THE ARC MERCER, INC. Plaintiff, v. **MEDIANEWS GROUP, THE TRENTONIAN, AND L.A. PARKER,** Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MERCER COUNTY *Civil Action* **Docket No.: MER-L-000168-23** **ORAL ARGUMENT REQUESTED**

BRIEF OF PLAINTIFF
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

The motion filed by Defendants to dismiss the claims against them must be denied. It is undisputed that Plaintiff, The Arc Mercer, Inc., ("Plaintiff" or "Arc"), is a non-profit organization serving the needs of the persons with developmental and intellectual disabilities in the Mercer County region. In addition, it is undisputed that Plaintiff hosted a fundraising gala at the Stone Terrace by John Henry's, ("Stone Terrace"). Plaintiff alleges that Defendants unlawfully discriminated against Plaintiff by targeting Plaintiff on the basis of the disabilities of its consumers in order to incite others, and attempt to incite others, to refuse to do business with Plaintiff.

Defendants claim that Plaintiff has pled insufficient facts to set forth a claim against them under the New Jersey Law Against Discrimination ("NJLAD"). In addition, Defendants allege that the NJLAD provisions cited by Plaintiff apply only to "commercial" entities and transactions, and not charities. Defendants also claim that their alleged conduct is protected by the First Amendment and the NJLAD for protesting unlawful discrimination by Plaintiff. As discussed herein, these arguments lack merit. Further, to the extend Defendants argue that their motivation and intent was something other than discrimination against the persons with developmental and intellectual disabilities served by Plaintiff, Defendants raise an issue of fact not suited for disposition on a motion to dismiss on the parties' respective pleadings.

The facts alleged in Plaintiff's Complaint clearly are sufficient to support a claim of discrimination by Defendants under *N.J.S.A.* 10:5-12 (l) and (n). Further, the facts alleged in the complaint are sufficient to survive a motion to dismiss. At the very worst, should the Court somehow be persuaded that the factual allegations of Plaintiff's Complaint are somehow insufficient, Defendants' motion should be granted without prejudice to Plaintiff's right to submit an amended complaint.

PROCEDURAL HISTORY

The Complaint was filed on January 26, 2023, seeking relief for Plaintiff for unlawful discrimination by Defendants MediaNews Group ("MNG"), the Trentonian, and L.A. Parker ("Parker"). On February 21, 2023, Defendants' counsel accepted service of the Complaint on behalf of the Defendants as part of an agreement with Plaintiff to extend the period of time in which to answer or otherwise respond to the complaint by 60 days, to May 24, 2023.

On May 24, 2023, Defendants filed a Motion to Dismiss for failure to state a claim. Plaintiff's counsel subsequently agreed to Defendants' request to extend the return date for the Motion to Dismiss from June 23, 2023, to July 7, 2023. Accordingly, Plaintiff's opposition papers are due for filing by June 27, 2023.

STATEMENT OF FACTS

Plaintiff incorporates by reference the factual allegations of the Complaint filed with the Court on January 26, 2023, and summarizes the key factual allegations below. Insofar as the pending motion seeks dismissal on the pleadings, all of Plaintiff's factual allegations must be taken as true, and all reasonable inferences must be granted to Plaintiff.

1. In 2022, Plaintiff, like multiple other businesses and politicians, chose to host its annual fundraising gala at the Stone Terrace. The 2022 gala celebrated the inauguration of Arc Liberia, a pioneering Arc initiative to provide assistance towards developmentally disabled individuals residing in Liberia. Complaint, ¶ 9.

2. Upon information and belief, the Arc is the only organization that has held an event at the Stone Terrace since June 2020 that had a client base of persons with developmental and intellectual disabilities. Complaint, ¶ 10.

3. The Stone Terrace is a restaurant and catering venue located in Hamilton Township, New Jersey, that specializes in weddings, special events and fine dining. Complaint, ¶ 12.

4. On June 11, 2020, Joseph Russo, the head chef and partial owner of the Stone Terrace at the time, published statements on social media that were racially offensive. These statements included slurs towards Black Lives Matter, as well as calling George Floyd protesters "evil." Complaint, ¶ 13.

5. The Stone Terrace experienced a considerable backlash from the local community including protests and boycotting of the venue. John Henry and Catherine Henry, owners of the Stone Terrace, released a statement referring to Russo as their "former executive chef" and apologized for the offensive statements by Russo, and confirming that Russo's views did not reflect the Stone Terrace's views or policies, and that the Stone Terrace supports the Black Lives Matter Movement. Complaint, ¶ 14.

6. Since June of 2020, numerous significant other organization, business and political official/candidates have had events there with no comment or objection by Defendants. These parties include, but are not limited to, the Hamilton Area YMCA, the Hamilton Township Economic Development Advisory Commission, and the Princeton Mercer Regional Chamber. Complaint, ¶ 15.

7. Upon information and belief, none of the many other organizations, businesses or political officials/candidates that have held events at the Stone Terrace have a primary client base from the developmentally disabled community. Complaint, ¶ 16.

8. While remaining silent with respect to these other organizations, businesses and political officials/candidates, Defendants singled out Plaintiff with a series of articles designed to incite or induce members of the public to refuse to do business with Plaintiff, make charitable contributions

to Plaintiff, attend Plaintiff's gala, and/or detrimentally impact the Plaintiff's reputation and marketability, purportedly because of Plaintiff's decision to host its gala at Stone Terrace. Complaint, ¶ 11.

9. On November 11, 2022, Parker and the Trentonian published an article titled, "Arc Mercer stone-cold wrong about gala venue," quoting Dr. Martin Luther King and accusing Plaintiff of "pos{ing} a significantly different perspective on justice, equality and tolerance" by hosting its upcoming annual fundraising gala on November 18, 2022, at the Stone Terrace, an allegation not asserted against any other of the significant number of organization, business or political officials/candidates that had hosted events at the Stone Terrace subsequent to June 2020. Complaint, ¶ 17.

10. The November 11, 2022, article republished the social media comments made by Joseph Russo in June 2020 containing racially offensive material, while accusing Plaintiff of being guilty of racial insensitivity and racism by hosting its gala at the Stone Terrace. No other organization, business or political official/candidate having hosted events at the Stone Terrace subsequent to June 2020 had been (or has since been) so targeted. Complaint, ¶ 18.

11. Four days later, on November 15, 2022, Parker and the Trentonian followed up on its initial article by published a second article, now accusing Plaintiff of "posing Black people" and of being "complicit" in the racially offensive comments that the former head chef had posted over two and one-half years previous to the gala. No other organization, business or political official/candidate having hosted events at the Stone Terrace subsequent to June 2020 had been (or has since been) so targeted. Complaint, ¶ 19.

12. Not content to let matters rest, on November 22, 2022, Parker and the Trentonian published a *third* article about the Arc gala that labeled the event as an act of "hate" comparable to the "brutal

attack on our LGBTQ family in Colorado Springs," while calling for the public to "speak up *and act* before hate overwhelms and drowns us all." No other organization, business or political official/candidate having hosted events at the Stone Terrace subsequent to June 2020 had been (or has since been) so targeted. This third article in particular called for the public at large to "act" by refusing to do business with or support the Arc. Complaint, ¶ 20.

13. On November 26, 2022, Parker and the Trentonian published a *fourth* article titled, "Liberian outreach fails as smoke screen for abhorrent behavior," that now accused the Arc of using its Liberian outreach to "distort issues involving racism." Complaint, ¶ 21.

14. Within the two and one-half years since the publication of the racially offensive material on social media by the Stone Terrace's former head chef, dozens of other individuals, businesses and organizations have hosted events at the Stone Terrace, but Plaintiff has been the only entity targeted by Defendants in this manner. Complaint, ¶ 22.

15. Plaintiff relies in significant part on voluntary charitable contributions from and on community business relationships with members of the public to operate, as well as public funding. Complaint, ¶ 23.

16. Plaintiff also relies on community partners to advance social enterprises to support developmentally disabled individuals, such as residential and day programs, which members of the public choose to support. Complaint, ¶ 24.

17. The articles written and published by Defendants were intended to, and/or had the effect of, inducing and/or inciting others to not do business with the Arc, not make charitable contributions to the Arc, not attend the Arc's fundraising galas, and/or detrimentally impact the Arc's reputation and marketability. Complaint, ¶ 25.

18. Plaintiff was targeted by Defendants because its customers are persons with developmental and intellectual disabilities. There is no other reason for distinguishing Plaintiff from the many other individuals, businesses and organizations have hosted events at the Stone Terrace since June 2020 and who were not attacked by Defendants in this way. Complaint, ¶ 26.

19. By engaging in the conduct as described above, Defendants have engaged in unlawful discrimination as defined by the New Jersey Law Against Discrimination (NJLAD), *N.J.S.A.* 10:5-12(l) and (n). Complaint, ¶ 27.

20. Plaintiff attempted to address these actions of unlawful discrimination through voluntary resolution. In a letter dated December 9, 2022, Plaintiff called Defendants' attention to their unlawful discriminatory actions, and stated its intent to initiate litigation unless Defendants made efforts to discuss a resolution. Defendants did not respond. Complaint, ¶ 28.

21. Plaintiff has suffered economic loss, time loss, uncertainty, planning difficulty, adjustment issues, and career, family and social disruption as a result of Defendants' unlawful discrimination practice, all of which constitute grounds for recoverable damages under NJLAD, *N.J.S.A.* 10:5-3. Complaint, ¶ 29.

STANDARD OF REVIEW

When considering a motion to dismiss, courts take all factual allegations as true and examine the allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim." *Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 *N.J.* 739, 746 (1989). The standard for surviving a motion to dismiss is whether "a cause of action is "suggested" by the facts." *Id*. All allegations pleaded in the Complaint are assumed true and the Plaintiff is entitled to "all reasonable factual inferences that those allegations support." *F.G. v. MacDonell*, 150 *N.J.* 550 (1997). The complaint must be searched in depth and with liberality to

determine if a cause of action can be gleaned even from an obscure statement. *Printing Mart-Morristown,* 116 *N.J.* at 746.

Dismissal is warranted when the allegations of the complaint, taken as true, are insufficient to set forth a valid cause of action. *Frederick v. Smith*, 416 *N.J. Super.* 594, 597 (App. Div. 2010). A motion to dismiss brought under *R*. 4:6-2(e) at the onset of litigation has "extraordinarily limited range" and "is granted only in the rarest instances." *Geyer v. Faiella*, 279 *N.J. Super.* 386, 389 (App. Div. 1995), *petit for certif. den.*, 141 *N.J.* 95 (1995). Additionally, if such a motion is granted, it ordinarily granted without prejudice. If there is a missing allegation of fact that may be truthfully added, then Plaintiff should be permitted to amend the complaint. *Id*.

Simply put, motions to dismiss on the pleadings are greatly disfavored and are granted in only the rarest of circumstances. As addressed *infra,* no such rare circumstances exist in the instant matter.

ARGUMENT

POINT I

PLAINTIFF HAS FULFILLED ITS OBLIGATION TO STATE A CLAIM OF UNLAWFUL DISCRIMINATION BASED UPON THE ACTIONS OF DEFENDANTS.

A. Plaintiff Has Pled Facts Sufficient For A Claim Of Unlawful Discrimination.

N.J.S.A. 10:5-12(l) makes it unlawful for any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis, *inter alia,* of the disabilities of that person or, *inter alia,* that person's customers. *N.J.S.A.* 10:5-12(n) makes it unlawful for any person to aid, abet, incite, compel, coerce, or induce the doing of any act forbidden by, *inter alia, N.J.S.A.* 10:5-12(l), or to attempt or conspire to do so. The facts alleged in Plaintiff's Complaint, with or

without the reasonable inferences to which Plaintiff is entitled as a matter of law, are more than sufficient to make out causes of action under these statutes.

In its Complaint, Plaintiff has alleged that no other organizations that held events at the Stone Terrace experienced such negative criticism by Defendants. Complaint, ¶ 22. Defendants in their motion claim that such an allegation is insufficient to support a claim of unlawful discrimination. Defendants argue that the Complaint does not specifically allege that Defendants had knowledge of other events at the Stone Terrace, and does it allege that the specific local mayors who attended the Arc gala had attended other events and that the Defendants were aware of it. Defendants further claim that the articles in dispute somehow expressed Defendant Parker's support and approval of Arc's purpose of aiding individuals with disabilities,[1] and that the articles were to condemn discrimination by Arc in hosting its gala at the Stone Terrace.

Defendants' arguments under this point are unavailing. Plaintiff has provided in the Complaint multiple articles written by Defendants specifically criticizing Plaintiff and actively encouraging others not to patronize Plaintiff, while a significant number of other organizations and events were held at the Stone Terrace without any criticism from Defendants, let alone the level of repeated criticism that Plaintiff received. Complaint, ¶ 17, 18, 19, 20, 21, 22. None of those numerous organizations serve persons with intellectual and developmental disabilities. Complaint, ¶ 22. Plaintiff alone does. Plaintiff being singled out for attack by Defendants thus is a direct factual allegation of disparate treatment, and of Defendants engaging in conduct expressly prohibited by *N.J.S.A.* 10:5-12(l) and (n). *Id*. "If a generous reading of the allegations merely

[1] One may well question how Defendant Parker describing Plaintiff's extension of services to Liberia as a "smoke screen for abhorrent behavior," and describing Plaintiff's gala as act of "hate" comparable to the "brutal attack on our LGBTQ family in Colorado Springs," constitutes "support and approval" of Plaintiff's mission!

suggests a cause of action, the complaint will withstand the motion." *Printing Mart-Morristown*, 116 *N.J* at 746.

Defendants' mention of local mayors within their four articles targeting Plaintiff does not detract from their referring to Arc as "posing Black people" and Arc's new Liberia outreach being an effort to "distort issues involving racism." Complaint, ¶ 19, 21. That Defendants chose also to include gratuitous attacks against the mayors who attended the gala does not in any way undermine the fact that Plaintiff was itself attacked in such a way as to discourage others from doing business with Plaintiff.

Defendants also allude to, without expressly citing, the standard of *McDonnell Douglas Corp. v. Green*, 411 *U.S.* 792 (1973), in claiming that Plaintiff must specifically plead that Defendants were aware of the numerous other organizations that had held events at Stone Terrace subsequent to June 2020. New Jersey Court have adopted the *McDonnell Douglas* paradigm for use in determining whether a plaintiff has established a *prima facie* case of discrimination under the NJLAD. *See, e.g., Victor v. State,* 203 *N.J.* 383, 408 (2010). However, the *McDonnell Douglas* standard is not applied to a plaintiff's initial pleading with respect to a motion to dismiss. "{I}f a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion." *F.G.,* 150 *N.J* at 556. Indeed, the *prima facie* case under *McDonnell Douglas* is an evidentiary standard, not a pleading requirement. *Swierkiewicz v, Sorema N.A.,* 534 *U.S.* 506, 510 (2002), *abrogated in part on other grounds by Bell Atlantic Corp. v. Twombly,* 550 *U.S.* 544, 570 (2007); [2] *Bell v. KA Indus. Services, L.L.C.,* 567 *F.Supp.2d* 701, 706 (D.N.J. 2008)(applying NJLAD).

[2] *Bell Atlantic* addressed the sufficiency of pleadings in federal court. It has no relevance to generous pleading standards applicable in New Jersey courts.

The question on a motion to dismiss for failure to state a claim is whether the Complaint, taken as a whole, sets forth a cognizable claim. *Printing Mart-Morristown,* 116 *N.J.* at 746. A motion to dismiss is not an occasion for a party to present its defenses or argue whether the plaintiff can ultimately prove its case before discovery has even occurred. Plaintiff in this matter has stated a cognizable claim and Defendants fail to demonstrate otherwise. Defendants' motion should be denied.

B. N.J.S.A. §§ 10:5-12(l) And (n) Apply To Interactions With All Organizations, And Is Not Limited To For-Profit Entities or Strictly "Commercial" Transactions.

Next, Defendants argue that the protections of *N.J.S.A.* 10:5-12(l) and (n) do not apply to Plaintiff. Defendants argue that the phrase, "do business with," is limited to strictly commercial exchanges, or "to sell or to buy from." Defendants cite case law that references *N.J.S.A.* 10:5-12(l) and (n) in the context of commercial exchanges and somehow draw the conclusion that these two NJLAD subsections apply solely to commercial exchanges between for-profit entities. It is not clear whether Defendants claim that *N.J.S.A.* 10:5-12(l) and (n) do not apply to non-profits under any circumstance, or whether they apply only to specific transactions that are "commercial" in nature. In either circumstance, however, Defendants' argument fails.

First and foremost, nothing in the cases cited by Defendants suggests that non-profits cannot draw protection from *N.J.S.A.* 10:5-12(l) and (n). Nor does anything in the cases cited by Defendants suggest that only strictly "commercial" transactions fall within the scope of these provisions. And with excellent reason. Such a narrow interpretation of *N.J.S.A.* 10:5-12(l) and (n) would be directly contrary to the intent of the Legislature and the public policy of this State, which is nothing less than the eradication of the "cancer" of discrimination in all its forms. *Smith v. Millville Rescue Squad,* 225 *N.J.* 373, 390 (2016). The NJLAD is to be liberally construed to

advance this purpose. *Id.* It would be absurd to argue that the Legislature somehow intended that the cancer of discrimination be allowed to continue to victimize non-profits and their consumers.

The NJLAD defines a "person" as "one or more individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries." *N.J.S.A.* 10:5-5(a). Plaintiff, as a non-profit corporation dedicated to serving individuals with disabilities, clearly falls under the definition of a "person" for the protections and liberal construction of the NJLAD.

In addition, the actual language found in *N.J.S.A.* 10:5-12(l) and (n) allows no person "to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, *provide goods, services or information* to, or otherwise *do business with*" another person on the basis of a protected category such as disability. Defendants' suggestion that this language applies only to strictly "commercial" transactions is far too narrow a reading. For example, *N.J.S.A.* 10:5-12(l) prohibits the refusal to *provide* goods, services or information, *separate and apart from refusal to sell to trade or buy such items from the other person or to contract for such items.* One need not engage in a strictly commercial transaction to "provide" another party with goods, services or information; one may "provide" such items by voluntary service, donation, gift, or devise. That the Legislature included the term, "provide," separate from buying from, selling to, contracting or trading with, means that the Legislature intended to reach conduct *beyond* the strict commercial buying and selling of goods and services. Otherwise, the "provide" clause would be redundant. Statutes are to be interpreted in a manner that gives effect to all of its terms, and that does not render terms redundant or superfluous. *In re DiGugliemo,* 252 *N.J.* 350, 360-1 (2022).

Similarly, Defendants read the phrase, "do business with," far too narrowly. The term, "business," means, *inter alia,* "{p}atronage." The American Heritage Dictionary, Third Edition,

118 (1994). "Patronage," in turn, means, *inter alia,* "{s}upport from a patron." *Id.* at 609. And a "patron," *inter alia,* is "{o}ne who supports, protects, or champions someone or something." *Id.* "Doing business with" thus, by its plain dictionary meaning, extends well beyond strictly commercial transactions and extends to support provided by patrons, such as supporters of Arc who attend its fundraisers.

Also, as stated in the Complaint, Plaintiff relies on community partners to advance social enterprises in its support of developmentally disabled individuals, and consequently, contracts with these community partners in the course of its activities, irrespective of their status as for-profit or non-profit organizations. Complaint, ¶ 24. Certainly, *contracting* with community partners qualifies as "doing business" with Plaintiff even under Defendants' improperly narrow reading of this term. Indeed, both *N.J.S.A.* 10:5-12(l) and (n) expressly prohibit discriminatory refusals to *contract* with a party, or urging others to engage in discriminatory refusals to *contract*.

Further, Plaintiff's organization of a fundraising event, and the purchase of tickets and attendance of guests at such an event, certainly qualify as commercial transactions. Complaint, ¶ 9. Such transactions, involving efforts to provide goods, services, and information to its clients as well as support and protection of Arc's mission, logically qualify as "doing business" for the purposes of *N.J.S.A.* 10:5-12(l) and (n). Given the broad remedial nature of the NJLAD, *Smith,* 225 N.J. at 390, this broader interpretation is consistent with the Legislature's intent as well as with its choice of language.

Oasis Therapeutic Life Ctrs., Inc., v. Wade, 457 *N.J. Super*. 218 (App. Div. 2018), cited in Defendants' brief, actually supports Plaintiff's position. *Oasis* establishes that non-profit organizations and charities are included as "individuals" protected by the LAD under *N.J.S.A.*

10:5-12(l) and (n), and that such organizations engage in "commercial activities" just as for-profit entities do. *Id*.

Defendants also misstate the language of *N.J.S.A.* 10:5-12(n), as the provision also makes it unlawful for a person to "attempt to, or conspire to" incite the refusal to contract with or provide goods or services to a party on the basis of disability. As Defendants have intentionally published multiple articles comparing Plaintiff's decision to host their gala at the Stone Terrace to previous tragedies committed on the basis of prejudice and discrimination, the attempt to incite others to engage in the violation of *N.J.S.A.* 10:5-12(1) is clear.

Defendants argue that they were allegedly acting only to protest racial discrimination, and attempt to take advantage of the "anti-discrimination boycott" exception to *N.J.S.A.* 10:5-12(n). *See, N.J.S.A.* 10:5-12(n)(2).[3] The simple answer to this argument is that it raises an issue of fact that is not appropriate for disposition on the instant motion. It is not appropriate to seek dismissal of a complaint for failure to state a claim by denying the allegations of the complaint or raising issues of disputed fact. Disputes of fact are to be resolved through discovery and/or trial, not by a motion to dismiss on the pleadings.

Defendants' motion to dismiss must be denied.

POINT II

DEFENDANTS' CONDUCT EXCEEDS THE PROTECTIONS OF CONTENT-BASED SPEECH, AND THEREFORE ALLOWS LIABILITY BASED UPON DEFENDANTS' INCITEMENT TO VIOLATE THE NJLAD.

[3] Defendants cite no case law or other support for the proposition that the "anti-discrimination boycott" exception to *N.J.S.A.* 10:5-12(n) allows for boycotts that are themselves discriminatory. Can it seriously be argued, for example, that person who's purported anti-racism boycotts are targeted only at businesses owned by persons with disabilities is not himself engaging in discriminatory conduct?

Defendants argue that the application of *N.J.S.A.* 10:5-12(l) and (n) to their publications at issue would violate their rights to free expression under the First Amendment and the analogous provisions of the New Jersey Constitution. Yet the very cases Defendants cite rebut this argument.

Defendants cite *Oasis Therapeutic Life Ctrs., Inc.* That case involved a non-profit organization, strikingly similar to Arc, which asserted a claim under *N.J.S.A.* 10:5-12(n) against individuals who pressured a property owner not to sell the non-profit land on which the non-profit intended to operate a home for persons with autism. Like Defendants herein, the individuals cited a First Amendment defense. The Superior Court, Appellate Division, had little difficulty rejecting this argument. "While [d]efendants are free to get up on their proverbial soapbox and make public their negative views about people afflicted with autism, such expression loses its First Amendment protection when it is used as [a] vehicle for discriminatory conduct that violates the LAD and the State's interest in eliminating discrimination." *Oasis Therapeutic Life Ctrs., Inc.*, 457 *N.J. Super.* at 234.

Defendants' alleged expressive conduct in the instant matter, which must be assumed true for purposes of the instant motion, similarly loses its First Amendment protection because it was used as vehicle for discriminatory conduct directed against individuals with disabilities. Complaint, ¶ 26.

Defendants also cite *Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio,* 905 *F. Supp*. 492 (D.N.J. 1995). That case involved a claim that the NJLAD provisions prohibiting discrimination on the ground of sexual preference violated the First Amendment right of freedom of religion. The *Presbytery* Court rejected the argument that these antidiscrimination provisions were unconstitutional as applied to a religious leader who wished to speak out against same-sex relationships. A "statute regulating conduct or secondary effects is not unconstitutional

simply because speech or expressive conduct may occasionally provide the vehicle for committing a violation." *Id.* at 521. With specific reference to *N.J.S.A.* 10:5-12(n), the *Presbytery* Court reasoned that the statute "incidentally restrict{s} speech in extremely limited circumstances" when it is "likely to have discriminatory secondary effects of discrimination in employment, public accommodations, business or real estate transactions." *Id.* at 522.

The allegations of Plaintiff's Complaint, which must be taken as true for purposes of this motion, establish that Defendants' publications have, and were intended to have, the discriminatory secondary effect of discrimination against Plaintiff and its consumers. Complaint, ¶ 16.

The *Presbytery* Court cited *Jews for Jesus, Inc. v. Jewish Community Relations Council, Inc.*, 968 *F.2d* 286, 296 (2d. Cir. 1992). That case involved a Jewish organization that had allegedly used economic coercion to induce a resort to cancel a contract it had entered into with the "Jews for Jesus" organization. The defendant organization argued that its conduct was protected by the First Amendment. The *Jews for Jesus* Court rejected that argument. "{S}imply because speech or other expressive conduct can in some circumstances be the vehicle for violating a statute directed at regulating conduct does not render that statute unconstitutional." *Id.* at 295. "States can constitutionally regulate conduct even if such regulation entails an incidental limitation on speech." *Id.*

Thus, Defendants' claim that the First Amendment (and the analogous provisions of the New Jersey Constitution) bar application of *N.J.S.A.* 10:5-12(l) and (n) to their conduct is not supported by applicable law. Indeed, the applicable law holds directly to the contrary. In contrast, Defendants cite no case holding, or even suggesting, that the provisions of *N.J.S.A.* 10:5-12(l) and (n) are unconstitutional.

Boy Scouts of America v. Dale, 530 *U.S.* 640 (2000), is of no aid to Defendants. Plaintiff's claim of unlawful discrimination due to Defendants' publication is for a reason greater than "promoting an approved message or discouraging a disfavored one." *Id*. at 661. It is a challenge to the secondary effect, expressly prohibited by the NJLAD, of inciting others, or at least attempting to incite others, not to do business with Plaintiff when no such incitement was directed against other persons similarly situated to Plaintiff in all respects save one: That Plaintiff provides services to persons with disabilities. Complaint, ¶ 26. It is the discrimination against Plaintiff's consumers that is the issue.

Defendants' misguided attempt to have Plaintiff's Complaint dismissed on constitutional grounds must be rejected.

POINT III

IF DEFENDANTS' MOTION IS GRANTED, IT SHOULD BE WITHOUT PREJUDICE.

"The allegations of a complaint must be deemed true for the purposes of a Rule 4:6-2(e) motion." *Geyer*, 279 *N.J. Super.* at 389. In addition, a motion to dismiss for failure to state a claim under *R*. 4:6-2(e) "is granted only in the rarest instances." *Id*. at 389. However, if the motion is granted, it should be without prejudice unless the allegations are palpably insufficient to state a claim or if discovery cannot produce evidence to support the claim. If there is a missing allegation of fact that may be truthfully added, then Plaintiff should be permitted to amend the complaint. *Id*. "If a complaint must be dismissed after it has been accorded the kind of meticulous and indulgent examination counselled in this opinion, then, barring any other impediment such as a statute of limitations, the dismissal should be without prejudice to a plaintiff's filing of an amended complaint." *Printing Mart-Morristown*, 116 *N.J*. at 772.

Plaintiff asserts that its Complaint is more than adequate to set forth a cognizable cause of action under the applicable pleading standard of New Jersey law. But if the Court is somehow persuaded that the factual allegations of Plaintiff's Complaint are somehow insufficient, Defendants' motion should be granted without prejudice to Plaintiff's right to submit an amended complaint.

CONCLUSION

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

Respectfully submitted,
TRIMBOLI & PRUSINOWSKI, LLC

s/*Stephen E. Trimboli*
Stephen E. Trimboli, Esq.

Dated: June 27, 2023