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FILED

FEB 10 2015

PETER F. BARISO, JR., A.J.S.C.

Michael Ferguson, Benjamin Unger, Sheldon Bruck, Chaim Levin, Jo Bruck, Bella Levin, Plaintiffs, v. JONAH (Jews Offering New Alternatives for Healing f/k/a Jews Offering New Alternatives to Homosexuality), Arthur Goldberg, Alan Downing, Alan Downing Life Coaching LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY HUDSON COUNTY, LAW DIVISION Docket No. L-5473-12 CIVIL ACTION **ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter having been opened to the Court by Bruce D. Greenberg, Esq., of Lite DePalma Greenberg, LLC, attorneys for plaintiffs Michael Ferguson, Benjamin Unger, Chaim Levin, Bella Levin, and Jo Bruck, on motion returnable December 19, 2014 for a partial summary judgment order.

The Court having considered the motion and good cause appearing;

It is on this 10th day of Feb 2015 hereby:

ORDERED that plaintiffs' request for partial summary judgment is granted, specifically:

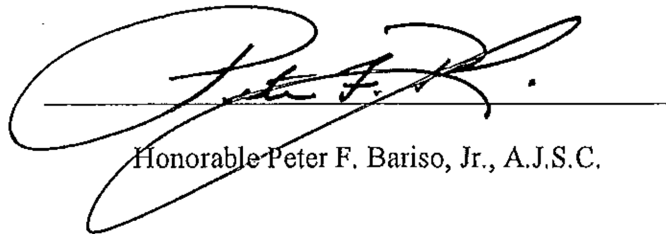
1. It is a misrepresentation in violation of the CFA, in advertising or selling conversion therapy services, to describe homosexuality, not as being a normal variation of human sexuality, but as being a mental illness, disease, disorder, or equivalent thereof.
2. ~~It is a misrepresentation in violation of the CFA, in advertising and selling conversion therapy services, when discussing change of sexual orientation or change from gay to straight, to use the word "change" as including a mere change of label or merely suspending same-sex activity while continuing to experience homosexual desire, without so specifying.~~
3. It is a misrepresentation in violation of the CFA, in advertising or selling conversion therapy services, to include specific "success" statistics when there is no factual basis for calculating such statistics, e.g., when client outcomes are not tracked and no records of client outcomes are maintained.
4. The Eighth Affirmative Defense be struck.
5. The Ninth Affirmative Defense be struck.

~~6. The Twelfth Affirmative Defense be struck.~~

7. The Fourteenth Affirmative Defense be struck. PFB

~~8. The Fifteenth Affirmative Defense be struck.~~

FURTHER ORDERED that a copy of this order be served on all parties within seven days.



Honorable Peter F. Bariso, Jr., A.J.S.C.

✓ opposed

___ unopposed

See statement of reasons dated 2/10/15 and colloquy on the record on 2/5/15. PFB

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FILED
FEB 10 2015
PETER F. BARISO, JR., A.J.S.C.

Michael Ferguson, Benjamin Unger, Sheldon Bruck, Chaim Levin, Jo Bruck, Bella Levin,	)	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - HUDSON COUNTY DOCKET NO. L-5473-12
Plaintiffs,	)	
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,	)	**~~ORDER GRANTING~~ DENYING ORDER DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AS TO ALL PLAINTIFFS**
Defendants.	)	

This matter having been opened to the Court by Michael P. Laffey, Esq. and Charles S. LiMandri Esq., attorneys for Defendants, and the Court having considered the papers submitted and any opposition thereto and ~~for good cause shown~~ it is on this 10th day of Feb, 2015;

ORDERED that Defendants' Motion for Summary Judgment as to all Plaintiffs is hereby Denied ~~granted~~ in its entirety. PJB

FURTHER ORDERED that a copy of this order be served on all parties within 7 days of the date herein.

Dated: Feb. 10, 2015 [signature] J.S.C.

opposed-

See Statement of Reasons dated 2/10/15 PJB and colloquy on the record 2/5/15

SUPERIOR COURT OF NEW JERSEY
COUNTY OF HUDSON

MICHAEL FERGUSON, BENJAMIN UNGER,
CHAIM LEVIN, JO BRUCK, BELLA LEVIN,

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,

COPY FILED
FEB 10 2015
PETER F. BARISO, JR., A.J.S.C.

CIVIL ACTION
STATEMENT OF REASONS
FOR THE COURT'S
FEBRUARY 10, 2015 ORDERS

STATEMENT OF REASONS

This matter arises from a consumer fraud action filed on behalf of plaintiffs Michael Ferguson, Benjamin Unger, Chaim Levin, Jo Bruck, and Bella Levin ("plaintiffs") against defendant, Jews Offering New Alternatives for Healing ("JONAH"). For a complete factual history of this case, please refer to the court's February 5, 2015 opinion regarding plaintiffs' motion to exclude expert testimony.

Before the court are summary judgment motions filed by both parties.

On November 21, 2014, Plaintiffs filed a motion for partial summary judgment. Specifically, plaintiffs request that summary judgment be granted as to the following: it is a misrepresentation in violation of the CFA, in advertising or selling conversion therapy services (1) to describe homosexuality, not as being a normal variation of human sexuality, but as being a mental illness, disease, disorder, or equivalent thereof; (2) to use the word "change" as including a mere change of label or merely suspending same-sex activity while continuing to experience homosexual desire, when discussing change of sexual orientation or change from gay to straight,

without so specifying; (3) to include specific "success" statistics when there is no factual basis for calculating such statistics, e.g., when client outcomes are not tracked and no records of client outcomes are maintained. Plaintiffs also ask that JONAH's Eighth, Ninth, Twelfth, Fourteenth, and Fifteenth Affirmative Defenses be struck.

On November 25, 2014, JONAH filed a cross-motion seeking summary judgment in its favor as to all plaintiffs asserting: (1) misrepresentations regarding the efficacy of JONAH's program are precluded by signed consent forms; (2) alleged misrepresentations regarding homosexuality are contradicted by evidence; (3) the alleged misrepresentations are non-actionable opinions or puffers; (4) the action seeks to resolve societal issues that are subject to scientific dispute; (5) the alleged misrepresentations regarding the efficacy of sexual orientation change efforts ("SOCE") conflict with protections under the U.S. and N.J. Constitutions; and (6) Plaintiffs' request for declaratory relief cannot be granted.

I.

Rule 4:46-2(c) provides that a court shall render summary judgment only when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." To determine whether there is a genuine issue as to a material fact, the court views the facts in the light most favorable to the nonmoving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Generally, summary judgment is inappropriate before the completion of discovery, and a litigant should have the opportunity for full exposure of its case. See Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988); Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498 (App. Div. 2012). However, summary judgment may be granted if further discovery will not alter the result. Minoia v. Kushner, 365 N.J. Super. 304, 307 (App. Div.), certif. denied, 180 N.J. 354 (2004).

II.

As an initial matter, the court notes that certain arguments were disposed of at oral argument on February 5, 2015. First, JONAH conceded that its Fourteenth Affirmative Defense, which asserts that the New Jersey Charitable Immunity Act bars or limits plaintiffs' claims, does not apply because there are no negligence claims involved in this case. JONAH's Eighth

Affirmative Defense, which asserts claims arising from conduct by Thaddeus Heffner, a therapist to whom JONAH referred Sheldon Bruck for conversion therapy services, does not apply because Mr. Heffner is not a defendants and plaintiffs do not seek to hold JONAH vicariously liable for his actions. JONAH's Ninth Affirmative Defense, relating to the affidavit of merit requirement embodied in N.J.S.A. 2A:53A-26, is inapplicable for the same reasons. JONAH's request that the court preclude declaratory and injunctive relief is denied as premature, but may be requested again at the conclusion of trial.

III.

The CFA was enacted in 1960 "'to combat the increasingly widespread practice of defrauding the consumer.'" Weinberg v. Sprint Corp., 173 N.J. 233, 247 (2002) (quoting Cox v. Sears Roebuck & Co., 138 N.J. 2, 14 (1994)). Originally, the power to enforce the CFA was vested exclusively with the Attorney General but, in a 1971 amendment, the Legislature supplemented the statute with a private cause of action. See id. at 248; D'Agostino v. Maldonado, 216 N.J. 168, 183 (2013).

The private cause of action operates to "(1) compensate the victim for his or her actual loss; (2) punish the wrongdoer through the award of treble damages; and (3) attract competent counsel to counteract the 'community scourge' of fraud by providing an incentive for an attorney to take a case involving a minor loss to the individual." D'Agostino, supra, 216 N.J. at 183-84 (quoting Weinberg, supra, 173 N.J. at 249).

The CFA requires the proof of three elements: (1) an unlawful conduct by defendant; (2) an ascertainable loss by plaintiff; and (3) a causal relationship between the unlawful conduct and the ascertainable loss. D'Agostino, supra, 216 N.J. at 184. Unlawful conduct can be established through affirmative acts or omissions of any of the violations specified under N.J.S.A. 56:8-2, irrespective of intent. Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 245 (2005); see also D'Agostino, supra, 216 N.J. at 184 (explaining that CFA "establishes a broad business ethic applied to balance the interests of the consumer public and those of the sellers" (citation and internal quotation marks omitted)).

Plaintiffs contend that JONAH engaged in unconscionable practices, deception, fraud, false promises, and misrepresentations in rendering its services. Insofar as these motions are concerned, the litigants do not contest the second and third elements. Rather, the threshold issue

is whether JONAH committed unlawful conduct; specifically, whether JONAH made actionable misrepresentations regarding homosexuality and the efficacy of its SOCE therapy program.

The CFA prohibits the use of misrepresentations in connection with the sale, advertisement, or provision of services. N.J.S.A. 56:8-2. The CFA specifically provides that:

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice[.]
>
> [Id.]

Merchandise, as defined under the CFA, includes "any . . . services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1(c). "One who makes an affirmative misrepresentation is liable even in the absence of knowledge of the falsity of the misrepresentation, negligence, or the intent to deceive." Gennari v. Weichert Co. Realtors, 148 N.J. 582 (1997). Notably, plaintiff is not requestiong that the court conclude JONAH actually made any misrepresentations. Rather, plaintiffs ask this court to find that certain statements would qualify as misrepresentations. JONAH, on the other hand, contends that any alleged misrepresentations are precluded, non-actionable, or true facts rather than misrepresentations.

Plaintiffs argue that, as a matter of law, the following qualify as misrepresentations under the CFA: (1) describing homosexuality as a mental illness, disease, disorder, or equivalent thereof; (2) using the word "change" as including a mere change of label or merely suspending same-sex activity while continuing to experience homosexual desire, when discussing change of sexual orientation or change from gay to straight, without so specifying; and (3) including specific "success" statistics when there is no factual basis for calculating such statistics.

JONAH argues that the following alleged misrepresentations are contradicted by undisputed evidence: (1) homosexuality is unhealthy; (2) homosexuality is "loathsome;" and (3) homosexuality is a mental disorder. JONAH also argues that the alleged misrepresentations are non-actionable opinions or puffery. Alternatively, JONAH argues that this action is improper as a matter of law because it seeks to resolve societal issues that are subject to scientific dispute.

Several of the parties' arguments overlap. JONAH contends that any misrepresentations as to the efficacy of JONAH's program are precluded by signed consent forms with a "no guarantee" clause. Plaintiffs argue that the "no guarantees" disclaimer does not enable JONAH to defraud consumers and should be stricken as a defense. JONAH asserts that summary judgment in its favor is appropriate because the alleged misrepresentations conflict with constitutional protections of religion, speech, privacy, and self-determination. Plaintiffs' motion counters that JONAH's Twelfth Affirmative Defense, which relates to the First Amendment claims, are inapplicable because JONAH is not engaged in religious expression and the CFA does not implicate First Amendment rights.

A.

The court has already addressed the issue of whether homosexuality is a mental disorder in the litigants' evidentiary motions, concluding that, based on the accepted general consensus in the mental health field, homosexuality is not a mental disorder. For a complete discussion, please refer to the court's February 5, 2015 opinion relating to Plaintiffs' motion to bar JONAH's experts ("Evidentiary Opinion"). Plaintiffs have now asked the court to take judicial notice of this statement and the materials provided to support it. See N.J.R.E. 201(d) ("A court shall take judicial notice if requested by a party on notice to all other parties and if supplied with the necessary information."). The court is permitted to take judicial notice under N.J.R.E. 201(b)(3) of "specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned." The Rule does not define what is meant by a source "whose accuracy cannot reasonably be questioned." See Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 640 n. 10 (2000) (judicially noticing material published in the American Medical Association Journal because "The AMA is a widely respected 153-year-old-society of American physicians and has no direct interest in the outcome of this case."). The ultimate objective of this inquiry is "the judicial validation" of a scientific theory. Windmere, Inc. v. Int'l Ins. Co., 105 N.J. 373, 379 (1987). To take judicial notice of the reliability of scientific tests on the basis of general consensus of their reliability, case law recognizes that there need not be "unanimity of opinion nor universal infallibility . . . for judicial acceptance of generally recognized matters." State v. Johnson, 42 N.J. 146, 171, 199 A.2d 809, 823 (1964). For the reasons discussed in its evidentiary opinion, the court now takes judicial notice of the general consensus in the mental health field that

homosexuality is not a mental disorder, but is instead a normal variation of human sexuality. The court does not take judicial notice of all studies cited in Plaintiffs' brief because it recognizes, while all the major professional associations of mental health practitioners and researchers agree that homosexuality is not a disorder, there is no general consensus as to the causes of homosexuality. A finding as to the causes, however, is not necessary to take judicial notice of fact that homosexuality is not a mental disorder. Thus, any representations made to the contrary would qualify as a misrepresentations under the CFA.

B.

According to JONAH, statements characterizing homosexuality as unhealthy are not misrepresentations because these statements are supported by evidence from the CDC. Plaintiffs reply that JONAH mischaracterizes the statements at issue. Rather, the Complaint alleges that JONAH misrepresented that gay people "generally...have or will contract HIV/AIDS." See Complaint ¶ 61. The court has already concluded that this issue bears no relevance to the proffers plaintiffs specified they will prove at trial. Based on this conclusion, the court excluded expert testimony relating to the potential harms of homosexual activity by Dr. Diggs. Should plaintiffs attempt to introduce such evidence at trial, the court reserves the right to consider allowing recall of Dr. Diggs for rebuttal testimony.

C.

JONAH asserts that it never misrepresented that it is loathsome to be homosexual, as plaintiffs' deposition testimony confirms. Plaintiffs counter that JONAH seizes on the word "loathsome" and misunderstand the description itself. This formalism ignores the fact that JONAH repeatedly disparaged gay people, asserting they were damaged, disordered, physically ill, promiscuous, incapable of happiness, etc. Plaintiffs will prove at trial that JONAH made all of these statements, and that the overall effect was to communicate that homosexuality is loathsome, and thus in need of treatment via its conversion therapy services. JONAH replies that what Plaintiffs describe does not fit within the definition of "loathsome," which indicates disgust or repulsion.

This issue also bears little relevance to plaintiffs' proffers, with the exception of the characterization of the term loathsome as disordered. Whether such statements qualify as "loathsome" is a disputed fact, and should be left to the jury's determination. The fact that

JONAH never used the term "loathsome" in the sale or advertisement of its conversion therapy services does not warrant summary judgment as to all plaintiffs.

D.

Plaintiffs contend that, at trial, they will prove that Defendants told them that JONAH's conversion therapy services could "change" their sexual orientation. However, rather than using change in the normal and common sense, to "make different" or "transform," JONAH silently included in this personal definition a mere change of label or better behavioral control, with a continuation of homosexual desire. Plaintiffs argue that, as a matter of law, it is a violation of the CFA to use commonplace words while distorting their meaning in a misleading way, without disclosing that distorted meaning. JONAH counters that this cannot form the basis of a CFA claim because Plaintiffs' definition of change is absurd; plaintiffs had actual knowledge that change in homosexuality existed on a continuum; their definition of change in sexual orientation comports with the mental health profession's understanding; the use of the word change constitutes puffery; and Defendants have the right to have a jury determine whether their use of the word change was misleading.

To constitute consumer fraud the business practice in question must be misleading and stand outside the norm of reasonable business practice in that it will victimize the average consumer. New Jersey Citizen Action v. Schering–Plough Corp., 367 N.J. Super. 8 (App. Div. 2003). "The fact that the [statement was] literally true does not mean [it] cannot be misleading to the average consumer." Smajlaj v. Campbell Soup Co., 782 F. Supp. 2d 84, 98 (D.N.J. 2011); see also Miller v. American Family Publishers, 284 N.J. Super. 67, 77 (Ch. Div. 995) (upholding claim even though "Defendant [was] correct that a careful, literal reading of the quoted language reveals that the words do not actually say what plaintiffs claim they are intended to convey").

As plaintiffs note, the term "change" can mean "to make different." JONAH relies on this to argue that change is not a guarantee of the "greatest possible change." Indeed, being "made different" could mean simply diminishing same sex attraction or changing one's identification. The court is convinced that an average juror could find "change" to mean choosing not to act on homosexual desires, and instead acting only on heterosexual desires. Indeed, JONAH's website states that they believe "homosexuality is a learned behavior [] that anyone can *choose to disengage from*." See *JONAH's History*, JONAH, available at http://jonahweb.org/sections.php?secId=11 (last visited February 5, 2015). Thus, a reasonable

juror could concluded that JONAH used the term "change" to simply mean consumers could disengage from their homosexual desires. As a result, this issue is not ripe for summary judgment.

E.

In their moving papers, the parties raise issues concerning (1) whether JONAH represented success rates to consumers as the statistics for SOCE therapy services in general, as opposed to its own success rates; (2) if so, whether it was reasonable for JONAH to do so given that they are only a "referral service" that does not have an actual "program," (a fact plaintiffs hotly contest given the group therapy services it provides and marketing strategies it uses); and (3) whether JONAH's use of customer reports, or "anecdotal evidence," is a legitimate means of assessing its outcomes. The court notes these issues raise clear factual disputes best suited for the jury. However they are irrelevant to the instant motion. Plaintiffs ask this court to conclude only that "it is a misrepresentation in violation of the CFA, in advertising or selling conversion therapy services, to include specific 'success' statistics when there is no factual basis for calculating such statistics..." Thus, the court need only determine whether, as a matter of law, citing statistical success rates without having a factual basis to determine their truth, is misleading to consumers.

If a merchant that does not track success rates or establish a procedure to confirm its representations of success rates, it would be misleading to tell consumers that a specific success rate for its services exists. See Hyland v. Aquarian Age 2,000, Inc. 148 N.J. Super. 186, 191 (Ch. Div. 1977) (it is a misrepresentation for a merchant to offer a service without any knowledge of whether it is capable of providing that service); Gennari v. Weichert Co. Realtors, 148 N.J. 582 (1997). As a result, it is a misrepresentation in violation of the CFA to use specific success statistics in advertising and selling of services when client outcomes are not tracked and records are not maintained.

F.

JONAH's Fifteenth Affirmative Defense relies on a disclaimer in agreements signed by Levin, Jo Bruck, and Unger. The disclaimer states that results are not guaranteed. Plaintiffs' motion asks the court to strike this defense. JONAH uses the consent form to argue that summary judgment should be granted in its favor because the no guarantee clause precludes any claims concerning alleged misrepresentations about the changeability of homosexuality and the

efficacy of JONAH's program. JONAH also argues that, the integration clause included in the agreements bars claims of any misleading statements other than those included in the consent form. Additionally, although there is no evidence that Ferguson signed such an agreement, he had actual knowledge that there were no guarantees.

It is well settled under New Jersey law that a written instrument does not immunize CFA claims. Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 377 (App. Div. 1960) ("[A] party to an agreement cannot, simply by means of a provision in the written instrument, create an absolute defense or prevent the introduction of parol evidence in an action based on fraud in the inducement to contract"). Even where the writing is integrated, the parol evidence rule does not operate to preclude parol proof of fraud in the inducement because such evidence indicates that the written instrument is void or voidable by reason of fraud. Id. at 378. Thus, the guarantee clause is not a bar to plaintiffs' claims.

Furthermore, the disclaimer, or even plaintiffs' knowledge of "no guarantee," is not applicable to the claims at issue. Plaintiffs contend that JONAH misrepresented that its services were capable of changing sexual orientation when, in fact, JONAH's program was ineffective. The disclaimer does not inform consumers about the efficacy of JONAH's program. Consequently, the guarantee clause in plaintiffs' agreements is not a basis for summary judgment. However, because JONAH's "no guarantee" defense is related to the issue of whether the term "change" means a full change in sexual orientation or a change in identity, the affirmative defense is not stricken.

G.

JONAH's cross-motion for summary judgment asserts that certain of the alleged misrepresentations, particularly those relating to the efficacy of its program, are not actionable under the CFA because they are mere puffery. JONAH lists seven statements it contends are classic examples of puffery. See JONAH's Brief in Support of its Motion for Summary Judgment, at 35. Although JONAH's motion asks that the court grant summary judgment as to all plaintiffs, its motion does not relate to all of the alleged misrepresentations. JONAH does not contend that puffery includes statements representing homosexuality as a mental disorder. In fact, the majority of the statements it cites are irrelevant to the proffers plaintiffs intend to prove. JONAH would be hard-pressed to argue that statements such as its "program is effective in changing homosexuality" or "its program and SOCE in general are scientifically proven to be

effective" are "pure" puffery. See Black's Law Dictionary (9th ed. 2009) (defining puffing as "[t]he expression of an exaggerated opinion — as opposed to a factual misrepresentation — with the intent to sell a good or service."). This argument is not an adequate basis for summary judgment as to all plaintiffs.

H.

JONAH requests that this court grant summary judgment in its favor because this action improperly seeks to resolve societal issues subject to scientific dispute. It cites Acuna v. Turkish, 192 N.J. 399 (2007) for the proposition that since plaintiffs' CFA claims require resolution of a divisive social issue about which there is no consensus, this court should dismiss this case as non-justiciable. Specifically, JONAH contends that it is disputed whether homosexuality is a mental disorder and whether SOCE in general is effective.

The court already determined, in JONAH's earlier motion to dismiss, that Acuna is inapplicable. The issue in Acuna was whether or not an obstetrician-gynecologist had a legal duty to inform a pregnant patient that an embryo is an existing, living human being and that abortion results in the killing of a family member. Id. at 409. In ultimately upholding the trial court's grant of Summary Judgment in favor of the defendant, the New Jersey Supreme Court found that plaintiff did not provide support for creating the legal duty she sought to impose on doctors. Id. at 416 ("[t]he instructions that plaintiff would have us mandate obstetricians to give are certainly not the medical professional norm within this State . . . [p]laintiff has not pointed out whether even a small minority of physicians currently give such instructions . . . [p]laintiff cannot find support for creating the legal duty she seeks to impose on doctors in either this State's law or federal law."). The Court went on to conclude that

> [w]e need not reach the constitutional arguments raised by defendants and amici who claim that it is both an undue burden on a woman's right of self-determination and a violation of a physician's First Amendment free speech right to compel a physician to advise a pregnant woman that an embryo is an existing human being and that an abortion is tantamount to killing a child. We do not resolve those arguments because we cannot find that New Jersey's common law imposes a legal duty on a physician to give the instructions sought by plaintiff.
>
> [Id. at 419.].

Therefore, the language in Acuna discussing the "raging debate" on the issue of abortion amounts to nothing more than dicta, and has no bearing on this court's decision. See id. at 419.

Furthermore, even if Acuna were applicable, this issue is now moot for two reasons. First, the court has concluded that the general consensus in the mental health field is that homosexuality is not a disorder. Therefore, there is no "great question" in scientific dispute on that issue. Second, as the court and plaintiffs have repeatedly made clear, this case is not about the efficacy of SOCE in general. Plaintiffs are not required to prove that sexual orientation is fixed or unchangeable. Plaintiffs must prove only that JONAH's practices were ineffective, and that the representations JONAH made to the contrary were false.

I.

JONAH's constitutional arguments do not warrant summary judgment for similar reasons. JONAH again asserts arguments regarding SOCE in general that are irrelevant to this case. Plaintiffs' complaint does not attempt to limit JONAH's religious expression relating to its belief that sexual orientation is changeable. Nor does it attempt to restrict an individual's ability to self-determine their sexuality through restricting access to SOCE. Rather, plaintiffs' complaint targets JONAH's practices specifically, which it alleges were ineffective in changing sexual orientation,

Furthermore, the alleged misrepresentations do not pose religious questions. The critical distinction is between religious and secular claims. The Free Exercise Clause does not limitlessly protect any act done in the name of religious practice. McTernan v. City of York, Penn., 577 F.3d 521, 532 (3d Cir. 2009). The alleged statements at issue, regarding homosexuality as a *mental* disorder, are statements with a medical or scientific, rather than religious, basis. Freedom of religion and expression do not protect against such statements. See United States v. Article or Device . . . "Hubbard Electrometer", 333 F. Supp. 357, 362 (D.D.C. 1971) (issuing an injunction against commercial speech where "false scientific claims permeate[d] the writings" and which were "not even inferentially held out as religious, either in their sponsorship or context."). As a result, the First Amendment is not a sufficient basis for summary judgment.

A genuine issue of material fact exists, however, regarding JONAH represented homosexuality as a "mental disorder" or as "disordered" within the context of JONAH's religious belief. As the court has already found, describing homosexuality as a mental disorder constitutes a misrepresentation under the CFA if used in the sale or advertising of JONAH's services. On the other hand, a jury could find, based on evidence presented at trial that JONAH

represented homosexuality not as a mental disorder, but as "disordered" and prohibited by its religion. First Amendment protections would be applicable in this latter situation. Consequently, JONAH's Twelfth Affirmative Defense is not stricken.

IV.

The court holds that JONAH's motion for summary judgment is denied in its entirety for the aforementioned reasons. The court grants plaintiffs' motion for partial summary judgment as to the following: (1) it is a misrepresentation in violation of the CFA, in advertising or selling conversion therapy services to describe homosexuality, not as being a normal variation of human sexuality, but as being a mental illness, disease, disorder, or equivalent thereof; (2) it is a misrepresentation in violation of the CFA, in advertising or selling conversion therapy services, to include specific "success" statistics when there is no factual basis for calculating such statistics; (3) JONAH's Eighth Affirmative Defense is stricken; (4) JONAH's Ninth Affirmative Defense is stricken; and (5) JONAH's Fourteenth Affirmative Defense is Stricken.