

**IN THE COUNTY COURT FOR PALM
BEACH COUNTY, FLORIDA**

JODY GORRAN,)	
)	Case No. 502004-CC-006591-MB
Plaintiff,)	
)	
v.)	
)	
ATKINS NUTRITIONALS, INC. and PAUL)	
D. WOLFF, Solely in his Representative)	
Capacity as Co-Executor of the Estate of)	
Robert C. Atkins, M.D.,)	
)	
Defendants.)	

PLAINTIFF’S FIRST MOTION TO COMPEL

Plaintiff, Jody Gorran, through counsel and pursuant to Rule 1.380, Florida Rules of Civil Procedure, hereby moves this Court for an order compelling discovery, specifically, answers to certain interrogatories and production of certain documents as to which Defendants interposed objections. Plaintiff further seeks an Order requiring Defendants to produce all responsive documents and information seven days after the Court grants this motion. As grounds, Mr. Gorran states:

1. On or about November 8, 2004, Plaintiff propounded his first Request for Production of Documents and First Set of Interrogatories.
2. On or about January 18, 2005, Defendants served their answers and objections to Plaintiff’s discovery requests.

3. On January 27, 2005 and February 2, 2005 counsel for the parties conferred in an effort to resolve amicably as many of the discovery disputes as possible. Those conferences did result in a significant narrowing of the issues, however, the following issues remain for decision by the Court.
4. The following are the disputed document requests and interrogatories, objections, and Plaintiff's responses to Defendants' objections:

A. Document Request 9

All documents used or sent to actual or potential investors, lenders or licensing partners that discuss, refer or relate to the books written by Dr. Robert Atkins.

Defendants' objection:

Defendants object to this request on ground that it is an overbroad fishing expedition that is not limited in time or reasonably calculated to lead to the discovery of admissible evidence and appears to be intended to impose an unfair and oppressive burden on Defendant. Defendant further objects on the grounds that this request seeks confidential, proprietary business information and trade secrets.

Plaintiff's response:

This request seeks documents going directly to the issue of whether Atkins' speech is purely commercial, as alleged in the complaint, or whether it is entirely non-commercial, as Atkins claims in its various motions. We offered to withdraw this request and other discovery on this issue if Atkins will stipulate that it engaged in commercial speech. Atkins refused this offer, thus establishing that this is a material disputed fact.

We advised Atkins that Plaintiff is not seeking any financial information from Atkins, and all financial information in these documents (e.g. balance sheets, profit and loss statements, financial results) can be redacted. What remain are documents that go to the heart of this issue. These documents will show that Atkins explicitly used, and intended to use, Dr. Atkins' books as products in themselves, and as marketing or sales tools to increase sales of its other products.

This is evidenced by how Atkins described itself in a recent press release:

Atkins Nutritionals, Inc. (ANI) was founded by Dr. Robert C. Atkins in 1989 as Complementary Formulations and changed to ANI in 1998. Today, ANI is a multimillion-dollar enterprise, providing a broad range of convenience foods, supplements, baked goods, snacks and **information products** designed to serve the millions of Americans who have adopted the controlled carbohydrate lifestyle. ANI's mission is stated as follows: To help people enjoy healthier lives Atkins will be the pioneer and leader in providing **innovative nutritional and information products** . . .

February 7, 2005 Press Release, *see*

<http://biz.yahoo.com/prnews/050207/nym2271.html> (accessed February 8, 2005). [Emphasis supplied.]

It is hard to imagine any statement by Atkins that would more clearly show that it is a products company, and that its books and other "informational products" are merchandise, nothing more or less. Atkins will have been even more candid about the commercial nature of its enterprise in its sales pitches to investors, lenders or licensing partners (such as Subway and TGI Friday's). This information is relevant and in all likelihood admissible in evidence.

Objections such as this must be specific, for a defendant cannot simply intone the familiar "overly broad, burdensome, oppressive and irrelevant" litany as Atkins does here; rather, it has the burden to show how, despite the broad and liberal construction afforded to the discovery rules, each request is not relevant or is overly broad, burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden. *Momah v. Albert Einstein Medical Center*, 164 F.R.D. 412, 417 (E.D.Pa.1996) (holding that "mere recitation of the familiar litany that an interrogatory or a document production request is 'overly broad, burdensome, oppressive and irrelevant' will not suffice") (quoting *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir.1982)); *First City Developments of Florida, Inc. v. Hallmark of Hollywood Condominium*, 545 So.2d 502, 503 (Fla. 4th DCA 1989)(objector "must be able to show the volume of documents, or the number of man-hours required in their production, or some other quantitative factor" establishing burden).

B. Document Request 10

All documents used or sent to actual or potential investors, lenders or licensees (such as TGI Friday's and Subway) which discuss, refer or relate to the actual or potential financial condition in the past, present and future, of Atkins Nutritionals, Inc.

Defendant's objection:

Defendants object to this request on ground that it is an overbroad fishing expedition that is not limited in time or reasonably calculated to lead to the discovery of admissible evidence and appears to be intended to impose an unfair and oppressive burden on Defendant. Defendant further objects on the grounds that this request seeks Defendants' financial information which is confidential, proprietary business information and is irrelevant to the subject matter of this litigation.

Plaintiff's response:

See response to Document Request 9.

C. Document Request 11:

All documents that discuss, refer or relate to potential or actual dangers of the Atkins' Diet or The Atkins Nutritional Approach™, including without limitation heart disease, stroke, death or other disease.

Defendants' objection:

Defendants object to this request on ground that it is an overbroad fishing expedition that is not reasonably limited in time or calculated to lead to the discovery of admissible evidence and appears to be intended to impose an unfair and oppressive burden on Defendants.

Plaintiff's Response:

This request seeks document going to another critical disputed issue, whether the Atkins diet is or is not safe for all consumers. If Atkins is prepared to stipulate that the diet is in fact dangerous for up to 1/3 of all dieters, who will be at increased risk of heart attack, stroke, or premature death, discovery on this issue is not necessary. Since Atkins has refused to so stipulate, this is a material disputed issue, and discovery must be allowed. See response to Document Request 9.

D. Document Request 14:

All documents that discuss, refer or relate to the safety of the Atkins Diet or the Atkins Nutritional Approach™.

Defendants' objection:

Defendants object to this request on ground that it is an overbroad fishing expedition that is not reasonably limited in time or calculated to lead to the discovery of admissible evidence and appears to be intended to impose an unfair and oppressive burden on Defendants.

Plaintiff's Response:

See response to Request 11.

E. Document Request 16.

All medical records of Dr. Robert Atkins that discuss, refer or relate to his heart or circulatory system.

Defendants' objection:

Defendants object to this request on ground that it is harassing, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence and seeks information that is confidential as a matter of law.

Plaintiff's Response:

The records requested are discoverable and not confidential.

In 1972, Robert C. Atkins published *Dr. Atkins' Diet Revolution*, which subsequently appeared in several editions. Atkins became the diet's principal spokesperson, and he often used details of his own health history to support the efficacy and safety of the diet. As the Wall Street Journal reported on February 13, 2004, "Throughout his life, Dr. Atkins was the public face of the eating plan he espoused and often spoke publicly about his own eating habits and health. As a result, his personal health has often been a subject of scrutiny by critics, including whether his heart problems were the result of diet or other causes."¹

¹ The information set forth in this response is hearsay, but not presented for the truth of the matters asserted. Rather, this information will demonstrate to the Court that Plaintiff has a good faith basis, based on statement in the public record, to believe that the discovery sought will show that: 1) Dr. Atkins held himself out as exemplar for the benefits of the diet; 2) Dr. Atkins put his own medical condition in issue by doing so; 3) the Atkins company also made public statements about Dr. Atkins' health; 4) Dr. Atkins' may have been injured or suffered premature death as a result of this adherence to his own diet.

On Good Morning, America, October 19, 1999, Dr. Atkins said of his diet, “It has steak and eggs and lobster. And it’s so easy to stay on. There’s no reason to go off of it. I’ve been on it for 36 years.” The suggestion was that the diet had been safe for Atkins himself, and it should be similarly safe for others.

In a Dateline (NBC) interview filmed approximately six weeks before his death, Dr. Atkins was asked about criticisms of the Atkins Diet. In particular, the interviewer quoted the AMA as calling the diet “unscientific and potentially dangerous to health.” Atkins replied, “And without a scintilla of evidence to allow them to make that statement.”

The interviewer then asked Atkins about his health: “What’s your cholesterol?”

Atkins replied, “Generally, it’s quite normal. It’s 200, but my good cholesterol is very high.”

Asked about his cardiac arrest, he said, “I didn’t have a heart attack, but I had a heart disease from an infection, and all the lab tests clearly showed that. And all the lab tests clearly showed that *I didn’t have blockages.*”

“So you’re in good shape, heart-wise?” the interviewer asked.

“I would say so,” Atkins replied. [Emphasis supplied.]

In a Katie Couric interview, he made similar comments, e.g. “*What will people say now that they know I don’t have artery blockages?*” [Emphasis supplied.]

In these statements, Atkins vigorously denied having any coronary artery disease, always maintaining that his high-cholesterol, high-fat diet was safe. The Atkins Web site went further, giving specific details of Atkins’ medical history and medical examinations, including an angiogram it described as normal. On April 25, 2002, after Dr. Atkins’ cardiac arrest, the following statement was issued on the Atkins Web site:

“We have been treating this condition, cardiomyopathy, for almost two years,” explains Patrick Fratellone MD, Dr. Atkins’ personal physician and cardiologist, “and during the course of diagnosis, *we discovered that Dr. Atkins’ coronary arteries were normal as diagnosed by an angiogram performed at Columbia Presbyterian Hospital on the upper west side of New York City in April of 2001. Clearly, his own nutritional protocols have left him, at the age of 71, with an extraordinarily healthy cardiovascular system.*” [Emphasis supplied.]

This statement shows that, despite Atkins protestations about individuals discussing Atkins' health history, Atkins and his company had done so themselves in detail (albeit falsely). The above statement describes the site of the examination, its date, its supposed results, and an interpretation that seeks to credit Atkins' diet with his good health. Later reports, of course, showed this interpretation to be false, as Dr. Atkins, in fact, had coronary artery disease and was treated for it.

Since both Dr. Atkins and his company used his own health and his own experiences on the diet to promote it, he and the company have opened up this issue, at least for discovery purposes.

Dr. Atkins is deceased, and there is no common law or statutory right of privacy surviving beyond death. *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004).

F. Document Request 17.

All medical records of Dr. Robert Atkins that discuss, refer or relate to any treatment he received for heart or circulatory problems.

Defendants' objection:

Defendants object to this request on ground that it is harassing, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence and seeks information that is confidential as a matter of law.

Plaintiff's Response:

See response to Request 16.

G. Document Request 18.

All documents that discuss, refer or relate to the factors leading to Dr. Robert Atkins' death.

Defendants' objection:

Defendants object to this request on ground that it is harassing, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence and seeks information that is confidential as a matter of law.

Plaintiff's Response:

See response to Request 16.

H. Document Request 22.

All documents that discuss, refer or relate to any contractual or other financial or legal agreements or arrangements between Atkins Nutritionals, Inc. and the American Heart Association, the National Educational Association, the National Association of State Boards of Education, or any other health or educational group or association.

Defendants' objection:

Defendants object to this request on ground that it is an overbroad fishing expedition that is not limited in time or reasonably calculated to lead to the discovery of admissible evidence and appears to be intended to impose an unfair and oppressive burden on Defendant. Defendant further objects on the grounds that this request seeks confidential, proprietary business information and trade secrets.

Plaintiff's response:

This document request seeks information going to the issue of whether Atkins' speech is purely commercial, as alleged in the complaint, or whether is entirely non-commercial, as Atkins claims in its various motions. Again, Atkins refused to enter into a stipulation on this issue. We advised Atkins that Plaintiff is not seeking any financial information from Atkins, and all financial arrangements and payments in these contracts can be redacted. What we are looking for is evidence that Atkins was seeking to sell its products and diet as healthy for all consumers by associating with educational and health groups. The extent to which these groups agreed to promote Atkins, its diet and its products is relevant to the type of speech Atkins was engaged in. Thus, these documents may constitute admissible evidence, or lead to the discovery of admissible evidence.

I. Interrogatory 15:

Set forth in detail any contractual or other financial or legal agreements or arrangements between Atkins Nutritionals, Inc. and the American Heart Association, the National Educational Association, the National Association of

State Boards of Education, or any other health or educational group or association.

Defendants' objection:

Defendants object to this interrogatory on the grounds that it is overbroad, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence and seeks confidential, proprietary business information and trade secrets.

Plaintiff's response:

See response to document request 22.

1 CERTIFICATE OF GOOD FAITH ATTEMPT TO RESOLVE DISPUTE

Plaintiff's counsel certify that they spoke with defense counsel in a good faith attempt to resolve this dispute, but to no avail.

Dated: February 18, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on February 18, 2005, via U.S. Mail and Facsimile to:

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