IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

ALAN HOROWITCH Plaintiff/Appellee, v. DIAMOND AIRCRAFT INDUSTRIES, INC. Defendant/Appellant.	)	CASE NO. SC11-1371

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPELLEE'S ANSWER BRIEF ON THE MERITS

James C. Hauser
Florida Bar No. 0168348
750 Live Oak Street
Maitland, Florida 32751
Telephone: (407) 951-6865
Facsimile: (407) 660-3009

William V. Custer, IV
Georgia Bar No. 202910
BRYAN CAVE LLP
One Atlantic Center, 14th Floor
1201 W. Peachtree Street, NW
Atlanta, Georgia 30309
Telephone: (404) 572-6600
Facsimile: (404) 572-6999
Bill.Custer@bryancave.com

Attorneys for Appellee Alan Horowitch

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STATEMENT OF THE CASE AND FACTS

Alan Horowitch ("Dr. Horowitch") filed suit against Diamond Aircraft Industries, Inc. ("Diamond") in September of 2006 based on Diamond's failure to honor a contract it signed with Dr. Horowitch for the purchase of a "D-Jet" personal aircraft. (2:1).[1] Diamond, instead of honoring its contract to deliver a D-Jet at an agreed upon advertised price of $850,000, insisted that it retained the right to modify the price of the D-Jet at will despite the parties' contract.

The D-Jet was undeniably meant to be a unique aircraft, the first of a new class of very light jets intended to be flown by owner pilots rather than for commercial purposes. (Deposition of Peter Maurer, filed at 181, hereinafter the "Maurer Dep.", 26:16 – 28:1). Previously, jet aircraft simply had not been manufactured for amateur aviators like Dr. Horowitch. (Id. at 28:2-6). Diamond had specifically sought to differentiate the D-Jet from other light jets, which are larger, more complex, require more training, and impose burdensome insurance requirements, by aiming the D-Jet at owner pilots instead of commercial operators. (Id. 38:1-19). The D-Jet's relatively low price, set at $850,000, was also central to its appeal. (Id.) Diamond repeatedly touted these unique features in its own

[1] All record citations are to the docket number in the federal district court, which the Eleventh Circuit forwarded to this Court, followed by the appropriate page or exhibit number from that docket item.

marketing materials, claiming the D-Jet was in a "class of its own," and that the D-Jet offered "…some things no other jet does, like affordability and ease of operation." (Id. at Plaintiffs' Exhs. 8 and 11). Finally, although competitors had announced similar aircraft, these competitors were only in the process of building them. (Id. 27:1-10). Therefore, obtaining an equivalent aircraft was not possible.

Not only did Dr. Horowitch have a contract with Diamond to purchase one of these unique aircraft, but he had a contract to purchase the fourth jet manufactured. Dr. Horowitch's order position was important because it meant that Dr. Horowitch would receive delivery of the D-Jet in the second month of production rather than having to wait years after production began for delivery. Additionally, planes with low production numbers are unique in their own right and more desirable. (Id. at 186:8-187:9).

The first count of Dr. Horowitch's complaint sought specific performance of his contract with Diamond, i.e. the delivery of a D-Jet aircraft at the parties' agreed upon price of $850,000. (2:1-4). Dr. Horowitch alleged that Diamond had breached the contract by unilaterally raising the price of the D-Jet from $850,000 to $1,380,000 after the parties' initial agreement and accepting Dr. Horowitch's initial $20,000 deposit. (Id.)

On November 2, 2006, Diamond removed the case from state to federal court based on diversity jurisdiction because Diamond is a Canadian Corporation

and Dr. Horowitch is an Arizona citizen. (1:2). On March 15, 2007, after receiving permission from the district court, Dr. Horowitch filed an amended complaint that asserted four claims: (1) specific performance; (2) in the alternative, breach of contract; (3) breach of implied covenants of good faith and fair dealing; and (4) deceptive trade practices in violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). (38:1; 41:1). Significantly, for purposes of the Diamond's later offer of judgment, Dr. Horowitch plead for attorneys' fees in the FDUTPA claim. Dr. Horowitch's primary reason for pleading the claim under Florida law was because the contract between the parties contained a choice of law provision that stated, "All disputes or controversies between the parties to this Agreement shall be governed and construed with the laws of the State of Florida." (41:1 and Exhibit A thereto).

On April 9, 2007, Diamond filed a motion to dismiss Dr. Horowitch's claim for deceptive trade practices, arguing that FDUTPA did not apply to the parties dispute because FDUTPA was not created to serve individuals like Dr. Horowitch who are not citizens of Florida, Dr. Horowitch's injury occurred exclusively outside of Florida, and the Commerce Clause precluded the application of FDUTPA to the parties' dispute. (46:5-10). On April 23, 2007, Dr. Horowitch filed his response in support of his deceptive trade practices claim, but also argued that if the choice of law clause did not apply, then Arizona law rather than Florida

law governed the parties' dispute and Dr. Horowitch's claim would be governed by the Arizona Consumer Fraud Act ("ACFA"). (48:9). On May 25, 2007, the district court denied Diamond's motion to dismiss, but delayed issuing a decision regarding whether Florida or Arizona law governed Dr. Horowitch's claim for deceptive trade practices, citing a need for further factual development. (57:3).

On May 8, 2007, Diamond served upon Dr. Horowitch an offer of judgment for $40,000 pursuant to § 768.79, Florida Statutes. (196-1). The offer stated that it was "to resolve all claims that were or could have been asserted by Plaintiff against Diamond Aircraft in the Amended Complaint" and was conditioned on dismissal of the pending claims with prejudice. (Id.) At the time the offer of judgment was made, Dr. Horowitch's claim for specific performance was still pending. Furthermore, even though Dr. Horowitch's claim for attorneys' fees under FDUTPA was still pending, Diamond's offer of judgment did not state whether it included attorneys' fees. (Id.) Dr. Horowitch did not accept the offer.

On July 5, 2007, both parties moved for summary judgment. (91:1 and 93:1). On September 17, 2007, after the time period to accept Diamond's offer of judgment had expired, the district court initially denied Diamond's motion for summary judgment as to all claims except Dr. Horowitch's claim for specific performance. (108:22). As to Dr. Horowitch's deceptive trade practices claim, the district court applied a conflict of law analysis to determine whether Florida,

Arizona or Canadian law should apply. (Id. at 16-20). Because none of the alleged misrepresentations took place in Florida, the district court held that "…Arizona tort substantive law applies to [Dr. Horowitch's] deceptive trade practices claim." (108:20). Unlike FDUTPA, the Arizona Consumer Fraud Act ("ACFA") does not permit a prevailing party to recover attorneys' fees. The district court then applied Arizona law to Dr. Horowitch's deceptive trade practices claim and denied Diamond's motion for summary judgment. (Id. at 21-22).

In June of 2008, the district court issued a new order that granted Diamond's motion for summary judgment on breach of contract and breach of implied covenants of good faith and fair dealing, but applied Arizona law in denying Diamond's motion for summary judgment on Dr. Horowitch's deceptive trade practices claim. (138:1; 142:1). After a bench trial in December of 2009 on Dr. Horowitch's ACFA claim, the district court ruled that Diamond did not violate ACFA in its dealings with Dr. Horowitch. (192:1; 193:1).

On January 5, 2010, Diamond filed a Motion for Attorneys Fees and Costs seeking $1,069,516.00 in attorneys' fees and requesting costs in the amount of $89,199.90 based on Florida's Offer of Judgment Statute and Florida's Deceptive and Unfair Trade Practices Act. (196:1; 197:1; 202:1). Dr. Horowitch opposed Diamond's motion. (199:1).

On April 8, 2010, the magistrate judge issued a report and recommendation that Diamond's motion for attorneys' fees and costs be denied. (210:1). Specifically, the magistrate judge found that Florida's Offer of Judgment Statute, § 768.79, Florida Statutes, was inapplicable because Dr. Horowitch's complaint sought equitable relief. (210:4-6). As to Diamond's claim for fees and costs under FUDPTA, the magistrate judge found that because the district court previously ruled that ACFA governed Dr. Horowitch's unfair trade practices claim, Diamond could not seek fees and costs under FDUTPA. (210:8-9). Diamond objected to the magistrate judge's report and recommendations and sought a ruling from the district court. (212:1; 213:1).

On May 27, 2010, the district court judge denied Diamond's motion for attorneys' fees and costs, granted Dr. Horowitch's motion for relief from the Bill of Costs, and adopted the report and recommendations of the magistrate judge. (216:1).

Diamond filed its notice of appeal on June 23, 2010. (218:1). After receiving briefing and entertaining oral argument, the Eleventh Circuit certified four questions to this Court. Diamond Aircraft Industries, Inc. v. Horowitch, 645 F. 3d 1254 (11th Cir. 2011).

CERTIFIED QUESTIONS

I. DOES FLA. STAT. § 501.2105 ENTITLE A PREVAILING DEFENDANT TO AN ATTORNEY'S FEE AWARD IN A CASE IN WHICH A PLAINTIFF BRINGS AN UNFAIR TRADE PRACTICES CLAIM UNDER THE FDUTPA, BUT THE DISTRICT COURT DECIDES THAT THE SUBSTANTIVE LAW OF A DIFFERENT STATE GOVERNS THE UNFAIR TRADE PRACTICES CLAIM, AND THE DEFENDANT ULTIMATELY PREVAILS ON THAT CLAIM?

II. IF FLA. STAT. § 501.2105 APPLIES UNDER THE CIRCUMSTANCES DESCRIBED IN THE PREVIOUS QUESTION, DOES IT APPLY ONLY TO THE PERIOD OF LITIGATION UP TO THE POINT THAT THE DISTRICT COURT HELD THAT THE PLAINTIFF COULD NOT PURSUE THE FDUTPA CLAIM BECAUSE FLORIDA LAW DID NOT APPLY TO HIS UNFAIR TRADE PRACTICES CLAIM, OR DOES IT APPLY TO THE ENTIRETY OF THE LITIGATION?

III. DOES FLA. STAT. § 768.79 APPLY TO CASES THAT SEEK EQUITABLE RELIEF IN THE ALTERNATIVE TO MONEY DAMAGES; AND, EVEN IF IT DOES NOT GENERALLY APPLY TO SUCH CASES, IS THERE ANY EXCEPTION FOR CIRCUMSTANCES IN WHICH THE CLAIM FOR EQUITABLE RELIEF IS SERIOUSLY LACKING IN MERIT?

IV. UNDER FLA. STAT. § 768.79 AND RULE 1.442, IS A DEFENDANT'S OFFER OF JUDGMENT VALID IF, IN A CASE IN WHICH THE PLAINTIFF DEMANDS ATTORNEYS' FEES, THE OFFER PURPORTS TO SATISFY ALL CLAIMS BUT FAILS TO SPECIFY WHETHER ATTORNEYS' FEES ARE INCLUDED AND FAILS TO SPECIFY WHETHER ATTORNEYS' FEES ARE PART OF THE LEGAL CLAIM?

SUMMARY OF THE ARGUMENT

Dr. Horowitch is a consumer who was unfairly taken advantage of by Diamond's deceptive marketing and dishonest attempts to revoke a contract signed by both parties where Diamond promised to deliver the fourth jet airplane it manufactured to Dr. Horowitch at a set price. Instead of accepting Diamond's attempt to unilaterally raise the price it had promised to sell this unique plane, Dr. Horowitch filed suit seeking specific performance of the contract, or in the alternative, breach of contract, breach of implied covenants of good faith and fair dealing, and deceptive trade practices. After a hotly disputed case that went to a bench trial on Dr. Horowitch's deceptive trade practices claim, Diamond prevailed under Arizona law. Diamond now seeks to collect attorneys' fees from Dr. Horowitch based on a statute that did not govern the parties' dispute and an offer of judgment with fatal flaws. This request is grossly unfair and unsupported by Florida law.

The Eleventh Circuit has posed four questions to this Court, all of which would permit Diamond to seek at least some portion of its attorneys' fees if answered in the affirmative. Although Diamond has inexplicably changed the order of the questions from how they were initially posed by Eleventh Circuit, Dr. Horowitch has mirrored Diamond's brief for clarity's sake. In short, Dr. Horowitch contends that this Court should answer "no" to all of the questions.

First, the Florida Unfair and Deceptive Trade Practices Act ("FDUTPA") cannot provide a basis for a fee award in the present case because § 501.2105, Florida Statutes, the attorney's fee provision of FDUTPA, cannot be used to award attorneys' fees where Florida law did not govern Dr. Horowitch's claim. In fact, FDUTPA was never applied at any point in this action, nor could it be. Furthermore, the statutory language of FDUTPA does not support such an award.

Second, even if Diamond could collect attorneys' fees under FDUTPA, the statute only permits an award of fees from for litigation "resulting from an act or practice involving a violation of [FDUTPA]," and therefore Diamond is barred from collecting any attorneys' fees it incurred after Arizona law was determined to govern Dr. Horowitch's deceptive trade practices claim. Permitting Diamond to collect fees for the entirety of the litigation, when FDUTPA played only a small part in the case's initial phase, is therefore contrary to the clear language of the statute.

Third, Diamond's offer of judgment fails because Dr. Horowitch's primary claim was for specific performance, i.e. delivery of the D-Jet aircraft, and § 768.79, Florida Statutes does not apply to claims that seek equitable relief. Pleading an equitable claim in the alternative has no affect on this rule. Furthermore, this Court should not create some exception for allegedly "meritless" claims because

such a standard would be impossible to enforce, and even if it could be, Dr. Horowitch's claim was not lacking in merit.

Finally, Diamond's failure to disclose whether its offer of judgment included attorneys' fees is not only a clear violation of the plain language of Rule 1.442, but also a mistake that substantively prejudiced Dr. Horowitch in evaluating Diamond's offer. Diamond's inclusion of language stating that the offer was to satisfy "all claims" did not clarify this error. Therefore, Diamond's offer of judgment is unenforceable for this additional reason as well.

ARGUMENT

I. FDUTPA DOES NOT PROVIDE A BASIS FOR AWARDING ATTORNEYS' FEES WHEN THE DECEPTIVE TRADE PRACTICES LAWS OF ANOTHER STATE ARE APPLIED.

Diamond cannot collect attorneys fees pursuant to the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") because Dr. Horowitch's claim was litigated and tried under the deceptive trade practices laws of a completely different state. Nevertheless, The Eleventh Circuit posed the following question on this issue:

> DOES FLA. STAT. § 501.2105 ENTITLE A PREVAILING DEFENDANT TO AN ATTORNEY'S FEE AWARD IN A CASE IN WHICH A PLAINTIFF BRINGS AN UNFAIR TRADE PRACTICES CLAIM UNDER THE FDUTPA, BUT THE DISTRICT COURT DECIDES THAT THE SUBSTANTIVE LAW OF A DIFFERENT STATE GOVERNS THE UNFAIR TRADE PRACTICES CLAIM, AND THE DEFENDANT ULTIMATELY PREVAILS ON THAT CLAIM?

Diamond is seeking to collect attorneys' fees under a statute that was never even applied to Dr. Horowitch's claim, and which he never was allowed to litigate the merits of, is barred by Florida law because: (A) § 501.2105, Florida Statutes ("Section 501.2105") does not permit an award of attorneys' fees if FDUTPA does not govern the parties' dispute; (B) the statutory language at issue does not support such an award; and (C) Diamond cites no Florida cases that would support this argument. Therefore, this Court should answer "no" to this certified question.

A. Section 501.2105 Does Not Permit An Award of Attorneys' Fees If A Party Only Prevails Under A Foreign Statute.

It is black letter law in Florida that because an award of attorneys' fees is in derogation of the common law, statutes permitting such an award will be strictly construed. Campbell v. Goldman, 959 So. 2d 223, 226 (Fla. 2007); Daniels v. Florida Dept. of Health, 898 So. 2d 61, 65 (Fla. 2005); Major League Baseball v. Morsani, 790 So. 2d 1071, 1077-78 (Fla. 2001); Gershuny v. Martin McFall Messenger Anesthesia Professional Association, 539 So. 2d 1131 (Fla. 1989). Consequently, the right to attorneys' fees under FDUTPA must be strictly construed. If FDUTPA did not govern the parties dispute, then Diamond could not have prevailed under it, and a strict construction of Section 501.2105(1) mandates that Diamond not be permitted to recover attorneys' fees.

It is axiomatic that a party cannot recover attorneys' fees under a non-applicable statute. There is a world of difference between a case where the plaintiff is unable to prove that the actions of the defendant violated FDUTPA, and a case where **FDUTPA was never even applied**. In the latter situation, the defendant cannot recover attorneys' fees because the defendant did not prevail under FDUTPA. By contrast, the defendant can recover attorneys' fees in the former situation because the plaintiff failed to prove that the acts of the defendant constituted an unfair trade practice under FDUTPA.

In similar cases where Florida courts have interpreted statutes permitting attorneys' fees, Florida courts have denied any attorneys' fee award unless the statute specifically applied to the facts of the case. See Florida Hurricane Protection and Awing, Inc., v. Pastina, 43 So. 3d 893 (Fla. 4th DCA en Banc 2010) (consumer had no right to attorneys' fees under § 57.105(7), Florida Statutes, the reciprocal attorneys' fees statute, because the consumer's lawsuit did not involve the issue of collection by the contractor, and § 57.105(7), Florida Statutes only permits fees if they are sought on **exactly** the same basis as that drafted in the contract). If Florida courts do not permit attorneys' fees when a statute is not broad enough to award attorneys' fees to the prevailing party, certainly it cannot award attorneys' fees to the prevailing party if the statute does not even apply.

In the case at bar, Diamond prevailed under Arizona's version of the Deceptive Trade Practice Act. However, because Arizona law does not permit the recovery of attorneys' fees, Diamond cannot recover attorneys' fees from Dr. Horowitch. The absurdity of permitting Diamond to collect fees is apparent if one considers that if Dr. Horowitch had prevailed under the Arizona law that was actually applied to the case, Dr. Horowitch would not have been entitled to attorneys' fees. To permit Diamond to recover attorneys' fees in the case at bar would put Dr. Horowitch and similarly situated plaintiffs in the position of "heads

you win, tails I lose," a proposition that the Florida Legislature could not have intended when enacting a consumer protection statute.

B. A Plain Reading Of Section 501.2105 Indicates That It Does Not Provide a Basis for Attorneys' Fees When FDUTPA Is Never Applied.

Nothing in the statutory language of Section 501.2105 suggests that it was intended to provide an attorneys' fees award if FDUTPA itself was never applied in the action action. Section 501.2105 reads:

> (1) In any civil litigation **resulting from an act or practice involving a violation of this part**, . . . the **prevailing party**, after judgment in the trial court and exhaustion of all appeals, if any, may receive his or her reasonable attorneys' fees and costs from the nonprevailing party.

(Emphasis added). Nothing in this wording remotely implies that the legislature intended to permit the recovery of attorneys' fees if a party invoked Section 501.2105 but another state's law was found to govern the parties' dispute.

To permit attorneys' fees under a law that did not govern the parties' dispute is also a radical departure from the common law. It is black letter law that unless there unless there is a statute or contract that permits attorneys' fees to the prevailing party, the losing party is not liable for attorneys' fees. Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1148 (Fla. 1985). Had the Florida legislature intended the radical result that a party, by merely invoking Florida law, would be responsible for the opposing party's attorneys' fees even though Florida

law did not govern the parties' dispute, the legislature would have explicitly said so in the statute.

C. Diamond's Argument That FDUPTA Permits Attorneys' Fees When FDUPTA Does Not Apply Is Not Persuasive.

None of the cases cited by Diamond suggest that FDUTPA permits the recovery of attorneys' fees where a foreign state's laws govern the claims set forth by the plaintiff.

Diamond first cites two Ninth Circuit cases involving the application of a particular California statute in federal court. (Diamond's Initial Brief pp. 15-16, citing Love v. Associated Newspapers, Ltd., 611 F.3d 601, 614 (9th Cir. 2010); Cairns v. Franklin Co., 292 F.3d 119, 1156 (9th Cir. 2002)). These cases, however, have nothing to do with FDUTPA or Florida law, and therefore are not relevant here.

Diamond then cites two Florida cases for the proposition that FDUTPA can provide a basis for awarding attorneys' fees even when it does not apply. (See Diamond's Initial Brief pp. 16-17, citing Brown v. Gardens by the Sea South Condominium Association, 424 So. 2d 181, 184 (Fla. 4th DCA 1983) and Rustic Village, Inc. v. Friedman, 417 So. 2d 305, 306 (Fla. 3d DCA 1982)). These cases are clearly distinguishable from the present one.

First, in both Rustic Village and Brown, FDUTPA was applied — it just did not produce a remedy for the plaintiffs. See, e.g., Rustic Village, 417 So. 2d at 306

(although suits between competitors were not covered by FDUTPA, attorneys' fees still warranted because the "…Act was applied in the action. It is simply that after being applied, it did not produce a remedy for this plaintiff"); Brown v. Gardens, 424 at 184 (same). This is clearly different from the present case, where FDUTPA was never applied at any point and the application of Florida tort law does not even have a jurisdictional basis.

Second, neither of these cases analyzed the award of attorneys' fees under FDUTPA by applying a strict construction test. Statutes permitting an award of attorneys' fees must be strictly construed because they are in derogation of common law. Campbell v. Goldman, 959 So. 2d 223, 226 (Fla. 2007). Neither court in Rustic Village or Brown, however, even analyzed the wording of Section 501.2105, which only permits an award of fees if a party "prevailed" under FDUTPA. Dr. Horowitch did not fail to prove that Diamond's actions constituted a violation of FDUTPA because Arizona law governed the parties dispute, and thus Dr. Horowitch was never permitted to litigate the merits of his claim under FDUTPA. Thus, a strict construction reading of Section 501.2105 also contradicts the cases cited by Diamond.

Third, Brown v. Gardens and Rustic Village rely on the implicit premise that because a party pleads a claim under a statute, they are estopped from arguing

against any award for attorneys' fees made pursuant to that statute. Diamond makes a similar estoppel argument in its brief:

> …it is inconceivable that a party can pursue a statutory claim (which supplies a basis for attorneys' fees) over a defendant's objections, then latter claim he does not owe attorneys' fees when the court says he is wrong to pursue it.

(Initial Brief of Appellant Diamond Aircraft Industries, Inc. ("Diamond's Initial Brief") at p. 20). This Court, however, has rejected the argument that a party subjects itself to attorneys' fees merely by pleading a claim for them. See Gibson v. Courtois, 539 So. 2d 459, 460 (Fla. 1989).

In Gibson, the prevailing party sought attorneys' fees based on a contractual provision. This Court, however, held that if the contract never came into existence, then the prevailing party was not entitled to attorneys' fees under that contract. Importantly, this Court noted that the fact that the losing party pled for attorneys' fees was not relevant. Id. Florida appellate courts have similarly denied attorneys' fees where the parties plead such fees without a statutory or contractual basis. Kovack Securities Inc. v. Bailey, 933 So. 2d 1202 (Fla. 4th DCA 2006); Downey v. The Surf Club Apartments, Inc., 689 So. 2d 348 (Fla. 3d DCA 1997). Similarly, even though Dr. Horowitch's original deceptive trade practices claim encompassed a claim for attorneys' fees, such pleading does not create a basis for Diamond to seek such fees when there is no basis for applying FDUTPA in the present case.

It also bears noting that contrary to Diamond's assertion, Dr. Horowitch did not aggressively pursue a FDUTPA claim for several months. Although Diamond did file a motion to dismiss the deceptive trade practices claim which Dr. Horowitch opposed, Dr. Horowitch clearly stated at his very first opportunity that Arizona law should govern the parties' dispute if the Florida contractual choice of law clause was not controlling. (48:9-10). The later disposition of this issue was not due to Dr. Horowitch's insistence on litigating FDUTPA, but rather to the district court's decision that further discovery was required to resolve it. (57:3). Notably, Diamond's attempts to obstruct discovery, for which it was repeatedly sanctioned by the district court, (75:3-4 and 143:13-14), was the largest contributor to the delayed ruling. Dr. Horowitch should not be required to pay attorneys' fees merely because he asserted a claim which raised a choice of law issue.

Finally, Diamond cites Mandel v. Decorator's Mart, Inc. of Deerfield Beach to argue that the attorney's fee provision of FDUTPA is meant to deter plaintiffs from complicating simple contractual disputes and increasing litigation expenses by injecting claims of fraud into the analysis. 965 So. 2d 311, 314 (Fla. 4th DCA 2007) (attorney's fee provision in FDUTPA deters claims that complicate suit and increase financial risk for both sides). Diamond fails to explain, however, why Florida policy considerations are relevant in a case where Arizona law was applied to a dispute that arose in Arizona between citizens of Canada and Arizona.

Furthermore, choice of law issues are usually resolved early in litigation, so there is little reason to punish plaintiffs who bring a deceptive trade practices claim under FDUTPA that is later held to be controlled by another state's statute. Such a policy would strongly discourage plaintiffs from asserting an unfair and deceptive trade practices claim where a choice of law issue may exist.

For all of these reasons, this Court should answer "no" to the Eleventh Circuit's third certified question.

II. EVEN IF FDUTPA DOES PROVIDE A BASIS FOR AWARDING ATTORNEYS' FEES, IT CANNOT BE USED AS A BASIS TO AWARD FEES FOR THE ENTIRETY OF THE LITIGATION.

Even if Diamond could collect attorneys' fees under FDUTPA, the statute only permits an award of fees for litigation "resulting from an act or practice involving a violation of" FDUTPA, and therefore Diamond is barred from collecting any attorneys' fees it incurred after Arizona law was determined to govern Dr. Horowitch's deceptive trade practices claim. Despite the clear language of Section 501.2105 the Eleventh Circuit posed the following question on this issue:

> IF FLA. STAT. § 501.2105 APPLIES UNDER THE CIRCUMSTANCES DESCRIBED IN THE PREVIOUS QUESTION, DOES IT APPLY ONLY TO THE PERIOD OF LITIGATION UP TO THE POINT THAT THE DISTRICT COURT HELD THAT THE PLAINTIFF COULD NOT PURSUE THE FDUTPA CLAIM BECAUSE FLORIDA LAW DID NOT APPLY TO HIS UNFAIR TRADE PRACTICES CLAIM, OR DOES IT APPLY TO THE ENTIRETY OF THE LITIGATION?

Permitting Diamond to collect fees for the entirety of the litigation, when FDUTPA played only a small part in the case's initial phase, is contrary to the clear language of the statute and grossly unfair. Therefore, this Court should answer "no" to this certified question.

A. The Statutory Language of Section 501.2105 Does Not Permit Recovery Of Fees Incurred For Claims Unrelated To FDUTPA.

Permitting Diamond to collect fees for the entirety of the litigation when FDUTPA played only a small part in the case's initial phase is contrary to the clear language of Section 501.2105 and grossly unfair. Therefore, this Court should answer "no" to this certified question.

The attorneys' fees provision of FDUTPA, Section 501.2105, reads in part as follows:

> (1) In any civil litigation **resulting from an act or practice involving a violation of this part**… the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, may receive his or her reasonable attorneys' fees and costs from the nonprevailing party.

(Emphasis added). While some Florida courts have held that attorneys' fees associated with non-FDUTPA claims need not be separated from fees awarded under FDUTPA when both claims arise out of the same facts or transaction, they have also recognized that fees should not be awarded if "…the attorney's services clearly were not related in any way to establishing or defending an alleged

violation of chapter 501." Mandel v. Decorator's Mart, Inc. of Deerfield Beach, 476 So. 2d 266, 314 (Fla. 4th DCA 2007). Additionally, Florida courts have recognized that some type of apportionment is appropriate as between those claims for which attorneys' fees are recoverable and those for which they are not. See Hamilton v. Palm Chevrolet-Oldsmobile, Inc., 388 So. 2d 638, 639 (Fla. 2d DCA 1980) (fees for attorney's services in defending against punitive damages claim were improperly included in award because the recovery of punitive damages is clearly beyond the scope of FDUTPA). Consequently, prohibiting the award of attorneys' fees under FDUTPA where such costs were clearly not related to defending an alleged "act or practice involving a violation of [FDUTPA]" comports with the plain language of the statute and Florida case law.

In the present case, the district court held at summary judgment that Arizona law, rather than Florida law, applied to Dr. Horowitch's unfair and deceptive trade practices claim. (108:20). Dr. Horowitch had previously asserted that his deceptive trade practices claim would succeed under either Arizona or Florida law. (48:9). Regardless the district court's delay in making its decision, once it ruled that Arizona law governed Dr. Horowitch's deceptive trade practices claim, there was no question that the parties were no longer litigating about an "act or practice involving a violation of [FDUTPA]."

The ruling by the district court provides a clear demarcation line for the award of fees based on FDUTPA in the present case, and would provide an easily enforceable standard for future courts. If a deceptive trade practices claim is found to be governed by the law of another state, or if the FDUTPA claim is dismissed, no attorneys' fees incurred beyond that point should be awarded. The problems posed by separating fees incurred in litigating different claims arising from the same transaction or occurrence are not present when the FDUTPA claim is no longer at issue. Therefore, strong policy reasons also support a denial of Diamond's request for fees incurred after FDUTPA was determined not to govern Dr. Horowitch's claim.

B. Diamond's Arguments To The Contrary Are Flawed.

Although Diamond advances several arguments that attorneys' fees may be awarded under FDUTPA for claims totally unrelated to FDUTPA, all such arguments fail.

Diamond first argues that the summary judgment ruling eliminating Dr. Horowitch's right to proceed under FDUTPA was interlocutory, and therefore the FDUTPA claim remained in the case until Dr. Horowitch failed to appeal the adverse judgment against him. (Diamond's Initial Brief at p. 21). This argument is meritless. Just because Dr. Horowitch could have appealed the court's decision that Arizona law governed does not mean that any "act or practice involving a

violation of [FDUPTA]" was litigated after the district court's ruling. To the contrary, Dr. Horowitch did not appeal the court's decision to apply Arizona law. Therefore, while Diamond's is technically correct that Dr. Horowitch's claim could have been resurrected under FDUTPA, it never was.

Diamond also argues that Section 501.2105 takes a broad view of compensable attorney time in cases involving FDUTPA claims. (Diamond's Initial Brief pp. 21-22). In support this argument, Diamond cites language from Mandel v. Decorator's Mart, Inc. of Deerfield Beach that Section 501.2105 allows a trial judge to award a "legal fee" for hours "actually spent on the case," and "…does not require allocation of attorney times between the chapter 501 count and other alternative counts based on the same consumer transaction." 476 So.2d 266, 314 (Fla. 4th DCA 2007).

This case is easily distinguished, however, by the reservation included in the court's opinion, which permitted such fees "…**unless** the attorney's services clearly were not related in any way to establishing or defending an alleged violation of chapter 501." Id. (Emphasis added). To its credit, Diamond included this language in its quotation of the court's opinion even though it undoubtedly negates the argument Diamond seeks to make. Once the trial court determined that FDUTPA did not govern Dr. Horowitch's claim, then the services rendered by

Diamond's lawyers "clearly were not related in any way to establishing or defending an alleged violation of chapter 501." Id.

Finally, Diamond claims that permitting the recovery of fees under FDUTPA for the entirety of the litigation recognizes the alleged purposes of the attorneys' fee provision in FDUTPA, i.e. that injecting a FDUTPA claim into an ordinary breach of contract litigation raises the stakes and increases litigation expenses. (Diamond's Initial Brief pp. 22-23 citing Diamond Aircraft, 645 F. 3d at 1265). Contrary to the Diamond's suggestion, Diamond did not spend one million dollars defending Horowitch's FDUTPA allegations through any fault of Dr. Horowitch. (Diamond's Initial Brief pp. 23). The applicability of FDUTPA could have been decided on Diamond's motion to dismiss, but the district court delayed making a ruling on whether Arizona law governed the claim until the summary judgment stage. (57:3). Furthermore, much of the litigation that occurred prior to the district court's summary judgment ruling was the result of Diamond's repeated efforts to obstruct discovery, for which it was justly sanctioned. (75:3-4 and 143:13-14).

Therefore, for all the aforementioned reasons, this Court should answer the Eleventh Circuit's fourth certified question "no."

III. DIAMOND'S OFFER OF JUDGMENT SHOULD NOT BE ENFORCED BECAUSE IT SOUGHT TO SETTLE A CLAIM FOR SPECIFIC PERFORMANCE.

Diamond's offer of judgment fails because Dr. Horowitch's primary claim was for specific performance, i.e. delivery of the D-Jet aircraft, and § 768.79, Florida Statutes ("Section 768.79")does not apply to claims that seek equitable relief. Nevertheless, the Eleventh Circuit sought direction on this issue by posing the following question:

> DOES FLA. STAT. § 768.79 APPLY TO CASES THAT SEEK EQUITABLE RELIEF IN THE ALTERNATIVE TO MONETARY DAMAGES; AND, EVEN IF IT DOES NOT GENERALLY APPLY TO SUCH CASES, IS THERE ANY EXCEPTION FOR CIRCUMSTANCES IN WHICH THE CLAIM FOR EQUITABLE RELIEF IS SERIOUSLY LACKING IN MERIT?

The Court should answer "no" to this question because: (A) an offer of judgment is invalid if it seeks to resolve a claim for equitable relief regardless of the claim's merit; (B) posing such a claim in the alternative has no affect on this rule; (C) even if this rule were applied, Dr. Horowitch's claim was not seriously lacking in merit; and (D) the cases cited by Diamond and the Eleventh Circuit are distinguishable. Therefore, this Court should answer this certified question "no."

A. An Offer of Judgment Cannot Apply to a Claim of Specific Performance Because The Offeree Has No Way to Evaluate Such An Offer.

Diamond's offer of judgment was made pursuant to Section 768.79 and Fla. R. Civ. P. 1.442 ("Rule 1.442). Section 768.79, however, cannot be applied to cases where equitable relief is sought.

Florida appellate courts have unanimously held that the Florida Offer of Judgment Statute does not apply when a party seeks both monetary damages and equitable relief and the offer is made to resolve the entire case. Winter Park Imports, Inc. v. JM Family Enterprises, 66 So. 3d 336 (Fla. 5th DCA 2011) (hereafter "Winter Park"); Palm Beach Polo Holdings, Inc. v. Equestrian Club Estates Property Owner's Ass'n, Inc., 22 So. 3d 140 (Fla. 4th DCA 2009) (hereafter "Polo"); see also Di Paola v. Beach Terrace Ass'n, Inc., 718 So. 2d 1275 (Fla. 2nd DCA 1998) (offer of judgment was flawed in part because it did not specify whether defendants were agreeing to entry of injunctions). These cases provide three separate reasons for holding that Section 768.79 does not permit an offer of judgment seeking to resolve both monetary and equitable claims.

First, as stated by the Fourth DCA in Polo, Section 768.79 only applies to "a civil action for damages," and therefore it cannot be used in any cause of action where equitable relief was being sought. In Polo, the plaintiff owned a land-locked piece of real estate and wanted access to a road that was owned by the defendant.

Polo, 22 So. 3d at 141-42. Although the plaintiff sought $8.6 million in damages in his suit against the defendant, the sixth count sought injunctive relief to allow the plaintiff use of the road. Id. The defendant made an offer of judgment of $1,001 to resolve the entire case, which was rejected by the plaintiff. Id. at 142. The defendant ultimately prevailed and sought attorneys' fees, but on appeal, the Fourth DCA reversed an award of attorneys' fees because the complaint included a claim for equitable relief. Id. at 144.

The Fourth DCA noted that the Florida Offer of Judgment Statute must be strictly construed because it is in derogation of the common law's requirement that each party bear its own attorneys' fees. Id. (citing Campbell v. Goldman, 959 So. 2d 223 (Fla. 2007)). Based on this principle, the court stated:

> [S]trict construction of the statute and rule should not allow application of a general offer of settlement, sought to be applied to claims seeking non-monetary relief as well as actions for damages. In this case, each offer of settlement filed was general, such that it applied to all claims contained within the complaint which, of course, included both a claim for damages and non-economic claims. Strict construction of the statute leads to the conclusion that when an action seeks non-monetary relief, such as a pure declaration of rights or injunctive relief, then the fact that it also seeks damages does not bring it within the offer of judgment statute.

Id. at 144 (emphasis added). A general offer of judgment served on a plaintiff to resolve an entire case that includes both claims for damages and equitable relief is not binding.

The second reason that an offer of judgment cannot be enforced when it seeks to resolve a case where both monetary and equitable relief is sought is because calculating whether the amount recovered on an equitable claim is less than 75% of the offer is mathematically impossible. See Winter Park Imports, Inc. v. JM Family Enterprises, 36 So. 3d 336 (Fla. 5th DCA 2011). In Winter Park, the Fifth DCA held that if a party pleads for both damages and equitable relief, the opposing party cannot make an offer of judgment that seeks to resolve the entire case because there is no mathematical way to calculate whether the amount recovered was less than 75% of the amount offered. Id. at 340.

The third reason Section 768.79 cannot apply to equitable claims is that it would permit only the defendant, and not the plaintiff, to use an offer of judgment where equitable claims are involved:

> Section 768.79 makes no provision for a court to determine the value of any injunctive relief obtained in calculating the "judgment obtained." The statute speaks only in terms of "amount**."** While we recognize that, as in the instant case, an "amount" of zero can be used where no injunctive relief is obtained**,** that would appear to be the **only scenario** in which a court could compare the mathematical value of an offer against the judgment obtained when the offer addresses both monetary and injunctive claims. Furthermore, to accept defendants' argument, would, as a practical matter, **enable only a defendant to avail itself of the statute** where a plaintiff's claim seeks both damages and injunctive relief. Under the defendants' argument, a plaintiff could only make a demand for judgment if it dropped its injunctive relief request.

Winter Park, 66 So. 3d at 340 (emphasis added). Although the Fifth DCA did not go as far as the Fourth DCA in holding that an offer of judgment could never be used, its' reasoning is still applicable to the case at bar. Specifically, the Fifth DCA opined that an offer of judgment might be used if it were directed solely to the count seeking monetary damages, but not the count seeking equitable relief. See Id. at 1429. This reasoning could not be applied in the present case, however, because Diamond's offer of judgment was for the entire case, and not just Dr. Horowitch's claims for monetary relief.

Finally, creating an exception that permitted offers of judgments to "meritless" claims for equitable relief would do little to solve the problems with equitable claims discussed above, and would create many new problems. Importantly, several superior methods of dealing with such "meritless" claims already exist.

For example, if Dr. Horowitch's count for specific performance was truly lacking in merit, which it was not, Diamond could have served a § 57.105(4), Florida Statutes motion asserting that the count for specific performance was frivolous. If Dr. Horowitch did not drop his claim for specific performance within twenty-one days and Diamond was successful on the § 57.105 motion, Diamond would have been able to recoup all of its attorneys' fees dealing with the specific performance count. Alternatively, after Dr. Horowitch's claim for equitable relief

was dismissed by the district court in 2007, nothing precluded Diamond from making a subsequent offer of judgment. § 768.79(2), Florida Statutes. The subsequent offer of judgment could have been limited to the count seeking monetary relief and in that way, there would be no question that Diamond's offer was limited to a "civil action for damages" as mandated by Polo.

Diamond also could have avoided this problem by restricting its offer of judgment to those counts dealing with monetary damages. In 1996 the Florida Supreme Court amended Fla. R. Civ. P. 1.442(c)(2)(B) to read: "A proposal shall… identify the claim or claims the proposal is attempting to resolve." In re Amendments to Fla. Rules of Civil Procedure, 682 So. 2d 105, 125 (Fla. 1996). This amendment deleted the prior requirement that the offer be made to settle all claims. Based on this rule change, the First, Second and Third District Courts of Appeal have all permitted offers to be made to specific counts without having to resolve the entire case. Harris Specialty Chemicals, Inc., v. Punto Azul, S.A., de C.V., 12 So. 3d 809, 810 (Fla. 3d DCA 2009); Jacksonville Golfair, Inc. v. Grover, 988 So. 2d 1225, 1227 (Fla. 1st DCA 2008); Wager v. Brandeberry, 761 So. 2d 443, 447 (Fla. 2d DCA 2000). Under this rule, "meritless" claims for equitable relief could easily be dealt with by a targeted offer of judgment that did not seek to resolve the equitable claims for relief.

Finally, neither Diamond nor the Eleventh Circuit propose any clear standard for determining whether the count for equitable relief "lacked substantial merit," therefore any such proposed standard would create more problems than it solves. Would a claim have to be so frivolous to rise to the standard of a § 57.105, Florida Statutes motion? Would it have to have been filed in bad faith? Or, as occurred in the present case, would merely losing the claim for equitable relief on a motion for summary judgment be sufficient to validate an otherwise defective offer of judgment? What if at the time the offer of judgment was served, the claim for equitable relief had merit, but as the case progressed, it became either moot or was found lacking in merit? Under the proposed test, would attorneys' fees run from the date the claim for equitable relief was determined to be without merit or from the date of service of the offer of judgment? In short, such a standard would create more problems than it solves.

B. Section 768.79, Florida Statutes Should Also Not Apply When A Party Is Seeking Equitable Relief In the Alternative, Particularly When The Offer is Made to Resolve the Entire Case.

Contrary to Diamond's assertion, pleading an equitable claim in the alternative does not render enforceable an offer of judgment made to resolve the entire case where both equitable and monetary relief are sought.

Diamond argues that to the extent there is any bar on offers of judgment seeking to resolve equitable claims, it only applies to cases where the claim for

equitable relief is independent from the claim for monetary relief, because in such instances an offer of judgment would not result in termination of the litigation. (Diamond's Initial Brief pp. 29-30). Diamond argues that in cases where the equitable claim is pled in the alternative, accepting the offer and its monetary relief would have precluded pursuit of the equitable remedy, thereby ensuring the early termination of the litigation and resolving the concerns expressed in Polo. (Id.)

In making this argument, Diamond fails to acknowledge that the distinction regarding alternative prayers for equitable relief only matters if Dr. Horowitch had accepted Diamond's offer of judgment for $40,000, because only that outcome would have terminated the litigation. The question of whether the offer is valid, however, arises at the time the offer is made, not at the time of the final judgment. See Allstate Indemnity Co. v. Hingson, 808 So. 2d 197 (Fla. 2002).

In Hingson, the plaintiffs were injured in a car accident and filed suit for personal injury, while her husband sued for loss of consortium. Id. at 197. The defendant made an offer of judgment for $30,000 to both plaintiffs that did not distinguish what portion of the offer each plaintiff would receive, which the plaintiffs rejected. Id. A jury ultimately denied any damages to both plaintiffs, and the defendant moved for attorneys' fees. Id. Given this outcome, the question of what portion of the $30,000 offer had been made to which plaintiff ultimately did not matter for purposes of determining whether each plaintiff recovered less

than 75% of the $30,000 offer because both plaintiffs recovered nothing. This Court, however, still ruled that the defendant's offer was defective because at the time it was made, it was a joint offer that did not allow the plaintiffs the ability to separately accept, or reject, the offer. Id. at 199. Therefore, this Court ruled that the crucial time period to determine whether an offer of judgment is defective is the date that the offer is served, not the date of the final judgment.

Judging Diamond's offer at the time it was served, Dr. Horowitch's claim for specific performance was still pending. Therefore, he could have rejected the offer and made it to trial on his specific performance claim, and the Court would have had no way of determining whether Dr. Horowitch recovered less than 75% of Diamond's $40,000 offer.

Diamond conceded this inherent ambiguity in its initial brief to the Eleventh Circuit when it stated that:

> The existence of a claim for equitable relief only became relevant if Horowitch recovered under it. While not an issue for today, if Horowitch had recovered under his claim for specific performance, then Diamond would not have triggered [Section 768.79] because, although the lawsuit was an action for money damages, the second part of the statute was not satisfied. In other words, Diamond could not satisfy the second part of the statute which required a finding of either no liability or the judgment at least 25% less than such offer.

(Diamond's Eleventh Circuit Brief at p. 19). Thus, Diamond acknowledges the dilemma created by their offer: if Dr. Horowitch had succeeded on his specific performance claim, there would be no way to calculate whether Horowitch's

recovery was less than 75% of Diamond's $40,000 offer. Of course, this made it impossible for Dr. Horowitch to evaluate the offer when it was made because of the uncertainty created by how Diamond's offer of judgment might be measured against any outcome on his equitable claim.

C. Even If An Exception Existed That Permitted Offers of Judgment Which Sought to Resolve Allegedly Meritless Equitable Claims, Dr. Horowitch's Claim for Specific Performance was Not Seriously Lacking in Merit.

Although Diamond never raised the issue before the Eleventh Circuit issued its opinion, it now claims that Dr. Horowitch's claim was seriously lacking in merit, and therefore an exception to the rule barring offers of judgment seeking to enforce equitable claims should be created after the fact. (Diamond's Initial Brief, pp. 32-33).

Dr. Horowitch was never given the opportunity to brief the merits of his specific performance claim before the Eleventh Circuit. If Diamond had raised this issue in its briefing to the Eleventh Circuit, rather than just claiming that Dr. Horowitch's claim for specific performance could be compared to one for money damages, perhaps Dr. Horowitch could have corrected this impression. Contrary to the Eleventh Circuit's suggestion, Dr. Horowitch's claim for specific performance was made in good faith, well-grounded in the case law, and was the first and primary claim he asserted in this litigation.

Although granting specific performance for the purchase of goods is unusual, it is not limited to only extreme cases of uniqueness such as a family heirlooms or real property, particularly in the wake of the 1978 revision to the UCC § 2-716. Numerous cases demonstrate that granting specific performance on a contract for the sale of goods, including aircraft, is permissible and involves the examination of several factors, including the good's relative degree of scarcity, its uniqueness, and the difficulty of calculating damages. See, e.g., Mangus v. Porter, 276 So. 2d 250, 250-251 (Fla. App. 1973) (Plaintiff entitled to remedy of specific performance for sale of antique automobile); Schweber v Rallye Motors, Inc., 12 UCC Rep. 1154, 1973 WL 21434 (Sup. Ct. N.Y. 1973) (specific performance justified in contract to purchase a 1973 Rolls Royce Corniche automobile); King Aircraft Sales, Inc. v. Lane, 68 Wash. App. 706, 846 P.2d 550 (Wash. App. Div. 1, 1993) (Would-be buyer of planes entitled to specific performance even though there exists adequate remedy at law. The airplanes, although not necessarily "unique", were rare enough so as to make the ability to cover virtually impossible); George J. Priester Aviation Service, Inc. v. Gates Learjet Corp., 1985 WL 5068, 5-6 (N.D.Ill. 1985) (specific performance for sale of jets could be warranted — Plaintiff had alleged that aircraft are unique, and 'are the only new aircraft of this type in existence,' i.e. they were older models with upgraded features and an unusual factory warranty); Hogan v. Norfleet, 113 So. 2d 437 (Fla. 2nd DCA

1959) (Where performance of a contract is to extend over a considerable period of time, specific performance of such contract will be granted where damages are difficult to estimate and establish); see also American Bancshares Mortg. Co., Inc. v. Empire Home Loans, Inc., 568 F.2d 1124 (5th Cir. 1978); Camp v. Parks, 314 So. 2d 611 (Fla. 4th DCA 1975); see generally, Specific Performance of Sale of Goods Under UCC § 2-716, 26 A.L.R.4th 294 (1983).

In the present case, Dr. Horowitch sought specific performance on a contract for the sale of a D-Jet personal aircraft. (2:1). The first count of Dr. Horowitch's complaint sought specific performance of the parties' contract, i.e. the delivery of a D-Jet aircraft at the parties' agreed upon price of $850,000. (2:1-4).

The D-Jet aircraft was undeniably intended to be a unique aircraft, the first of a new class of very light jets intended to be flown by owner pilots. (Maurer Dep., 26:16 – 28:1). Previously, jet aircraft simply had not been manufactured for amateur aviators like Dr. Horowitch. (Id. at 28:2-6). Diamond had specifically sought to differentiate the D-Jet from other light jets, which are larger, more complex, require more training, and impose burdensome insurance requirements, by aiming that D-Jet at owner pilots instead of commercial operators. (Id. 38:1-19). Furthermore, to the extent comparable aircraft might exist, Diamond's competitors had only announced that they intended to produce them, but had not

actually done so. (Id. 27:1-10). Therefore, Dr. Horowitch could not obtain a comparable aircraft from any other manufacturer.

Furthermore, Dr. Horowitch's contract with Diamond included his right to be the fourth in line to receive the new D-Jet. Thus, if specific performance had been granted as Dr. Horowitch requested, he would have received his jet in the first or second month of production. Signing a new contract with a different manufacturer would have meant not only a different aircraft, but also the possibility of waiting years to receive it. All of these factors demonstrate that Dr. Horowitch's claim for specific performance was made in good faith and did not lack merit.

D. The Cases Diamond Cites Are Distinguishable.

Diamond cites several cases in support of its assertion that offers of judgment are not barred in cases involving equitable claims. Specifically, Diamond continues to advance its argument that Dr. Horowitch's equitable claim is indistinguishable from a monetary claim for damages. (Diamond's Initial Brief pp. 24-26, citing Stewart v. Tasnet, 718 So. 2d 820 (Fla. 2nd DCA 1998); Burtman v. Porchester Holdings Inc., 680 So. 2d 631 (Fla. 4th DCA 1996); and Beyel Bros. Crane & Rigging Co. of South Florida, Inc. v. Ace Transport, Inc., 664 So. 2d 62 (Fla. 4th DCA 1995)). All of the cases cited by Diamond are distinguishable.

Stewart and Burtman are distinguishable because both cases involved equitable claims for money, not claims seeking equitable relief. In Stewart the plaintiff filed suit for equitable subrogation, which is a cause of action arising out of an operation of law to provide a remedy to one who has paid a debt and is entitled to reimbursement. Stewart, 718 So. 2d at 821. The 2nd DCA ruled that the offer of judgment statute applied because the Plaintiff was really seeking only money damages, not equitable relief. Id. at 822. By contrast, Dr. Horowitch's claim for equitable relief sought to force Diamond to deliver the fourth D-Jet it produced at the parties' agreed upon price. Were Dr. Horowitch to merely recover monetary damages, he would have been able to find a suitable replacement for the unique D-Jet, and would have had to wait several years to do so because of the extended production time of very light jet aircraft.

Similarly, Burtman dealt with a dispute over which party was entitled to money deposited with the court. Burtman, 680 So. 2d at 632. By contrast, Dr. Horowitch did not seek the return of any definite amount of money, but the delivery of a D-Jet aircraft.

The third case, Beyel Bros. Crane & Rigging Co. of South Florida, Inc. v. Ace Transport, Inc., simply does not stand for the proposition for which it is cited by Diamond, i.e. that Section 768.79's reference to "any civil action for damages" is intended to encompass claims for equitable relief. In Beyel, there was not even a

count for equitable relief as there is in the case at bar. 664 So. 2d 62. The issue in Beyel was whether the 1990 amendment to Section 768.79 included non-tort claims, such as breach of contract. Id. at 64. The court in Beyel was simply noting that due to a revision in the language of § 768.79, Florida Statutes the statute included civil suits for breach of contract, not just suits in tort.[2]

Diamond also highlights two cases it claims require a court to look beyond the relief sought for the "real issue" in case. (Diamond's Initial Brief pp. 26-27 citing National Indemnity Co. of South Carolina v. Consolidated Insurance Services, 778 So. 2d 404 (Fla. 4th DCA 2001) and Nelson v. Marine Group of Palm Beach, Inc., 677 So. 2d 998 (Fla. 4th DCA 1996)). Neither of theses cases support Diamond's argument.

Although the court in National Indemnity did state that it was looking for the "real issue" in the plaintiffs' declaratory judgment action, the court determined that in that case, the issue was insurance coverage and not money damages, and therefore the offer of judgment was properly stricken because it was not a "civil action for damages." National Indemnity, 778 So. 2d at 408. Similarly, the "real issue" in the present case was that Diamond refused to deliver a unique personal

[2] Prior to 1990, there were numerous offer of judgment statutes and rules, such as § 45.061, Florida Statutes since repealed, which applied to non-tort claims.

aircraft of limited availability at the agreed upon price, which Dr. Horowitch sought the delivery of through his claim of specific performance.

The other case cited by Diamond, Nelson v. Marine, was a dispute was over a definite amount of money held in escrow that the parties were litigating over. 677 So. 2d at 999. Therefore, even if the court in Nelson was correct in finding the "real issue" was a damages claim, it is inapplicable here. Dr. Horowitch sought the delivery of the D-Jet aircraft, and not the return of some fixed amount of money. In fact, in the nearly five years since Dr. Horowitch tendered his $20,000 deposit, not a single D-Jet aircraft has been delivered to a paying customer and its final price is still undetermined. Therefore, unlike the case in Nelson, Dr. Horowitch's claims did not involve a set amount of money.

Finally, both Nelson and National Indemnity were decided before Polo and Winter Park. Therefore, to the extent the decisions conflict, the holdings of Polo and Winter Park provide a more persuasive line of reasoning.

For all of the these reasons, this Court should answer the Eleventh Circuit's second certified question "no."

IV. AN OFFER OF JUDGMENT CANNOT BE VALID IF IT DOES NOT SPECIFY WHETHER IT INCLUDES ATTORNEYS' FEES.

Finally, Diamond's failure to disclose whether its offer of judgment included attorneys' fees is not only a clear violation of the plain language of Rule 1.442, but also a mistake that substantively prejudiced Dr. Horowitch from evaluating

Diamond's offer. Contrary to Diamond's assertion, the inclusion of language stating that the offer was to satisfy "all claims" did not clarify the fundamental confusion this error created. Despite the clear language of the applicable statues and Florida case law, the Eleventh Circuit indicated that such an offer might still be valid, and posed the following question:

> UNDER FLA. STAT. § 768.79 AND RULE 1.442, IS A DEFENDANT'S OFFER OF JUDGMENT VALID IF, IN A CASE IN WHICH THE PLAINTIFF DEMANDS ATTORNEYS' FEES, THE OFFER PURPORTS TO SATISFY ALL CLAIMS BUT FAILS TO SPECIFY WHETHER ATTORNEYS' FEES ARE INCLUDED AND FAILS TO SPECIFY WHETHER ATTORNEYS' FEES ARE PART OF THE LEGAL CLAIM?

This Court should respond to this certified question "no" because: (A) Diamond's offer did not comply with the explicit requirements of Rule 1.442; (B) the cases cited by Diamond in support of its argument and referenced by the Eleventh Circuit are inapplicable to the case at bar; and (C) Diamond's failure to specify whether attorneys' fees were included was substantively prejudicial to Dr. Horowitch.

A. Diamond's Offer Of Judgment Did Not Comply With The Explicit Requirements Of Fla. R. Civ. P. 1.442.

Diamond's offer of judgment was made pursuant to Section 768.79 and Fla. R. Civ. P. 1.442, which establishes the procedure for making an offer of judgment. Rule 1.442 requires that an offer of judgment "state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim." Fla. R.

Civ. P. 1.442(c)(2)(F). This requirement was adopted by the Florida Supreme Court and became effective on January 1, 1997. In Re: Amendments to Florida Rules of Civil Procedure, 682 So. 2d 105 (Fla. 1996) ("Fla.R.Civ.P. 1.442(c)(2), "A proposal shall…(F) state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim").

Importantly, binding precedent issued by this Court states that any offer of judgment which does not strictly comply with the requirements of § 768.79, Florida Statutes and Rule 1.442 is not enforceable. In Campbell v. Goldman, an offer of judgment stated that it was being made pursuant to Rule 1.442, but did not state that it was being made pursuant to Section 768.79 959 So. 2d 223, 224 (Fla. 2007). On that basis alone, this Court held that the offer was technically defective and must be stricken and rendered unenforceable. In so holding, the Court stated that both Section 768.79 and Rule 1.442 must be strictly construed in determining the enforceability of an offer of judgment:

> We find that the holding in Willis Shaw and Lamb regarding strict construction of the language in the offer of judgment statute and rule at issue in those cased is equally applicable to the language from rule 1.442 and section 768.79 concerning the requirements of citing authority. Contrary to Goldman's assertions, **strict construction is applicable to both the substantive and procedural portions of the rule and statute**.

Campbell, 959 So. 2d at 226-27 (emphasis added).

Importantly, this Court reached that conclusion even though the offeree could not claim that he was prejudiced by the offer. Therefore, failure to strictly comply with terms of either Section 768.79 or Rule 1.442 renders an offer of judgment unenforceable. This Court has reiterated in several subsequent cases that this rule of strict construction applies not just to Section 768.79, but also Rule 1.442, in deciding whether an offer of judgment is enforceable. Attorneys' Title Ins. Fund, Inc. v. Gorka, 36 So. 3d 646, 650-51 (Fla. 2010); Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 278-79 (Fla. 2003).

In the present case, Dr. Horowitch's deceptive trade practices claim included a claim for attorneys' fees at the time Diamond's offer was made. However, Diamond's offer of judgment made no reference to attorneys' fees. Therefore, Diamond clearly failed to comply with the express requirements of Rule 1.442, and it should not be permitted to enforce its offer of judgment.

B. The Cases Cited By Diamond And Referenced By The Eleventh Circuit Are Distinguishable Or Have Been Overruled.

Diamond claims that at least some Florida cases have held that an offer of judgment which does not explicitly reference attorneys' fees is viable. (See Diamond's Initial Brief, p. 33). In support of this argument, Diamond cites Unicare Health Facilities, Inc., v. Mort, 553 So. 2d 159 (Fla. 1989) and George v. Northcraft, 476 So. 2d 758 (Fla. 5th DCA 1985). The Eleventh Circuit similarly noted that these cases conflict with Campbell. (See Diamond Aircraft Industries,

Inc. v. Horowitch, 645 F. 3d 1254 at 1260 (11th Cir. 2011). Diamond's reliance on these cases, however, is misguided.

First, both Unicare Health Facilities and George v. Northcraft were decided under the 1981 version of Rule 1.442,[3] which did not require that attorneys' fees be referenced. The present version of Rule 1.442 was adopted in 1997,[4] and added the specific requirement that attorneys' fees be referenced. Therefore, the holdings

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[3] The Florida Bar Rules of Civil Procedure, 391 So. 2d 165 (Fla. 1980)

RULE 1.442 OFFER OF JUDGMENT (1980)

At any time more than ten days before the trial begins a party defending against a claim may serve an offer on the adverse party to allow judgment to be taken against him for the money or property or to the effect specified in his offer with costs then accrued. An offer of judgment shall not be filed unless accepted or until final judgment is rendered. If the adverse party serves written notice that the offer is accepted within ten days after service of it, either party may then file the offer and notice of acceptance with proof of service and thereupon the *court* shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence of it is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the adverse party is not more favorable than the offer, he must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by further proceedings, the party adjudged liable may make an offer before trial if it is served within a reasonable time, not less than ten days, before beginning of the hearing or trial to determine the amount or extent of liability. This rule shall not apply to actions or matters related to dissolution of marriage, alimony, nonsupport or child custody.

[4] For a more thorough discussion of the history of both Rule 1.442, Fla. Stats. 768.79 and 45.061, see Sarkis v. Allstate Ins. Co., 863 So. 2d 210, 218-222 (Fla. 2003).

of these cases in regards to attorneys' fees are irrelevant because they were decided on a version of Rule 1.442 that did not require attorneys' fees to be referenced.

Furthermore, Unicare and George were decided before the creation of Section 768.79, so it is far from clear whether they even apply to Section 768.79 offers. Finally, it appears that both Unicare and George may have been procedurally overruled. The committee notes to the 1996 amendments to Rule 1.442 states the following:

> COMMITTEE NOTES
> 1996 Amendment…This rule replaces former rule 1.442, which was repealed by the Timmons decision, and **supersedes those sections of the Florida Statutes and the prior decisions of the court, where reconciliation is impossible**, in order to provide a workable structure for proposing settlements in civil actions.

(Emphasis added). For these reasons, neither case carries any precedential or persuasive weight on whether an offer of judgment under the current version of Rule 1.442 is required to state whether a claim for attorneys' fees is included.

Second, Unicare Health and George v. Northcraft do not even stand for the proposition that an offer of judgment which does not explicitly reference attorneys' fees is viable. Both Unicare and George dealt with the situation where a party waived his right to attorneys' fees if he **accepted** an offer that did not mention attorneys' fees. Neither case dealt with the situation at bar, i.e. if a party pled for attorneys' fees and rejected the offer, how the attorneys' fees incurred by the offeree prior to the date of serving the offer should be addressed.

The only way Rule 1.442(c)(2)(F) makes any sense is that if a party has pled for attorneys' fees, the party making the offer must disclose whether the offer includes attorneys' fees prior to the offer. Because Diamond failed to follow the explicit requirements of Rule 1.442, it should not be rewarded by creating the ambiguity of whether the offer did, or did not, include attorneys' fees. See Campbell, 959 So. 2d at 226-27.

C. Diamond's Failure To State Whether The Offer Encompassed Attorneys' Fees Was Substantively Prejudicial To Dr. Horowitch.

Diamond also argues that the issue of whether attorneys' fees were included in its offer is not relevant because Dr. Horowitch's unfair and deceptive trade practices claim was ultimately governed by Arizona, rather than Florida law, and therefore did not provide for an award of attorneys' fees. (Diamond's Initial Brief, pp. 33-34 citing Bennett v. American Language Sys. Of Boca Delray, Inc., 857 So. 2d 986 (Fla. 4th DCA 2003) (offeror not required to include inapplicable conditions in the offer of judgment)). First, the holding of Bennett conflicts with the strict construction of Rule 1.442 and Section 768.79 set forth by this Court. Campbell, 959 So. 2d at 226-27. More importantly, however, is that despite Diamond's suggestion to the contrary, an offer must be evaluated at the time it was made, not at the conclusion of the litigation. See Allstate Indemnity Co. v. Hingson, 808 So. 2d 197 (Fla. 2002) (ruling that the defendants' offer was

defective because at the time the offer was made, it was a joint offer that did not allow one plaintiff the ability to separately accept, or reject, the offer).

Given the holding in Hingson that an offer must be evaluated at the time it was made, the fact that Dr. Horowitch was later barred from pursing attorneys' fees because Arizona law governed his unfair trade practices claim is irrelevant. The facts are that when Dr. Horowitch received the offer of judgment, he had a pending claim which, if successful, would have entitled him to recover attorneys' fees.

Diamond's failure to state whether the offer included attorneys' fees was substantively prejudicial to Dr. Horowitch at the time the offer was made because it prevented him from effectively evaluating the offer. The parties had been litigating for over a year when Dr. Horowitch received the offer and by then attorneys' fees were substantial. Whether or not Diamond's offer included such fees was therefore critical to Dr. Horowitch's ability to effectively evaluate the offer.

For example, if Dr. Horowitch had assumed that Diamond's offer of $40,000 did not include attorneys' fees and he had accepted it, then Dr. Horowitch could have applied to the trial court to determine whether he was the prevailing party entitled to attorneys' fees under FDUTPA even though he had accepted the offer. See, e.g., Mady v. DaimlerChrysler Corporation, 59 So. 3d 1129 (Fla. 2011) (by

accepting offer of judgment exclusive of attorneys' fees, plaintiff did not waive his right to recover statutory attorneys' fees prior to the date that the offer was made). At the same, it also meant that if the case went to trial and Dr. Horowitch only recovered his $20,000 deposit, the attorneys' fees he incurred prior to the date of the offer could not be added to the final judgment to determine whether the amount recovered was less than 75% of Diamond's offer of judgment. See, e.g., Segui v. Margrill, 864 So. 2d 518 (Fla. 4th DCA 2004) (adding $7,500 in pre-offer attorneys' fees for purposes of determining whether 125% threshold permissible unless there is no independent statutory basis for such attorneys' fees).

On the other hand, if Dr. Horowitch had assumed that Diamond's offer did include attorneys' fees, then Dr. Horowitch knew that if he accepted the offer, he would not be entitled to the attorneys' fees he had incurred prior to the date of the offer. If he rejected the offer, however, and recovered only his $20,000 deposit, then the attorneys' fees incurred by Horowitch prior to the date of Diamond's offer could be added to the $20,000 net judgment entered[5] to determine whether Horowitch had recovered more than 75% of the Diamond $40,000 offer. See State Farm Mutual Automobile Ins. Co. v. Nichols, 932 So. 2d 1067, 1077 (Fla. 2006). Since Dr. Horowitch knew that he had incurred more than $20,000 in attorneys'

[5] § 768.79(6), Fla. Stat.

fees prior to the date of Diamond's offer, Dr. Horowitch could be confident that Diamond's offer would not be enforceable in this scenario.

In short, Dr. Horowitch could not meaningfully evaluate Diamond's offer unless he knew with certainty whether Diamond's offer included the attorneys' fees that Dr. Horowitch had incurred prior to the date the offer was served. This goes to the very heart of whether Dr. Horowitch could evaluate the offer. An offer of judgment not only must put the offeree on notice as to the amount being offered, it must also allow an offeree an opportunity to evaluate the risks of not accepting the offer. White v. Steak & Ale, of Florida, Inc., 816 So. 2d 546, 551-52 (Fla. 2002); Scottsdale Ins. Co. v. De Salvo, 748 So. 2d 941 (Fla. 1999). Without knowing with certainty whether Diamond's offer included his attorneys' fees incurred prior to the offer, Horowitch could not properly evaluate his risks of not accepting Diamond's offer.

Finally, at the very least, because Diamond's offer was ambiguous on the issue of attorneys' fees. An offer of judgment that is ambiguous in its terms is defective and not enforceable. State Farm Mutual Automobile Ins. Co. v. Nichols, 932 So. 2d 1067, 1079-80 (Fla. 2006); Morgan v. Beekie, 879 So. 2d 110, 111 (Fla. 5th DCA 2004). Therefore, Diamond's offer should be declared unenforceable for this additional reason as well. For all of the these reasons, this Court should answer the Eleventh Circuit's first certified question "no."

CONCLUSION

As a consumer who sought to fight Diamond's unfair, if not legally barred, practices, Dr. Horowitch should not be punished with paying Diamond's attorneys' fees. Fortunately, Florida law provides no basis for such a fee award, and for good reason. Awarding attorneys' fees under a Florida law that was never applied, was never litigated on the merits, and did not even govern the parties' dispute would be a gross miscarriage of justice. Furthermore, Diamond's offer of judgment was so seriously flawed that it could not be evaluated and should not be enforced. Therefore, this Court should answer "no" to each of the certified questions by the Eleventh Circuit.

William V. Custer, IV
Georgia Bar No. 202910
BRYAN CAVE LLP
One Atlantic Center, 14th Floor
1201 W. Peachtree Street, NW
Atlanta, Georgia 30309
Telephone: (404) 572-6600
Facsimile: (404) 572-6999

James C. Hauser
Florida Bar No. 0168348
750 Live Oak Street
Maitland, Florida 32751
Telephone: (407) 951-6865
Facsimile: (407) 660-3009

Counsel for Appellee Dr. Alan Horowitch

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TALLAHASSEE, FLORIDA

ALAN HOROWITCH Plaintiff/Appellee, v. DIAMOND AIRCRAFT INDUSTRIES, INC. Defendant/Appellant.	)	CASE NO. SC11-1371

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S mail to:

Hala Sandridge, Esquire
Fowler White Boggs P.A.
P.O. Box 1438
Tampa, FL 33601

This ___ day of October, 2011.

_____
William V. Custer, IV
Georgia Bar No. 202910
BRYAN CAVE LLP
One Atlantic Center, 14th Floor
1201 W. Peachtree Street, NW
Atlanta, Georgia 30309
Telephone: (404) 572-6600
Facsimile: (404) 572-6999

Counsel for Appellee

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

This ___ day of October, 2011.

_____
William V. Custer, IV
Georgia Bar No. 202910
BRYAN CAVE LLP
One Atlantic Center, 14th Floor
1201 W. Peachtree Street, NW
Atlanta, Georgia 30309
Telephone: (404) 572-6600
Facsimile: (404) 572-6999

Counsel for Appellee