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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 LAW DIVISION - HUDSON COUNTY DOCKET NO. L-5473-12 Civil Action Date: July 19, 2013 Judge: Hon. Peter F. Bariso, Jr.

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

On the Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

I.

INTRODUCTION.

Plaintiffs base their opposition to defendants' motion to dismiss on four inaccurate propositions. (See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion To Dismiss ["Opp."] at pp. 1-2.)

First, it is not defendants who attempt to "misdirect the inquiry away from the concrete allegations" of the complaint, but rather the plaintiffs. Plaintiffs brazenly deny that they have placed the immutability of sexual orientation at issue in this case, even though the foundational allegation of their complaint is that defendants "misrepresented" the fact that change in orientation is possible. (See, e.g., Complaint at ¶¶ 38 and 40; Opp. at pp. 6 and 11.) Unless sexual orientation change is *im*possible, plaintiffs cannot show that any of defendants' other statements alleged to be violations of New Jersey's Consumer Fraud Act ("CFA") are actionable.

Second, defendants' expert certifications have not been "improperly inject[ed]" because they are "incompatible with a motion to dismiss." "If, on a motion to dismiss based on the defense numbered (e) [failure to state a claim upon which relief can be granted], matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion." (R. 4:6-2.) The Court will recall that plaintiffs' counsel previously raised this issue during the June 7, 2013 hearing on defendants' motion to quash a third

party subpoena duces tecum. At that time, the Court indicated that it would treat defendants' motion to dismiss as a motion for summary judgment and accordingly postponed the hearing to give plaintiffs additional time to respond.

Third, plaintiffs' contention that this case merely "touches on a controversy not at issue in this litigation" is risible. The question of whether sexual orientation is immutable is at the heart of plaintiffs' case (though of course they deny that for the purpose of opposing this motion). Because the Court would have to resolve that controversy on the plaintiffs' side of the debate in order to find liability under the CFA, the New Jersey Supreme Court's reasoning in *Acuna v. Turkish* is directly on point here. (*Severns v. Concord Chem. Co., Inc.*, 373 N.J. Super. 368, 374 (Ch. Div. 2004) [trial courts are bound by decisions of the Supreme Court that apply to the facts in the case under consideration]; *Brown v. United Cerebal Palsy/Atl. & Cape May, Inc.*, 278 N.J. Super. 208, 212 (Ch. Div. 1994) [Supreme Court pronouncements, although dicta, are entitled to great, if not conclusive, weight].)

Finally, plaintiffs' sensationalistic and inaccurate recitation of defendants' supposed treatment methods is irrelevant to this motion. By its own terms, the CFA applies to practices and statements made "in connection with the sale or advertisement of any merchandise [including services]," not to the services themselves. (N.J.S.A. §§ 56:8-2 and 8-1(c).) Notably, plaintiffs inaccurately cite *Perth Amboy Iron Works, Inc. v. Am. Home Assurance Co.*, 226 N.J.Super. 200, 209 (App.Div. 1988) for the proposition that the CFA applies "both to misrepresentations about a product as well as to 'subsequent

performance' of the product or service itself." (See Opp. at p. 5.) In fact, the actual language of the CFA states "subsequent performance of such person as aforesaid" – i.e., the "person" performing the "unlawful practice." (N.J.S.A. § 56:8-2.) The *Perth* court determined that this language meant that the manufacturer and distributer of a product, and not just the seller, could be found liable under the CFA for misrepresentations or concealment, not that the performance of the product itself gave rise to liability. (*Id.* at 209-211.) The only conduct by defendants at issue here is the statements they made in connection with the "sale or advertising" of their counseling services, not the services themselves.

Notwithstanding plaintiffs' arguments, defendants respectfully suggest that this Court should grant their motion for all the reasons set forth below and in the Brief in Support of Defendants' Motion To Dismiss For Failure to State a Claim Upon Which Relief Can Be Granted ("Brief").

II.

BECAUSE 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.

A. Plaintiffs' CFA Claims Arise out of a Controversial Societal Issue Which Cannot Be Resolved by the Judiciary.

In opposition to defendants' motion to dismiss, plaintiffs first argue that their

complaint adequately alleges the three elements required to state a claim under New Jersey's Consumer Fraud Act -- conduct unlawful under the statute, ascertainable loss, and a causal connection between the two. (See Opp. at pp. 3-7.) The "unlawful conduct" of which plaintiffs accuse defendants in this case are alleged "misrepresentations." Interestingly, most of the examples of such alleged misrepresentations cited by plaintiffs pertain to the issue of "change" – i.e., statements by the defendants that sexual orientation can be effectively changed through therapy. (See Opp. at p. 6.) To prevail on their CFA claims, plaintiffs must prove that such statements are fraudulent; in other words, they must convince the Court to adopt the position that sexual orientation *cannot* be changed.

As explained in defendants' Brief, however, that issue is the subject of intense controversy, and "there is no consensus in the [therapeutic] community or among the public supporting the plaintiff's assertions." (*Acuna v. Turkish*, 192 N.J. 399, 419 (2007).) When the opposing sides of such a "profound issue" are "arrayed along a deep societal philosophical divide," the Court cannot "drive public policy in one particular direction" by choosing one side over the other. (*Id.*) Thus, while plaintiffs may have alleged the elements of CFA claim, this particular case is not capable of being disposed of judicially and so it must be dismissed.

B. The New Jersey Supreme Court's Reasoning in *Acuna v. Turkish* Mandates Dismissal of Plaintiffs' Complaint.

1. <u>The non-justiciable issue</u>.

In their opposition, plaintiffs argue that *Acuna v. Turkish* does not provide a basis

for dismissing their complaint. (See Opp. at pp. 7-13.) Plaintiffs begin by claiming that the *Acuna* did not address the issue of justiciability, even by implication. (See Opp. at pp. 7-10.) A controversy is "justiciable" when it is "capable of being disposed of judicially." (Black's Law Dictionary (9th ed. 2009).) While it did not use the word, the *Acuna* court did in fact address the justiciability of profound societal issues about which there is no scientific, theological, or philosophical consensus.

The plaintiff in *Acuna* had asked the court to find that physicians have a duty to inform pregnant patients that an abortion procedure will kill not just a potential life, but an actually existing human being. (*Id.* at 413.) Among other governing precepts, the court noted that "courts will find a duty where, in general, reasonable persons would recognize and agree that it exists," and that "[c]ourts also must be conscious of whether the desirable policy proposed by a party is the subject of intense controversy and therefore likely to be divisive." (*Id.* at 414 [internal quotes and citations omitted].) Finding that there was no consensus in the medical community or among the public on the profound issue of when life begins, the court concluded that it could not take a side. For that reason, it would not impose the duty sought by the plaintiff and ordered the trial court's order dismissing that claim reinstated. (*Id.* at 419-420.)

Plaintiffs erroneously contend that *Acuna* was decided based on a failure of proof. (See Opp. at p. 8.) In fact, the *Acuna* court observed that both parties were prepared to offer diametrically opposed expert opinions – for the plaintiff, testimony that her embryo was an existing human being at the time of the abortion as a biological fact, and for the

defendant testimony 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. (*Acuna v. Turkish*, *supra*, 192 N.J. at 416.) The court concluded that it could impose a duty on the physician only if it accepted one side of the medical, philosophical, and religious debate as to when life begins -- which the *Acuna* court properly declined to do.

Thus, the *Acuna* court disposed of a dispute "involving" a scientific, philosophical, and theological controversy but it did ***not*** resolve the controversial issue itself. Rather, it specifically found 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].) In other words, by implication, the New Jersey Supreme Court concluded that the underlying issue of when life begins is *not justiciable*, even if cases "touching on" that issue can be. (See *id.* at 417, citing *Roe v. Wade*, 410 U.S. 113, 159 (1973), *Planned Parenthood of Southeasstern Pa. v. Casey*, 505 U.S. 833, 875-876 (1992), and *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).)

Contrary to plaintiffs' assertion, defendants do not argue that "the judiciary is not competent to hear cases *involving* scientific, philosophical, theological, moral, or societal controversy." (Emphasis added.) Of course, as plaintiffs note, the history of the judicial system is replete with such cases. (See Opp. at pp. 9-10.) Obviously, courts can and do decide substantive legal questions "implicating" controversial societal issues. What the United States Supreme Court in *Roe v. Wade* and the New Jersey Supreme Court in

Acuna v. Turkish teach, however, is that the judicial branch cannot answer the underlying question itself when there is no societal consensus. Thus, the United States Supreme Court can find a constitutional right to privacy precluding restrictions on abortions, while noting that "the judiciary is not in a position to speculate as to the answer" to the "difficult question of when life begins" "[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus." (*Roe v. Wade, supra,* 410 U.S. at 159.) Similarly, the New Jersey Supreme Court can find that summary judgment of a claim for lack of informed consent can be upheld based on no duty, while declining to answer the question identified in *Roe* for the same reasons. (*Acuna v. Turkish, supra*, 192 N.J. at 419-420.)

This case differs from cases "involving" or "implicating" profound societal issues, however, because deciding the substantive legal issue here – i.e., whether defendants' statements violate the CFA because they were false -- necessarily requires resolution of the underlying controversy – i.e., whether sexual orientation can be changed through therapy. This case does not simply "touch on" a controversial issue, it arises from it. Unless plaintiffs convince this Court to adopt their side of this debate – i.e., to find that sexual orientation is immutable – they cannot prevail on their claims under the CFA that defendants' statements regarding the changeability of orientation and the effectiveness of SOCE were fraudulent. (See Complaint at ¶¶ 39-40.)

Notably, because courts have recognized that they are not equipped to resolve the profound and controversial issue of when life begins, society has been able to freely

continue the scientific and theological debate. (See, e.g., *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 270 (1993) [opposition to abortion is a "common and respectable" point of view].) But as defendants noted previously, plaintiffs here would use their CFA claims to shut down the debate over the immutability of sexual orientation. They have asked this Court to find that statements that sexual orientation is changeable and that SOCE is effective are fraudulent, in violation of the CFA, literally illegal. (See Brief at p. 2.) This cannot be permitted. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (*West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).)

In sum, with respect to justiciability, just as the Supreme Court in *Acuna* could not resolve the issue of when life begins and so could not impose a duty on a physician based on the plaintiff's side in that debate, this Court cannot resolve the issue of the changeability of sexual orientation; therefore, it cannot impose liability under the CFA based on the side of that debate taken by the plaintiffs here.

2. Characterization of plaintiffs' claims.

On a note related to justiciability, plaintiffs contend that defendants have "mischaracterized" their claims by "wrongly assert[ing] that the only way that Plaintiffs can prevail on their CFA claims is to prove that sexual orientation is fixed or unchangeable." Plaintiffs assert that they only need to prove that "*Defendants'* practices

were ineffective, and that the representations *Defendants* made to the contrary were therefore false." (See Opp. at pp. 10-11.)

Interestingly, it is actually the plaintiffs who are "mischaracterizing" their own claims in their effort to defeat defendants' motion. While they apparently think this Court will overlook it, one of the main "misrepresentations" identified in plaintiffs complaint is that "homosexuality is changeable." (See Complaint at ¶¶ 38, 40, 44, 68, 80, 90, 103.) Moreover, whether sexual orientation is changeable is inextricably connected to plaintiffs' claim that statements regarding the effectiveness of SOCE, including the defendants' own counseling services, constitute "misrepresentations" under the CFA. (See Complaint at ¶¶ 38, 41, 68, 82, 92, 104-105.) Thus, plaintiffs blatantly ignore the theme of their own complaint – i.e., defendants' statements that their counseling services can help people overcome unwanted same sex attraction is a fraud because sexual orientation is not changeable (i.e., "immutable").

Furthermore, plaintiffs assertion that they only have to prove that defendants' counseling services did not work for them, thus rendering defendants' statements about those services fraudulent, borders on nonsensical. [1] Is Weight Watchers liable under the CFA every time someone signs up for that program but fails to lose weight, or gains it back? Of course not. The alleged ineffectiveness of the services for the plaintiffs does

[1] Plaintiffs' contention that this lawsuit is a "straightforward" CFA case strictly limited to the relationship between these plaintiffs and these defendants is belied by their counsel's own very public representations to the contrary. (See an article about the Southern Poverty Law Center's community meetings on conversion therapy and an op-ed by attorney Sam Wolfe, attached as Exhibits 7 and 8 to Supp. LiMandri Decl.)

not prove the falsity of statements about the potential efficacy of those services. Each of the plaintiffs signed Agreements with defendants acknowledging that "successful results could not be guaranteed." (See Brief at fn. 7.) Just because SOCE may not be effective for some people does not mean that it is not effective for others. Certifications by six individuals who benefitted from such therapy are attached to the Supplemental Declaration of Charles S. LiMandri in Reply to Plaintiffs' Opposition to Motion To Dismiss ["Supp. LiMandri Decl."] as Exhibit 1.

Nevertheless, plaintiffs assert that they "may" present evidence at trial of the "uniform consensus of all reputable mental health organizations that conversion therapy does not work." As explained in detail in defendants' brief, supported by the Certifications of Nicholas Cummings, Ph.D., and Michelle Cretella, M.D., however, the question of whether sexual orientation is subject to spontaneous or facilitated change is a controversial one about which there is no scientific consensus in the psychotherapeutic community. (See Brief at pp. 7-12.)

Further, because this Court informed plaintiffs' counsel that it would treat this motion as one for summary judgment, their opportunity to present evidence refuting the defendants' evidence was with their opposition. They elected not to so. While they might have been able to come with an ideological expert willing to opine that sexual orientation is immutable and SOCE is always ineffective, they cannot overcome the fact that opposing scientific views exist, thus creating the very type of controversy which the

Acuna court found dispositive. (*Acuna v. Turkish, supra,* 192 N.J. at 416.)[2]

Importantly, there is also no theological consensus regarding the nature or immutability of homosexuality. For example, the Catechism of the Catholic Church teaches that homosexual acts are "disordered" (i.e., sinful). (See Exhibit 2 to Supp. LiMandri Decl.) Similarly, traditional Jewish teaching, upon which defendant JONAH's services are based, holds that homosexual conduct is prohibited and homosexual inclinations can be changed. (See Exhibits 3 - 5 to Supp. LiMandri Decl.) A recent Pew poll found that about half of all Americans say there is a conflict between their religious beliefs and homosexuality. (See Exhibit 6 to Supp. LiMandri Decl.) Notwithstanding plaintiffs' allegations, defendants do not contend that homosexuality is a "mental disease or disorder," but they do believe that homosexual conduct is "disordered" from a religious perspective. Finding this characterization to be actionable under the CFA would impermissibly shut down the societal debate and of course violate defendants' free speech and free exercise rights guaranteed by the First Amendment.

In sum, based on the reasoning of the New Jersey Supreme Court in *Acuna v. Turkish*, the lack of societal consensus about the immutability of sexual orientation and the effectiveness of SOCE mean that these issues cannot properly be resolved by the

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[2] Plaintiffs contend that further discovery is necessary for the Court to have a "complete factual record" on which to base its ruling on this motion. (See Opp. at pp. 8 and 13.) Defendants' motion is based on the Court's inability to resolve the profound issue of the immutability of sexual orientation because of the lack of scientific, philosophical, and theological consensus on that issue. Defendants have established the fact, which is subject to judicial notice, that there is no such consensus. Accordingly, no additional discovery is needed for the purposes of this motion.

judicial branch. Plaintiffs' contention that "this case does not even present the scientific, philosophical, theological, moral, or societal controversy that Defendants urge is non-justiciable" is most generously described as inexplicable.

3. **Defendants' supporting expert certifications.**

Plaintiffs next object to the Cummings and Cretella certifications submitted by defendants for the purpose of allowing the Court to take judicial notice of the lack of scientific, philosophical or theological consensus regarding the immutability of sexual orientation and effectiveness of SOCE. (See Opp. at pp. 11-12.) Plaintiffs argue that "whether or not sexual orientation is mutable in general is an abstract question not relevant to the concrete claims made by the Plaintiffs in this action. The existence, or non-existence, of debate about that abstract question is therefore also irrelevant." Of course, as noted above, one of the main "misrepresentations" alleged in plaintiffs' complaint is the statement that "homosexuality is changeable." Changeable and mutable mean the same thing. Clearly, a major allegation is relevant in this action.

Plaintiffs then argue that the fact of lack of consensus is "beyond the limit of appropriate judicial notice." They correctly point out that no fact may be judicially noticed if can "reasonably be the subject of dispute" or its accuracy can "reasonably be questioned." But then they do not demonstrate that lack of consensus regarding the changeability of sexual orientation or effectiveness of SOCE is disputed or questioned. Dr. Cummings' Certification alone, which plaintiffs do not even mention, establishes that there is no consensus among the psychological community, in which he is recognized as

a giant. Of course, Dr. Cretella's Certification, and the papers cited in it, establish the breadth of that lack of consensus. Plaintiffs make a half-hearted attempt to challenge these authorities by arguing that "legitimate scientists" must be distinguished from "cranks and charlatans." Filed and served with this Reply is the Certification of Christopher H. Rosik, Ph.D. Dr. Rosik testifies that he has reviewed Dr. Cretella's Certification and has identified those studies that appear in peer-reviewed journals, as well as respected books and treatises. Based upon his review of those materials, Dr. Rosik concludes that Dr. Cretella's research and analysis is accurate and her conclusions are well-founded.

There is no reasonable dispute or question that there is a lack of scientific, philosophical and theological consensus regarding the immutability of sexual orientation and effectiveness of SOCE. Defendants are not asking this Court to agree with Drs. Cummings, Cretella, and Rosik that sexual orientation can be changed through therapy, only that there is no societal consensus on the issue. This Court can and should take judicial notice of that fact. In the event the Court has any doubt, defendants respectfully request an evidentiary hearing on the issue. (Evid. R. 104(a).)

C. Plaintiffs' Complaint Does Not Present a Justiciable Controversy.

Defendants are not arguing at this time that the prosecution of plaintiffs' lawsuit constitutes an abuse of process. (See Opp. at pp. 13-14.) Defendants drew the Court's attention to the motives of plaintiffs and their counsel in bringing this case to further show that their ultimate intent is not to vindicate their individual rights under the CFA,

but as part of a nation-wide, ideologically-driven strategy to stamp out all SOCE, which they refer to as "conversion therapy." (See Brief at 15-18.) Further, defendants are not arguing at this time that this case presents a political question. (See Opp. at p. 15.)

Rather, defendants are relying on the reasoning of the New Jersey Supreme Court in *Acuna v. Turkish*, which teaches that courts cannot resolve profound issues of societal importance about which there is no scientific, philosophical or theological consensus and which divides the public. The mutability or immutability of sexual orientation is one such profound issue. But to find the defendants' liable under the CFA for making false and fraudulent misrepresentations about the changeability of sexual orientation or the effectiveness of SOCE, this Court would have come down on one side of this debate. Because the resolution of such questions is not for the courts, plaintiffs' CFA claims are not justiciable, and this Court should dismiss their complaint.

III.

CONCLUSION.

For the foregoing reasons, defendants respectfully request that this Court grant their motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted.

Respectfully submitted,

July 15, 2013

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