

II. ATKINS' MOTION TO DISMISS IS PROCEDURALLY DEFECTIVE

By their motion, defendants, Atkins Nutritionals, Inc. and Paul D. Wolff, co-executor of the estate of Robert C. Atkins, M.D. (collectively "Atkins"), seek dismissal of the Complaint in its entirety, with prejudice, "pursuant to Fla. R. Civ. P. 1.14(b)." Motion to Dismiss, p.1. (Emphasis added.) There is no such rule of civil procedure in Florida.

Unfortunately, because Atkins' Motion to Dismiss refers to numerous matters outside the Complaint, and also contests the merits of Plaintiff's claims, it is unclear which procedural mechanism it is seeking to travel under.

If Atkins is seeking dismissal for failure to state a cause of action, it improperly refers to matters outside the Complaint, and this motion should be denied on this basis alone. *Lutz Lake Fern Road Neighborhood Groups, Inc. v. Hillsborough County*, 779 So.2d 380, 383 (Fla. 2d DCA 2000)("We begin by repeating that in ruling on a motion to dismiss, the trial court must look only within the four corners of the complaint, accept the plaintiff's allegations as true, and resolve all inferences in the plaintiff's favor.")(citation omitted.); *National Ventures, Inc. v. Water Glades 300 Condominium Ass'n*, 847 So.2d 1070, 1073 (Fla. 4th DCA 2003)("When ruling on a motion to dismiss for failure to state a cause of action, a trial court must accept the allegations of a complaint as true and in the light most favorable to the plaintiffs."); *Ingalsbe v. Stewart Agency, Inc.*, 869 So.2d 30, 35 (Fla. 4th DCA 2004)("A motion to dismiss for failure to state a cause of action may be granted only by looking exclusively at the pleading itself, without reference to any defensive pleadings or evidence in the case"); *H.E. Temples v.*

Florida Industrial Construction Co., 310 So.2d 326 (Fla. 2nd DCA 1975)(consideration on motion to dismiss of matters outside the complaint is reversible error).²

Further, Atkins ignores the standard for dismissal for failure to state a claim.

“[A] complaint should not be dismissed for failure to state a cause of action unless the movant can establish beyond any doubt that the claimant could prove no set of facts whatever in support of his claim.”

[T]est for motion to dismiss for failure to state cause of action is whether pleader could prove any set of facts whatever in support of claim. A motion to dismiss should not be granted if the pleader sets forth facts in his complaint upon which relief can be granted on any theory. [Internal citations omitted.]

Ingalsbe, 869 So.2d at 30

If Atkins is using its Motion to Dismiss to obtain a ruling on the merits, its Motion is equally defective. *Neighborhood Groups, Inc.*, 779 So.2d at 383. (“[A] motion to dismiss should not be used as a substitute for a motion for summary judgment or a motion for judgment on the pleadings.”)(citation omitted.) Atkins’ Motion, to the extent

² Atkins accuses plaintiff of filing a complaint that is “replete with selective quotations from, and inaccurate paraphrases of, the Book and the website...” Motion, p. 7. However, the rule it cites, Fla. R. Civ. P.1.130, specifically allows plaintiff to attach a copy of the document or "a copy of the portions thereof" that are material to the pleading. (Emphasis added.) Yet Atkins then suggests that it can add, and the Court can consider, its own additional selective quotations from the Book and the website materials that are outside the four corners of the Complaint on its Motion to Dismiss.

Plaintiff recognizes that federal courts have discretion under Fed. R. Civ. P. 12(b)(6) to consider such materials, if the court converts the motion to dismiss to a motion for summary judgment. *See, e.g., Brooks v. Blue Cross and Blue Shield of Florida*, 116 F.3d 1364, 1369 (11th Cir.1997).Florida courts have no such discretion.

Even if Florida courts did have such discretion, this Court should decline to consider Atkins’ proposed additional materials because they are under-inclusive. *Prager v. LaFaver*, 180 F.3d 1185 (10th Cir.1999). Here, Atkins chose not to attach its entire book, or Web site, which would have demonstrated, among other things, how the purported warnings were buried in the text or in small print. *See also*, p. 8 and n. 4, *infra*. for further examples of the under-inclusivity and incompleteness of Atkins’ proposed submissions, as well as their inadequacy and misleading nature. Accordingly, Atkins’ materials outside the four corners of the Complaint should not be considered.

it seeks to put before the Court material outside the four corners of the Complaint, should be denied for this reason alone as well.

Atkins' Motion is defective for a myriad of other reasons. It is rife with unsupported statements not taken from either the Complaint or the exhibits attached to the Complaint. For example, the *ad hominem* attacks on the Physicians Committee for Responsible Medicine (a non-party) are supported by anything other than the hearsay statement of counsel for Atkins. More importantly, Atkins seeks to balance the false claims of safety it made for the Atkins diet, as quoted in the Complaint and documented in the attached exhibits, with other statements it made, which are outside the scope of the pleading and therefore cannot be considered by this Court on this motion.

Also, Atkins seeks to have this Court make factual findings, as a matter of law, that are inconsistent with the allegations of the Complaint, despite the fact that Atkins admitted those allegations for the purposes of this motion. *Ingalsbe, supra* (motion to dismiss admits all well-pleaded facts as true.) For example, Atkins argues that the Court can find as a matter of law that Mr. Gorran did not follow the Atkins diet. However, the Complaint repeatedly alleges that Mr. Gorran in fact followed the diet, *see, e.g.*, Complaint, ¶33:

Plaintiff, Jody Gorran, began the Atkins diet in early May 2001. He went on the Atkins diet relying on Dr. Atkins' book, *Dr. Atkins' New Diet Revolution*, and on information learned on the Atkins, Inc. Web site. Mr. Gorran remained on the Atkins diet, in reliance on the book and the Web site, until the end of October 2003.

Complaint, ¶35:

After doing the research and reading Dr. Atkins' book and the Web site, Mr. Gorran chose to rely upon Dr. Atkins and Atkins, Inc. and followed their diet advice.

Complaint, ¶39:

On June 26, 2001, after following the Atkins diet for about two months, Mr. Gorran had his blood checked by Quest Diagnostics, following his customary practice of having it checked yearly. The report showed trace amounts of ketones in his blood, indicating that Mr. Gorran was in ketosis as a result of abiding carefully by the Atkins diet.

Notwithstanding these well-pled allegations, Atkins asks the Court to find these allegations (which it has admitted to be true) to be false as a matter of law. Atkins further argues that Mr. Gorran ate pastrami and cheesecake, which are allegedly forbidden on the Atkins diet. However, as set forth in Atkins' Motion, p. 15, "there is no specific endorsement or discussion of pastrami anywhere in the Book," and, Atkins admits to selling an Atkins-approved cheesecake. Even if the Court were to consider matters outside the pleadings, over Plaintiff's objections, *see* n.2, *supra*, it could not resolve this question of fact from the face of the Complaint. Disputes such as this cannot be resolved on a motion to dismiss. Thus, the motion must be denied for the many procedural reasons set forth above.

III. THE ALLEGATIONS OF THE COMPLAINT

A. This Is a Case about Products, Not Simply Nutritional Advice or the Contents of a Book

Atkins' Motion to Dismiss suggests that Plaintiff is seeking to impose liability based solely on the ideas and purported advice expressed in the late Dr. Atkins' diet book. Motion, pp. 1-2 ("The Complaint...is predicated on a falsified portrayal of the nutritional advice contained in Dr. Atkins' best-selling book..."); p. 3 ("the content of a book is not a product..."). Atkins is wrong.

Atkins' overlooks the repeated allegations in the Complaint that this is a

case about products. Plaintiff has never claimed that the books, or the statements contained therein, are a product by themselves. “The purpose, intent and plan of the Atkins Business was to profit through the sale of various diet-related products to Florida customers and others worldwide,” Complaint, ¶5 (emphasis added); “[t]he diet was conceived by Dr. Atkins in the 1970s and was originally marketed by him to enhance the sales of various products including books, nutritional supplements, herbs and minerals,” ¶6; “Dr. Atkins and Atkins, Inc., through their Web site (www.atkins.com), were running a coordinated advertising and marketing campaign in Florida and nationwide to convince the public to follow the Atkins diet and buy a series of products, including Atkins’ books and other products sold by Atkins, Inc.,” ¶7; and “[w]hile on the Atkins diet, Mr. Gorran consumed numerous products purchased from Atkins, Inc., including Advantage Bars, Pancake Mix, and Pancake Syrup.” ¶44. *See also*, Complaint, ¶¶9, 32, 63, 68-71, 78, 82.

B. The Products Are Dangerous

Further, the Complaint alleges the dangers of the Atkins’ diet and products: “The products are defective and unreasonably dangerous, in that the diet and the diet advice put at least a substantial minority of persons purchasing the products and following the diet at increased risk of cardiovascular disease and other illnesses,” Complaint, ¶70; “[t]he National Heart, Lung and Blood Institute (“NHLBI”), a division of the federal government’s National Institutes of Health that provides leadership for a national program of research and education in diseases of the heart, recommends that for good health, the average American adult should consume no more than 300 milligrams of dietary cholesterol per day... NCEP³ also recommends limiting the quantity of meat, including poultry, to be included in a cholesterol-reducing diet to no more than six

³ “NCEP” is the acronym for the NHLBI’s National Cholesterol Education Program.

ounces per day,” Complaint, ¶23; “[t]he Atkins diet ignores all these recommendations,” Complaint, ¶23; “The American Heart Association makes the following recommendation with respect to high-protein diets, such as the Atkins Diet:

The American Heart Association doesn't recommend high-protein diets for weight loss. Some of these diets restrict healthful foods that provide essential nutrients and don't provide the variety of foods needed to adequately meet nutritional needs. People who stay on these diets very long may not get enough vitamins and minerals and face other potential health risks.

* * *

Some high-protein diets de-emphasize high-carbohydrate, high-fiber plant foods. These foods help lower cholesterol when eaten as part of a nutritionally balanced diet. Reducing consumption of these foods usually means other, higher-fat foods are eaten instead. This raises cholesterol levels even more and increases cardiovascular risk.

Complaint, ¶55. See also ¶56.

C. Atkins failed to adequately warn consumers of the dangers associated with the diet and products

While Atkins at least implicitly acknowledges the dangers of its diet, particularly for people like Mr. Gorran, its Motion argues that it adequately warned consumers of the dangers associated with the diet and its products. It emphasizes repeatedly the purported warning on the copyright page of the book:

The advice offered in this book, although based on the author's experience with thousands of patients, is not intended to be a substitute for the advice and counsel of your personal physician.

Motion to Dismiss, pp. 9, 11, quoting parts of its Exhibit A. Again, Plaintiff objects to Atkins' attempt to place before the Court on this motion to dismiss matters outside the four corners of the Complaint. *See* n. 2, *supra*. If Plaintiff's objection is sustained, any alleged warnings from outside the Complaint cannot be considered, and no further

response to this argument is required and Plaintiff respectfully suggests that the Court proceed directly to Section III.D, *infra*.

Atkins accuses Plaintiff of selectively quoting and misrepresenting Atkins' book, Motion to Dismiss, pp. 9, 11, but it is Atkins that selectively quotes its own warnings. Atkins' entire warning from the 1999 edition suggests that the dangers are associated not with the diet itself, but rather with the artificial sweeteners and MSG contained in the products sold with the diet:

The advice offered in this book, although based on the author's experience with many thousands of patients, is not intended to be a substitute for the advice and counsel of your personal physician. *Although most published scientific studies have proclaimed aspartame (NutraSweet, Equal) to be safe, clinical experience often indicates otherwise. Headaches, irritability, failure to lose weight or control blood glucose have all been reported, as well as cross reaction with those who cannot tolerate MSG. Consult with your local doctor if you have any concern about your use of aspartame. The best advice may be to use it sparingly, preferably blending it with other sweeteners. Remember, too, that aspartame loses its sweetness when heated.*

(Exhibit A, attached to Motion to Dismiss.)(Emphasis added.)⁴ As will be demonstrated below, the above "warning" is incomplete, unfair and deceptive.

⁴ The following, quoted out-of-context by Atkins, appeared on the copyright page in the 2002 edition, which Mr. Gorran first saw after he had been on the diet for quite some time:

The advice offered by this book, although based upon the author's experience with many thousands of patients, is not intended to be a substitute for the advice and counsel of your personal physician. *If you are currently taking diuretics, insulin or oral diabetes medications, consult your physician before starting Atkins. You will need to reduce and then closely monitor your dosage as you lower your blood-sugar level. People with severe kidney disease should not do Atkins. The weight loss phases of the Atkins Nutritional Approach are not appropriate for pregnant women and nursing mothers.* (Emphasis added.)

Since Mr. Gorran was not taking the indicated medications, suffering from kidney disease, and was neither pregnant nor nursing, there was nothing in this statement to warn him of the risks he faced.

The only other "warning" Atkins points to in the book or the Web site, that might be relevant to Mr. Gorran, is a small, two-page section on "fat sensitivity." The Complaint and Atkins' Motion quote from this, but we suggest the Court simply read the entire section, (Exhibit A to Atkins' Motion, at pp. 139-140). Nowhere does the book say that all Atkins dieters should have their blood monitored to determine whether their cholesterol levels are getting dangerously high. Even more importantly, it does not say that

D. For The Purposes Of This Motion, The Court Must Accept As True Plaintiff's Contention That The Products Were Sold With False And Misleading Representations That The Diet, Coupled With The Products, Could Be Consumed Safely By Everyone.

These non-warnings must be contrasted with two separate themes that lead Atkins' consumers down a dangerous path. The first is safety assurances that appear throughout the book and the Web site and are cited at length in the Complaint.

The second is Atkins' claims that the medical/scientific community is simply wrong and has not studied the applicable scientific evidence. Thus, Atkins claims, a dieter's doctor is unlikely to be informed on this subject.

Examples of safety assurances taken from the Complaint are as follows:

1. From Dr. Atkins New Diet Revolution (1999 ed.): "Wouldn't you rather be on a diet that . . . consistently produces improvements in most health problems that accompany overweight? Too good to be true? Not at all. Simply true. Moreover, repeatedly demonstratable and scientifically impeachable." Complaint, ¶11.

2. From the Web site: "Of the many misconceptions that surround the Atkins [Diet] perhaps the most widespread is the assumption that eating foods high in fat is a health risk. Not so-in the absence of refined carbohydrates." "Is it OK for me to consume more than 20 percent of my calories in the form of saturated fat? Absolutely. . ." "Rather than creating high cholesterol levels, eating saturated fat actually reduces those levels." "Dr. Atkins does not believe that cholesterol elevations are as important a risk factor as high triglycerides, homocysteine and C-reactive protein." "As Dr. Atkins often

Atkins dieters whose cholesterol goes up should get off the diet. The critical warning to the dieter is not to have the blood tested, since that is not a cure to the problems caused by the diet. The "cure" for Atkins dieters whose cholesterol has gone up is to get off the diet before they suffer a heart attack, stroke or death. That is the warning that is indisputably missing from every Atkins book, Web site and product.

explained, the cholesterol in your blood has very little to do with the fat and cholesterol you eat. Complaint, ¶34.⁵

⁵ The following citations are not found in the complaint, and are offered solely in the event the Court chooses to overrule Plaintiff's objection to consideration of matters outside the Complaint, n. 2 *supra*. Plaintiff never believed, and still does not believe, that Atkins offered any warnings about the dangers of the diet, so the Complaint did not reference the fact that Atkins consistently disparaged the scientific/medical communities and consequently, their warnings against Atkins' diet. If the Court chooses to consider the so-called warnings to consult a doctor, it will want to consider the fact that Atkins dieters were told that that everything their doctors knew that might lead them to warn against the Atkins diet was wrong.

Examples of claims that doctors and the scientific/medical authorities provide incorrect information about diet include:

You have been repeatedly told that meat, eggs, butter and cream are bad for you and that pasta, cereals, bread, low-fat milk, flavored yogurt, high carbohydrate energy drinks and the like are good for you. Scientific research points in the other direction . . .

Although scores of scientific papers have been published showing that what we are taught cannot be true, the utterances from medical associations, the government and the media never change.

1999 Edition at Preface.

Also, the diet "Consistently produces improvements in most of the health problems that accompany overweight." *Id.* at 4.

Our epidemic of diabetes, heart disease, and high blood pressure are very largely the products of the hyperinsulinism connection. The Atkins diet can correct and has corrected these serious medical complications of obesity. Indeed, 35% of my patients come to me for help with cardiovascular problems. The Atkins diet is probably the most aggressively health-promoting diet you will ever have the opportunity to be on.

Id. at 5-6.

Atkins goes on to claim that "[M]y record of success has been rip-roaring, record ending, and remarkably reproducible." *Id.* at 7.

The diet is healthy. . . .In addition, hypertension, diabetes and most cardiovascular conditions respond with extraordinary rapidity to this diet. Since I was a practicing cardiologist when I began to prescribe the diet and 30 to 40% of my large patient population is still made up of people with cardiovascular problems, you can imagine how much of my success is based on the diet's heart benefits.

Id. at 45.

Atkins continues,

Now, let's look at the evidence behind the heart disease and cancer claims, and, as we do, let's keep in mind that there is no good direct evidence that a low-carbohydrate diet leads to these health hazards. *What evidence there is in population studies showing an association between high fat and heart disease are actually simultaneous studies showing that diets high in refined carbohydrates are associated with heart disease. And the same is true for cancer.*

Id. at 149-150. (Emphasis in original.)

Atkins boldly claims, "the evidence that you're going to get heart disease or cancer from the fat in your diet isn't strong, it's weak; it isn't persuasive, it's remarkably unpersuasive. False accusations are being passed off as scientific gospel . . . *Id.* at 158. "True, there are many behind-the-times, pharmaceutically oriented cardiologists who will still insist that a low-fat diet and a panoply of drugs is the answer for a treacherous combination [involving the ratio between triglycerides and HDL cholesterol]. If they do, they will be wrong."

Finally, in a section headed "Debunking the Fallacies" is found the following:

[Fallacy Number] Ten – It is a known fact, acknowledged by every major health organization, that fats are the major cause of cardiovascular disease.

The Complaint is replete with safety claims made by Atkins, and if the Court chooses to consider the expanded record, it will see that those safety claims were coupled with statements by Atkins that doctors who disagreed simply did not know what they were talking about. A reasonable consumer of the Atkins products would have no way of knowing that he or she faced a risk of injury or death if they chose to buy Atkins products and consume them without clearance and active monitoring by a physician.

E. Plaintiff Purchased Atkins Products

Atkins' Motion ignores the well-pleaded allegations that Plaintiff purchased its products (i.e., nutritional supplements). Complaint, ¶¶44, 63, 68, 71, and 84.

IV. ARGUMENT

A. Plaintiff Has Stated Claims for Deceptive or Unfair Trade Practices

As noted above, Atkins cites no authority to support its argument that Mr. Gorran has failed to state a claim under FDUTPA. Instead, it argues that because Plaintiff failed to state a claim for negligent misrepresentation, he cannot state a claim under FDUTPA. Atkins is plainly wrong.

1. The FDUTPA Allegations.

Mr. Gorran has alleged that he is a consumer within the meaning of Section 501.203(7), *Fla. Stat.*, Complaint, ¶75; that he and Atkins have engaged in trade or commerce within the meaning of Section 501.203(8), *Fla. Stat.*, Complaint, ¶76; and that Atkins has engaged in unfair or deceptive acts or practices, or unconscionable acts or

[Response] I certainly do not deny that every major health organization, as well as the United States government, endorses a low-fat diet in the unquestioned belief that fat causes heart disease. But are they right? There is compelling evidence pointing in the opposite direction.

Id. at 243.

practices, in the conduct of trade or commerce with plaintiff, which acts or practices are unlawful, pursuant to Section 501.204(1), *Fla. Stat.*, including:

1. Touting the Atkins diet and products as safe for all customers when it well knew that, for at least a substantial minority of its customers, the diet and their products carried potential serious risks.
2. Failing to give adequate warnings about the adverse health consequences of a high-fat diet.
3. Claiming that the diet was “fool-proof” and a guaranteed success when it well knew that there would be people for whom the diet would not be safe.

Complaint, ¶78.

Plaintiff further alleges that millions of consumers acting reasonably under the circumstances have relied,⁶ as he relied, on Atkins’ misrepresentations concerning their diet and products and have been misled under the circumstances, as he was misled, and that he suffered a loss as a result of Atkins’ violations of FDUTPA and is entitled to recover actual damages from Atkins, pursuant to Section 501.211(2), *Fla. Stat.* Complaint, ¶¶82-85.

2. The Legislature, in Adopting FDUTPA, Used Extremely Broad Language, So As To Protect Florida Consumers from a Wide Variety of Unfair and Deceptive Practices Employed by Unscrupulous Merchants.

FDUTPA does not define the elements of an action brought under it. It merely provides that an aggrieved party may initiate a civil action against a party who has engaged in "unfair or deceptive acts or practices in the conduct of any trade or commerce." See § 501.204(1), *Fla. Stat.* (2004). Rather than defining precise elements of the cause of action, the Act provides that the Florida courts must give "due consideration

⁶ Section 501.211(1) authorizes injunctive relief, even if that relief does not benefit the customer who filed the suit. *Orkin Exterminating Co. v. Petsch*, 872 So.2d 259, 263 (Fla.2nd DCA 2004) (citing *Davis v. Powertel, Inc.*, 776 So.2d 971, 975 (Fla. 1st DCA 2000)). FDUTPA "is designed to protect not only the rights of litigants, but also the rights of the consuming public at large." *State, Office of Atty. Gen., Dept. of Legal Affairs v. Wyndham Intern., Inc.*, 869 So.2d 592, 598 (Fla.1st DCA 2004).

and great weight" to Federal Trade Commission and federal court interpretations of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C § 45(a)(1). See § 501.204(2), Fla. Stat. (1999). According to the federal decisions, a deceptive practice is one that is "likely to mislead" consumers. See *In re International Harvester Co.*, 104 F.T.C. 949 (1984); *In the Matter of Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984); *Southwest Sunsites, Inc. v. Federal Trade Comm'n*, 785 F.2d 1431 (9th Cir.1986). This standard does not require subjective evidence of reliance, as would be the case with a common law action for fraud. The objective test adopted by the Federal Trade Commission and the federal courts applies, as well, in suits in Florida courts under FDUTPA. See *Millennium Communications & Fulfillment, Inc. v. Office of the Attorney General*, 761 So.2d 1256 (Fla. 3d DCA 2000).

Further, the language of FDUTPA supports an expansive reading of the statute. "The provisions of this part shall be construed liberally to ... protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." § 501.202(2), Fla. Stat. (2004)

3. Plaintiff Need Not Allege or Prove Negligent or Fraudulent Misrepresentation to State a Claim under FDUTPA; All That Plaintiff Need Allege Is Unfair or Deceptive Acts or Practices, Which He Has Done

FDUTPA prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." *Keech v. Yousef*, 815 So.2d 718, 719 (Fla. 5th DCA 2002 (quoting Fla.Stat. § 501.204(1))(emphasis added.)

Thus, proceeding under the deception prong of FDUTPA, Plaintiff need not allege or prove the elements of fraud or negligent misrepresentation to state a claim under FDUTPA. See *W.S. Badcock Corp. v. Myers*, 696 So.2d 776 (Fla. 1st DCA 1996); *Urling v. Helms Exterminators, Inc.*, 468 So.2d 451 (Fla. 1st DCA 1985). “That is so because the question is not whether the plaintiff actually relied on the alleged deceptive trade practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstances.” *Davis v. Powertel, Inc.*, 776 So.2d 971, 974 (Fla.1st DCA 2000)(cited with approval, *Fendrich v. RBF, L.L.C.*, 842 So.2d 1076, 1078 (Fla. 4th DCA 2003))(emphasis added.)⁷.

Alternatively, under the unfairness prong, Atkins is liable for unfair acts or practices that are not deceptive because an act need not be both unfair *and* deceptive to violate FDUTPA. See *Orkin Exterminating Co., Inc. v. F.T.C.*, 849 F.2d 1354, 1363-66 (11th Cir.1988); *American Financial Services, Ass'n v. F.T.C.*, 767 F.2d 957, 971 (D.C.Cir.1985). As recognized by the Florida Supreme Court in *PNR, Inc. v. Beacon Property Management, Inc.*, 842 So.2d 773 (Fla. 2003):

An unfair practice is "one that 'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' " *Samuels [v. King Motor Co. of Fort Lauderdale]*, 782 So.2d 489, 499 (Fla. 4th DCA 2001)](quoting *Spiegel, Inc. v. Fed. Trade Comm'n*, 540 F.2d

⁷ Even if the Court were to find, as a matter of law, that Mr. Gorran did not follow the Atkins diet, he could still prevail on his FDUTPA claim if Atkins used unfair or deceptive practices to sell its products. It is undisputed that Mr. Gorran bought some \$40.45 worth of Atkins products as a result of Atkins wrongful marketing practices. Nothing more is required to establish a violation of FDUTPA and to authorize the Court to require warnings on all Atkins' products. See n. 6, *supra*. As noted in *Davis*:

Section 501.211(1), Florida Statutes is broadly worded to authorize declaratory and injunctive relief even if those remedies might not benefit the individual consumers who filed the suit... Nothing in the statute requires proof that the declaratory or injunctive relief would benefit the consumer filing the suit... It follows that an aggrieved party may pursue a claim for declaratory or injunctive relief under the Act, even if the effect of those remedies would be limited to the protection of consumers who have not yet been harmed by the unlawful trade practice.

776 So.2d at 974. (citations omitted.)

287, 293 (7th Cir.1976)); see *Millennium Communications & Fulfillment, Inc. v. Office of the Attorney Gen.*, 761 So.2d 1256, 1263 (Fla. 3d DCA 2000) (stating that deception occurs if there is a " 'representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.' ") (quoting *Southwest Sunsites, Inc. v. Fed. Trade Comm'n*, 785 F.2d 1431, 1435 (9th Cir.1986)).

Id. at 777. A practice is unfair when it " 'offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,' (or competitors or other businessmen)." *Day v. Le-Jo Enterprises, Inc.*, 521 So.2d 175, 178 (Fla. 3d DCA 1988)(emphasis added.) (quoting *Spiegel, Inc. v. Federal Trade Comm'n*, 540 F.2d 287, 293 (7th Cir.1976)).

Here Plaintiff's allegations that Atkins "touting [of] the Atkins diet and products as safe for all customers when they well knew that, for at least a substantial minority of their customers, the diet and their products carried potential serious risks," "failing to give adequate warnings⁸ about the adverse health consequences of a high-fat diet," and "claiming that the diet was "fool-proof" and a guaranteed success when they well knew that there would be people for whom the diet would not be safe" certainly state a claim

⁸ The FTC and state courts acting under their own deceptive and unfair trade practices acts have found the failure to warn unfair and deceptive. As set forth in *American Shooting Sports Council, Inc. v. Attorney General*, 429 Mass, 871 (1999):

The FTC has deemed "unjustified consumer injury" as "the primary focus of the FTC Act," 1980 Unfairness Statement, reprinted at 104 F.T.C. 1070, 1073 (1984), and has expressly stated that "unwarranted health and safety risks may support a finding of unfairness." *Matter of Int'l Harvester, Co.* 104 F.T.C. 949, 1061 (1984), quoting 1980 Unfairness Statement, *supra*. Certainly the health and safety risks associated with a defective product would be unjustified. FN 19

.....
FN19 . . . See, e.g., *Matter of Int'l Harvester, Co.*, *supra* (where FTC determined that manufacturer's failure to take adequate measures to inform consumers of simple measures by which they could have avoided injury from product was unfair practice).

Further, the "[f]ailure to disclose material information may cause an advertisement to be false and deceptive within the meaning of the FTCA even though the advertisement does not state false facts." *Simeon Management Corporation v. Federal Trade Commission*, 579 F.2d 1137, 1145 (9th Cir. 1978). As a result, courts have held that under their consumer protection or deceptive trade practices acts, a failure to give adequate warning is an "unfair" trade practice. See, *Maillet v. ATF-Davidson, Co., Inc.*, 407 Mass. 185 (1990); *McClary v. Erie Engine & Manufacturing Company*, 1994 WL 803088 (D.N.H. 1994).

for deception or, at the very least, unfairness, under FDUTPA, given the allegation that the diet, with its products, is “substantially injurious to consumers.” Complaint, ¶81.

B. Plaintiff States a Claim for Negligent Misrepresentation

The elements of a cause of action for negligent misrepresentation are set out in *Wallerstein v. Hospital Corporation of America*, 573 So.2d 9, 10 (Fla. 4th DCA 1991):

In order to be actionable, a suit for negligent misrepresentation must contain the following: (1) misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the representation without knowledge as to its truth or falsity, or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend that the representation induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation. *Atlantic Nat’l Bank of Florida v. Vest*, 480 So.2d 1328, 1331 (Fla. 2nd DCA 1985), *rev. denied*, 491 So.2d 281 (Fla. 1986) and 508 So.2d 16 (Fla. 1987).

. . . All that must be alleged in a suit for negligent misrepresentation is not that the representor intended to make a false statement, but rather that the representation was made under circumstances in which its falsity should have been known.

Plaintiff alleges each and every element of this cause of action. First, he alleges that Atkins misrepresented the safety of the diet. Complaint, ¶61. The Complaint alleges, and quotes Atkins’ statements, as to the safety of the diet, and goes on to show that virtually all mainstream health and medical associations, not to mention the federal government, have issued strong warnings about the diet because it is in fact dangerous for large numbers of consumers. Complaint, ¶¶11, 14-32, 34, 41, 42, 55-56, 61. Given these warnings, and the results of Atkins’ own funded studies, Atkins knew or should have known that its diet was potentially dangerous to a large minority of dieters, unless they had medical screening before going on the diet, and constant monitoring while on the diet, and that Atkins’ reassurances to the contrary were or might well be false. The

Complaint alleges that Atkins intended to have readers and consumers follow the diet and purchase Atkins' products in reliance on the safety assurances. Complaint, ¶63. Finally, Mr. Gorran justifiably relied upon the safety assurances and was injured as a result. Complaint, ¶¶64, 65.

Notwithstanding the specificity of *Wallerstein*, Atkins seeks to add an additional fifth element to the cause of action, not found in Florida law, that is, a duty of care running from Atkins to Mr. Gorran. Notably, Atkins cites no Florida case for this proposition, *see*, Motion to Dismiss, pp.17-20. In fact, *Wallerstein* specified the elements of negligent misrepresentation, and did not include the fifth element urged by Atkins. This Court is bound by *Wallerstein*.

Also, Atkins does not actually argue that duty of care is an element of the tort of negligent misrepresentation. Instead, it argues that the First Amendment somehow requires that element as part of the cause of action against an author, but cites only one out of state case for that proposition. In any event, Atkins is sued as a seller of products. It is an "author" only to the extent every seller authors advertising and promotional literature for the products it sells.

Other Florida negligent misrepresentation cases reflect that there is no requirement of a duty of care between the defendant and the plaintiff. In *Chandler v. Van Dyke Farm Homeowners*, 2003 WL 21639021 (Fla. 13th Cir. Ct. June 4, 2003) a homeowner sued his homeowners' association for negligent misrepresentation. The homeowner became concerned about his neighbor's landscaping plans, and asked the homeowners' association if the plans had been approved as required by the deed restrictions. The homeowner was incorrectly told that no approval had been given, and in

reliance on the false information the homeowner brought suit against his neighbor. Once the correct information was learned, the homeowner had to withdraw suit, and he sued the homeowners' association for his costs of suit under a theory of negligent misrepresentation. The Court held that:

On the legal issue, a description of the elements necessary to recover for a cause of action for negligent misrepresentation appears in *Standard Jury Instructions-Civil Cases*, 777 So.2d 378 (Fla. 2000) citing *Atlantic National Bank of Florida v. Vest*, 480 So.2d 1328, 1331 (Fla. 2nd DCA 1985), *rev. denied*, 491 So.2d 281 (Fla. 1986) and 508 So.2d 16 (Fla. 1987). Therein, the Florida Supreme Court stated . . . that the following should be presented to the trier of fact: whether defendant made a false statement to another concerning a material fact; whether, in the exercise of reasonable care under the circumstances, defendant was negligent in making the statement because it should have known the statement was false; whether defendant intended that another would rely on the false statement; whether plaintiff reasonably and justifiably relied on the false statement; and whether plaintiff suffered damages as a result. *Id.* at 381

Id. at 2. The *Chandler* Court held that the plaintiff stated a claim, and additionally held:

[W]hether reasonable care was exercised, and, if not, whether it constituted negligence is for the trier of fact. Negligence is typically a jury issue. [Citation omitted.] Even where the facts are undisputed, summary judgment is inappropriate where there is an inference of negligence.

Id. See also, *Baggett v. Electricians Local 915 Credit Union*, 620 So.2d 784 (Fla. 2nd DCA 1993). Here, Mr. Gorran has stated a cause of action for negligent misrepresentation.

C. Plaintiff States a Claim for Product Liability

Mr. Gorran brings this products liability claim, asserting that Atkins' products are defective because the foreseeable risk of harm from the Atkins' diet could have been reduced or avoided by the provision of adequate warnings.

Atkins' motion asserts that because they do not directly sell the beef, pork, poultry, dairy and other foods that can cause injury to people who consume these foods in accordance with Atkins' advice, they are not responsible for the harm to their customers. Motion, p. 22-24. However, Atkins is not sued merely for its diet advice. Rather, plaintiff alleges:

5. The purpose, intent and plan of the Atkins Business was to profit through the sale of various diet-related products to Florida customers and others worldwide. The diet is called The Atkins Nutritional Approach™ (the "Atkins diet"), trademarked by Atkins, Inc.

6. The diet was conceived by Dr. Atkins in the 1970s and was originally marketed in the form of various products including books, nutritional supplements, herbs and minerals. The diet was also used to promote Dr. Atkins' medical clinic in New York City.

7. By 1998, the Atkins Business had become far more sophisticated. By that point, Dr. Atkins and Atkins, Inc., through their Web site (www.atkins.com), were running a coordinated advertising and marketing campaign in Florida and nationwide to convince the public to follow the Atkins diet and buy a series of products, including Atkins' books and other products sold by Atkins, Inc.

Thus, Plaintiff's claim is that Atkins chose to sell various products by promoting a diet it knew to be dangerous to a substantial minority of all people who follow it. Atkins sold products (books and videotapes) that were specifically designed to falsely assure consumers that their diet was safe, when in truth and in fact it was dangerous. Atkins also sold "vita-nutritional supplements" and food products that supposedly protected consumers from the dangers of the diet, knowing full well that such claims were either false or not scientifically provable.

In *Scheman-Gonzalez v. Saber Manufacturing Company*, 816 So.2d 1133, 1139-1140 (Fla. 4th DCA 2002), the Court considered products liability claims involving the failure to give adequate warnings, holding:

[A] product is considered defective “when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions and warnings” and their omission “renders the product not reasonably safe.” *Restatement (Third) of Torts: Products Liability (1998)* at § 2(c); see also *Warren v. K-Mart Corp.*, 765 So.2d 235, 237-38 (Fla. 1st DCA 2000).

Unless the danger is obvious or known, a manufacturer has a duty to warn where its product is inherently dangerous or has dangerous properties.

This court has recognized that, “[t]o warn adequately, the product label must make apparent the potentially harmful consequences. The warning should be of such intensity as to cause a reasonable man to exercise for his own safety caution commensurate with the potential danger. In addition, “[a] warning should contain some wording directed to the significant dangers arising from the failure to use the product in the prescribed manner, such as the risk of serious injury or death. Furthermore, as is the case when considering whether the injured party knew of the danger, the sufficiency and reasonableness of a manufacturer’s warnings are questions of fact which are best left to a jury unless the warnings are accurate, clear, and unambiguous.

Id. at 1139-40 (citations omitted; emphasis added)

In *Ferayorni v. Hyundai Motor Company*, 711 So.2d 1167 (Fla. 4th DCA 1998)

the Court held that:

Under the theory of strict products liability adopted in *West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976), a product may be defective by virtue of a design defect, a manufacturing defect, or an inadequate warning. In the failure-to-warn context, an “otherwise safe product” may be “defective” solely by virtue of an inadequate warning.

The Court continued:

We . . . specifically hold that a prima facie case of strict liability failure to warn does not require a showing of negligence. In so holding, we note that the policy behind strict products liability is to facilitate a

plaintiff's recovery when a manufacturer places on the market a potentially dangerous product and thereby "undertakes a certain and special responsibility toward the consuming public who may be injured by it."

Id. at 1172. (Citations omitted; emphasis added.)

The Court went on to adopt the holding of the California Supreme Court in *Anderson v. Owens-Corning Fiberglass Corp.*, 53 Cal.3rd 987 (1991) that:

The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution.

Id. (Emphasis in original.)

Mr. Gorran asserts a valid claim, even if the Atkins diet was dangerous to as few as one-third of all Atkins dieters. In *Advance Chemical Company v. Harter*, 478 So.2d 444 (Fla. 1st DCA 1985), the Court considered a products liability claim by a woman with hypersensitivity to the product at issue. The Court held:

In essence [the manufacturer] urges that the standard to be applied is or should be that before [plaintiff] may recover for negligent failure to warn, she must show that [the product] is dangerous to the average person. We conclude that is too great a burden upon one seeking to recover from a manufacturer for negligent failure to warn. The distributor of a commodity inherently burdened with potential danger has the duty to take reasonable precautions to avoid reasonably foreseeable injuries to those who might use the commodity. [Citation omitted.] One who claims a negligent failure to warn of an inherent danger has the burden to prove that the manufacturer or seller knew, or by the exercise of reasonable care should have known, of the potential danger in the use of the product, and, in the reasonable course of business, should have been able to foresee the possible uses of the product as well as the potential damage or injury that might result from such use.

* * *

Stated another way, if the particular injury is reasonably foreseeable, however rare, the manufacturer or seller has the duty to warn.

Id. at 447-448.

Here, of course, the heart of Atkins' sales pitch was that if its customers read their books and swallowed their "vita-nutritional supplements" and food products, they could eat and would eat as much high-fat, high-cholesterol food as they wanted, without risk of injury or death. They knew or should have known that a substantial minority of their customers were at increased risk for serious injury or death, and they failed to give adequate warnings of that fact. *See, Brown v. Glade and Grove Supply, Inc.*, 647 So.2d 1033 (Fla. 4th DCA 1995):

The mere existence of warnings in an instruction manual is not dispositive of the adequacy of warnings for several reasons. A warning may be defective not only by virtue of inadequate warning, but as a result of its location and the manner in which the warning is conveyed. For example, even if the language contained in the instruction manual adequately apprised a user of the dangers, a jury could find the warning defective because it was not permanently affixed to the tractor.

* * *

A warning should contain some wording directed to the significant dangers arising from failure to use the product in the prescribed manner, such as the risk of serious injury or death.

Id. at 1035-1036. (Citation omitted.)

Here, Atkins concedes that its diet causes about one-third of all consumers to have an increased risk of serious injury or death, which risk can only be detected by constant blood testing by a doctor. Motion, p. 11. Yet Atkins concedes that no such warning is contained in any of their books, on any of their Web pages, or on any of the hundreds of millions of dollars worth of products sold every year to unsuspecting consumers. The Complaint states a claim for products liability.

D. There Is No First Amendment Protection for Atkins' False and Misleading Commercial Speech

Atkins attempts to cloak itself with First Amendment protection, citing numerous political speech, press and artistic expression cases. Motion, pp. 24-28. None of the cases cited involved the sale of products, or the advertising of products, and none of them address the lesser protection afforded commercial speech, particularly speech that is false, deceptive, or misleading, such as that involved here.

Atkins' speech is at most "speech proposing a commercial transaction," and as such, is commercial speech. *Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64 (1983). Here Plaintiff alleges:

5. The purpose, intent and plan of the Atkins Business was to profit through the sale of various diet-related products to Florida customers and others worldwide. The diet is called The Atkins Nutritional Approach™ (the "Atkins diet"), trademarked by Atkins, Inc.

6. The diet was conceived by Dr. Atkins in the 1970s and was originally marketed in the form of various products including books, nutritional supplements, herbs and minerals. The diet was also used to promote Dr. Atkins' medical clinic in New York City.

7. By 1998, the Atkins Business had become far more sophisticated. By that point, Dr. Atkins and Atkins, Inc., through their Web site (www.atkins.com), were running a coordinated advertising and marketing campaign in Florida and nationwide to convince the public to follow the Atkins diet and buy a series of products, including Atkins' books and other products sold by Atkins, Inc.

As commercial speech, Atkins' promotion of its products is entitled to lesser protection than other forms of expression. *Fox*, 492 U.S. at 477. Commercial speech may be regulated in ways that other expression may not. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-73 (1976). Specifically, the government may regulate commercial speech to ensure that it is not false, deceptive or misleading. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 431-32 (1993).

Commercial speech that is false or misleading is afforded no First Amendment protection at all. *Discovery Network*, at 433-34 (Blackmun, J., concurring); *accord Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, 447 U.S. 557, 562-63 (1980). This is because a listener "has little interest in receiving false, misleading, or deceptive commercial information." *Discovery Network*, 507 U.S. at 432 (Blackmun, J., concurring). As the Florida Supreme Court held in *State v. Bradford*, 787 So.2d 811 (Fla. 2001):

The First Amendment's concern for commercial speech is based on the informational function of advertising...Consequently, there can be no constitutional objection to the suppression of commercial speech that does not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than inform it . . .

Id. at 820 (emphasis added, citations omitted.)

In *South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc.*, 676 F.Supp. 346 (D.D.C. 1987), the South Carolina Port Authority ("SCPA") sued Booz-Allen, a large management-consulting firm, for negligently preparing a report comparing the Ports of Savannah, Georgia and Charleston. The SCPA alleged that the report contained misleading, false, and damaging information. Booz-Allen moved for summary judgment, asserted the First Amendment as a defense. The Court began its ruling noting that: "the 'speech' that South Carolina seeks 'to regulate' is erroneous 'objective factual data' resulting from negligent preparation." *Id.* at 348. The Court continued as follows:

When the speech at issue revolves around fact, not opinion, the first amendment concerns, though still existent, are diminished because "the greater objectivity and hardness of commercial speech makes it less necessary to tolerate inaccurate statements for fear of silencing the speaker. *Virginia Pharmacy*, 425 U.S. at 771 n. 24, 96 S.Ct. at 1830 n. 24. [Footnote omitted.] As Justice Stewart explained in his concurring opinion in *Virginia Pharmacy*, "[i]n contrast to the press, which must

often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or services he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them.” *Id.* at 777, 96 S.Ct. at 1833.

* * *

The first amendment concerns here are not only diminished because of the type of speech at issue, but also because of the significant differences in the burdens of proof and presumptions operative in negligence compared to defamation cases. In a defamation suit, damages and punitives are presumed. [Citations omitted.] In a negligence case, there is no such presumption . . .

* * *

There is also little concern that “regulation” by way of a negligence cause of action will chill such expression or diminish the free flow of commercial data.

Id. at 350. The Court cited with approval the Supreme Court’s language in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985):

[T]he speech here [credit report] is hardy and unlikely to be deterred by incidental state regulation. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. . . .

It then concluded there was no constitutional obstacle to the SCPA’s negligence suit and noted that summary judgment was not available, because:

An essential factor in determining whether defendant’s speech is protected by the First Amendment is whether the statements made were in fact false. That issue cannot be resolved at this juncture, but remains a genuine issue of material fact for resolution at trial.

Id. at 350.

Further, the First Amendment does not bar Mr. Gorran’s product liability claim. Atkins’ reliance on *Cardozo v. True*, 342 So.2d 1053 (Fla. 2nd DCA 1977) is unavailing. First, the *Cardozo* ruling did not consider claims against an author, or even against a

publisher. Rather, the claim was against a bookseller. Second, the case was premised solely on a theory of breach of warranty. No products liability claim was even presented. Third, the Court specifically limited its holding stating “our [holding] does not bear on the plaintiffs’ action against the [author defendant].” *Id.* at 1055. Finally, the Court further limited its ruling with respect to the bookseller stating that “we do not pass upon the question of whether [the bookseller] could be held liable if it actually knew the book it sold contained recipes with poisonous ingredients.” Thus, the *Cardozo* decision offers no guidance in this matter. Since Mr. Gorran has adequately pled a products liability cause of action, this portion of the Complaint stands.

Atkins also argues that publishers and authors cannot be held liable for harm caused by their books, citing numerous cases involving publishers. Motion, pp. 27-29. Atkins is not a publisher; nor is it being sued solely in its capacity as an author. Rather, Atkins is being sued for the false, deceptive and misleading statements contained in its book and on its web site, which are used to market and sell its products. Thus, the publisher cases are inapplicable.

Even were Atkins sued solely as an author, unconnected to any of its products, there is virtually no case law on the liability of authors for harm caused by their books, and there is none in Florida. Virtually all of the case law cited by Atkins involves publisher liability, which is different from author liability. As set forth in *Jones v. J.B. Lippincott Company*, 694 F.Supp. 1216 (D. Md. 1988):

Author liability for errors in the contents of books, designs, or drawings is not firmly defined and will depend on the nature of the publication, on the intended audience, on causation in fact and on the foreseeability of damages. Publisher liability, on the other hand, has more clearly defined principles and is therefore more easily determined.

Id. (Citation omitted.) As noted above, publisher liability is not at issue here, as Mr. Gorran has not sued any publisher.

This case simply does not present an author-liability claim, though Mr. Gorran does seek to hold Atkins responsible for the misstatements in its book, and Atkins, Inc., for the misstatements on its Web site. The book and Web site are simply the sales pitch or, put more kindly, the instruction manual, for the purchase of the Atkins' products which are to be consumed with, and to complete the allegedly safe, high-fat, high-meat Atkins diet. Thus, the book and the Web site here are simply the marketing campaign to get people on the Atkins diet, and purchasing Atkins' products, and the speech is at most commercial.

This also distinguishes this case from the one out-of-state case cited by Atkins that involved a suit against an author, *Bailey v. Huggins Diagnostic & Rehabilitation Center, Inc.*, 952 P.2d 768 (Co. Ct. App. Div. I 1998). There, the claim against the author arose from nothing more than a book that constituted "participation in an on-going debate." *Id.* at 769. That is far different from Atkins marketing and selling hundreds of millions of dollars in products each year, and putting untold numbers of lives at risk by selling those products using false and misleading statements, advertising and promotional material.

Since Atkins' speech at issue is commercial and, for purposes of this Motion, it is conceded to be misleading, it is not protected, and the First Amendment is no bar to any of the claims asserted in the Complaint.

CONCLUSION

WHEREFORE, the Atkins' Motion should be denied in its entirety. Atkins' suggestion in its Section 57.105 Motion that Plaintiff's Complaint is without basis in fact or law should be rejected as well.

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Respectfully submitted,

James K. Green
JAMES K. GREEN, P.A.
Suite 1630, Esperante'
222 Lakeview Avenue
West Palm Beach, FL 33401
Florida Bar No. 229466
(561) 659-2029
(561) 655-1357 (fax)

Daniel Kinburn
PHYSICIANS COMMITTEE FOR
RESPONSIBLE MEDICINE
5100 Wisconsin Avenue, N.W.
Washington, D.C. 20016
(Applying for admission *pro hac vice*)
(202) 686-2210 ext. 308
(202) 686-2216 (fax)

ATTORNEYS FOR PLAINTIFF