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Attorneys for Defendants

Michael Ferguson, Benjamin Unger, Sheldon	)	SUPERIOR COURT OF NEW JERSEY
Bruck, Chaim Levin, Jo Bruck, Bella Levin,	)	LAW DIVISION - HUDSON COUNTY
	)	
Plaintiffs,	)	DOCKET NO. L-5473-12
	)	
v.	)	Civil Action
	)	
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.	)	
	)	

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**BRIEF IN SUPPORT OF DEFENDANTS MOTION TO DISMISS**  
**FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

On the Brief  
Charles S. LiMandri Esq.  
Teresa L. Mendoza Esq.  
Michael P. Laffey Esq.

## INTRODUCTION

This case arises out of counseling services the plaintiffs sought from the defendants in connection with issues and problems stemming from (at the time) unwanted same-sex attraction. Plaintiffs have sued the defendants under New Jersey's Consumer Fraud Act ("CFA"), alleging that the defendants' position that sexual orientation can change is "false," "deceptive," and a "misrepresentation." In fact, a debate is currently raging in the scientific community regarding the fluidity of human sexual orientation, and there is a deep divide regarding the effectiveness and safety of sexual orientation change efforts ("SOCE"):

While many mental health care providers and professional associations have expressed considerable skepticism that sexual orientation could be changed through psychotherapy and also assumed that therapeutic attempts at reorientation would produce harm, recent empirical evidence demonstrates that homosexual orientation can indeed be therapeutically changed in motivated clients and that reorientation therapy does not produce emotional harm.

(J.S. Maxmen, M.D., et al., *Essential Psychopathology & Its Treatment* 468 (3rd ed., Norton and Co. (2009).)

In 2007, the Supreme Court of New Jersey affirmed entry of summary judgment against a plaintiff who had sued her doctor for failing to inform her that a fetus is a “complete, separate, unique, and irreplaceable human being” before performing an abortion on her. (*Acuna v. Turkish*, 192 N.J. 399, 403 (2007).) The Supreme Court noted that there is no consensus in the medical community supporting the plaintiff’s characterization of a fetus as a matter of biological fact, as opposed to as a moral, theological or philosophical judgment. (*Id.* at 416.) Ultimately, the Supreme Court held that it could not drive public policy on the deeply divisive issue of when life begins in a particular direction by compelling doctors to espouse a one-sided viewpoint with which they may not agree. Accordingly, it reinstated the trial court order dismissing the plaintiff’s lack-of-informed-consent claim. (*Id.* at 419-420.)

Here, the plaintiffs are well aware that there is no scientific consensus that sexual orientation is fixed and immutable, and, on the contrary, that many studies have confirmed that change is possible. Nevertheless, they want this Court to declare that asserting that sexual orientation can be changed is an unlawful act in violation of the CFA – i.e., a deception, a fraud, a misrepresentation. In other words, the plaintiffs want to use this Court not only to *drive* public policy on the deeply divisive issue of SOCE in a certain direction, but to *shut down* the debate by making one viewpoint on the issue literally illegal. As the New Jersey Supreme Court made clear in *Acuna*, this is not a proper role for the judicial branch. Accordingly, this Court should grant defendants’ motion to dismiss plaintiffs’ case with prejudice.

## STATEMENT OF FACTS<sup>1</sup>

Defendant JONAH, Inc. (“Jews Offering New Alternatives for Healing”) is a New Jersey non-profit corporation. Its mission is to help individuals who are dealing with a number of sexual issues, including unwanted same-sex attraction. (PC para.15<sup>2</sup>) Defendant Arthur Goldberg is a co-founder and co-director of JONAH. (PC para.16) Defendant Alan Downing is a life coach who accepts referrals from JONAH to provide individual and group counseling. (PC para.17)

At various times in 2007 and 2008, plaintiffs Benjamin Unger, Chaim Levin and Michael Ferguson each contacted JONAH for assistance in dealing with unwanted same-sex attractions and was referred to Alan Downing. (PC paras.18-20). In 2009, plaintiff

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<sup>1</sup> Support for the facts set forth in this Section and below is provided with reference to the plaintiffs’ complaint (“PC”), a true and correct copy of which is attached to the Certification of Charles S. LiMandri as Exhibit A. In their answer, defendants deny certain of the specific incidents and statements set forth in the Complaint, however, these factual disputes are not material to this motion.

<sup>2</sup> As set forth on the website referenced in PC 15, JONAH’s mission statement is set out as follows:

JONAH, Jews Offering New Alternatives for Healing, is a non-profit international organization dedicated to educating the world-wide Jewish community about the social, cultural and emotional factors which lead to same-sex attractions. JONAH works directly with those struggling with unwanted same-sex sexual attractions (SSA) and with families whose loved ones are involved in homosexuality.

Our Rabbinical sages explain that because mankind has been endowed by our Creator with a free will, everyone has the capacity to change. Furthermore, the Rabbis emphasize that parents, teachers and counselors have a special responsibility to educate, nurture, and provide an opportunity for those struggling with unwanted same-sex attractions to journey out of homosexuality.

Through psychological and spiritual counseling, peer support, and self-empowerment, JONAH seeks to reunify families, to heal the wounds surrounding homosexuality, and to provide hope.



Sheldon Bruck contacted JONAH for the same reason and was referred to Thaddeus Heffner, a licensed marriage and family therapist in Tennessee. (PC paras.22, 91)

Years after they left the JONAH program, the plaintiffs agreed to aid the Southern Poverty Law Center (“SPLC”) in its “campaign to end conversion therapy” by bringing this “first-of-its-kind” lawsuit asserting a consumer fraud action against providers of SOCE. (See <http://www.splcenter.org/get-informed/news/splc-files-groundbreaking-lawsuit-accusing-conversion-therapy-organization-of-fraud>, last accessed May 21, 2013.) The complaint alleges that defendants violated New Jersey’s Consumer Fraud Act (N.J.S.A. §§ 56:8-2 *et seq.*) by falsely claiming that homosexuality is a mental disorder, that gay orientation is alterable, that SOCE is grounded in science and effective, and that failure to change is the fault of the counseling client. (PC paras.34-42, 44, 66-70 [Unger], 78-82 [Levin], 89-93 [Bruck], 102-105 [Ferguson]).

### **PROCEDURAL HISTORY**

On November 27, 2012, plaintiffs filed their complaint in this matter. On February 4, 2013, Defendants filed their answer.

On February 26 2013, defendants served plaintiffs with a First Notice and Demand for Withdrawal of the Complaint in accordance with Rules 1:4-8(b) (1) and 1:8-8 (f). (A true and copy of the Notice is attached to the Certification of Charles S. LiMandri [“LiMandri Cert.”] as Exhibit B.) To date, plaintiffs have not withdrawn their complaint.

On March 6, 2013, this Court held a case management conference and issued its Initial Case Management Order. The Court re-assigned this case to Track IV – Case Type 508 (Complex Commercial). The next case management conference is scheduled for June 26, 2013 at 2:00 p.m. The discovery end date is May 23, 2014.

## **POINT I**

### **IT IS NOT THE ROLE OF THE COURT TO DECIDE** **SOCIETAL ISSUES THAT ARE SUBJECT** **TO SCIENTIFIC DISPUTE.**

#### **A. At Issue in *Acuna v. Turkish*: The Question of When Life Begins.**

In *Acuna v. Turkish* 192 N.J. 399 (2007), the New Jersey Supreme Court addressed one of the great questions of scientific, philosophical and theological dispute that has divided our society for decades. The question before the Court was “whether, under the common law duty to obtain informed consent, a physician is required to advise a women, who is in the sixth to eighth week of pregnancy, that an abortion procedure will kill not just a potential life, but an actual existing human being.” (*Id.* at 413.)

The Court in *Acuna* declined to impose that obligation. (*Id.* at 403-404.) The Court noted that while the *plaintiff* was “prepared to present expert testimony to establish as a biological fact that her embryo was an ‘existing human being’ . . . at the time of the abortion,” the *defendant* could present expert witnesses who “will assert that plaintiff’s characterization of the embryo as a living human being is a moral, theological, or

ideological judgment, not a scientific or biological one.” (*Id.* at 416.) The Court then concluded:

Clearly, there is no consensus in the medical community or society supporting plaintiff's position that a six- to eight-week-old embryo is, as a matter of biological fact -- as opposed to a moral, theological, or philosophical judgment -- “a complete, separate, unique and irreplaceable human being” or that terminating an early pregnancy involves “actually killing an existing human being.”

(*Id.* [emphasis added].) The Court also pointed out the United States Supreme Court had “eschewed answering the ‘difficult question of when life begins,’ stating that ‘[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.” (*Id.* at 417, quoting *Roe v. Wade*, 410 U.S. 113, 159 (1973) [emphasis added].)

In light of the lack of any consensus “[o]n the profound issue of when life begins,” the Court finally decided that it “cannot drive public policy in one particular direction by the engine of the common law when the opposing sides, which represent so many of our citizens, are arrayed along a deep societal and philosophical divide.” (*Id.* at 419 [emphasis added].) Accordingly, the Court held: “Under that doctrine of informed consent, the knowledge that plaintiff sought from defendant cannot be compelled from a doctor who may have a different scientific, moral, or philosophical viewpoint on the issue of when life begins. Therefore, we do not find that the common law commands

a physician to inform a pregnant patient that an embryo is an existing, living human being and that an abortion results in the killing of a family member.” (*Id.* at 419-420.)

In short, the New Jersey Supreme Court established in *Acuna v. Turkish* that the judiciary is not competent to resolve scientific, moral, or philosophical disputes where the experts in those fields are unable to do so.

**B. At Issue in the Case at Bar: The Immutability of Sexual Orientation.**

In the present case, the Court is being asked to decide another great question of scientific, philosophical and theological debate that continues to divide our society. Plaintiffs contend that there is scientific consensus that sexual orientation is immutable, and therefore any individual or organization that says it can be changed is making a false statement. (PC paras. 24-25, 30-33.) Plaintiffs further contend that this “false statement” constitutes a violation of the Consumer Fraud Act (assuming other requirements of the Act are met) which should be declared unlawful and permanently enjoined by this Court. (PC paras. 34-42, 112(a) and (c) [prayer for relief].) Thus, the question before the Court is whether sexual orientation is always fixed, such that offering professional help to persons experiencing unwanted same-sex attraction constitutes consumer fraud.

As demonstrated below, however, the Court can and must take judicial notice that there is no consensus – scientific, philosophical or otherwise -- that sexual orientation is immutable. Consequently, based on the precedent set forth in *Acuna*, this Court has no

authority to wade into the ongoing scientific, moral, theological, and philosophical debate regarding the changeable nature of human sexual orientation.

### **1. The APA Task Force Report.**

Defendants acknowledge that the politically correct belief that homosexuals are “born that way” has permeated the zeitgeist. This conventional wisdom is not, however, grounded in science. In their complaint, the plaintiffs rely heavily on the 2009 “Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation” in support of their allegations that all SOCE are harmful because orientation is fixed. (PC 5-6, 24.) While the Report does appear to warn against SOCE that is not desired by the patient, it does not conclude that homosexual orientation is fixed or that SOCE has been scientifically determined to be harmful.

One of the “scientific facts” upon which that Report is based specifically notes that sexual orientation is *not* immutable: “Same-sex sexual attractions and behavior occur in the context of a variety of sexual orientations and sexual orientation identities, and for some sexual orientation identity (i.e., individual or group membership and affiliation, self-labeling) is fluid or has an indefinite outcome.” (American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (August 2009) at 2, <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf> , last accessed May 21, 2013.)

Although the context of the Report makes it clear that the APA Task Force *wants* to say that SOCE is harmful, the Report states that the “dearth of scientifically sound research on the safety of SOCE” prevents it from concluding “how likely it is that harm will occur from SOCE.” (*Id.* at 42.) It then concludes that additional, scientifically rigorous research should be conducted on the “safety and effectiveness” of SOCE. (*Id.* at 90.)<sup>3</sup>

## **2. Materials on SOCE Produced in Discovery.**

Notwithstanding the APA Task Force’s call for additional research, substantial research regarding sexual orientation has already been conducted. In response to plaintiffs’ Request for Production of Documents No. 14, “Any and all documents that You contend support the claim that sexual orientation can be changed,” defendants produced a long list of books, websites, surveys, articles, studies, and court filings all addressing in one way or another the changeability of sexual orientation and/or the efficacy of SOCE. (A true and correct copy of that response is attached as Exhibit C to the LiMandri Cert.) As indicated in the response, the defendants produced hard copies of some of the written documents, as well as additional materials. For example, defendants produced an article entitled, “Sexual Orientation Change Efforts: A Clinical Perspective,” by clinical psychologist Elan Karten, Ph.D., published in the Fall 2012

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<sup>3</sup> In holding that SB 1172 (the California law prohibiting mental health providers from engaging in SOCE with minors) could not withstand strict scrutiny, the District Court found that the proponents of the law had not shown a causal link between SOCE and harm to minors. (*Welch v. Brown*, 2012 WL 6020122 at \*13-14 (E.D. Cal. Dec. 3, 2012).) “The few and arguably incomplete studies addressing harms of SOCE do not appear to have assessed whether the harms reported after undergoing SOCE were caused by SOCE as opposed to other internal or external factors and thus would have been sustained regardless of SOCE.” (*Id.* at \*14.)

issue of *Dialogue*. (A true and correct copy of that article is attached as Exhibit D to the LiMandri Cert.) Defendants also supplemented the list of responsive websites in a March 26, 2013 letter to plaintiffs' counsel James L. Bromley. Defendants will make any and all of these documents available at the Court's request.

### **3. Certification of Michelle Cretella, M.D. – Survey of Scientific Literature.**

Further, submitted herewith is the certification of Michelle Cretella, M.D. ["Cretella Cert."], Vice President of the American College of Pediatricians.<sup>4</sup> Dr. Cretella is on the Board of Directors of the National Association for Research and Therapy of Homosexuality "NARTH". (Cretella Cert. para. 3.) She has conducted a survey of the scientific literature on the issue of whether sexual orientation is changeable and presents her findings and conclusion. (Cretella Cert. para. 5.) First, Dr. Cretella discusses the literature demonstrating that sexual attractions are fluid. (Cretella Cert. para. 6-11.) Second, she presents literature demonstrating that sexual orientation is subject to adventitious changed. (Cretella Cert. paras. 12-13.) Finally, Dr. Cretella discusses the literature showing that sexual orientation is subject to assisted change. (Cretella Cert. paras. 14-22.)

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<sup>4</sup> Dr. Cretella should not be unknown to the plaintiffs since she is personally featured on the SPLC's map of "conversion therapy practitioners across the United States." (Dr. Cretella does not practice SOCE, but presumably is included on the map because of her connection with NARTH.) Moreover, defendants provided a copy an abstract principally authored by Dr. Cretella, entitled "Empowering Parents of Gender Discordant and Same-Sex Attracted Children," published in April 2008 by the American College of Pediatrics in their original production to plaintiffs (Bate Nos. 000057-62.)

#### **4. Certification of Nicholas A. Cummings, Ph.D., Sc.D. – Professional Therapeutic Experience.**

Finally, submitted herewith is the Certification of Nicholas A. Cummings Ph.D., Sc.D. [“Cummings Cert.”], who was the Chief Psychologist for Kaiser Permanente in San Francisco for over 20 years.<sup>5</sup> (Cummings Cert. para. 2.) Among his other impressive credentials, in 2003 he received the psychology community’s highest award, the American Psychological Foundation Gold Medal for Lifetime Achievement in the Practice of Psychology. (Cummings Cert. para. 10.) Dr. Cummings is a life-long champion of civil rights, including gay and lesbian rights. For example, as a member of the American Psychological Association (APA) Council of Representatives, in 1975 Dr. Cummings sponsored the resolution by which the APA issued its official position that homosexuality is not a mental disorder. In 1976, Dr. Cummings sponsored another successful resolution that gays and lesbians should not be discriminated against in the workplace. While President of the APA in 1979, he appointed the first task force on gay and lesbian issues. (Cummings Cert. paras. 15-16.)

Dr. Cummings is also a proponent of patient self-determination, which, among other things means that gays and lesbians have the right to be affirmed in their

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<sup>5</sup> Like Dr. Cretella, Dr. Cummings should not be unknown to the plaintiffs. Beyond his renown throughout the psychology community, on April 11, 2013 defendants provided plaintiffs with a link to a video interview of Dr. Cummings. (See <http://www.lifesitenews.com/news/former-president-of-apa-says-organization-controlled-by-gay-rights-movement/>, last accessed May 20, 2013.) On April 30, 2013, defendants also provided plaintiffs with a link to Family Watch International video entitled “Understanding Same-Sex Attraction,” which features, among others, Dr. Cummings. (The video is password-protected, but a true and correct copy of a transcript is attached as Exhibit E to the LiMandri Cert.)



homosexual identity and also have the right to seek help in changing their sexual orientation if that is their choice. (Cummings Cert. para. 17.) During the years that he was employed by Kaiser, he and his staff treated thousands of homosexual patients, including both those who wished to obtain a happier, more stable homosexual life style, as well as those who sought to change their sexual orientation. He personally observed hundreds of patients in the second category successfully change their orientation. (Cummings Certification paras. 19-23.) Based on his own extensive professional experience, Dr. Cummings has concluded that contending all same-sex attraction is an unchangeable or immutable characteristic like race is a distortion of reality. (Cummings Cert. para. 27.)

**C. Request for Judicial Notice of Ongoing Scientific Dispute Regarding the Immutability of Sexual Orientation and Effectiveness of SOCE.**

The point of all these certifications and citations is not to prove to the Court that it is possible to change sexual orientation. The defendants do not have to prove that fact to prevail on this motion. The point of presenting this evidence to the Court is to allow the Court to take judicial notice of the verifiable fact that there is no consensus as to the immutability of sexual orientation based on the scientific evidence.

“Facts which may be judicially noticed include: . . . specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned.” (Evid. R. 201(b)(3).)

A court may take judicial notice that a certification has been filed. In addition, a court can

take notice of what is alleged in a certification, if the fact that the allegation has been made is itself relevant. (*RWB Newton Associates v. Gunn*, 224 N.J. Super. 704, 710-11, (App. Div. 1988).) Moreover, courts are expressly authorized to take judicial notice that certain “published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art” constitute “reliable authority” which may properly be relied upon by testifying experts, used to cross-examine such experts or quoted from by the attorneys in a case. (Evid. R. 803(c)(18).)<sup>6</sup>

Matters subject to judicial notice can properly be considered by the Court on a dismissal motion. (*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986).) Because Rule 4:6-2(e) is based on Federal Rule 12(b)(6), federal case law should be used to interpret the state rule. (See *In re Petition of Hall*, 147 N.J. 379, 385 (1997); *Baumann v. Marinaro*, 95 N.J. 380, 390 (1984).)

Here, the plaintiffs’ theory of liability is premised on the alleged immutability of sexual orientation and the corresponding ineffectiveness and harmfulness of SOCE. Thus, evidence about these matters is highly relevant. Defendants have submitted certifications by Dr. Cretella and Dr. Cummings addressing these matters. In her certification, Dr. Cretella cites to and quotes from various books and studies which show that sexual orientation is fluid and/or that spontaneous and assisted change in orientation

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<sup>6</sup> If the court determines that there is not a sufficient basis for taking notice of a purported authority, it should conduct a hearing pursuant to Evid. R. 104 and decide the issue on the basis of expert testimony received at that hearing. (Biunno, *Current N.J. Rules of Evidence*, 167-68, comment 11 on Evid. R. 201.)

is possible. In his certification, Dr. Cummings testifies that he has personally treated hundreds of patients who successfully changed their orientation from homosexual to heterosexual. The information in these certifications proves that there is no scientific or philosophical consensus that sexual orientation is immutable or that all SOCE is ineffective and harmful.

Defendants respectfully request that this Court take judicial notice that the learned treatises cited in Dr. Cretella's certification constitute reliable authorities which establish that various researchers have determined that human sexuality can be fluid and that SOCE has been effective. The defendants also respectfully request that this Court take judicial notice of the relevant facts alleged in the Cretella and Cummings certifications establishing that there is no scientific or philosophical consensus that sexual orientation is immutable or that all SOCE is ineffective and harmful.

Plaintiffs will undoubtedly argue that there is a genuine factual dispute as to the immutability issue, precluding summary judgment. But defendants agree that there is a genuine dispute on immutability. Indeed, that is precisely the basis for this dismissal motion. Once the Court determines that a genuine dispute exists in the scientific, philosophical, moral and theological communities, *Acuna* requires this Court to dismiss plaintiffs' claims because resolving the dispute is beyond the competence of the judiciary.

#### D. Plaintiffs' Lawsuit Is a Misuse of the CFA.

The plaintiffs are misusing the CFA in what their counsel, the SPLC, calls a “first-of-its-kind lawsuit . . . accusing a New Jersey organization of consumer fraud for offering ‘conversion therapy’ services.” (See <http://www.splcenter.org/get-informed/news/splc-files-groundbreaking-lawsuit-accusing-conversion-therapy-organization-of-fraud>, last accessed May 21, 2013.) Notably, the plaintiffs did not make a professional negligence claim pursuant to which they could seek emotional distress damages. This reveals that their goal in bringing this lawsuit is *not* to obtain personal redress for supposed misrepresentations made to them by the defendants.<sup>7</sup>

Rather, the plaintiffs and their counsel have not been shy in publicly stating that their actual objective is to establish that all SOCE is a fraud *in order to end the practice altogether*. Notably, the last sentence of the press release on the SPLC website regarding this lawsuit states: “***More* information about the SPLC’s campaign to end conversion therapy, including an interactive map showing the location of therapists who advertise conversion therapy, can be found here.**” (See <http://www.splcenter.org/get-informed/news/splc-files-groundbreaking-lawsuit-accusing-conversion-therapy->

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<sup>7</sup> Based on the New Jersey Supreme Court’s holding in *Acuna v. Turkish*, plaintiffs could not prevail on a professional negligence claim on these facts. Moreover, each of the plaintiffs signed agreements with the defendants which specifically informed them that successful results could not be guaranteed and holding defendants harmless for any “adverse situations created as a direct or indirect result of a specific referral, advice given, or [plaintiff’s own] actions taken while working with or as a result of working with the Jonah Institute.” (True and correct copies of Plaintiffs Unger and Levin’s respective Life Coaching Client Service Agreement and Plaintiff Heffner’s Consent to Treat and Financial Agreement are attached as Exhibits F, G, H to the LiMandri Cert.) Consequently, the allegations that plaintiffs expected a favorable result in reliance upon representations by defendants and that plaintiffs suffered harm when those results were not achieved are demonstrably false and were known by plaintiffs to be false at the time of the filing of the Complaint.

organization-of-fraud, last accessed May 21, 2013 [emphasis added].) That “interactive map” lists seventy individuals and organizations purportedly offering SOCE that the SPLC openly intends to attack with a nationwide litigation campaign if this case is successful. (See <http://www.splcenter.org/conversion-therapy>, last accessed May 21, 2013 [“The devastating consequences of conversion therapy are why the Southern Poverty Law Center is dedicated to ending this practice.”])

An article entitled “The New Gay-Rights Frontier,” published March 21, 2013 on *The American Prospect* website describes this “consumer-fraud case against conversion therapy” as “the opening salvo of a grassroots, multistate effort to chip away at LGBT discrimination by subverting the notion that homosexuality is nothing more than a lifestyle choice.” A then-member of plaintiffs’ legal team, former SPLC attorney Christine Sun is quoted: “Discrediting the idea that you can change your sexual orientation completely demolishes the number-one justification for denying gay people equal rights.” The article goes on to describe Sun as saying that by publicly exposing the “absurdity” of conversion-therapy practices, even a loss in open court is not without its merits. Sun explained that the JONAH case is part of a “broader campaign against an industry that preys on vulnerable gay people” that includes plans for legal action in other states. The article concludes: “If we’re successful,” Sun says, “this case will be the death knell of conversion therapy.” (See <http://prospect.org/article/new-gay-rights-frontier>, last accessed May 21, 2013. A true and correct copy of a print version of the article is attached as Exhibit I to the LiMandri Cert.)

Clearly, in an effort to advance a political objective, the plaintiffs would have this Court apply the CFA to punish the defendants not because they made actual misrepresentations in contravention of established scientific fact, but because defendants' opinions about the changeable nature of sexual orientation and the efficacy of SOCE differ from the plaintiffs' own ideologically-driven viewpoint.

“Weighing competing public policy concerns, courts must consider the real life consequences of imposing a duty and cannot be oblivious to the social realities of the day.” (*Acuna, supra*, 192 N.J. at 414.) If this Court somehow determines that the statement that homosexuals can change their sexual orientation is false and therefore a violation of the CFA, where does that leave people who want to change and want to seek help to do so? What happens to their rights? As Dr. Cummings succinctly states in his certification: “A political agenda should not be permitted to prevent gays and lesbians who desire to undertake sexual orientation change efforts from exercising their right to self-determination.” (Cummings Cert. para. 30.)<sup>8</sup> This Court should refuse to allow

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<sup>8</sup> The defendant in *Acuna* argued that being compelled to voice the plaintiff's “non-medical and ideologically-driven viewpoint” would violate his Constitutional right to free speech. (*Acuna v. Turkish*, 192 N.J. 399, 413 (2007). Deciding the case on the narrower grounds of its inability to resolve a profound societal issue about which there was no scientific, moral or philosophical consensus, the New Jersey Supreme Court did not reach that argument. (*Id.* at 419-420.) If the case at bar were to proceed, defendants would have to raise the same free speech arguments the *Acuna* defendant did, and with which the Ninth Circuit Court of Appeals is now grappling in connection with cases challenging SB 1172 (the California law prohibiting mental health providers from engaging in SOCE with minors). (*Pickup v. Brown*, Ninth Circuit Case. No. 12-17681; *Welch v. Brown* Ninth Circuit Case No. 13-15023.) Defendants respectfully suggest that this Court should follow the reasoning of the Supreme Court in *Acuna* and avoid the need to reach constitutional issues. “Courts should not reach a constitutional question unless its resolution is imperative to the disposition of litigation.” (*Randolph Town Ctr., L.P. v. Cnty. of Morris*, 186 N.J. 78, 80 (2006).)

plaintiffs and the SPLC to misuse New Jersey's CFA to advance their one-sided political agenda.

## POINT II

### **BECAUSE THIS ACTION IS NOT JUSTICIABLE BY THE COURT, THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED.**

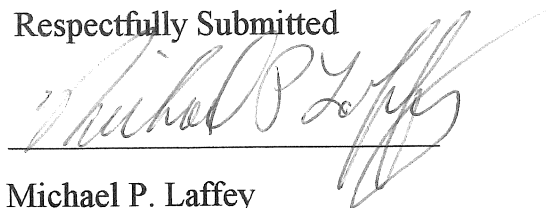
Where there is no justiciable controversy, the complaint should be dismissed. (*Civil Serv. Comm'n v. Senate of State of N. J.*, 165 N.J. Super. 144, 148 (App. Div. 1979); see also Rule 6-2 [providing for motions to dismiss based on failure to state a claim upon which relief can be granted].) Debate rages in the scientific community – and in society generally -- over the immutability of sexual orientation and the efficacy and safety of SOCE. The only way plaintiffs could prevail in this action and obtain the relief they seek under the CFA would be for this Court to resolve that debate in favor of plaintiffs' viewpoint. But the New Jersey Supreme Court has made it clear that the judiciary “cannot drive public policy in one particular direction” by injecting itself into “profound issues” on which there is no scientific, theological, moral or philosophical consensus. (*Acuna, supra*, 192 N.J. at 419.) Accordingly, plaintiffs have not stated a justiciable claim, and the Court should follow the precedent of *Acuna v. Turkish* by dismissing the Plaintiffs complaint as a matter of law.

## CONCLUSION

For the reasons stated herein, the defendants' motion to dismiss the complaint should be granted.

May 28, 2013

Respectfully Submitted

A handwritten signature in cursive script, appearing to read "Michael P. Laffey", is written over a horizontal line.

Michael P. Laffey

Attorney for Defendants