and all operations," including "operation of its websites and listservs, which it shall cause to be taken offline." *Id.* ¶ 1. Further, Defendants were permanently enjoined from:

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[2] For purposes of this motion (the "Motion"), "Defendants" is defined to include JONAH, Arthur Goldberg and, because she is subject to the Permanent Injunction, Elaine Berk. While Alan Downing is not the subject of the Motion, Plaintiffs continue to reserve all rights with respect to his compliance with the Permanent Injunction and the Settlement Agreement (as defined herein).

[3] All exhibits referenced in this brief are attached to the accompanying *Certification of Thomas S. Kessler* ("Kessler Cert."), and identified by number with the prefix "Ex."

> engaging, whether directly or through referrals, in any therapy, counseling, treatment or activity that has the goal of changing, affecting or influencing sexual orientation, "same sex attraction" or "gender wholeness," or any other equivalent term, whether referred to as "conversion therapy," "reparative therapy," "gender affirming processes" or any other equivalent term ("Conversion Therapy"), or advertising, or promoting Conversion Therapy or Conversion Therapy-related commerce in or directed at New Jersey or New Jersey residents (whether in person or remotely, individually or in groups, including via telephone, Skype, email, online services or any delivery medium that may be introduced in the future, and including the provision of referrals to providers, advertisers, promoters, or advocates of the same). . . .

Id. ¶ 3. The Permanent Injunction awarded Plaintiffs $3.5 million in attorneys' fees and costs (the "Fee Award") and retained jurisdiction "with respect to all matters relating to or arising from the interpretation, implementation, or enforcement of this Order." *Id.* ¶¶ 4, 6.

Also in December 2015, the Parties executed a settlement agreement (the "Settlement Agreement"), which provided, *inter alia*, that Plaintiffs would agree to accept a reduced payment in respect of the Fee Award. *See* Ex. 3 ¶ 5. In exchange, the Parties agreed that, if Defendants violate the Permanent Injunction or otherwise breach the Settlement Agreement on or before December 18, 2020, Plaintiffs are entitled to collect the remaining balance of Fee Award and, if Defendants refuse to pay, to seek a default judgment. *Id.* ¶ 6.[4]

[4] Under the Settlement Agreement, Plaintiffs agreed to provide Defendants a notice defining the breach and providing Defendants thirty days in which to cure the breach (to the extent the breach can be cured) or to pay the Fee Award. *Id.* ¶¶ 6(a)-(c). Because the return date for this Motion is more than thirty days from the date it is served on Defendants, this Motion serves as Plaintiffs' requisite notice and demand for payment. For the avoidance of doubt, nothing herein is intended to suggest that Defendants' breaches of the Settlement Agreement can be cured; as discussed herein, they cannot.

RELEVANT FACTS

A. JONAH Is Rebranded As JIFGA, Continues Operations

In a December 31, 2015 newsletter, Defendants announced that JONAH would be shutting down its operations and that its website, jonahweb.org, would "no longer be available online after mid-January 2016." Ex. 4 at 1.[5]

In the same December 31 newsletter, Defendants announced that, on December 29, 2015—only eleven days after entry of the Permanent Injunction—they filed articles of incorporation for the "Jewish Institute for Global Awareness," or "JIFGA." *Id*. at 2. The JIFGA acronym was previously associated with the "Jonah Institute for Gender Affirmation" ("Old JIFGA"). As Defendants have admitted, Old JIFGA had "no separate life from JONAH," but was merely a label applied to JONAH's services in an effort to make them more marketable to the general public. Ex. 5, Trial Tr. 113:1-114:11, June 8, 2015 vol. 1; Ex. 6, JONAH Dep. 34:14-22. Just as with JONAH, the "new" JIFGA is co-directed by Arthur Goldberg and Elaine Berk, each of whom also serves as a JIFGA trustee and, according to JIFGA's 2016 tax filings, devotes a full thirty-five hour workweek to the organization. Ex. 7 at Part IV. JIFGA's offices are located at the site of JONAH's offices in Jersey City, New Jersey, where JIFGA continues to use JONAH's telephone number. *Compare id.* at 1, *with* Ex. 8 at 1.

B. Defendants' Public Activities Reflect Continuing Involvement in Conversion Therapy and Conversion Therapy-Related Commerce

JIFGA's public website does not provide any indication that it sells any goods or services or otherwise has ongoing operations. Tellingly, JIFGA's publicly available 2015 and 2016 tax returns failed to disclose JIFGA's "primary exempt purpose." Ex. 7 at Part III; Ex. 9 at

[5] Counsel for Plaintiffs confirmed that on January 11, 2016, jonahweb.org had been replaced with a "page unavailable" banner. However, at various times since the entry of the Permanent Injunction, confirmed as early as May 9, 2016 and as late as October 16, 2017, jonahweb.org appeared to be back in operation, although requiring users to log in. Kessler Cert. ¶ 6.

Part III. That silence notwithstanding, the public record demonstrates that JIFGA and its founders have been focused on promoting Conversion Therapy since the organization's inception. For example:

- JIFGA joined a group calling itself the "National Task Force for Therapy Equality," which submitted a report to the Federal Trade Commission in support of Conversion Therapy. This report, among other things, contends that many Conversion Therapy recipients see "a significant and meaningful shift in their sexual orientation or gender identity." Ex. 10 at 38.
- JIFGA operates an online "crowd funding" platform called "Funding Morality," which raises money for projects like "The Legacy of Dr. Joseph Nicolosi, Sr.: Video Series," which aims to explain "strategies available to assist those living with same-sex attractions" and "the science of sexual orientation change." *See, e.g.*, Ex. 11 at 4-5.[6] JIFGA keeps for itself 4% of all donations that Funding Morality collects. *Id*. at 18 ¶ 19.
- Mr. Goldberg continues to promote Conversion Therapy independent of JIFGA. For example, in May 2016, Mr. Goldberg participated on a Nefesh listserv, a listserv used predominantly by orthodox Jewish mental health professionals, through the jonahhelp@aol.com email address. Ex. 12. In his email, Mr. Goldberg urged recipients to read an article by Dr. Laura Haynes, Ph.D., and defense counsel, Mr. LiMandri. *Id*. In that article, the authors provide links to a variety of sources, many of which were discussed or referenced in Defendants'

[6] Defendants previously offered Dr. Nicolosi as an expert witness in this case. His testimony was excluded by the Court on, among others, the basis that his conclusions were based "on the initial false premise that homosexuality is either abnormal or a mental disorder." *Ferguson v. JONAH*, Case No. L-5473-12, 2015 WL 609436 at *10 (N.J. Super. Ct. Feb. 5, 2015). Dr. Nicolosi died on March 9, 2017.

excluded expert reports, that purport to "show[] change therapy is effective for those who seek it." Ex. 13. Mr. Goldberg's email closed with an offer to speak more with anyone who "desires to learn more about the reality (as opposed to the myths) of the JONAH case," instructing them to use the jonahhelp@aol.com email address or JONAH's phone number. Ex. 12.

C. Defendants Reveal Their Continued Engagement in and Promotion of Conversion Therapy and Conversion Therapy-Related Commerce

Lest there be any doubt as to JIFGA's true purpose, its 2016 tax return, along with subsequent confirmation by Defendants themselves, makes clear that Defendants are using JIFGA to continue JONAH's core operations. JIFGA's 2016 IRS Form 990[7] reveals that it paid $42,549 in "professional fees and other payments to independent contractors" through Form 1099s. Ex. 7 at 1 at Line 13. The Form 990 also indicates that JIFGA took in $29,618 in "gross receipts from admission, merchandise sold or services performed, or facilities furnished in any activity that is related to the organization's tax-exempt purpose." *Id*. at Schedule A at 3. These funds are distinct from any gifts, grants or donations JIFGA received. *Id*.

After reviewing JIFGA's 2016 tax filings, Plaintiffs sent a letter to defense counsel on January 19, 2018, requesting that Defendants provide the Form 1099s[8] that JIFGA issued in 2016, as well as documentation sufficient to identify the source(s) of their gross receipts. Ex. 14. On January 30, 2018, Plaintiffs received a response from defense counsel disclosing, for the first time, that when JONAH publicly announced it had ceased operations, it had actually transferred assets directly to JIFGA. Ex. 15. Among those assets were the balance

[7] An IRS Form 990 is an Internal Revenue Service form that a nonprofit organization must file annually to provide the public with information about its mission, governance and finances.

[8] A IRS Form 1099 is an Internal Revenue Service form used by businesses, including nonprofits, to report amounts paid to independent contractors.

of a JONAH bank account and certain referral agreements between JONAH and its network of Conversion Therapy providers, namely Robert Vazzo and Robert Morgan. *Id.*

In their letter, Defendants admit that the referrals JONAH provided to Messrs. Vazzo and Morgan "most likely" include clients "seeking assistance with 'same-sex attraction,'" and that they generated $28,210.74 in direct payments to JIFGA in 2016, more than 95% of JIFGA's gross receipts for that year. *Id.* Of that sum, JIFGA kept $14,987.36, or more than 50%, as aggregate referral fees. *Id.* at 2. JIFGA paid the remainder to Messrs. Vazzo and Morgan as payment for the Conversion Therapy provided to their JONAH-referred clients. *Id.*

ARGUMENT

I. LEGAL STANDARD

A private litigant is entitled to move to enforce an injunction against a non-compliant defendant. *See In re Adoption of N.J.A.C. 5:96 & 5:97 ex. rel. N.J. Council on Affordable Hous.*, 221 N.J. 1, 17 (2015); *Asbury Park Bd. of Educ. v. New Jersey Dep't of Educ.*, 369 N.J. Super. 481, 486 (App. Div.) ("A claim that a party . . . is acting in violation of court order ordinarily should be brought before the court that issued that order . . . by a motion for relief in aid of litigants' rights under Rule 1:10-3."), *aff'd in relevant part*, 180 N.J. 109, *clarified by* 180 N.J. 113 (2004). Courts routinely grant Rule 1:10-3 motions to enforce their orders and injunctions. *See, e.g.*, *Adoption*, 221 N.J. at 17-20; *Irish Pub v. Stover*, 364 N.J. Super. 351, 353 (App. Div. 2003).

The Court has broad discretion to fashion appropriate remedies in order to ensure compliance with the Permanent Injunction. *See Adoption*, 221 N.J. at 17; *see also Bd. of Educ., Twp. of Middletown v. Middletown Twp. Educ. Ass'n*, 352 N.J. Super. 501, 509 (Ch. Div. 2001) ("The particular manner in which compliance may be sought is left to the court's sound

discretion.").[9] Further, Rule 1:10-3 gives the Court express authority to "make an allowance for counsel fees to be paid . . . to a party accorded relief under [Rule 1:10-3]." R. 1:10-3; Pressler & Verniero, cmt. 4.4.5 on R. 1:10-3 (award of counsel fees recognizes that "as a matter of fundamental fairness, a party who willfully fails to comply with an order or judgment entitling his adversary to litigants' rights is properly chargeable with his adversary's enforcement expenses").

II. DEFENDANTS HAVE VIOLATED THE PERMANENT INJUNCTION

A. JONAH Continues to Operate As JIFGA

This Court ordered JONAH to "permanently cease any and all operations" and to "permanently dissolve as a corporate entity and liquidate all its assets, tangible or intangible." Ex. 2 ¶¶ 1-2. Because JIFGA is a continuation of JONAH in all material respects, Defendants have plainly failed to comply with one of the most fundamental provisions of the Permanent Injunction.

JONAH's central business practice was providing its customers with referrals to a handpicked network of conversion therapists. Ex. 6, JONAH Dep. 76:12-14 ("[W]e primarily work as a referral agency"); Ex. 5, Trial Tr., 189:6-8, June 8, 2015 vol. 1 ("[A]ll the therapists are independent referral counselors."). These therapists included Robert Vazzo and Robert Morgan. Ex. 15. As part of this service, JONAH often received payments directly from its clients, retained a pre-negotiated referral fee and paid its affiliated conversion therapists through Form 1099s. Ex. 6, JONAH Dep. 73:9-15, 83:2-6; 133:7-11.

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[9] Where a court finds that a defendant's failure to comply was not excusable, these remedies can include coercive measures, including the imposition of monetary sanctions. *See Milne v. Goldenberg*, 428 N.J. Super. 184, 199 (App. Div. 2012) (monetary sanctions appropriate where defendant simply "ignored the obligation" contained in the court's order); *see also* Sylvia B. Pressler & Peter G. Verniero, *Current N.J. Court Rules*, cmt. 4.3 on R. 1:10-3 (2017) ("[T]he court must be satisfied that . . . the defendant [was] able to comply and had no good reason to resist compliance.").

Some of JONAH's operations, including certain of its Conversion Therapy referrals, were provided under the Old JIFGA name, a label Defendants applied to make JONAH's services more palatable to the general public. Ex. 5, Trial Tr. 112:1-6, 113:1-4, June 8, 2015 vol. 1; Ex. 6, JONAH Dep. 34:14-22, 54:22-55:18. In essence, Defendants admitted that Old JIFGA was just another name for JONAH.

Defendants incorporated "new" JIFGA, repurposing the self-admitted JONAH alter ego, only eleven days after entry of the Permanent Injunction—even before JONAH publicly announced it would cease operations. JIFGA operates out of JONAH's offices in Jersey City, uses JONAH's telephone number and employs JONAH's co-directors and trustees. As Defendants later disclosed, JONAH also transferred liquid assets and assigned its referral agreements with conversion therapists to JIFGA, enabling this "new" organization to carry out JONAH's enjoined activities without interruption. In fact, 95% of JIFGA's 2016 gross receipts came from payments it collected from JONAH clients who continue to receive Conversion Therapy from JONAH-referred Conversion Therapy providers. JIFGA deposited these payments, kept thousands in referral fees and paid its conversion therapists through Form 1099s, just as JONAH had done.

The fact that JONAH and JIFGA share the same directors and trustees, location, assets and operations makes it clear that JONAH has not "permanently cease[d] any and all operations." Defendants cannot avoid compliance with the Permanent Injunction simply by changing the name on their door. *See, e.g.*, *Marshak v. Treadwell*, 595 F.3d 478, 490 (3d Cir. 2009) (applying New Jersey law and finding that two entities were "mere continuations" of an enjoined company because "the personnel of each business were the same, the location of each business was the same, the assets of each business were the same, the general operations of each

business were the same, and [the predecessor] folded shortly after [the new entities] w[ere] formed"); *see also Woodrick v. Jack J. Burke Real Estate, Inc.*, 306 N.J. Super. 61, 77 (App. Div. 1997) (finding a corporation inherited the liabilities of its predecessor and noting that the new corporation amounted to nothing more than "a change of hat"). Because JIFGA is, at its core, a continuation of JONAH, Plaintiffs request that the Court find that Defendants have violated the injunction by failing to "cease any and all operations" of JONAH and order that JIFGA be subject to the Permanent Injunction in all respects, including Paragraphs 1-2, which set out the terms on which JIFGA should be required to cease operations and dissolve.

B. Defendants Continue to Engage in Conversion Therapy and Promote Conversion Therapy-Related Commerce

The Permanent Injunction also bars Defendants from "engaging, whether directly or through referrals, in [Conversion Therapy], or advertising, or promoting Conversion Therapy or Conversion Therapy-related commerce in or directed at New Jersey or New Jersey residents." Ex. 2 ¶¶ 3, 5. Just as JONAH used Old JIFGA to legitimize its services, Defendants have used the JIFGA façade to obscure their continued engagement in, and promotion of, Conversion Therapy and Conversion Therapy-related commerce.

Defendants have now admitted that, through JIFGA, they continue to receive money from JONAH's Conversion Therapy clients as payment for continuing Conversion Therapy. In 2016, Defendants retained approximately 50% of those payments for themselves and then paid the rest to their affiliated Conversion Therapy providers—all from their office at 80 Grant Street in Jersey City. There can be no question that these activities constitute engaging in "Conversion Therapy."[10] As discussed above, it is precisely this activity that caused Plaintiffs

[10] Notably, the Permanent Injunction's definition of "Conversion Therapy" goes beyond "therapy, counseling [or] treatment" to include "any . . . activity that has the goal of changing, affecting or influencing sexual orientation, "same sex attraction" or "gender wholeness" or any equivalent term." Ex. 2 ¶ 3. Thus, the fact that neither JIFGA

to bring suit against Defendants, led a jury to find that Defendants violated New Jersey law and resulted in the Court entering the Permanent Injunction.

These same actions also constitute an impermissible promotion of Conversion Therapy-related commerce. It is beyond question that accepting money for a good or service, as well as making payments to the provider of a good or service, is an act of commerce. *See, e.g.*, *Hambright v. Yglesias*, 200 N.J. Super. 392, 395 n.1 (App. Div. 1985) ("Commerce is defined as business.").[11] Similarly, Defendants cannot credibly deny that their actions, which are the exclusive means through which certain of their clients pay for the Conversion Therapy that JONAH referred them to, "promote" Conversion Therapy-related commerce.[12]

In their January 30 letter, Defendants suggest that they have not violated the Permanent Injunction because they limited their Conversion Therapy and Conversion Therapy-related commerce to customers who do not reside in New Jersey and who receive Conversion Therapy services outside of the state. *See* Ex. 15. As an initial matter, the plain terms of the Permanent Injunction prohibit "engaging, whether directly or through referrals, in [Conversion Therapy]" without regard to location, placing the "in or directed at New Jersey or New Jersey residents" limitation only on "advertising, or promoting Conversion Therapy or Conversion Therapy-related commerce[.]" *See* Ex. 2 ¶ 3. In any event, Defendants' argument

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nor Defendants are directly providing the Conversion Therapy at issue is irrelevant. Defendants' own letter makes clear that their active facilitation of payments for Conversion Therapy through JIFGA is an "activity that has the goal of changing, affecting or influencing" their clients' sexual orientation. *See* Ex. 15.

[11] And, of course, an entity's nonprofit status is irrelevant to whether or not its exchange of money for services constitutes "commerce." *See United States v. Brown Univ. in Providence in State of R.I.*, 5 F.3d 658, 666 (3d Cir. 1993) ("The exchange of money for services, even by a nonprofit organization, is a quintessential commercial transaction."); *see also Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 295 n.8, 297-98 (1985) (nonprofit religious organization was an "[e]nterprise engaged in interstate commerce" under the FLSA insofar as it derived income from the operation of "ordinary commercial activities").

[12] *Promote*, Miriam-Webster, https://www.merriam-webster.com/dictionary/promote (last updated Mar. 21, 2018) (meaning "to contribute to the growth or prosperity of" or "further," and "to help bring (something, such as an enterprise) in being").

ignores the dispositive facts that Defendants themselves are based in New Jersey and that they incorporated a New Jersey entity whose apparent sole function is to receive and make payments from their New Jersey headquarters on account of Conversion Therapy services they orchestrated. Ex. 4 at 2; Ex. 7; Ex. 15. Moreover, the facts that Defendants in their letter point to as exculpatory are the same as those that formed the basis of Plaintiff Jo Bruck's successful claims against Defendants. *See* Ex. 1 ¶¶ 22-23, 88-100. There, none of Ms. Bruck, her son who received the Conversion Therapy nor the Conversion Therapy provider were located in New Jersey. *Id.* Just as the location of the customers and the Conversion Therapy providers were irrelevant to Ms. Bruck's claims against Defendants, so too are those locations irrelevant here.

Similarly unavailing is Defendants' too-clever-by-half suggestion that their conduct does not violate the Permanent Injunction because the "actual referrals" pursuant to which they were paid predate the Permanent Injunction. Ex. 15. Regardless of when the initial referrals were made, the Conversion Therapy itself, which JIFGA facilitates and promotes through its ongoing receipt and distribution of payments, postdates the Permanent Injunction. JIFGA assumed responsibility for paying the conversion therapists for their services. In doing so, it and Defendants became the sole conduit through which the ongoing Conversion Therapy at issue was paid for. It defies reason to suggest that the Permanent Injunction can be read to permit Defendants to continue engaging in Conversion Therapy so long as that therapy began prior to the three week trial where the same actions were found by a jury to constitute consumer fraud and an unconscionable business practice.[13]

Finally, Defendants' argument about the date of the Conversion Therapy referrals in no way alters the fact that they have continued to promote Conversion Therapy-related

[13] Indeed, if the Permanent Injunction envisioned that Defendants would be permitted to continue working with their preexisting clients, the grandfather clause that permitted Alan Downing to transition his Conversion Therapy clients to other providers would have been unnecessary. Ex. 2 ¶ 3.

commerce in New Jersey. As explained above, Defendants' post-Permanent Injunction acceptance, in New Jersey, of payments for ongoing Conversion Therapy, and their subsequent payments, from New Jersey, to conversion therapists for that Conversion Therapy, independently constitutes an impermissible promotion of "Conversion Therapy-related commerce," regardless of when the underlying contracts were signed and when the referrals themselves were made. As a result, Plaintiffs request that the Court find that Defendants have violated the Permanent Injunction by engaging in Conversion Therapy and promoting Conversion Therapy-related commerce.

III. PLAINTIFFS ARE ENTITLED TO DEFAULT JUDGMENT FOR THE FEE AWARD

In addition to enforcement of the Permanent Injunction, Plaintiffs are also entitled to entry of default judgment against Defendants for failure to pay the remaining Fee Award, an obligation triggered by Defendants' breaches of the Settlement Agreement.

The Settlement Agreement provides that if Defendants breach the terms of the Settlement Agreement within five years of entry of the Permanent Injunction, then "Plaintiffs shall be entitled to" collect the full Fee Award, less the confidential sum Defendants paid pursuant to the Settlement Agreement. Ex. 3 ¶ 6(a). Any violation of the Permanent Injunction constitutes a breach of the Settlement Agreement. *Id.* If Defendants fail to make such a payment within thirty days of receiving a breach notice from Plaintiffs, Plaintiffs are entitled to seek default judgment for Defendants' failure to satisfy the full Fee Award. *Id.* ¶ 6(b).

As demonstrated above, Defendants' actions over the last two years conclusively establish that they have violated the Permanent Injunction by failing to "permanently cease any and all operations" and by engaging in and promoting Conversion Therapy and Conversion Therapy-related commerce. *See supra* Part II. Further, Defendants' activities relate to

Conversion Therapy sessions that have already occurred, rendering their breaches incapable of being cured. Because Defendants' actions also constitute incurable breaches of the Settlement Agreement, if Defendants fail to satisfy the Fee Award by April 27, 2018, Plaintiffs are entitled to default judgment in an amount equal to the unpaid portion of the Fee Award. *See* Ex. 3 ¶¶ 6(a)-(c).

IV. AN AWARD OF COSTS AND FEES TO PLAINTIFFS IS APPROPRIATE

Pursuant to New Jersey's Court Rule 1:10-3, the Court has the discretion to award counsel fees to Plaintiffs if they prevail in establishing that Defendants' failure to comply with a court order was inexcusable. *See* Pressler & Verniero, cmt. 4.4.5 on R. 1:10-3; *see also Milne v. Goldenberg*, 428 N.J. Super. 184, 209 (App. Div. 2012). As established above, Defendants were fully capable of complying with each of their obligations under the Permanent Injunction; they simply chose to not do so. *See supra* Part II. Nor can Defendants' actions be interpreted as an honest mistake. Quite to the contrary, Defendants constructed the appearance of a "new" organization, which appears to exist only to promote Conversion Therapy and to obscure Defendants' continued receipt of tens of thousands of dollars from JONAH's core operations. These admitted facts demonstrate the willful violation of the Permanent Injunction. Accordingly, Defendants should be responsible for the expense incurred to hold them accountable for their inexcusable attempts to evade compliance with the Permanent Injunction.[14]

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[14] Should the Court grant this request, Plaintiffs will submit a certification setting forth their attorneys' time and expenses.

CONCLUSION

Plaintiffs respectfully request that the Court enter an order:

1. Finding that JONAH, Arthur Goldberg and Elaine Berk have violated the Permanent Injunction by failing to "permanently cease any and all operations" of JONAH;
2. Finding that JONAH, Arthur Goldberg and Elaine Berk have violated the Permanent Injunction by engaging in Conversion Therapy and promoting Conversion Therapy-related commerce;
3. Finding that JONAH, Arthur Goldberg and Elaine Berk have breached their obligations under the Settlement Agreement;
4. Ordering that JIFGA, as a successor to JONAH, be subject to the terms of the Permanent Injunction in all respects and, pursuant to Paragraphs 1-2 of the Permanent Injunction, must permanently cease any and all operations within 30 days of the entry of the Court's order and must dissolve as a corporate entity within 180 days of the entry of the Court's order; and
5. Granting default judgment against JONAH, Arthur Goldberg and Elaine Berk in respect of the unpaid portion of the Fee Award.

In addition, Plaintiffs respectfully request that the Court award them the costs of bringing this Motion, including attorneys' fees.

Dated: March 28, 2018

Respectfully submitted,

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BRIEF IN OPPOSITION TO PLAINTIFFS MOTION TO ENFORCE PERMENNAT INJUNCTION AND ENTER DEFAULT JUDGMENT.

Michael P. Laffey

On the Brief

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PRELIMINARY STATEMENT

The plaintiffs have filed a motion claiming that the Defendants have violated the settlement agreement. In support of this contention they rely on an interpretation of the agreement contrary to the intent of the parties, take actions of the Defendants out of context, and rely on assumptions that are incorrect and events they have known about for almost two years but did not object to. Further they have brought this motion without following the procedures for notice of default set in the settlement agreement. It appears that the Plaintiffs are trying to enforce an agreement that they wished they had, rather than the one they actually have.

STATEMENT OF FACTS

This matter was tried to conclusion on June 25th, 2015. The Jury found in favor of the Plaintiffs. Before the Court entered final judgment the parties began extensive negotiations that resulted in a settlement of the case. The terms of that settlement are memorialized by an order entering a permanent injunction against the Defendants that was agreed to jointly stipulated to by all the parties (exhibit A. certification of Michael P. Laffey) and a settlement agreement which references said consent order (exhibit B "certification of Michael P. Laffey" hereinafter cert. of MPL)

Plaintiffs now bring a motion alleging that the Defendant Arthur Goldberg and Elaine Berk, who was not a party to the original action but who made certain promises in the settlement agreement, have violated the terms of the settlement agreement and now seek to enforce that agreement.

Specifically plaintiffs make the following allegations:

1. That JONAH INC. continues to operate under a different name in violation of the permanent Injunction.

2. That the Defendants continue to be involved in Conversion Therapy and Conversion Therapy related Commerce.

POINT 1

THE JEWISH INSTITUTE FOR GLOBAL AWERENESS ("JIFGA") IS NOT THE ALTER EGO OF JONAH.

Plaintiffs allege that JIFGA is the alter ego of Jonah and therefore its existence is a violation of the language in the permanent injunction that requires JONAH to cease all operations. JIFGA does not provide any of the services that JONAH performed. It does not provide the "educational services" that JONAH provided and it does not provide referrals and or direct services as JONAH did. It does not operate JONAH's website and in fact the website was taken offline as required by the order. That this has been done is set forth in the certification of Anthony Tawadrous who managed the JONAH website.

The Certificate of Dissolution for JONAH is attached as (exhibit C, cert. of MPL) to the certification of Michael P. Laffey. As required by law paragraph 5 of the certificate of dissolution sets forth a plan of dissolution which states that the property of the Corporation will be transferred to JIFGA a not for profit corporation. N.J.S.A. § 15A:12-8 requires "Transfer or conveyance of all assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational or similar purposes, … " The disposition of JONAH's assets was done as required by law and disclosed in the certificate of dissolution. It should be noted that the certificate of dissolution was sent to counsel on August 30, 2016 (ex.D, cert. of MPL) and no objection was raised to that plan of dissolution until 20 months after the fact. The fact that JIFGA has the same board members or that it offered employment to the long time employees of JONAH is immaterial as neither those

facts or the transfer of assets violate the permanent injunction or the settlement agreement. These facts are immaterial because JIFGA does not engage in the activities that JONAH engaged in nor does it engage in activity that violates any of the terms of the injunction or the settlement agreement. The primary case that Plaintiffs cite *Marshak v. Tredwell,* 593 F.3d 478, 490 (3rd Cir.) was based not only on the personnel and the location being the same but the "general operations of each business being the same". The facts show that this requirement is not present in this case.

The mission Statement of JIFGA as set forth on its, website (exhibit 4) States;

> The Jewish Institute for Global Awareness seeks to globally provide humanity with greater awareness of the existence of these universal values, principles that are dependent upon Biblical teachings. These are root ethical values that Jews, Christians and Muslims, who represent more than 50% of the world's population, can act upon within their own religious traditions. The great Eastern religions, Hinduism and Buddhism, also have, at their root, a primordial link to these core values. In fact, going back to Noah, these values are part of a legacy for all humanity to follow.
>
> The Jewish Institute for Global Awareness (JIFGA) teaches that by understanding, internalizing and following a set of Divinely-ordained moral imperatives and universal ethics known as the Seven Noahide Laws, the world can produce more just societies, which are better able to receive and retain G-d's** Presence. We seek to inspire our fellow human beings, because we are all descendants of Noah who, together with his family, is described in the Hebrew Bible as the survivor of The Flood and who thus became the ancestor of all of humanity. However, not only do we seek to inspire everyone who follows the Abrahamic religions (Jews, Christians, and Muslims) to follow these Noahide laws but also those of every race, color, or creed.
>
> Our foundation is rooted in Biblical principles and expresses a Biblical world-view. Some may refer to this code as representative of a "Judeo-Christian" worldview because it includes the moral values initially set forth in the Hebrew Bible (the Torah) and shared by the Christian traditions that historically shaped much of the western world. Given to us by G-d at the dawn of history, (as recounted in the book of Genesis and documented in the Talmud, Sanhedrin 56a-b -- the Oral Law), these seven principles, if followed, permit us to establish a harmonious world in which diverse peoples can live together peacefully.

The Mission statement attached as exhibit 5 further sets forth the purpose of JIFGA. Clearly JIFGA is not about therapy of any type and is a vehicle to promote religious values.

What exactly has JIFGA done in this area aside from creating a website to promote certain religious ideals? Arthur Goldberg using JIFGA as a platform has written profusely on issues relating to the focus of JIFGA. Below is a list of those articles and essays, with links to sites where they were published and discussed, which is illustrative of the writing he has done.

The Secularization of America's Religious Colleges and Universities - www.catholiceducation.org/en/education/other-topics/the-secularisation-of-america-s-religious-colleges-and-universities.html

Western civilization depends on parental rights. Time to restore them - www.lifesitenews.com/opinion/western-civilization-depends-on-parental-rights.-time-to-restore-them "We Must Reclaim Parental Rights as Building Blocks to a Healthy Society" (reprinted as a CNS News commentary under the title "Parental Rights Subject to Whims of the Courts, Must be Restored" at *https://www.cnsnews.com/commentary/arthur-goldberg/parental-rights-becoming-subject-whims-courts-must-be-restored*

Abortion Stops A Beating Heart: The Heartbeat Protection Act of 2017 - https://barbwire.com/2017/03/10/abortion-stops-beating-heart-protection-act-2017/

Euthanasia Activists Want to Legalize Assisted Suicide in All 50 States, We Have to Stop Them - www.lifenews.com/2017/12/20/euthanasia-activists-want-to-legalize-assisted-suicide-in-all-50-states-we-have-to-stop-them/

The Inalienable Right to Life: An Update on Assisted Suicide in the United States and Canada - www.virtueonline.org/inalienable-right-life-update-assisted-suicide-united-states-and-canada

In Canada, If Your Doctor Thinks Your Death in "Reasonably Foreseeable" He Can Euthanize You - www.lifenews.com/201709/12/in-canada-if-your-doctor-thinks-your-death-is-reasonably-foreseeable-he-can-euthanize-you/

Good essay by Arthur Goldberg on Assisted Suicide in US and Canada by Richard Myers - www.uffl.org/blog/2017/12/08/good-essay-by-arthur-goldberg-on-assisted-suicide-in-us-and-canada/

The Inalienable Right to Life: An Update on Assisted Suicide in the United States and Canada - www.lifeissues.net/writers/gold/gold_08inalienablerighttolife.html

Full copies of these articles and others listed below that Mr. Goldberg has written can be accessed on the Public Discourse website at http://www.thepublicdiscourse.com/author/arthur-goldberg

"The Inalienable Right to Life: An Update on Assisted Suicide in the United States and Canada,"

"The Urgency of Restoring the Biblical Values of America's Founders,"

"Same-Sex Attraction and Therapy: It's Time to Let People Choose"

"A Tragic Abandonment of Identity:-The Secularization of America's Religious Colleges and Universities."

Rabbi Dr. Shimon Cowen, the son of the former Governor General of Australia and leader of the Institute for Judaism and Civilization, co-authored two articles for publication with Arthur Goldberg. They are *Restoring the Political Moral Center,* http://www.thepublicdiscourse.com/2016/08/17530/ and the *Contagion of Euthanasia and the Corruption of Compassion* http://www.thepublicdiscourse.com/2017/09/19983/ .

Arthur Goldberg and Elaine Berk we met with Rabbi Yakov D. Cohen, Director of the Institute of the Noahide Code, a UN based NGO with consultative status to the United Nations whose focus is to create peaceful cooperation among people and nations. Rabbi Cohen, had both Elaine Berk and Arthur Goldberg appear on his television show to explain our particular focus on educating the public about the Noahide principles and their applicability to today's social and cultural issues.

A second group with whom JIFGA connected is Ask Noah.Org led by Rabbi Dr. Michoel Schulman. Impressed by JIFGA's research on various topics, including in particular how various world leaders have recognized the importance of the Noahide laws as a moral code for all nations, Dr. Schulman asked permission to reprint some of Mr. Goldberg's research on their website. See, e.g., https://asknoah.org/faq/have-the-noahide-laws-been-recognized-by-any-governments .

JIFGA is also working with an organization out of Texas called Netiv which does a great deal of educational video programming and will start doing projects with JIFGA when, in the near future, Rabbi Dror Moshe Cassouto joins JIFGA as its director of Religious Education.

These activities are set forth more fully in the certification of Arthur Goldberg.

In furtherance of their argument that JIFGA is the alter ego of JONAH Plaintiffs point to a website run by JIFGA called Funding Morality and particularly a project on that site called *The Legacy of Dr. Joseph Nicolosi Sr.; Video Series.*

Funding Morality.com explains what it is as follows:

> We began as a result of the denial by other "crowd funding" platforms to profile persons of faith who would not compromise their moral and biblical convictions and in turn have been persecuted by those who are intolerant of a Judeo-Christian worldview. These crowd-funding platforms (which are mostly for-profit businesses) have often denied services to individuals who have lost their jobs, been harassed or persecuted for their politically incorrect views. https://fundingmorality.com/page.php?id=who-we-are

The projects that appear on the website are created by third parties. Not by Arthur Goldberg, not by Elaine Berk and not by JIFGA. Plaintiffs conveniently ignore the other projects found on the site such as raising money for Jonathan Wedger a crusader against child sexploitation, scholarships for pro-life medical students, funding for a Political Network for Values- Youth

Program, money for the medical bills of Stephanie Packer, wife and mother of four and a former church youth counselor who was diagnosed with scleroderma in 2012, funding for a Kenyan youth center *The Life Choices program*, started by the Anglican Church and funding for Julio Severo Blogger and one of the founders of the National Pro-Life and Pro-Family Network in Brazil. (see certification of Arthur Goldberg)

The activities of JIFGA and of Funding Morality involve issue advocacy. It is clearly a different mission than the mission JONAH was engaged in and JIFGA is therefore not the alter ego of Jonah.

POINT II

DEFENDANTS ARE NOT ENGAGED IN THE PROMOTION OF CONVERSION THERAPY OR CONVERSION RELATED THERAPY

When contacted by the attorneys for the Plaintiffs regarding certain income JIFGA received despite there being no legal basis for them to request the information, defendants through counsel responded honestly and forthrightly. In that response which is attached as exhibit 15 to Plaintiffs moving papers. Defendants admitted to receiving referral fees that used to go to JONAH and while not knowing exactly what the clients were being treated for assumed it was likely that some were receiving therapy for same sex attraction. Defendants stand by the argument that to the extent any of the referrals were receiving treatment for same sex attraction receipt of the fees did not violate the injunction or the settlement agreement because the actual referrals pre-dated the settlement, the clients did not reside in New Jersey and the counsellors did not reside in NJ.

That being said the Court does not need to address that issue to decide this motion.

Upon being served with the plaintiffs motion Defendants contacted the counsellors to determine exactly what the referral clients were receiving treatment for. As it turns out none of the referral clients are receiving treatment for same sex attraction (or as Plaintiffs refer to it "conversion therapy").

Both Robert Vazzo and Robert Morgan have submitted certifications wherein they make it clear that none of those clients are (or were) being treated for same sex attraction. Further, so that there can be no doubt as to that fact, they set forth what each client was being treated for and how they were being treated. Based on their certifications it is clear that none of those referral fees were paid for people who were receiving "conversion therapy". Therefore receipt of those fees can in no way said to violate the injunction or the settlement agreement.

POINT III

TO THE EXTENT THAT THE DEFENDANTS ENGAGED IN ANY ACTIVITIES THAT ADDESSED THE SUBJECT OF SAME SEX ATTRACTION OR "CONVERSION THERAPY" THOSE ACTIVITIES WERE IN THE NATURE OF ISSUE ADVOCACY AND ARE NOT PROHIBITED BY THE INJUNCTION OR THE SETTLEMENT AGREEMENT

The settlement agreement and the permanent injunction which was entered into with the consent of the parties were the result of negotiations that took place over the course of many months. The trial ended on June 25th and the settlement was not finalized until almost 6 months later. There was correspondence between the parties and various drafts of the agreements circulated. These documents will show the Court that the certain acts of Defendants now complained of were not intended to be prohibited by the agreement.

> Evidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement. This is so even when the **contract** on its face is free from ambiguity. The polestar of construction is the intention of the parties to the **contract** as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be

> regarded. ***HN3***The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing -- not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said. So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant. The judicial interpretive function is to consider what was written in the context of the circumstances under which it was written, and accord to the language a rational meaning in keeping with the expressed general purpose. *Casriel v. King*, 2 *N.J.* 45 (1949).*Atl. N. Airlines, Inc. v. Schwimmer*, 12 N.J. 293, 301-02 (1953)

Building on this the Court in *Conway v. 287 Corp. Ctr. Assocs.*, 187 N.J. 259, 269 (2006) stated.

> Within the constraints described in *Schwimmer*, the court allows a thorough examination of extrinsic evidence in the interpretation of contracts. Such evidence may "include consideration of the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct." *Kearny PBA Local # 21 v. Town of Kearny*, 81 N.J. 208, 221, 405 A.2d 393 (1979). "Semantics cannot be allowed to twist and distort [the words'] obvious meaning in the minds of the parties." *Schwimmer*, *supra*, 12 N.J. at 307, 96 A.2d 652. Consequently, the words of the **contract** alone will not always control.

One issue that greatly concerned the Defendants was the question of issue advocacy. Attached to the certification of counsel are the emails, correspondence and marked up agreements that addressed this issue. (exhibits E through K, cert.MPL). Particularly Counsel's letters to James Bromley dated November 4 2015 and December 1, 2015 (exhibits E and F, Cert. MPL) make it clear that the Defendants would not enter into a settlement that abridged their constitutional right to engage in issue advocacy and that they would only agree to not be engaged in providing services or promoting service in a commercial setting. This is made especially clear in the letter dated December 1 2015 were it states

> As to the broadening of the prohibited activities to include "promotion or advocacy" once again this action deals with the provision of services. From the beginning of our negotiations we have discussed barring my clients from that

> activity and it appears that now that we are very close to an agreement there is an effort on behalf of the Plaintiffs to broaden the scope of the agreement. The issue of sexual orientation change is an issue of public policy that touches on issues related to religion, science and social policy. There are many national organizations that address this issue along with many other political and cultural issues and this provision would bar my clients from working with those organizations. My clients will not agree to waive their First Amendment rights such that they are barred from participating in the debate of the issues surrounding sexual orientation change.

In response to this stand as shown in the redacted version of the settlement agreement that was an attachment to Mr. Bromley's email of December 8, 2015 (Ex. G, cert. MPL) the word "advocacy" was specifically removed as a prohibited activity.

Plaintiffs now come before the Court and seek to punish the defendants for activities that they agreed would not be prohibited.

More specifically they allege that the following activities violate the party's agreement.

First they allege that Mr. Goldberg violated the agreement by promoting conversion therapy on a Nefesh listserv, a listserve used by predominantly orthodox Jewish Mental Health Professionals because in a response to a comment about JONAH by one of the users he referred them to an article written by Dr. Laura Haynes PH.D. and lead counsel in the JONAH case Charles Limandri Esq. It is alleged that this violates the injunction because that article then cites sources referenced by the Defendants proposed experts which allege that change therapy can be effective. Aside from the fact that it is based on the tenuous proposition that Mr. Goldberg cited an article which cited an article, the conversation was not only taken out of context but falls within the realm of issue advocacy. It is no secret to this court that Plaintiffs and their Counsel disagreed with many of the rulings the Court issued in connection with the case. The article is clearly aimed at those disagreements. Further as can be seen from both the comment of Dr.

Sarah Miller about the "JONAH debacle" and concerns about" religious coercion" and Mr. Goldberg's response he was clearly addressing what he felt was Dr. Miller's misconception about what JONAH did and arguing that the Courts legal rulings were incorrect. This is not the advertising or promotion of conversion therapy or conversion therapy related commerce. It is not aimed at getting an individual to engage in conversion therapy, which is the essence of what Mr. Goldberg was sued for. Mr. Goldberg's comments and his citing the article is however, firmly within the realm of issue advocacy.

Plaintiffs also point to JIFGA's becoming a member of the "National Task Force for Therapy Equality". There website is located at http://www.therapyequality.org/ .

Their home page states that" The National Task Force for Therapy Equality is a coalition of licensed psychotherapists, psychiatrists, physicians, public policy organizations, and psychotherapy clients/patients from across the United States of America. Their purpose is to secure therapy equality for clients that experience distress over unwanted same-sex attractions and identity conflicts." The website reveals that they have provided testimony at legislative hearings on conversion therapy and engaged in letter writing to legislators. They do not sell services or make referrals for "conversion therapy" They are clearly an issue advocacy organization. It should be noted that the settlement agreement prohibits the defendants from being on the Board or having a leadership position in organizations that were involved in providing or making referrals for "conversion therapy" (ex. B cert. MPL) but even as to those organizations the Defendants were explicitly not prevented from being members of such organizations.

Defendants also point to the fact that "Funding Morality" allowed an organization seeking funding for a video on the Legacy of Dr. Joseph Nicolosi Sr. (who died on March 8, 2017,

https://www.nytimes.com/2017/03/16/us/joseph-nicolosi-dead-gay-conversion-therapist.html). Once again this is not aimed at selling conversion therapy services to individuals but is issue advocacy. To argue otherwise would subject every article, book or video that defended "conversion therapy" to a claim of consumer fraud. To do that would unequivocally be a violation of the First Amendment to the Constitution. A right that the Defendants clearly had no intention of waiving.[1]

POINT IV

PLAINTIFFS MOTION IS PREMATURE AND VIOLATES THE SETTLEMENT AGREEMENT.

Paragraph 6a of the settlement agreement states:

> Plaintiffs shall provide notice to the JONAH parties of their intent to seek applicable Breach Damages, accompanied by a description of Plaintiff's good faith basis for believing the JONAH parties are in Breach of the settlement agreement or Order. If the Defendants fail to cure the Breach within 30 days of receiving notice or if the Breach cannot be cured (collectively an uncured Breach the applicable Breach Damages will become due.

The agreement then goes on to say that if the Breach cannot be cured then the Defendants have 30 days to pay the "Breach Damages" and it is only after those are unpaid that the Plaintiffs will file a motion. Defendants ignore this provision of the settlement agreement. They state that the reason that they do not have to follow the procedures set

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[1] it is just as firmly established that "every reasonable presumption should be indulged against * * * **waiver" of a constitutional right**. *Hodges v. Easton*, 106 *U.S.* 408, 412, 1 *S. Ct.*307, 27 *L. Ed.* 169 (1882). The vast majority of cases concerning waiver of constitutional rights deal with criminal proceedings wherein the courts repeatedly stress that there must be "an intentional relinquishment or abandonment of a **known** right or privilege." *Johnson v. Zerbst*, 304 *U.S.* 458, 464, 58 *S. Ct.* 1019, 1023, 82 *L. Ed.* 1461 (1938); *Brady v. United States*, 397 *U.S.* 742, 748, 90 *S. Ct.* 1463, 25 *L. Ed.* [***7] 2d 747 (1970); *Miranda v. Arizona*, 384 *U.S.* 436, 444, 86 *S. Ct.* 1602, 16 *L. Ed.* 2d 694 (1966); *United States v. Corbitt*, 541 *F.* 2d 146, 149 (3 Cir. 1976), and *State v. Green*, 129 *N.J. Super.* 157, 161 (App. Div. 1974). In *Schneckloth v. Bustamonte*, 412 *U.S.* 218, 93 *S. Ct.* 2041, 36 *L. Ed.* 2d 854 (1973)... Our Appellate Division, in *State v. Morgenstein*, 147 *N.J. Super.* 234 (App. Div. 1977) has observed that in New Jersey: *Even within the setting of a civil controversy* it must affirmatively appear that the party charged with waiver **knew** his rights and deliberately intended to relinquish them
Porter & Ripa Assocs., Inc. v. 200 Madison Ave. Real Estate Grp., 159 N.J. Super. 317, 322 (Super. Ct. 1978)

forth in the agreement is because the breach cannot be cured. They do not however state what about any of the alleged breaches is incurable. Defendants are entitled to the notices set forth in the agreement and are entitled to try and cure any alleged breaches. As the Plaintiffs have not met the condition precedent to filing this motion that is in the agreement, this motion is premature and should be dismissed by the Court or in the alternative the Court should state what it finds to be a breach of the agreement and then the Defendants should have 30 days to cure that breach.

POINT V

PLAINTIFFS RIGHT TO ALLEGE THAT CERTAIN CONDUCT OF THE DEFENDANTS IS A BREACH OF THE SETTLEMENT AGREEMENT IS BARRED BY THE DOCTRINE OF LACHES.

Plaintiffs knew in August of 2016 that the assets of JONAH had been transferred to JIFGA. Mr. Goldberg's post on the Nefesh list serve was in May of 2016. Plaintiff did not give notice to plaintiff that they considered these acts to be a breach of the agreement until they filed the current motion in March of 2018. They now claim the breaches of the agreement are incurable. While the Defendants position is that all of the complained of breaches can be cured, if in fact they cannot, it is likely because of the passage of time. For instance if the Plaintiffs had taken the position in August of 2016 that any transfer of assets to a non-profit controlled by Arthur Goldberg or that using the acronym JIFGA was a violation of the settlement agreement Defendants could have taken immediate steps to avoid that argument. Instead they are being told almost two years later that they should not have done that and that now it is too late to fix it. Further if this had been

raised at that time it also would have disposed of the issue of referral fees as those would not have been assigned to JIFGA.

The doctrine of laches as involving "inexcusable delay in asserting a right. . . " *Lavin v. Hackensack Bd. of Educ.*, 90 *N.J.* 145, 151 (1982) (quoting *Atlantic City v. Civil Serv. Comm'n*, 3 *N.J. Super.* 57, 60 (App.Div.1949)), *Urban League of Greater New Brunswick v. Carteret,* 115 N.J. 536, 554 (1989). Pomeroy defines laches as "such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." 2 *Equity Jurisprudence* § 419, at 171-72 (5th ed. 1941). *Lavin v. Bd. of Educ.,* 90 N.J. 145, 151 (1982). As a result in their inexcusable delay, the Plaintiffs should be barred from claiming that a transfer of assets or the Nefesh list serve comments are a breach of the agreement. This also raises the issue of when did the Plaintiffs learn of other conduct of the Defendants that they complain of. This cannot be discerned from their brief and in light of the known delays they should be required to disclose that information and give a reason for any unreasonable delay.

CONCLUSION

For the reasons set forth herein Plaintiffs motion should be denied.

Respectfully Submitted

April 27, 2018

Michael P. Laffey
Attorney for Defendants