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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
HUDSON COUNTY, LAW DIVISION

Docket No. L-5473-12

CIVIL ACTION

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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## I. PRELIMINARY STATEMENT

This case focuses on Defendants' unlawful acts under New Jersey's Consumer Fraud Act ("CFA"), which prohibits any "act, use or employment by any person of any unconscionable commercial practice . . . false promise, [or] misrepresentation . . . in connection with the sale or advertisement of any [service]." N.J.S.A. 56:8-2; N.J.S.A. 56:8-1(c) (defining "merchandise" to include "service"). Defendants' Motion to Dismiss ignores the precise, sufficiently pleaded allegations in the Complaint, and not only fails to articulate a legally sufficient basis for the assertion that the Complaint fails to state a claim for which relief can be granted, but also fundamentally misconstrues the nature of this litigation. Defendants attempt to misdirect the inquiry away from the concrete allegations in the Complaint concerning their own words and actions and towards abstract and hypothetical questions; improperly inject "expert" certifications that are incompatible with a motion to dismiss; and rely on inapposite cases for the incorrect proposition that this Court is not competent to hear this case because it touches on a controversy not at issue in this litigation, namely, whether sexual orientation is fixed and immutable.

The central allegation of this lawsuit is that "Defendants falsely claimed that their services were effective in changing a person's sexual orientation." Compl. ¶ 10. Plaintiffs will prove this at trial. Defendants misrepresented to Plaintiffs that they could become straight by paying thousands of dollars to the Defendants in exchange for the Defendants' conversion therapy services, which included the following activities, among others:

- Undressing (and sometimes touching one's buttocks and penis) in the presence of a much older "ex-gay" counselor (Compl ¶ 45);
- Spending time at the gym and being naked with one's father or father figures at bathhouses (Compl. ¶ 54);

- Submitting to taunts with epithets including "fag, homo, [and] queer boy" (Compl. ¶ 55);
- Entering a mock locker room or sporting scenario, blindfolded, while counselors dribbled basketballs and hurled anti-gay insults (Compl. ¶ 57);
- Participating in group cuddling sessions with other young clients and older counselors (Compl. ¶ 60);
- Beating effigies of their mothers, to whom the Plaintiffs purportedly were too close (Compl. ¶ 59).

Of course, none of these methods, nor any of the many others that Defendants included among their services, succeeded in changing Plaintiffs from gay to straight. Plaintiffs will prove this at trial.

Defendants advance two arguments for dismissal. First, Defendants assert, based on a lone Supreme Court of New Jersey case, Acuna v. Turkish, that Plaintiffs' Complaint must be dismissed as non-justiciable because it purportedly hinges on a scientific, philosophical, theological, moral, or societal controversy beyond the competence of New Jersey courts to adjudicate. But Acuna does not even address the issue of justiciability, and was decided on the merits after the conclusion of full discovery. Second, Defendants appear to assert that dismissal is warranted because Plaintiffs' Complaint implicates a non-justiciable political question and/or is an abuse of process. This is a straightforward litigation alleging fraud under the CFA. This action is plainly cognizable under the CFA. Defendants' tortured arguments should be rejected in their entirety.

## II. PROCEDURAL HISTORY

On November 27, 2012, Plaintiffs filed their Complaint, alleging four counts of violations of New Jersey's CFA, which protects consumers from deceptive, false, or fraudulent business practices. The Complaint alleges that Defendants falsely claimed that Plaintiffs' (or their sons' in the case of the parent Plaintiffs) homosexuality was a mental disease or disorder and that Defendants' conversion therapy services could "heal" or change the Plaintiffs' sexual orientation from gay to straight.

Defendants filed their Answer on February 4, 2013, and their Amended Answer on February 26, 2013. On February 28, 2013, Defendants unsuccessfully attempted to serve Plaintiffs with a Notice and Demand for Withdrawal of Complaint ("Notice and Demand"). Plaintiffs and Defendants have exchanged written discovery requests.[1] On May 28, 2013, Defendants filed their Motion to Dismiss the Complaint with a return date of June 21, 2013, which was ultimately adjourned to July 19, 2013.

## III. ARGUMENT

### A. Plaintiffs' Complaint Properly States Claims Against Defendants For Violation Of The CFA

New Jersey law directs trial courts to approach motions to dismiss "with great caution" and to grant such motions "in only the rarest of instances." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 771-72 (1989). In considering a motion to dismiss, the court must examine the legal sufficiency of the allegations in the Complaint, conducting an examination "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned

[1] Document discovery has proceeded at an unacceptably slow pace due to Defendants' unwillingness and/or inability to meet their legitimate discovery obligations in a timely fashion and in a manner that is rule-compliant and consistent with commonly accepted professional standards. Discovery is scheduled to close on May 23, 2014, but that deadline is in serious doubt unless Defendants are forced to promptly meet their discovery obligations.

even from an obscure statement of claim." Sammarone v. Bovino, 395 N.J. Super. 132, 137-38 (App. Div. 2007) (quoting Printing Mart-Morristown, 116 N.J. at 746). In undertaking this examination, the court must give the Plaintiffs "the benefit of all reasonable factual inferences that [their] allegations support." F.G. v. MacDonell, 150 N.J. 550, 556 (1997). "If a generous reading of the allegations merely suggests a cause of action, the Complaint will withstand the motion." Id.

Our Supreme Court has noted that "[t]he Consumer Fraud Act affords broad protections to New Jersey consumers" and that "the history of the Act demonstrates a strong and consistent pattern of expanding the rights of consumers and protecting them from a wide variety of marketplace tactics and practices deemed to be unconscionable." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 547 (2009); see also Gennari v. Weichert Co. Realtors, 148 N.J. 582, 604 (1997) ("The history of [the CFA] is one of constant expansion of consumer protection."). The CFA was intended to give New Jersey "one of the strongest consumer protection laws in the nation." Belmont Condominium Assoc., Inc. v. Geibel, A-2584-10T3, 2013 WL 3387636, *10 (App. Div. July 9, 2013) (internal quotation omitted). To that end, the New Jersey courts have been instructed to "interpret the CFA, and its prima facie proof requirements, so as to be faithful to the Act's broad remedial purposes" and to "construe the [CFA] broadly, not in a crabbed fashion." Gennari at 555-56 (internal citations and quotations omitted.); see also Cox v. Sears Roebuck & Co., 138 N.J. 2, 15-16 (1994) ("Courts have emphasized that like most remedial legislation, the [CFA] should be construed liberally in favor of consumers."). The CFA's provisions authorizing consumers to bring private actions is "integral to fulfilling the [CFA's] legislative purposes." Id. at 16.

A prima facie case under the CFA consists of only three elements: "1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss." Bosland, 197 N.J. at 557. Each element originates in the language of the CFA. The CFA defines an "unlawful practice" to be any "act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation . . . in connection with the sale or advertisement of any merchandise." N.J.S.A. 56:8-2.[2] The CFA applies both to misrepresentations about a product as well as to "subsequent performance" of the product or service itself. Perth Amboy Iron Works, Inc. v. Am. Home Assurance Co., 226 N.J. Super. 200, 209 (App. Div. 1988), aff'd, 118 N.J. 249 (1990). And the CFA grants a private right of action to "[a]ny person who suffers any ascertainable loss of moneys or property" as a result of practices made unlawful by the Act. N.J.S.A. 56:8-19. Where, as here, an offense arises from an affirmative act, "an intent to deceive is not a prerequisite to the imposition of liability." Gennari, 148 N.J. at 605. "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." Id. "Thus, the Act is designed to protect the public even when a merchant acts in good faith." Cox, 138 N.J. at 16. Finally, a plaintiff need not demonstrate reasonable reliance on the misrepresentation, Kleinman v. Merck & Co., 417 N.J. Super. 166, 182 (Law. Div. 2009), and "[a] practice can be unlawful even if no person was in fact misled or deceived thereby." Cox, 138 N.J. at 17.

Thus, in order to survive a motion to dismiss, the Complaint needs merely to allege that the Defendants made misrepresentations in connection with the offer or provision of services to the public, that the Plaintiffs suffered an ascertainable loss, and that the ascertainable loss

[2] "Merchandise" is defined to include "services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1(c).

resulted from the Defendants' misrepresentations. See Belmont, 2013 WL 3387636, *10 ("in order to prevail [under the CFA], a plaintiff need only demonstrate a causal connection between the unlawful practice and ascertainable loss."). Because the Complaint unequivocally and repeatedly alleges all three elements, it states a claim under the CFA and Defendants' motion should be denied.

On nearly every page, the Complaint contains one or more allegations concerning misrepresentations made by the Defendants. See, e.g., Compl. ¶ 7 ("Defendants claimed that their services were scientifically proven to be effective"); ¶ 10 ("Defendants falsely claimed that their services were effective"); ¶ 26 (explaining that Defendants embrace the false premise that deficient father-son relationships cause male homosexuality); ¶ 29 ("Defendants further assert that a constellation of additional 'precipitating factors' can cause homosexuality"); ¶ 33 ("Defendants have nonetheless continued to peddle and practice conversion therapy"); etc. Although the CFA does not require that qualifying misstatements be addressed to plaintiffs, the Complaint also specifically alleges that the Defendants made misrepresentations directly to the Plaintiffs. See, e.g., Compl. ¶ 6 ("Defendants repeatedly represented to Plaintiffs that their services were effective in changing a person's sexual orientation from gay to straight"); ¶ 38 ("Defendants'… misrepresentation to Plaintiffs include the following…"); ¶ 67 ("On multiple occasions, Defendants misrepresented to Unger…"); ¶ 80 ("Goldberg misrepresented to Levin that 'you can change if you just try hard enough'"); ¶ 90 ("Goldberg… promised to Bruck that '…you're going to change'"); ¶ 105 ("Downing described 'change' to mean that one's same-sex attractions would disappear and heterosexual attractions would emerge"); etc. Finally, the Complaint alleges that each Plaintiff suffered an ascertainable loss as a result of the

misrepresentations made by the Defendants. See ¶¶ 73-76 (Benjamin Unger), ¶¶ 83-87 (Chaim and Bella Levin); ¶¶ 97-100 (Sheldon and Jo Bruck); and ¶¶ 107-110 (Michael Ferguson).

Defendants are well aware that these allegations appear in the Complaint. In their Notice and Demand, the Defendants state that "the Complaint alleges that defendants represented that their services were effective in changing a person's sexual orientation and that plaintiffs relied on these representations and suffered harm." Ex. B to LiMandri Certification In Supp. Of Defs.' Mot. to Dismiss, p. 3. There is simply no question that the Complaint sufficiently alleges every necessary element of a claim under the CFA and therefore states claims for which relief can be granted.

**B. Acuna v. Turkish Does Not Support Dismissal Of The Complaint**

In support of their argument that this Court (or any other New Jersey court, for that matter) is incompetent and incapable of adjudicating this lawsuit because it purportedly involves "deeply divisive" and controversial questions of science, philosophy, theology, or morality that render the case non-justiciable, Defendants rely almost exclusively on Acuna v. Turkish, 192 N.J. 399 (2007), a case in which the New Jersey Supreme Court reviewed a decision on summary judgment interpreting the common law duty to obtain informed consent. However, Acuna provides no basis to dismiss the Complaint in this case on any grounds.[3]

First, Acuna is not a justiciability case. Acuna never addresses justiciability – either explicitly, or by reference, or by implication. Despite Defendants' misplaced reliance on a few lines excerpted from the opinion, the court in Acuna did not do the very thing that Defendants contend the decision commands this Court to do: dismiss the case as non-justiciable without

[3] In addition to the points discussed *infra*, Defendants allude in a footnote to freedom of speech-based arguments which they threaten to raise should their Motion to Dismiss fail. Because Defendants do not actually articulate any such arguments in their brief, Plaintiffs make no response.

reaching the merits. In fact, every court that considered the Acuna case (the trial court and two levels of appellate courts) decided the issues presented on the merits, and no court dismissed the controversy as non-justiciable. The case simply does not stand for, nor has it ever been cited for, the proposition that a court cannot, and therefore should not, resolve cases that hinge on scientific, philosophical, theological, moral, or societal controversies.

It is significant that Acuna is, in fact, a summary judgment case in which extensive discovery took place, including on the specific question (what facts are "material" under the informed consent standard) that Defendants point to as the ostensibly non-justiciable controversy. Id. at 409 ("The parties agreed that the resolution of those issues needed to 'await a complete factual record.'") (citing Acuna v. Turkish, 354 N.J. Super 500, 514 (App. Div. 2002)). The issue in Acuna was whether the "material medical information" that the common law of informed consent requires doctors to provide to patients should include the particular information proposed by the plaintiff, namely that a fetus is an individual and identifiable human being whose life would be terminated by an abortion. Acuna, 192 N.J. at 415. The Supreme Court did not hold that it was not competent to decide whether such information must be provided by a doctor in order for him or her to meet his or her common law duty regarding informed consent nor that such a question was non-justiciable; rather, the court ruled on the merits, finding that the plaintiff did not meet her burden of proof on this point and that such information was not required as a part of the physician's duty in this context. Id. at 416. Rather than supporting the notion that a case involving a controversial subject should be dismissed for lack of justiciability, Acuna demonstrates that the courts are competent to adjudicate, and charged with resolving, such controversies, and that discovery is necessary and should proceed so that the courts can have the benefit of a complete factual record in support of their decisions.

The odd assertion that the judiciary is not competent to hear cases involving scientific, philosophical, theological, moral, or societal controversy is flatly contrary to the history of every level of the American judicial system, which does not flinch from highly controversial subjects. Deservedly famous Supreme Court decisions such as Brown v. Board of Educ., Wisconsin v. Yoder , Lawrence v. Texas, Association for Molecular Pathology v. Myriad Genetics, Inc., and United States v. Windsor are obvious examples of the fact that American courts regularly decide cases implicating scientific, philosophical, theological, moral, or societal controversy.[4] Nor do New Jersey courts shrink from litigation that implicates such issues. See Lewis v. Harris, 188 N.J. 415, 462 (2006) (holding that the New Jersey Constitution "guarantees that every statutory right and benefit conferred to heterosexual couples through civil marriage must be made available to committed same-sex couples."); Dale v. Boy Scouts of Am., 160 N.J. 562 (1999) (holding that it was impermissible discrimination for the Boy Scouts to fire an openly gay scout leader), rev'd, 530 U.S. 640 (2000); In re Baby M, 109 N.J. 396 (1988) (overturning an order terminating the parental rights of a surrogate mother); Right to Choose v. Byrne, 91 N.J. 287 (1982) (holding that a woman's right to choose to protect her health by terminating her pregnancy outweighed the state's asserted interest in protecting potential life at expense of women's health, and thus a statute restricting Medicaid funding for abortions necessary to save life of mother violated the New Jersey Constitution); Doe v. Bridgeton Hosp. Ass'n Inc., 71 N.J. 478 (1976) (holding that private, nonprofit, nonsectarian hospitals, as quasi-public institutions, could not refuse to permit their facilities to be used for elective abortions during the first trimester of pregnancy); In re Quinlan, 70 N.J. 10 (1976) (allowing the parents of a woman in a

[4] Brown v. Bd. of Educ., 347 U.S. 483 (1954); Wisconsin v. Yoder, 406 U.S. 205 (1972); Lawrence v. Texas, 539 U.S. 558 (2003); Ass'n for Molecular Pathology v. Myriad Genetics, Inc., No. 12-398, slip op. (U.S. Jun. 13, 2013); United States v. Windsor, No. 12-307, slip op. (U.S. Jun. 26, 2013).

persistent vegetative state to authorize the cessation of artificial ventilation); S. Burlington Cnty. N.A.A.C.P v. Twp. of Mount Laurel, 67 N.J. 151 (1975) (holding, inter alia, that in some circumstances a municipality may have an affirmative duty to provide housing for persons with low and moderate incomes).

Second, even if Defendants' interpretation of Acuna were correct – which it plainly is not – Defendants have mischaracterized the nature of Plaintiffs' CFA claims. Defendants wrongly assert that the only way that Plaintiffs can prevail on their CFA claims is to prove that sexual orientation is fixed or unchangeable. This is incorrect. Plaintiffs do not bear that evidentiary burden in this case. Rather, Plaintiffs must prove only that *Defendants'* practices were ineffective, and that the representations *Defendants* made to the contrary were therefore false. It is true that various people purport to engage in various forms of "conversion therapy." Plaintiffs may, through experts, explain at trial the history and dangerous consequences of these misguided and nonscientific efforts, as well as the uniform consensus of all reputable mental health organizations that conversion therapy does not work and presents significant risk of grave harm, up to, and including suicide. Yet Plaintiffs' actual burden in this case is narrow, and does not require resolution of the sweeping questions that Defendants raise.

In asserting that Plaintiffs' CFA claims require resolution of unnecessary, expansive scientific and cultural questions about the overall mutability of sexual orientation, Defendants attempt to distract this Court (and ultimately the jury) away from their own concrete misrepresentations about their particular conversion therapy services. Plaintiffs are not obligated to resolve the broad questions raised by the Defendants in order to meet their burden of proof. Instead, Plaintiffs can and will convince the jury, based on the evidence at trial, that Defendants' statements were false and deceptive because, contrary to Defendants' repeated assertions,

homosexuality is not a mental disease or disorder and Defendants' conversion therapy services do not change a person's sexual orientation as Defendants promised they would, and did not do so for the Plaintiffs. That is all that is required for Plaintiffs to succeed on their CFA claims against the Defendants and for the jury to find that Defendants are liable for their misconduct. Therefore, even if Acuna stood for the proposition Defendants suggest – which it does not – this case does not even present the alleged unsettled scientific, philosophical, theological, moral, or societal controversy that Defendants urge is non-justiciable.

Finally, Defendants' improper attempt to scare up a scientific, philosophical, theological, moral, or societal controversy to bolster their erroneous argument in favor of dismissal relies on the introduction of evidence outside of the pleadings, evidence which is not properly the subject of judicial notice.

Defendants submit two expert certifications with their Motion and ask the Court to take judicial notice of the "fact," asserted in those certifications, that there is debate in the scientific community as to the mutability of sexual orientation. Mot. to Dismiss at 12. As discussed, 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.

In any event, even if the certifications were relevant – which they are not – the Court still could not properly take judicial notice of them. No fact may be judicially noticed if it can "reasonably be the subject of dispute" or if its accuracy can "reasonably be questioned." N.J.R.E. 201. The assertion that there is a lack of consensus within the "scientific community,"

Mot. to Dismiss at 1, is one that goes beyond the limits of appropriate judicial notice.[5] Not every person who publishes an article on a website is necessarily a member of the scientific community. Not every blogger is scientifically credentialed, and fantasy is often stated as fact. Whether the scientific community is in fact divided on an issue may be difficult to determine, as it requires, among other things, distinguishing legitimate scientists from cranks and charlatans. Defendants cite RWB Newton Assocs. v. Gunn in support of their argument that judicial notice is proper, but that case explicitly stated that it is "a fundamental misunderstanding of judicial notice" for a court to consider the contents of such a certification "for the purpose of determining the truth of what it asserts simply because the certification has been filed with a court" as this would "circumvent the rule against hearsay and thereby deprive a party of the right of cross-examination." 224 N.J. Super. 704, 710-711 (App. Div. 1988). See State v. Silva, 394 N.J. Super. 270, 277-78 (App. Div. 2007) (refusing to take judicial notice because "a distinction must be drawn between taking judicial notice that a judge decided a case in particular way or made a particular finding ... and taking judicial notice that the judge's findings of fact must necessarily be true"). Thus, while the Court may take judicial notice of the fact that the certifications were filed and of the fact that they allege that a debate exists as to whether or not sexual orientation is immutable, it is not appropriate for the Court to consider those allegations as competent evidence of whether such a debate actually exists. The certifications should be disregarded by the Court.

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[5] Moreover, the certifications introduce claims that go well beyond the mere "existence of a debate," including assertions about the nature of conversion therapy, assertions purporting to summarize various books and studies, assertions about the nature of other forms of therapy, characterizations of various studies, untested claims about the experts' personal experiences, unsupported and ambiguous statistics, assertions about professional ethics, and the like. None are appropriate matters for judicial notice. Cf. State v. Sylvia, 424 N.J. Super. 151 (App. Div. 2012) (the boundary of a municipality was a proper subject of judicial notice); Estate of Schinestuhl, ex rel. Acquadro v. Director, Div. of Taxation, 26 N.J. Tax 289 (Tax. Ct. 2012) (the Tax Court took judicial notice of the prices for which stocks were traded).

In the event the Court does not disregard the certifications, Defendants' Motion to Dismiss must be converted into a motion for summary judgment. Rule 4:6-2 provides that "[i]f, on a motion to dismiss [for failure to state a claim upon which relief may 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." Defendants seem to anticipate such an outcome, noting that factual disputes identified in their Answer "are not material to this motion," a statement which makes no sense outside of the summary judgment context. Mot. to Dismiss at 3 n.1. The case most heavily relied on by Defendants, Acuna v. Turkish, is a summary judgment case. 192 N.J. 399. And Defendants also anticipate that "Plaintiffs will undoubtedly argue that there is a genuine factual dispute as to the immutability issue, precluding summary judgment." Mot. to Dismiss at 14. In actuality, what precludes summary judgment is that discovery has just begun and is far from complete, making summary judgment premature. Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 499 (App. Div. 2012) (reversing trial court's grant of summary judgment where discovery was not yet completed). The close of discovery is almost a year away, Defendants have not fully produced requested documents, no depositions have been taken, and no expert discovery has been taken even though Defendants attempt to introduce expert evidence with their motion. Plaintiffs are entitled to full discovery and to depose and rebut Defendants' experts, as well as to present experts of their own. Thus, if the Motion to Dismiss is converted to a motion for summary judgment, it should be denied as premature.

### C. Plaintiffs' Complaint Presents A Jusiticiable Controversy

As to the second argument, Plaintiffs' Complaint does not implicate a non-justiciable political question and Defendants have not demonstrated that Plaintiffs' case amounts to an

abuse of process.[6] In Point II of their Motion to Dismiss, Defendants argue (but do not clearly explain the legal basis for their argument) that this lawsuit presents "no justiciable controversy." Mot. to Dismiss at 18. They cite only one case, Civil Service Commission v. Senate of N.J., which stands for the irrelevant principle that courts will not issue advisory opinions. 165 N.J. Super. 144, 148 (App. Div. 1979). While it is true that cases asking for advisory opinions are not justiciable, here, the Plaintiffs do not seek relief that is premised on future, contingent, or uncertain facts; rather, Plaintiffs allege past, concrete injuries and seek concrete redress. Civil Service Commission is therefore plainly inapplicable; here, "the controversy that is presented... is actual and bona fide." N.J. Tpk. Auth. v. Parsons, 3 N.J. 235, 241 (1949) (finding a case justiciable). Plaintiffs' claims are clearly stated under an established statutory right of action and are a matter of straightforward statutory interpretation and application. See Shelton v. Restaurant.com, Inc., No. 068401, 2013 N.J. LEXIS 726 (July 9, 2013) where the New Jersey Supreme Court analyzed and interpreted the statutory right of action under New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 to -18, and that statute's application to the facts as asserted by plaintiffs. See also Dalton v. Kean, 213 N.J. Super. 572,

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[6] Defendants argue that Plaintiffs are "misusing" the CFA because they have a "political agenda." Mot. to Dismiss at 15-18. Defendants' argument is meritless. As noted above, Plaintiffs' Complaint properly pleads its causes of action under the CFA. Yet Defendants assert that Plaintiffs have inappropriate ulterior motives apart from their desire to vindicate their rights under the CFA. Although Defendants do not provide any legal basis for their argument, to the extent they mean to suggest that Plaintiffs have engaged in an abuse of process, they have not established (as, indeed, they cannot) the required element that Plaintiffs have committed some "further act" beyond the filing of the complaint that demonstrably abused process. See Klesh v. Coddington, 295 N.J. Super. 51, 64 (Law Div. 1996), aff'd and remanded, 295 N.J. Super. 1, 684 A.2d 504 (App. Div. 1996) ("The allegation that the action itself was brought for an improper purpose is not enough."); Fleming v. United Parcel Serv., Inc., 255 N.J. Super. 108, 158-159 (Law Div. 1992) aff'd, 273 N.J. Super. 526 (App. Div. 1994) ("The legal pursuit of one's right, no matter what the motive of the promoter of the action, cannot be deemed illegal or inequitable.") (quoting Simone v. Golden Nugget Hotel & Casino, 844 F.2d 1031, 1039 (3d Cir. 1988)).

576 (App. Div. 1986) (holding that "[t]he interpretation and application of [the N.J. Executive Reorganization Act], may be resolved, like any other statute's, upon judicial review.").

Defendants seem implicitly to rely on a different kind of justiciability problem, though they cite no supporting law – that this case presents a political question, the judicial determination of which would violate the separation of powers.[7] But neither the legislative nor the executive branch is implicated by this case. This lawsuit, authorized by a valid, legislatively-enacted statute, does not encroach on the domains of the other branches of government. Cf. Loigman v. Trombadore, 228 N.J. Super. 437, 444 (App. Div. 1988) (finding a case nonjusticiable where the court was asked to restrict the Governor from seeking, in the exercise of his appointing power, information concerning the qualifications of the judicial candidates). Instead, it does exactly what the legislative and executive branches intended when they enacted the CFA: it seeks redress for Defendants' unlawful conduct by bringing a private cause of action before this Court. Plaintiffs' lawsuit is in perfect accord with the separation of powers. Plaintiffs merely seek an opportunity to present proof of their allegations to the jury and obtain redress.

The fact that this lawsuit touches upon controversial issues does not make it unique or mandate dismissal. Defendants make much of the existence of a debate within our society concerning the nature and status of homosexuality, but that has no bearing on justiciability. As discussed, New Jersey courts, like all state and federal courts, routinely grapple with cases that touch upon weighty questions where there is a lack of societal consensus. It is no bar to

[7] Defendants again refer to Acuna in support of this point, but the court in that case did not dismiss for lack of justiciability (nor indeed mention justiciability), instead deciding the case on the merits. 192 N.J. 399.

litigation that "highly significant issues that vitally affect the state and its citizens are presented for determination." N.J. Tpk. Auth., 3 N.J. at 240 (finding a case justiciable).

## IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

Dated: July 11, 2013

Respectfully submitted,

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