UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 08-21449-CIV-LENARD/GARBER

ALVI ARMANI MEDICAL, INC., a
California corporation, and
DR. ANTONIO ALVI ARMANI,

Plaintiffs

v.

PATRICK HENNESSEY, and
MEDIA VISIONS, INC.
Defendants.
_____ /

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs, Alvi Armani Medical, Inc. (the "Company") and Dr. Antonio Alvi Armani ("Dr. Armani") (collectively, "Plaintiffs"), pursuant to S.D. Fla. L.R. 7.1(C), hereby respond in opposition to Defendants Patrick Hennessey ("Hennessey") and Media Visions, Inc.'s ("Media Visions") (collectively, "Defendants"), Renewed Motion to Dismiss Complaint [D.E. 20] and Memorandum of Law in Support of Their Renewed Motion to Dismiss Complaint [D.E. 21] (collectively, "Motion to Dismiss"), and in support thereof state as follows:

INTRODUCTION

Plaintiffs filed a complaint on May 19, 2008 based upon claims of deceptive and unfair trade practices and for trade libel against Hennessey and Media Visions (the "Complaint"). The Complaint alleges that Defendants have used the "Hair Restoration Network" (the "Website"), as a vehicle to deceive and mislead the public with respect to Dr. Armani and the Company and that that scheme included the use of false statements and information. The wrongful publication of

these false, unfair, and deceptive statements concerning Dr. Alvi Armani individually, as well as the business practices of the Company, are aimed at the consumer public generally and do not only affect Plaintiffs.

On July 14, 2008, Defendants filed their Motion to Dismiss, asserting that Plaintiffs' Complaint is legally insufficient. For the reasons explored below, the Motion to Dismiss must be denied.[1]

First, Florida's single action rule does not prohibit Plaintiffs' assertion of both their defamation claim and the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") claim because Plaintiffs' FDUTPA claim is supported by a separate and independent basis in fact. Second, Plaintiffs are not required to give prior notice under Section 770.01, Florida Statutes, before bringing their defamation claim because Defendants are not "media defendants" as defined by the statute and interpreting case law. Third, Plaintiffs have properly pled their defamation claim under the Federal Rules of Civil Procedure ("FRCP"). Fourth, Defendants are not immune from suit under the Communications Decency Act ("CDA") because the CDA is not applicable to this case. Fifth, Plaintiffs have sufficiently pled their FDUPTA claim. Finally, the injunctive relief sought does not constitute an impermissible prior restraint on speech. Consequently, the Motion to Dismiss should be denied.

I. Statement of Facts

Dr. Armani is a world-renowned, award-winning physician who practices the highest quality cutting edge techniques and procedures for natural hair restoration and hair transplants. Dr. Armani and the Company offer the latest scientific and medical advancements in hair replacement technology through dedicated research in the hair loss and hair restoration fields. (Compl. ¶¶9, 14.)

[1] Plaintiffs have voluntarily withdrawn Counts III and IV of the Complaint.

Defendant Hennessey is the principal owner of Media Visions and controls its operations. (Compl. ¶20.) Media Visions is the owner, host, and publisher of the Website which hosts and directs consumers and the public generally to its "Hair Transplant Forum" (the "Forum") where purportedly bona fide hair transplant patients are permitted to post and share information about their surgery results and doctors. (Compl. ¶26.) Additionally, Defendants receive a monthly fee from other hair transplant doctors to place them on a "recommended list" on the Website. (Compl. ¶34.)

The information contained on the Website and posted on the Forum is allegedly generated from a "patient driven community driven by patient members, not physicians and consultants." (Compl. ¶26.) Since the Website and its Forum are specifically designed for the purpose or sharing information, the forum "rules" require that any "poster" (i.e., a person who posts messages to the Forum chat board) who works for, or is affiliated with, any hair transplant doctor to disclose that affiliation to protect potential patients as well as to maintain the integrity of the Forum. (Compl. ¶27.) If such information is not disclosed, the rules (which Defendants' purport to enforce) require that the poster not be permitted to use the Forum. (Compl. ¶27.)

As a result, the public has a reasonable expectation that the posters on the forum are either hair loss sufferers or people associated with hair transplant doctors who have identified themselves as such, and that such information can be relied upon. (Compl. ¶28.) Defendants however, have engaged in false, deceptive, and unfair business practices by knowingly posting disparaging and false statements about Dr. Armani and the Company, and by creating the impression that the posters are bona fide disgruntled patients of Plaintiffs. (Compl. ¶30.) In fact the posters are either fictitious persons (and are the alter egos of Defendants) or are undisclosed affiliates of doctors who are on the Website's "recommended" list of "pre-screened" doctors.

(Compl. ¶30.) In furtherance of this wrongful conduct, Hennessey and Falceros themselves have publicly and intentionally disparaged Dr. Armani and the Company's professional ethics and services, specifically to harm the business reputation and goodwill of Plaintiffs, and to benefit themselves (and their "recommended doctors") financially. (Compl. ¶¶31, 32.) Consequently, Plaintiffs seek damages from Defendants for deceiving and misleading the general public with respect to Plaintiffs' skill, qualifications, and techniques as well as the "independence" of the Website and for harm done to Dr. Armani's and the Company's business. (Compl. ¶¶1, 26-32.)

II. The Single Action Rule Does Not Prohibit Plaintiffs from Simultaneously Maintaining Claims for Defamation and a FDUTPA Violation.

In their Motion to Dismiss, Defendants argue that under Florida's single action rule, "Plaintiffs' claim[] . . . for violation of the Florida Deceptive and Unfair Trade Practices Act . . . must . . . be considered as a defamation claim" because it "arise[s] from the same allegedly operative facts as their defamation claims." (Mot. to Dismiss at 2.) Defendants' argument fails because it ignores the fact that Plaintiffs have alleged an independent basis for their FDUTPA claim. In Florida, "if the *sole* basis of a complaint" is a defamatory statement, then no separate cause of action apart from defamation can exist. *Fridovich v. Fridovich*, 598 So. 2d 65, 69 (Fla. 1992) (citation omitted and emphasis added). In other words, the single action rule prevents a plaintiff from transforming a defamation claim by simply recasting the alleged defamation alone as another tort. *See id.* at 70. Where a plaintiff has "also pled . . . other circumstances and facts necessary in support of" its separate tort, however, the single action rule does not operate to preclude that separate tort. *Primerica Fin. Serv. v. Mitchell*, 48 F. Supp. 2d 1363, 1369 (S.D. Fla. 1998). This exception prohibits application of the single action rule even where Plaintiff "rel[ied] in large part upon allegedly untruthful statements in support of" its separate and independent tort. *Id.*

Here, the allegations in the Complaint supporting Dr. Armani's and the Company's FDUTPA claim go beyond mere defamation. While defamatory statements on the Website partially support Count I, Defendants ignore the "other circumstances and facts" of a deceptive and misleading nature which Plaintiffs have alleged in support of their FDUTPA claim. *See id.* These "other circumstances and facts" include, for example: (1) Plaintiffs' allegation that Defendants represented that the Website "is generated from a 'patient driven community driven by patient members, not physicians and consultants" when "in fact the posters are either fictitious persons (and are the alter egos of Defendants) or are undisclosed affiliates of doctors who are on the Website's 'recommended' list of 'pre-screened' doctors," (Compl. ¶¶26, 30); (2) Plaintiffs' allegation that Defendants failed to request Website poster "JimmyJam" to provide verifying information to establish that "JimmyJam" was Plaintiffs' bona fide patient despite Defendants' representation that the Website is "run for 'patients' by 'patients,'" (Compl. ¶¶24, 50, 51, 53); and (3) Plaintiffs' allegation that Defendants "have failed and refused to disclose to the public their own sponsor relationships with Dr. Armani's competitors, damaging Plaintiffs and misleading the public," even though "[t]he Website is financially sponsored by several of Dr. Armani's competitors, who are on the Website's list of 'accepted surgeons,'" (Compl. ¶¶63, 64). These are just a few examples of Defendants' deceptive and misleading conduct – separate and apart from defamatory statements – which Plaintiffs have alleged in the Complaint. Thus, having alleged "other facts and circumstances necessary in support of" its FDUTPA count, the single action rule does not bar Count I.

III. Section 770.01, Florida Statutes Is Not Applicable to Non Media Defendants

Defendants argue that Complaint should be dismissed because Plaintiffs failed to give notice required under section 770.01, Florida Statutes ("Section 770"). The Statute states,

"[b]efore any civil action is brought for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander, the plaintiff shall, at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory." § 770.01, Fla. Stat. (2008). Defendants state that "[u]nder Florida law, statements made on the Internet are considered made on an 'other media' for the purposes of [Section 770]." (Mot. to Dismiss at 5.) However, as explored in great detail by the Florida Court of Appeals in *Davies v. Bossert*, the legislative history and text of the statute indicate that the phrase "other media" was intended to include solely television and radio broadcasting stations. *Davies v. Bossert*, 449 So. 2d 418, 420 (Fla. 3d DCA 1984). The Court of Appeals stated:

> Since no other section of Chapter 770 uses the language "other medium" as found in Section 770.01, we can infer reasonably that the legislature intended that term to include television and radio broadcasting stations. There is no logical reason to suppose that Section 770.01 contemplates any form of medium not covered by other sections of the chapter.

Id. at 420.

Taking note that, in 1950, the Florida Supreme Court's *Ross v. Gore* decision applied Section 770 exclusively to newspapers and periodicals, as distinguished from private persons, *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950), the *Davies* court held the legislature's subsequent enactment of amendments to the statute without altering the "other media" provision amounted to implied approval of the *Ross v. Gore* interpretation of "other media." *Davies*, 449 So. 2d at 420. The Court also noted that all of the Florida state court cases interpreting Section 770 involved newspapers, periodicals or broadcasting companies (either radio or television). *Id.*; *see also Edward L. Nezelek, Inc. v. Sunbeam Television Corp.*, 413 So. 2d 51 (Fla. 3d DCA 1982); *Hulander v. Sunbeam Television Corp.*, 364 So. 2d 845 (Fla. 3d DCA 1978).

Upholding Defendants' argument that Section 770 should apply to an Internet discussion forum would require the Court to significantly and materially broaden the application of Section 770 beyond media defendants, as they have been defined by the Florida Legislature and interpreted by the Florida Supreme and appellate courts, to include defendants that run Internet discussion forums. *Cf. Zelinka v. Americare Healthscan, Inc.*, 763 So. 2d 1173, 1174-1175 (Fla. 4th DCA 2000) (declining to expand interpretation of Section 770 to find that Internet chat rooms constitute an "other medium" within the meaning of the statute). The cases cited by Defendants in support of this request are not on point.[2] For example, the court in *Holt v. Tampa Bay Television Inc.*, No. 03-11189, 34 Med. L. Rptr. 1540 (Fla. 13th Cir. Ct. Mar. 17, 2005), as the name suggests, addressed the publication of allegedly defamatory television stories on the television station's website.[3] *Id.* at 1541-42. Likewise, *Canonico v. Callaway*, No. 05-09049, 35 Med. L. Rptr. 1549 (Fla. 13th Cir. Ct. Feb. 22, 2007), applied Section 770's notice requirement to television stations and one television reporter who had defamed the plaintiffs via television broadcasts and an online television website. *Id.* at 1551-52. Clearly, the publication of television news stories on television broadcasts as well as through television Internet websites, would fall squarely within the traditional definition of "other media." However, this unremarkable proposition has no bearing on the application of the term to Internet discussion forums that have nothing to do with news.

In sharp contrast to this, the Florida Court of Appeals in *Davies v. Bossert* cited with approval the fact that multiple jurisdictions nationwide "have applied the same interpretation as the Florida Supreme Court to similar state retraction statutes by limiting the application of the

[2] Indeed, the only case cited by Defendants in which Section 770 notice was applied to an Internet bulletin board was a Georgia state case from 2002, which appears in a footnote on page 5. (Mot. to Dismiss at 5.)
[3] The case is also irrelevant as it considered a motion for summary judgment, the standard for which is irrelevant on motion to dismiss. *Holt*, 34 Med. L. Rptr. at 1541.

statutes to news media defendants [as defined as newspapers, periodicals or broadcasting companies (either radio or television)]." *Davies*, 449 So. 2d at 421 (citing *Alioto v. Cowles Commc'ns, Inc.*, 519 F.2d 777 (9th Cir. 1975) (statute's requirement that a retraction be demanded does not apply to magazines); *Fifield v. Am. Automobile Ass'n*, 262 F. Supp. 253 (D. Mont. 1967) (retraction statute strictly interpreted to apply only to media specifically enumerated in statute, and not to books; news dissemination media); *Comer v. Louisville & N.R. Co.*, 44 So. 676 (Ala. 1907) (not applicable to advertisers who prepare an article and pay for its publication are excluded); *Field Research Corp. v. Superior Court*, 453 P.2d 747 (Cal. 1969) (statute not applicable to non-media defendants); *Werner v. Southern California Associated Newspapers*, 216 P.2d 825 (Cal. 1950) (same); *Wheeler v. Green*, 593 P.2d 777 (Or. 1979) (retraction statute not applicable to defendants who wrote defamatory letters published in a newsletter)).

Defendants' only attempt at justifying the application of Section 770 to Internet chat forums, despite the juridical and legislative history to the contrary, consists of stating that because Defendants' Website provides information, it should be considered to be in the business of "disseminating news through the media." (Mot. to Dismiss at 6.) However, the Internet is obviously replete with web pages disseminating information which would never be characterized as news sources. Indeed, "news" is a particular form of information, relating to recent events or happenings, especially as those reported by newspapers, periodicals, radio, or television. Thus, not all information is news. Though the Forum provides an important service to the hair loss community by providing a place for hair loss suffers to support one another and share information about hair loss treatments, it is not a news source. Since, "[t]he purpose of the statute is to protect the public's interest in the free dissemination of news," *Mancini v. Personalized Air Conditioning & Heating*, 702 So. 2d 1376, 1378 (Fla. 4th DCA 1997), it should

be strictly construed to apply to media defendants as defined by the statute and jurisprudence. Therefore, Plaintiffs were not required to give Section 770 notice on Defendants and this argument in the Motion to Dismiss should be denied.

IV. Plaintiffs Have Adequately Pled a Defamation Claim.

Defendants argue that Armani has pled with insufficient specificity and has thus failed to state a claim of defamation. (Mot. to Dismiss at 7.) However, as made abundantly clear by the case cited by Defendants, "Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *see also Hanna v. Plumer*, 380 U.S. 460, 465-74 (1965) (stating that FRCP 8(a)(2) only requires the complaint to contain "a short and plaint statement of the claim showing that the pleader is entitled to relief."). As announced by the *Caster v. Hennessey* Court in reversing dismissal of a defamation case for failure to sufficiently plead, "[w]hile Florida requires, perhaps wisely, specific allegations of publication in the complaint . . . under Hanna a federal court need not adhere to a state's strict pleading requirements but should instead follow Fed.R.Civ.P. 8(a)." *Caster v. Hennessey*, 781 F.2d 1569, 1570 (11th Cir. 1986).

Thus, the pleading rules do not require the complaint contain specific facts to support the general allegations made. *Conley*, 355 U.S. at 47. However, Plaintiffs have provided specific facts in support their allegations. For example, Paragraph 61 of the Complaint alleges, "Hennessey, the publisher of the Website and the Forum, stated in various posts by the public that Dr. Armani is unethical and made other statements, purportedly of "fact," that Plaintiffs prioritize revenues over patient care." (Compl. ¶61.) Paragraph 62 states, "Falceros, the

Forum's editor, published statements on the forum that Dr. Armani's hair transplant work will cause patients' donor areas to 'look like swiss cheese,' and has on repeated occasions stated on the Forum that Dr. Armani has questionable ethics." (Compl. ¶62.) Paragraph 68 states that Falceros told a patient who had already had a consultation with Dr. Armani that, "Dr. Armani's 'ethics are question [sic] in general.'" (Compl. ¶ 68.) Thus, Plaintiffs have amply satisfied the criteria necessary to state a claim of defamation, have clearly satisfied the FRCP 8(a) requirements and have put Defendants on "fair notice" of Plaintiffs' defamation claims and the "grounds upon which [they] rests." *Conley*, 355 U.S. at 47.[4] This argument in the Motion to Dismiss should therefore be denied.

V. The Communications Decency Act Does Not Bar Plaintiffs' Claims.

Defendants argue that the Communications Decency Act ("CDA") provides immunity "from claims premised upon content provided by third parties" and "to the extent Plaintiffs purport to premise any of their claims on statements posted by users of [the Website], those claims should be dismissed." (Mot. to Dismiss at 10.) Under the CDA, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (2008). An "interactive content service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service." § 230(f)(2). According to Defendants, Media Visions is an "interactive computer service" entitled to immunity under the CDA (Mot. to Dismiss at 9.) Under the CDA, however, a defendant-"interactive computer service" is not "immunized . . . from allegations that it created tortious

[4] Defendants rely on paragraph 37 of the Complaint as proof of Plaintiffs' failure to state a claim. "Plaintiffs purposefully do not reprint such posts here to prevent further damage, but will make same available to the Court upon request." (Compl. ¶37.) However, this paragraph is only intended to limit the damage of unnecessary publication of the defamatory remarks and in no way affects the sufficiency of the claims pled therein. As indicated, Plaintiffs will be happy to make the additional remarks available upon request from the Court.

content." *Anthony v. Yahoo!*, 421 F. Supp. 2d 1257, 1262-63 (N.D. Cal. 2006) (citations omitted). Rather, "[t]he CDA only immunizes 'information provided by *another* information content provider.'" *Id.* (citing § 230(c)(1)). Consequently, tortious conduct by Media Visions, including its employees Hennessey and Bill Falceros, is not entitled to CDA immunity.

For similar reasons, Defendants are not entitled to immunity for tortious conduct by "the website poster identified as 'JimmyJam' and the unnamed, unspecified posters discussed in Paragraph 59 of the Complaint, which Defendants argue are "information content providers." (Mot. to Dismiss at 9-10.) Under the CDA, however, an "information content provider" is *anyone* who was wholly or partially responsible for the creation or development of information. § 230(f)(3) (emphasis added). Thus, where third parties were responsible for creating their own profiles on a website, but the plaintiff had alleged that it was the way the defendant-website presented the profiles that constituted the fraud about which the plaintiff was complaining, a court found that the CDA did not provide immunity to the web site. *See Anthony*, 421 F. Supp. 2d at 1263. Similarly, where a website asked third parties specific questions tailored to the website's "community" as part of the process of creating the users' profiles on the web site, the court found the website to be "an 'entity that is responsible, . . . in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1066-67 (C.D. Cal. 2002).

In the instant case, Plaintiffs have alleged that it is the Defendants' "false, deceptive, and unfair business practices," as well as defamatory statements on the Website, which give rise to Defendants' tortious conduct. (Compl. ¶30.) In particular, Plaintiffs have alleged that the Website deceptively purported to permit only "bona fide hair transplant patients . . . to post and share information about their surgery, results, and doctors," which information Defendants

promised to be reliable "because it is generated from a 'patient driven community driven by patient members, not physicians and consultants.'" (Compl. ¶26.) Further, Plaintiffs have also alleged that the posters in reality are "fictitious persons (and are the alter egos of Defendants) or are undisclosed affiliates who are on the Website's 'recommended' list of 'pre-screened doctors," (Compl. ¶30), and that Defendants have "attempted to lend weight to such posts, by publicly stating that Dr. Armani is unethical and making other statements, purportedly of 'fact,' that Plaintiffs prioritize revenues over patient care," (Compl. ¶61). As such, Defendants actively influence incoming third-party information and tailor it to the Website's community, and they request, respond to, and encourage certain content and viewpoints, including defamatory information injurious to Plaintiffs. Thus, Media Visions "is an 'entity that is responsible, . . . in part, for the creation or development of information" provided on the Website, regardless of the fact that some of that information may have originated with third parties. *See Carafano*, 207 F. Supp. 2d at 1066-67. Consequently, Media Visions is not entitled to CDA immunity for third-party statements posted on the Website.

Moreover, Defendants themselves have issued false and misleading statements regarding Plaintiffs. For example, as previously discussed, the Complaint cites several specific statements posted on the Website made by Hennessey and his agent, Falceros. (*See infra* § IV; Compl. ¶¶61, 62, 68.) Finally, under the CDA's plain language, Defendant Hennessey is clearly not an "interactive content service" entitled to immunity from defamatory statements posted on the Website because Hennessey, as a natural person, is not "any information service, system, or access software provider." Similarly, the fact that Hennessey may participate in the administration of the Website does not grant him immunity under the CDA. *Cisneros v. Sanchez*, 403 F. Supp. 2d 588 (S.D. Tex. 2005) ("Holding otherwise would have the effect of

allowing individuals to escape liability for making defamatory statements for which they would otherwise be held liable simply by publishing the defamatory statements on a web-site they administer. This Court cannot imagine that Congress intended to create a different standard for the authors of defamatory statements who double as the administrators of web-sites."). Thus, to the extent Defendants contend that claims against Hennessey should be dismissed on the basis of CDA immunity, that argument fails because Hennessey is not entitled to immunity under the CDA.

VI. FDUTPA Applies to Defendants and the Deceptive and Misleading Conduct Alleged in the Complaint.

In challenging Plaintiffs' FDUPTA claim, Defendants first contend that Count I fails because Defendants' tortious conduct purportedly did not occur in the course "trade or commerce" under FDUTPA. (Mot. to Dismiss at 11.) Specifically, Defendants claim that "[t]he public Internet forum described in Plaintiffs' Complaint is not advertising a service nor does it qualify in any other way as being part of 'trade or commerce.'" (Mot. to Dismiss at 11.) Defendants' argument misunderstands "trade or commerce" under Florida law.

Since the purpose of FDUTPA is "[t]o 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," it permits "any action [for damages] brought by a person who has suffered a loss as a result of a violation of" FDUTPA. §§ 501.202(2), 501.211(2), Fla. Stat. (2008). FDUTPA's definition of "trade or commerce," which is to be construed liberally, *see* § 501.202, includes "the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, of any other article, commodity, or thing of value, wherever situated," § 501.203(8).

As Plaintiffs alleged in the Complaint, Defendants established and currently administer the Website, which offers hair restoration advice to the consuming public and provides an online forum where individuals can discuss hair restoration issues. (Compl. ¶¶20-21, 23, 25-29.) Defendants support the Website by collecting a monthly fee from physicians, who pay Defendants to be included on the Website's "recommended list." (Compl. ¶34.) As such, Defendants clearly engage in "trade or commerce" to the extent that the Website advertises, solicits, provides, offers, or distributes services to physicians who pay for placement on this list, as well as the consuming public who relies on the information posted on the Website in making decisions regarding hair restoration.

Though Plaintiffs alleged in the Complaint that Defendants provide physicians certain services in exchange for a fee, Defendants nevertheless argue that they do not engage in "trade or commerce" because their "allegedly deceptive practice is the posting of statements on the forum, not any alleged fee to be on the recommended list."[5] (Mot. to Dismiss at 12.) In other words, Defendants appear to argue that because their alleged misconduct – e.g., knowingly posting disparaging and false statements about Dr. Armani and the Company through the use of Internet aliases, and allowing competitors of Dr. Armani, who advertise on the Website, to do the same – does not pertain to the "trade or commerce" aspect of the Website, Plaintiffs cannot properly maintain their FDUTPA claim. This interpretation is unsupported by well-established Florida precedent, which provides that to maintain a claim under FDUTPA, a connection between the trade or commerce and the alleged unfair act is not required. *Williams v. Edelman*, 408 F. Supp. 2d 1261, 1274 (S.D. Fla. 2005) ("'the standard is the conduct of the Defendant, coupled with the

[5] Defendants' contention that the premise of Plaintiffs' "FDUTPA claim is the allegedly false and defamatory statements on the forum," (Mot. to Dismiss at 12), is patently incorrect. As discussed with respect to the inapplicability of the single action rule in this case, Plaintiffs have alleged numerous instances of Defendants' deceptive and misleading conduct that is separate and apart from the defamatory statements Plaintiffs also allege. (*See, e.g.*, Compl. ¶¶26, 30, 50, 51, 53, 63, 64.)

fact that the Plaintiff is a member of the consuming public injured by the conduct of the Defendant." (citations omitted)); *James D. Hinson Electric Contracting Co., Inc. v. Bellsouth Telecommunications, Inc.*, No. 3:07-cv-598-J-32MCR, 2008 U.S. Dist. LEXIS 9464, at *10 (M.D. Fla. Feb. 8, 2008) ("reading [FDUTPA] to require a . . . plaintiff to purchase something of value from the defendant would stand contrary to the express holdings of other courts."); *see also Gritzke v. M.R.A. Holding, LLC*, No. 4:01cv495-RH, 2002 U.S. Dist. LEXIS 28085, at *3-4 (N.D. Fla. 2002); *Niles Audio Corp. v. OEM Systems Co.*, 174 F. Supp. 2d 1315, 1319-20 (S.D. Fla. 2001).

Here, Plaintiffs' allegations demonstrate that Plaintiffs were members of the consuming public – Plaintiffs have even alleged that Defendant Hennessey invited Dr. Armani to be on the "recommended list" but then changed his mind, (Compl. ¶¶34, 35) – who have been injured by Defendants' deceptive and misleading conduct in the course of any "trade or commerce." *See Williams*, 408 F. Supp. 2d at 1274 (rejecting an interpretation of FDUTPA that would "prohibit a plaintiff who has been injured by a defendant acting in 'trade or commerce' from bringing a claim against the defendant because the parties have not directly transacted with each other"). Thus, it is immaterial that Plaintiffs' allegations do not pertain to the "trade or commerce" aspects of the Website, and the fact remains that Plaintiffs have properly alleged that Plaintiffs were injured by Defendants' "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." § 501.204(1). Further, at the very least, the issue whether the Website itself constitutes "trade or commerce" – as Defendants contend it does not (*see* Mot. to Dismiss at 11) – requires a fact determination, which is inappropriate on motion to dismiss. *Cf. James D. Hinson Electrical Contracting Co.*, 2008 U.S. Dist. LEXIS 9464, at *10 ("While the Court may revisit the 'trade or commerce' issue

after some factual and legal development, the Court is not prepared to dismiss Hinson's FDUTPA claim on this basis at this early date.").

Defendants' second argument that FDUTPA does not apply to them is that FDUTPA would exempt "statements of third parties that are 'published' by Media Visions" from its grasp. (Mot. to Dismiss at 12.) Under section 501.212, FDUTPA does not reach conduct by a "publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial material, *insofar as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated this part.*" § 501.212(2) (emphasis added). As amply demonstrated in the Complaint and elsewhere in this Response, Plaintiffs' FDUTPA claim does not rely exclusively on third-party statements, but rather Plaintiffs have alleged that Defendants' misleading and deceptive conduct forms much of the basis for Plaintiffs' FDUTPA claim. Additionally, Defendants argue that with respect to third-party statements published on the Website, "Media Visions did not have actual knowledge that any such statements violated FDUTPA." (Mot. to Dismiss at 12.) Whether Media Visions, Hennessey, or any third-parties who made statements posted on the Website had "actual knowledge" that the defamatory statements on the Website violated FDUTPA, however, is a fact question and consequently is an inappropriate basis on which to decide a motion to dismiss. *See Larsen v. Carnival Corp.*, No. 02-20218-CIV-GRAHAM, 2002 U.S. Dist. LEXIS 10553, at *14 (S.D. Fla. June 12, 2002). Thus, FDUTPA applies to Defendants and their deceptive and misleading conduct, and having alleged all of the elements required to state a claim under FDUTPA, Defendants' motion to dismiss Count I must be denied.

VII. Injunctive Relief Requested Does Not Constitute an Impermissible Prior Restraint.

Finally, Defendants' argument addressing the constitutionality of Plaintiffs' "request for

an injunction" is misplaced. Plaintiffs have not moved for temporary injunctive relief from this Court to date. As such, the matter has not been fully briefed. As would be made clear were it to be fully briefed, Plaintiffs are seeking relief from the disparaging and defamatory posts that have been placed by Defendants on the Website. Plaintiffs are not seeking a "prior restraint:" a ban by the Court stretching into the future and prohibiting Defendants' future speech, which would obviously raise 1st Amendment concerns. Indeed, the very reason why Plaintiffs have not yet moved for injunctive relief is because, following the institution of this action, Defendants took down from the Website the disparaging and false statements about Plaintiffs. Additionally, as would be further expanded upon in an application for injunctive relief, equitable injunctive relief is perfectly appropriate in cases involving FDUTPA claims. *Furmanite America, Inc. v. T.D. Williamson, Inc.*, 506 F. Supp. 2d 1134, 1146 (M.D. Fla. 2007) (finding the current version of the FDUPTA "demonstrates a clear legislative intent to allow a broader base of complainants who have been injured by violations of FDUTPA to seek damages, not just injunctive relief."); *True Title, Inc. v. Blanchard*, No. 6:06-cv-1871-Orl-19DAB, 2006 U.S. Dist. LEXIS 95069 (M.D. Fla. Feb. 5, 2006) (The Florida Supreme Court has emphasized that the remedies of the FDUTPA "are in addition" to other remedies available under state or local law.)

CONCLUSION

For all of the foregoing reasons, Defendants' motion to dismiss must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 16, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/ Jose M. Ferrer
Jose M. Ferrer

SERVICE LIST

ALVI ARMANI MEDICAL, INC., et al.
v.
PATRICK HENNESSEY, et al.
CASE NO. 08-21449-CIV-LENARD/GARBER
UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

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