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SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - HUDSON COUNTY  
DOCKET NO. HUD-L-5473-12

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

Civil Action

Plaintiffs,

OPINION

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.

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DATE OF MOTION: January 30, 2015

DATE OF DECISION: February 5, 2015

Bruce D. Greenberg for plaintiffs (Lite DePalma Greenberg,  
LLC)

David C. Dinielli (pro hac vice), Samuel Wolfe (pro hac vice)  
for plaintiffs (Southern Poverty Law Center)

Lina Bensman (pro hac vice) for plaintiffs (Cleary Gottlieb  
Steen & Hamilton LLP)

Michael P. Laffey for defendants (Messina Law Firm)

Charles S. LiMandri (pro hac vice) for defendants (Freedom of  
Conscience Defense Fund)

BARISO, A.J.S.C.

Plaintiffs Michael Ferguson, Benjamin Unger, Sheldon Bruck, Chaim Levin, Jo Bruck, and Bella Levin ("plaintiffs") have moved to bar the testimony, either in whole or in part, of six defense experts, alleging that the threshold requirements for admissibility under N.J.R.E. 702 and 703 are not met because there is no reliable foundation for the opinion testimony. For the reasons that follow, the motion is granted in part and denied in part.

#### I.

On November 27, 2012, plaintiffs filed an action against defendants Jews Offering New Alternatives for Healing ("JONAH") and others. It is alleged that JONAH is a nonprofit corporation dedicated to educating the Jewish community about the social, cultural, and emotional factors that lead to same-sex attractions. JONAH's clientele and counselors are not restricted to members of the Jewish faith. It is further alleged that JONAH uses counseling and other methods to assist individuals to purge unwanted same-sex attractions. According to plaintiffs, JONAH's business practices violate the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 to -20, by misrepresenting that homosexuality is a mental illness or disorder and that JONAH's therapy program is effective in changing the sexual orientation of clients.

According to the complaint, JONAH provided conversion therapy and counseling services purporting to change plaintiffs' sexual

orientation from homosexual to heterosexual. JONAH believes that homosexuality is a "learned behavior" that can be reduced or eliminated through psychological and spiritual help. See JONAH's History, JONAH, available at <http://jonahweb.org/sections.php?secId=11> (last visited January 30, 2015). In addition to offering counseling on homosexuality, JONAH's scope of services include therapy on other "sexual conflicts," such as "sexual promiscuity, pornography, sexual abuse, pedophilia or pederasty, compulsive masturbation, fetishes, transvestitism, incest, prostitution, emotional dependency, [and] sexual addictions." Ibid.

Plaintiffs allege that JONAH's conversion therapy required that they engage in various individual and group activities. For instance, during a private session, defendant Alan Downing ("Downing"), a JONAH-affiliated counselor, instructed plaintiff Chaim Levin ("Levin") "to say one negative thing about himself, remove an article of clothing, then repeat the process." Compl. ¶ 45. Levin submitted to Downing's instructions until he was naked, when Downing directed Levin "to touch his penis and then his buttocks." Ibid.

Plaintiffs Benjamin Unger ("Unger") and Michael Ferguson ("Ferguson") engaged in similar disrobing activities with Downing. Downing instructed Unger to remove his shirt in front of a mirror and requested that he "continue," but Unger refused. Ibid. In

addition, Unger participated in a group exercise in which Downing instructed him and other young men to remove their clothing and stand in a circle naked, with Downing also nude. Id. at ¶ 46. As with Unger, Downing instructed Ferguson to undress in front of a mirror and "repeatedly urged [him] to remove additional clothing," but Ferguson refused. Ibid.

Other one-on-one activities consisted of counseling clients to spend more time at the gym and to be naked with their fathers at bathhouses. Id. at ¶ 54. Downing also instructed Unger to beat an effigy of his mother with a tennis racket while screaming, as if killing her. Id. at ¶ 59. Another JONAH counselor advised plaintiff Sheldon Bruck ("Bruck") to wear a rubber band on his wrist and snap it each time he felt attracted to another man. Id. at ¶ 51.

Organized group activities included reenacting scenes of past abuse. For example, Downing instructed Levin to select an individual from the group to role-play his past abuser. The selected participant would repeat statements similar to those his abuser had made, such as "I won't love you anymore if you don't give me blow jobs." Ibid.

Another group exercise required participants to hold hands to create a human chain, with one individual standing behind the chain clutching two oranges representing testicles. Id. at ¶ 55. Participants took turns standing on the other side of the human

chain while being taunted with homophobic slurs. Ibid. Many purportedly expressed anger and struggled to break through the human chain to seize the two oranges. Ibid.

A different group exercise entailed blindfolding participants while counselors dribbled basketballs and made anti-gay slurs. Ibid. Downing also conducted group cuddling sessions with counselors and their younger clients in an effort to reduce or eliminate same-sex attraction. Id. at ¶ 60.

As part of its conversion therapy counseling, JONAH told plaintiffs that homosexuality is loathsome and that homosexuals are more susceptible to loneliness, suicidal thoughts, and contracting HIV/AIDS. Id. at ¶ 61.

JONAH typically charged plaintiffs \$100 for each individual session, and \$60 for each group session. Id. at ¶ 43. The cost of these services could and did exceed \$10,000, per year depending on the individual. Id. at ¶ 11.

Plaintiffs' legal claim is that JONAH engaged in "unconscionable commercial practice, deception, fraud, false pretense, false promise, and misrepresentation[]" by claiming that homosexuality is a mental disorder and, in the face of empirical evidence to the contrary, that same-sex attractions can be reduced or eliminated through therapy. Id. at ¶¶ 38-40. Additionally, they contend that JONAH advised them that if conversion therapy

did not produce the promised results, the blame rested solely with the clients. Id. at ¶¶ 38, 42.

Plaintiffs maintain that conversion therapy has been discredited and rejected by mainstream health organizations. Id. at ¶ 5. They cite to the American Psychiatric Association for the proposition that "the potential risks of [conversion] therapy are great, including depression, anxiety and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient." Ibid. (quoting Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies): COPP Position Statement, Am. Psychiatric Ass'n, available at [http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2000\\_ReparativeTherapy.pdf](http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2000_ReparativeTherapy.pdf)).

During oral argument, plaintiffs clarified their intention to prove at trial that JONAH made the following misrepresentations: (1) homosexuality is a mental illness or disorder; (2) JONAH could cure or treat that disorder; (3) JONAH could do so within some specified time period, such as two to three years, which differed from person to person; (4) JONAH's program had specific success rates, sometimes one-third and others times two-third or 70-75%; (5) JONAH's program theories and techniques were scientifically based and valid; (6) JONAH's program was capable of changing people

from homosexual to heterosexual; and (7) JONAH used unconscionable business practices. Plaintiffs made clear that they do not intend to prove that sexual orientation change efforts ("SOCE") in general cannot be effective. They address solely the practices of JONAH's program specifically, rather than the universe of all possible efforts to change sexual orientation.

By way of damages, plaintiffs seek two sources of recovery. First, they claim they are entitled to restitution of all sums paid to JONAH. Second, they also claim that reparative therapy was necessary as a result of JONAH's services and that, as a result, JONAH is liable for those costs. For example, Unger became deeply depressed and suffered an impaired ability to engage in physical and emotional relationships with men because JONAH conditioned him to view such relations as unnatural. Id. at ¶ 72. Bruck experienced depression, anxiety, and suicidal thoughts because of his therapy sessions with JONAH. Id. at ¶ 95. In short, each plaintiff sought one or more professional mental counselors following his experience with JONAH. Id. at ¶¶ 73, 85, 98, 108. Consequently, plaintiffs assert that money expended for their post-JONAH therapy should be calculated as part of their ascertainable loss under the CFA.

On June 6, 2014, JONAH's motion for partial summary judgment seeking to dismiss plaintiffs' emotional distress claims for

failure to constitute an ascertainable loss under the CFA was denied.

On September 8, 2014, JONAH's motion for summary judgment seeking to dismiss Plaintiffs Bruck, Levin, and Unger for lack of standing under the CFA was granted in part and denied in part; Bruck's claims were dismissed with prejudice, Levin's and Unger's claims remained.

On November 21, 2014, plaintiffs sought partial summary judgment. On November 25, 2014, JONAH also moved for summary judgment. Both motions are returnable February 6, 2015.

On December 15, 2014, the parties each filed motions to bar expert testimony for inadmissibility under the New Jersey Rules of Evidence. During a conference call with the parties, it was determined that the evidentiary motions would be heard first because "[a]s a practical matter, a trial court confronted with an evidence determination precedent to ruling on a summary judgment motion squarely must address the evidence decision first." Estate of Hanges v. Met. Prop. & Cas. Ins., 202 N.J. 369, 384-85 (2010).

The court heard oral argument on both evidentiary motions on January 30, 2015. JONAH's motion, which sought to exclude, in their entirety, testimony by plaintiffs' experts -- Carol Bernstein, M.D.; Janja A. Lalich, Ph.D.; and A. Lee Beckstead, Ph.D -- was denied without prejudice to a possible later motion in limine seeking to bar specific testimony by plaintiffs' experts.



This opinion addresses plaintiffs' evidentiary motion, whereby plaintiffs seek to exclude the expert testimony of:

- (1) Joseph Berger, M.D.'s ("Dr. Berger") in its entirety, or alternatively, as to plaintiffs' credibility and/or as to the value of specific practices included in defendants' conversion therapy;
- (2) Christopher Doyle, M.A., L.C.P.C. ("Mr. Doyle") in its entirety, or alternatively, as to plaintiffs' credibility;
- (3) Joseph Nicolosi, Ph.D. ("Dr. Nicolosi") in its entirety, or alternatively, as to the efficacy of psychotherapy in changing sexual orientation and/or as to the credibility of gay people;
- (4) James E. Phelan, M.S.W., Ph.D. ("Dr. Phelan") in its entirety, or alternatively, as to the efficacy of SOCOE generally;
- (5) John R. Diggs, Jr., M.D. ("Dr. Diggs") in its entirety; and,
- (6) Rabbi Avrohom Stulberger ("Rabbi Stulberger") testimony in its entirety.

## II.

A brief background on each of JONAH's experts informs this analysis.

**A. Joseph Berger, M.D.**

Dr. Berger is a psychiatrist currently working in private practice in Toronto, Canada. He is a past assistant professor of psychiatry at the University of Toronto, as well as a past president of the Ontario Branch of the American Psychiatric Association. He has written articles on various subjects, including an article discussing psychotherapeutic treatment of male homosexuality, published in the American Journal of Psychotherapy and in the NARTH<sup>1</sup> Annual Conference Papers about bias. He guest-lectured at Bar-Ilan University in Israel on psychotherapy with homosexual patients and at various Israeli hospitals reviewing recent scientific studies on homosexuality. Dr. Berger bases his testimony on, in addition to discovery materials, articles by two of defendants' experts, Drs. Nicolosi and Phelan, as well as articles by R.L. Spitzer in the Archives of Sexual Behavior and a book titled Homosexuality: A Psychoanalytic Study, published by Basic Books.

**B. Mr. Christopher Doyle**

Mr. Doyle has been a licensed clinical professional counselor in the state of Maryland for one year. He is the director of the

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<sup>1</sup> NARTH -- an acronym for National Association for Research and Therapy of Homosexuality -- was co-founded by Dr. Nicolosi (another of JONAH's proffered experts) and has less than 1,000 members, including non-mental health professionals such as counselors, teachers, and pastors.

International Healing Foundation ("IHF"), where he has provided psychotherapy to clients experiencing unwanted same-sex attraction for the last five years. In that time, he has treated approximately 150 men experiencing conflicts with their sexual orientation. He also is the co-creator of several different therapeutic retreats at the IHF.

**C. Joseph Nicolosi, Ph.D.**

Dr. Nicolosi is a licensed psychologist in California. He founded the Thomas Aquinas Psychological Clinic and serves as its clinical director. His specialty is the treatment of men who wish to diminish their same-sex attractions. He is one of three founding members, and a former president, of NARTH.

**D. James E. Phelan, M.S.W., Psy.D.**

Dr. Phelan is a licensed clinical social worker currently working in private practice. He is also a MSW Field Practicum Instructor for Ohio State University. He is currently on the Health Practice Section Committee of NARTH.

**E. John R. Diggs, Jr., M.D.**

Dr. Diggs received his medical degree from the State University of New York at Buffalo School of Biomedical Sciences. Currently, he works as a preceptor for physician assistant students at the Massachusetts College of Pharmacy and Health Sciences. He was a lead physician for Christ's Hope International on an AIDS prevention project in Nambia. He authored an article titled The

Health Risks of Gay Sex, which he describes in his curriculum vitae as a "widely read free publication."

**F. Rabbi Avrohom Stulberger**

Rabbi Stulberger is a graduate of the Rabbinical Seminary of America. He currently serves as a Dean of Valley Torah High School in California. He also currently serves as the president of the Yeshiva Principals Council of Los Angeles and has been a member of the Rabbinical Advisory Board to Aleinu Jewish Family Services for over a decade.

**III.**

Plaintiffs' central argument for excluding the expert testimony of Drs. Berger, Nicolosi and Phelan, and Mr. Doyle is based on two premises. First, plaintiffs assert that it is a scientific fact that homosexuality is not a disorder, but rather it is a normal variation of human sexuality, and thus any expert opinion concluding that homosexuality is a disorder is inadmissible. Plaintiffs support this assertion with the fact that, in 1973, the American Psychiatric Association ("APA") removed homosexuality from the list of disorders in the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), and major organizations both nationally and internationally followed suit. Second, plaintiffs further assert that, because the belief that homosexuality is a mental disorder is false and lacks any basis in science, any expert opinion that is derived from that false initial

premise is unreliable and should be excluded. Additionally, because their belief that homosexuality is a disorder conflicts with the understanding held by every legitimate professional association, these experts have banded together under NARTH's umbrella.

Plaintiffs contend that each of Drs. Berger, Nicolosi and Phelan, and Mr. Doyle proffer opinions based on the initial false premise that: (1) homosexuality is not a normal variant of human sexuality but instead is a failure to achieve full development into normal heterosexuality; (2) homosexuality is not a normal variation of human sexuality, but rather is a "clinical condition" caused by negative experiences; (3) homosexuality is a disorder and there is a universal heterosexual natural order; and, (4) homosexuality is not a natural variation of human sexuality. Plaintiffs also assert that each of JONAH's experts derives the remainder of their expert opinions from this initial false premise. Specifically, Dr. Berger believes that homosexuals can become heterosexual through various psychotherapies and that some specific practices included in JONAH's conversion therapy program may be defensible. Mr. Doyle opines that homosexuals benefit from conversion therapy and psychotherapeutic interventions are effective in changing sexual orientation. Dr. Nicolosi's report proffers the opinions that homosexual desire is the result of trauma, that reparative and other therapies are effective in

changing sexual orientation, and that the American Psychological Association ("ApA") 2009 Task Force on Appropriate Therapeutic Responses to Sexual Orientation was unreliable due to influence by gay activists. Dr. Phelan believes that there is a compelling body of evidence showing that sexual orientation can be altered through a variety of methods, and that conversion therapy is a legitimate option that should be available to those who seek it. Notably, plaintiffs do not argue that these opinions by JONAH's experts are necessarily false. Rather, they argue that, because these secondary premises are derived from and rest entirely on each expert's initial false premise that homosexuality is a disorder, their testimony is nothing more than an inadmissible net opinion.

Plaintiffs also argue that the opinions proffered by these four experts are inadmissible for independent reasons. According to plaintiffs:

- a. Dr. Berger (1) uses methods that are so unreliable as to render his testimony entirely inadmissible; (2) offers opinions on plaintiffs' credibility; and (3) lacks expertise to opine that some of JONAH's specific practices may have value.
- b. Mr. Doyle (1) is not qualified to testify as an expert witness and his lack of actual expertise resulted in his use of unacceptable methods that render his conclusions

unreliable; and (2) offers opinions on plaintiffs' credibility by using a majority of his report to summarize plaintiffs' testimony and deriving conclusions from it.

c. Dr. Nicolosi (1) did not write his expert report; (2) has no basis to testify to the accuracy of JONAH's representations as to its program's success rate; and (3) cannot testify as to the credibility of gay people in general.

d. Dr. Phelan's (1) methods are so unreliable so as to render his testimony entirely inadmissible; (2) his opinions rest on counting the number of studies on a list without assessing their validity; and (3) opinions regarding the efficacy of SOCE are inapplicable to the specific practices at issue in this case and should be excluded as irrelevant.

JONAH first counters that defense experts' opinions classifying homosexuality as a disorder are legitimate and scientifically based. According to JONAH, reliance on the DSM is misplaced because the removal of homosexuality was a political, rather than scientific, decision. JONAH also asserts that (a) their experts' clinical experience in SOCE qualifies them to render these opinions, (b) the experts' methodologies are legitimate and sound, (c) the expert reports concern the legitimacy and efficacy

of JONAH's practices, and (d) those reports only incidentally impact plaintiffs' credibility.

Plaintiffs also argue that the opinions asserted by Dr. Diggs and Rabbi Stulberger cannot qualify as proper expert opinion. They note that Dr. Diggs' report asserts that homosexual activity is a harmful behavior that involves health risks, a notion that is irrelevant because the issues in this case do not turn on the harms of homosexual conduct; they also note that the risks of sexual activity are widely known and are not beyond the ken of the average juror. They also underscore that Rabbi Stulberger's report discusses Orthodox Judaism's view on homosexuality. Apart from his conclusion that preventing an Orthodox Jew from attempting to overcome unwanted same-sex attraction interferes with his freedom to exercise his religion, which is independently excludable as an impermissible legal conclusion, Rabbi Stulberger's proffered testimony is inadmissible because it is not relevant to any fact or issue in this case.

JONAH counters that Dr. Diggs' testimony is relevant to Plaintiffs' allegations that its group misrepresented that homosexuals lead unhappy and unhealthy lives, and that Rabbi Stulberger's testimony is relevant to plaintiffs' contention that defendants misrepresented their status as a Jewish organization, because his status as a rabbi allows him to opine on whether JONAH is an authentic Jewish ministry.



We address first the bases to exclude the testimony of Dr. Diggs and Rabbi Stulberger. We then turn to plaintiffs' central argument for excluding the other experts and the other independent bases.

#### **IV.**

##### **A.**

Dr. Diggs' opinions are not beyond the ken of the average juror. N.J.R.E. 702 (expert opinion must "assist the trier of fact to understand the evidence or to determine a fact in issue"). JONAH cannot legitimately argue that, today, jurors need an expert to explain to them that sexual activity, in any form, is potentially harmful.

Both Dr. Diggs' and Rabbi Stulberger's opinions are irrelevant to the issues in this case. Generally, all relevant evidence is admissible unless prohibited by some exclusionary rule. N.J.R.E. 401, 402. In determining whether evidence is relevant, the inquiry should focus on "the logical connection between the proffered evidence and a fact in issue." Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 15 (2004). "Relevant evidence" means "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. The test of relevancy is its probative value with respect to the points in issue. Brenman v. Demello,

191 N.J. 18, 30 (2007); Simon v. Graham Bakery, 17 N.J. 525, 530 (1955).<sup>2</sup>

JONAH has not demonstrated that the expert opinions of Dr. Diggs and Rabbi Stulberger are relevant to this case. The central issue here is whether JONAH made misrepresentations regarding homosexuality and the efficacy of its SOCE program. Dr. Diggs' expert opinion -- which relates solely to the harm caused by homosexual activity -- is not relevant to any of the alleged misrepresentations. Rabbi Stulberger's report -- which tenders opinions on Orthodox Judaism's view of homosexuality -- is irrelevant because this case is not about whether JONAH's statements or activities are consistent with Jewish law or about JONAH misrepresenting itself as a Jewish organization. Dr. Diggs and Rabbi Stulberger are barred from testifying as experts.

**B.**

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<sup>2</sup> Relevance alone does not suffice to render evidence admissible, for "even if relevant, evidence nonetheless 'may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.'" Brenman, supra, 191 N.J. at 30 (quoting N.J.R.E. 403). See also State v. Medina, 201 N.J. Super. 565, 580 (App. Div. 1985) ("[T]he more attenuated and the less probative the evidence, the more appropriate it is for a judge to exclude it.").

The overwhelming weight of scientific authority concludes that homosexuality is not a disorder or abnormal. The universal acceptance of that scientific conclusion -- save for outliers such as JONAH -- requires that any expert opinions to the contrary must be barred.

N.J.R.E. 104(a) commands that, "[w]hen the . . . admissibility of evidence . . . is in issue, that issue is to be determined by the judge. . . . [who] may hear and determine such matters out of the presence or hearing of the jury." See Kemp v. State, 174 N.J. 412, 432-33 (2002) ("The Rule 104 hearing allows the court to assess whether the expert's opinion is based on scientifically sound reasoning or unsubstantiated personal beliefs. . . . In the course of the Rule 104 hearing, an expert must be able to identify the factual basis for his conclusion, explain his methodology, and demonstrate that both the factual basis and underlying methodology are scientifically reliable."); see also Koruba v. Am. Honda Motor Co., Inc., 396 N.J. Super. 517, 523 (App. Div. 2007), certif. denied, 194 N.J. 272 (2008) (noting that trial court conducted Rule 104 hearing and determined that expert's opinion was barred as net opinion). Although the court did not conduct a Rule 104 hearing, the standard remains the same and there was sufficient basis from review of the expert reports and deposition testimony to make an informed decisions.

New Jersey courts apply a three-part test in reviewing issues of expert admissibility:

1. The intended testimony must concern a subject matter that is beyond the ken of the average juror;
2. The field testified to must be at a state of the art that such an expert's testimony could be sufficiently reliable; and
3. The witness must have sufficient expertise to offer the intended testimony.

State v. Kelly, 97 N.J. 178, 208 (1984) (proponent of expert testimony must demonstrate that testimony would enhance knowledge and understanding of lay jurors with respect to other testimony of special nature normally outside of usual lay person sphere); see also Agha v. Feiner, 198 N.J. 50, 62 (2009); Hisenaj v. Keuhnuer, 194 N.J. 6, 15-16 (2008).

In the area of scientific evidence, expert testimony will be deemed acceptable only if the technique or mode of analysis used has "a sufficient scientific basis to produce uniform and reasonably reliable results so as to contribute materially to the ascertainment of the truth." State v. Torres, 183 N.J. 554, 568-70 (2005); Kelly, supra, 97 N.J. at 210; Romano v. Kimmelman, 96 N.J. 66, 80 (1984). The reliability requirement applies to all scientific fields, including the social and psychological sciences. State v. Free, 351 N.J. Super. 203, 213 (App. Div.

2002). In New Jersey, reliability of a scientific technique can be proven in most cases by showing its "general acceptance in the particular field in which it belongs." Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923); Windmere, Inc. v. Int'l Ins. Co., 105 N.J. 373, 385, 522 n. 2 (1987); State v. Harvey, 151 N.J. 117, 169-70 (1997). General acceptance of an area of research or expertise can be established in one of three ways:

(1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis; (2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and (3) by judicial opinions that indicate the expert's premises have gained general acceptance.

[Kelly, supra, 97 N.J. at 210 (citation omitted); see also Hisenaj, supra, 194 N.J. at 12-13; Windmere, supra, 105 N.J. at 379 (testimony of experts with limited experience and affiliated with development of device at principal source did not establish general acceptance of voiceprint analysis within professional community so as to mandate admission of results).]

JONAH's suggestion that the court should ignore the DSM misapprehends basic New Jersey law. Under the general acceptance standard, the DSM is unquestionably authoritative in the mental health field; courts repeatedly have concluding this to be the case. See, e.g., State v. King, 387 N.J. Super. 522, 544 (App. Div. 2006) ("General acceptance of the DSM in the psychiatric

community is beyond dispute"); Patterson v. Bd. Of Trs., State Police Retirement Sys., 194 N.J. 29, 41-42 (2008); T.H. v. Div. of Developmental Disabilities, 189 N.J. 478, 485-86 (2007); Brunell v. Wildwood Crest Police Dep't, 176 N.J. 225, 240-43; State v. Pitts, 116 N.J. 580, 608 (1989).

Further, JONAH incorrectly characterizes the court's role in assessing scientific reliability. It argues that the APA's decision to remove homosexuality as a disorder from the DSM was a politically motivated decision made to de-stigmatize homosexuality, and was not based on science.<sup>3</sup> However, a "trial court should not substitute its judgment for that of the relevant scientific community." Landrigan v. Celotex Corp., 127 N.J. 404, 414 (1992). It is not a proper inquiry for a court to determine the correctness of the APA's decision to generally accept that homosexuality is not a disorder, and no proper basis has been advanced on which a court may reassess the scientific accuracy of the psychiatric categorization of homosexuality.

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<sup>3</sup> It should be noted that the APA does in fact provide a scientific reason for its decision to remove homosexuality as a disorder. A position statement regarding the then proposed change to the DSM defined a mental disorder as having at least one of two elements: (1) the illness must regularly cause subjective distress; and/or (2) it must regularly be associated with some generalized impairment in social effectiveness or functioning. The statement noted that homosexuality, per se, does not meet the requirements for a psychiatric disorder since many homosexual people are satisfied with their orientations and suffer no generalized impairment in social effectiveness or functioning. See Certification of Lina Bensman in Support of Plaintiffs' Motion for Partial Summary Judgment, Exhibit 6. The court also relies upon the numerous studies attached as exhibits to the Bensman Certification in support of Plaintiffs' Motion for Partial Summary Judgment, which support the contention that homosexuality is a natural variation of human sexuality.

No doubt, general acceptance within the scientific community is not an end in itself. In re Commitment of R.S., 173 N.J. 134, 136 (2002) ("It is reliability that must be assured."). Nevertheless, general acceptance constitutes strong -- some might say conclusive -- indicia of whether a sufficient level of reliability has been achieved. See State v. Doriguzzi, 334 N.J. Super. 530, 546 (App. Div. 2000). Countless organizations have followed the APA's lead in removing homosexuality from its listings of mental disorders; these include the World Health Organization (WHO), the Royal College of Psychiatrists, the ApA, and the American Academy of Child and Adolescent Psychiatry. See Certification of Lina Bensman, Exhibit 75. That scientific conclusion also has been embraced as part of the public policy of the State of New Jersey. See N.J.S.A. 45:1-54(a) (declaring that, in light of scientific community's finding, "[b]eing lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming. The major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years"); see also King v. Governor of the State of N.J., 767 F.3d 216, 238 (3d Cir. 2014) (affirming N.J.S.A. 45:1-54's prohibition against providing SOCE counseling to minors and noting that "[l]egislatures are entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the

professional practice under review, particularly when this community has spoken with such urgency and solidarity on the subject"). JONAH hardly can argue that all of these organizations -- including a federal appellate court -- were the victims of manipulation by "gay lobbying" groups. Regardless, it is not up to this court to decide that question.

JONAH's reliance on Rubanick v. Witco Chemical Corp., 125 N.J. 421 (1991), likewise is misplaced. JONAH argues that the absence of homosexuality in the DSM is not conclusive because this case presents a novel situation requiring the court to follow the relaxed reliability standard under Rubanick. Under Rubanick's more flexible approach, general acceptance of a new technique or theory is shown by "the strict application of the scientific method, which requires an extraordinarily high level of proof based on prolonged, controlled, consistent, and validated experience." Id. at 436. Each step of a scientific process or technique must be examined. Harvey, supra, 151 N.J. at 177.

Rubanick is inapposite; it dealt with a theory that, in fact, was novel and, therefore, had not yet had the opportunity to gain general acceptance. Unlike here, courts apply the Rubanick standard to cases "in which a medical cause-effect relationship has not been confirmed by the scientific community but compelling evidence nevertheless suggests that such a relationship exists." Kemp ex rel. Wright v. State, 174 N.J. 412, 430 (2002). Although



not exclusively limited to toxic tort cases, as plaintiffs seem to suggest, our courts have been "cautious in applying the more relaxed Rubanick standard for the admissibility of scientific evidence in other contexts." Id. at 429 (citing Harvey, supra, 151 N.J. at 170).

In contrast to Rubanick, the theory that homosexuality is a disorder is not novel but -- like the notion that the earth is flat and the sun revolves around it -- instead is outdated and refuted. Homosexuality was listed as a mental disorder in the DSM until its removal in 1973. Although the DSM has added newly recognized disorders as a result of evolving understandings of the medical field, this case presents the opposite situation: the APA removed homosexuality from the DSM upon concluding that it was not a disorder. JONAH has not identified any case that provides a standard for the admission of obsolete and discredited scientific theories. By definition, such theories are unreliable and can offer no assistance to the jury, but rather present only confusion and prejudice. The correct legal standard here is Frye's general acceptance standard.

JONAH also cannot point to the existence of NARTH to counter the general acceptance standard. This argument, which assumes that general acceptance requires unanimity, is incorrect. Although a merely "moderate" degree of acceptance is insufficient for expert admissibility, Tonsberg v. VIP Coach Lines, Inc. 216

N.J. Super. 522, 527 (App. Div. 1987), general acceptance "does not depend on unanimous or universal agreement within the scientific community." State v. Tate, 102 N.J. 64, 83 (1986); see also Windmere, supra, 105 N.J. at 379 ("There will always be some detractors to any scientific theory."). The existence of a minority of conversion therapy proponents does not and cannot negate the fact that the DSM and its exclusion of homosexuality are generally accepted in the mental health field. Furthermore, a group of a few closely associated experts cannot incestuously validate one another as a means of establishing the reliability of their shared theories. See id. at 380-82 (holding that general acceptance had not been established where all experts were affiliated with unique "principle place of research" such that development of relevant device appeared to be "sole source industry").<sup>4</sup>

Each of JONAH's experts proffers the opinion that homosexuality either is a disorder or is not a normal variation of human sexuality. Because the generally accepted scientific theory is that homosexuality is not a mental disorder and not abnormal, these opinions are inadmissible.

**C.**

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<sup>4</sup> Although not necessary to this decision, one cannot fail but notice that several of the JONAH experts' reports are riddled with methodological errors that also render their opinions inadmissible; these include the refusal to consider studies that do not support their views, and the plagiarism of another JONAH expert's prior work without independent research or analysis.

As a necessary corollary to the conclusions noted above, any expert opinion based on the initial premise that homosexuality is a mental disorder or abnormal is unreliable and likewise barred.

N.J.R.E. 703 contemplates that an expert's opinion must be based upon facts or data. "Qualified expert testimony is admissible to assist the jury, N.J.R.E. 702, but there must be a factual and scientific basis for an expert's opinion. An opinion lacking in foundation is worthless." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996) (citations omitted). Bare conclusions, unsupported by factual evidence or other data, may be challenged on the ground that it is a net opinion. State v. Townsend, 186 N.J. 473, 494-95 (2006); see also Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011); Polzo v. County of Essex, 196 N.J. 569, 583 (2008). An expert must give the "why and wherefore" of his or her opinion, rather than a mere conclusion. Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002).

The net opinion rule is a prohibition against speculative testimony. Under this doctrine, expert testimony is excluded if it is based merely on unfounded speculation and unqualified possibilities. Therefore, the net opinion rule appears to be a mere restatement of the established rule that an expert's bare conclusions, unsupported by factual evidence, [are] inadmissible. It frequently focuses...on the failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom.

[Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997) (internal citations and quotation marks omitted); see also Johnson v. Salem Corp., 97 N.J. 78, 91 (1984) (weight to which expert opinion is entitled can rise no higher than facts and reasoning upon which that opinion is predicated).]

The admissibility of a scientific theory requires general acceptance of the premises on which the expert bases his or her analysis. See Kelly, supra, 97 N.J. at 210. If the initial premise is rejected, an expert cannot supply the "why and wherefore" and his subsequent theories are rendered inadmissible net opinions. Rosenberg, supra, 352 N.J. Super. at 401.

Each of JONAH's experts base their conclusions on the initial false premise that homosexuality is either abnormal or a mental disorder. For example, Dr. Nicolosi expressly affirms that his clinical work and expert opinions are premised on the belief that homosexuality is a disorder. See Bensman Certification, Exh. 45. Dr. Berger rejects the DSM, disagreeing with the generally accepted understanding that homosexuality is a normal variation of human sexuality, and instead believes homosexuality is a developmental problem that can be fixed through SOCE. See id. at Exhs. 36 and 43. Regardless of JONAH's late-asserted notion that that sexual orientation can be changed without believing that homosexuality is abnormal, that notion is not echoed by its experts; instead, these

specific experts' squarely rely on the initial false premise. That reliance is fatal and renders their entire testimony inadmissible.

Nor do the experts' clinical experiences provide an adequate basis for the opinion that SOCE is effective. The experts merely would present to the jury their idiosyncratic observations that some clients have reported benefits from SOCE, but they cannot not supply the necessary "why and wherefore" for these observations. Specifically, the experts cannot overcome the initial false premise that they believe homosexuality is abnormal or a disorder that can be resolved through counseling. One is inexorably tied to the other: they cannot explain their clinical experience to the jury without also presenting their scientifically discredited belief that homosexuality is abnormal or a mental disorder.

**D.**

Plaintiffs also challenge Dr. Berger's expert report to the extent that it comments on their credibility and makes diagnoses without an adequate basis.

Because credibility is uniquely within the province of the jury and within its capacity to judge, expert testimony as to the credibility of witnesses or parties is not permitted. See State v. Henderson, 208 N.J. 208, 297 (2011); State v. Vandeweaghe, 177 N.J. 229, 239 (2003). Likewise, an expert cannot opine on matters for which he or she lacks sufficient basis. See State v. Pasterick, 285 N.J. Super. 607, 620-21 (App. Div. 1995) ("[A]n

expert's opinion may be based only on information of a type which experts in the relevant field of practice reasonably rely on in reaching conclusions of the type offered[.]"); Anderson v. A.J. Friedman Supply, 416 N.J. Super. 46, 75 (App. Div. 2010), certif. denied, 205 N.J. 518 (2011) (opinion on causation of cancer was net opinion where expert did not examine patient or review patient's medical history).

Dr. Berger devotes the majority of his report to a summary of plaintiffs' deposition testimony and certain treatment records. See Bensman Certification, Exh. 36. Using terminology from the mental health field, he creates the false impression that he is diagnosing plaintiffs in his capacity as a psychiatrist, even though he concedes that he cannot make diagnoses on persons who are not his patients. Rather, he states that he merely is "commenting in terms of aspects of character." See Bensman Certification, Exh. 43, Berger Transcript, 261:14-264:24. Dr. Berger comments extensively on plaintiffs' character and even on their unspoken thoughts and motivations; he goes so far as to conclude that there was no basis for any claim of misrepresentations and that any harm suffered by plaintiffs could not have been caused by JONAH's program. See id. at Exh. 36. Because credibility is uniquely within the province of the jury, this testimony is inadmissible.

Despite the inadmissibility of a majority of Dr. Berger's testimony, he does proffer admissible testimony in the form of comments as to the "remarkab[ility]" of the absence of any discussion of JONAH in Ferguson's post-JONAH treatment records. See id. To give expert testimony, it must be shown that the witness has certain skills, knowledge or training in a technical area or one that is not common to the world. Scully v. Fitzgerald, 179 N.J. 114, 129 (2004). Dr. Berger, as a licensed psychiatrist, does possess the requisite knowledge to testify that it is atypical for treatment records to lack any mention of dissatisfaction with the purported cause of a patient's harm.

**v.**

For the foregoing reasons, plaintiffs' motion to exclude Mr. Doyle, Dr. Nicolosi, Dr. Phelan, Dr. Diggs, and Rabbi Stulberger from testifying as experts is granted. Plaintiffs' motion to exclude Dr. Berger from testifying as an expert is granted only as to his testimony relating to the efficacy of SOCE and plaintiffs' credibility, but not as to testimony relating to the lack of any mention of JONAH in plaintiffs' treatment records.

An appropriate order follows.