IN THE COUNTY COURT FOR
PALM BEACH COUNTY, FLORIDA

COUNTY CIVIL DIVISION
CASE NO.: 2004-CC-006591-MB

JODY GORRAN,

Plaintiff,

vs.

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.
_____/

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW

Defendants Atkins Nutritionals, Inc. ("ANI") and Paul D. Wolff, in his representative capacity as co-executor of the Estate of Robert C. Atkins, M.D., move for final summary judgment pursuant to Fla. R. Civ. P. 1.510 on the ground that, based upon the pleadings, the full texts of the 1999 and 2002 paperback editions of the book *Dr. Atkins' New Diet Revolution* by Robert C. Atkins, M.D., and the contents of the http://atkins.com website, there is no genuine issue as to any material fact, and defendants are entitled to judgment as a matter of law. The particular grounds upon which this motion is based and the substantial matters of law to be argued at the hearing are set forth below.[1]

[1] This motion is supported by the affidavits of Stephanie Schonholz, Aaron Taylor and L. Martin Reeder, Jr. The purpose of the affidavits is to authenticate the texts of the 1999 and 2002 editions of *Dr. Atkins' New Diet Revolution* and the http://atkins.com website. Defendants filed those texts on August 27, 2004 as exhibits to Defendants' Request to Take Compulsory Judicial Notice ("Judicial Notice Request"). Although the Court has not yet ruled on defendants' request, plaintiff stated in his response that he "does not object to the Court taking judicial notice of the text" of the Atkins books.

PRELIMINARY STATEMENT

This action is factually baseless and legally unprecedented. It is predicated on a disregard for clearly-established parameters of federal and state constitutional protection for free speech; misrepresentation of the contents of Dr. Atkins' bestselling book *Dr. Atkins' New Diet Revolution* (the "Book") and the ANI website;[2] and distortions of Florida tort and consumer- protection law.

First, the Atkins Materials, upon which plaintiff claims he relied and upon which he bases his three causes of action, are, on their face, expressive, not commercial, speech concerning a subject of vital public interest and concern: health and nutrition. As such, they are fully protected by the First Amendment to the U.S. Constitution and by Article I, Section 4 of the Florida Constitution – a determination this Court can make from an inspection of the Atkins Materials. Accordingly, all three of plaintiff's claims, and his attempt to procure court-imposed warnings to silence or handicap one side of the public debate over the safety and efficacy of the Atkins low-carbohydrate nutritional approach, are barred as a matter of law. The fact that ANI also sells products that assist consumers in following the advice in the Book and on the website does not convert the Atkins Materials into commercial speech. (Section I)

Second, even if there were a genuine issue of material fact as to whether the Atkins Materials are expressive and not commercial speech – and, when reviewed in their entirety, as the law requires on a summary judgment motion, there can be no issue – there is not a single case that supports plaintiff's negligent misrepresentation, product liability, or FDUTPA claims. To the contrary, courts without exception have found such speech-directed claims to be unsustainable.

The negligent misrepresentation claim fails because the law does not impose on those responsible for creating or distributing generally circulated publications a duty of care towards readers; a negligence claim cannot be maintained in the absence of a duty of care. In any event, review of the

[2] The Book and website are sometimes referred to herein collectively as the "Atkins Materials."

Atkins Materials establishes that the alleged misrepresentation as to the safety and efficacy of the Atkins Nutritional Approach™ ("ANA") does not exist. (Section II.A)

Summary judgment must be granted on plaintiff's products liability claim with respect to the Book because the content of a book is not a "product" as a matter of law. The product liability claim also fails with respect to the ANI products plaintiff alleges he purchased because such products are not inherently dangerous and, hence, are not "defective" as a matter of law. (Section II.B)

Finally, the FDUTPA claim also fails on multiple grounds. Specifically, the Atkins Materials are noncommercial speech and thus not subject to FDUTPA. In any event, the Atkins Materials are not unfair or deceptive, and, under a separate, pending motion for judgment on the pleadings, plaintiff has failed to allege damages recoverable under FDUTPA. (Section II.C)

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Plaintiff alleges three causes of action: (i) negligent misrepresentation, claiming that he was injured as a result of his reliance on allegedly false statements made in the Atkins Materials by ANI and Dr. Atkins (Compl. ¶¶ 59-65) (Count I); (ii) product liability, claiming that the "books, nutritional supplements, minerals, and herbs" sold by ANI and Dr. Atkins are defective and unreasonably dangerous because they purportedly increase the "risk of cardiovascular disease and other illnesses" (Compl. ¶¶ 66-72) (Count II); and (iii) violation of Florida's Deceptive and Unfair Trade Practices Act (FDUTPA), on the ground that ANI and Dr. Atkins engaged in deceptive and unfair trade practices by allegedly making false claims that the Atkins diet and products were "fool-proof" and "safe for all customers" and by failing to give "adequate warnings about the health consequences of a high-fat diet." (Compl. ¶¶ 78) (Count III).

In addition to monetary damages of "less than $15,000" for Counts I and II, plaintiff seeks to recover $40.45 (the cost of the 1999 and 2002 paperback editions of the Book, plus $25 worth of products allegedly purchased from "Atkins, Inc." under FDUTPA (Compl. ¶ 84)), plus prejudgment interest, and an injunction requiring:

warnings on all Atkins' related books, Web sites and products such as the following:

> **WARNING – LOW-CARBOHYDRATE DIETS MAY BE HAZARDOUS TO YOUR HEALTH – CHECK WITH YOUR PHYSICIAN.**
>
> **WARNING – LOW-CARBOHYDRATE DIETS CAN INCREASE THE LEVEL OF LDL ("BAD") CHOLESTEROL IN YOUR BLOOD.**

Compl. ¶ 85.

What the Atkins Materials Actually Say

The Book

Plaintiff alleges that the section of the *Dr. Atkins' New Diet Revolution* entitled "Testing for Fat Sensitivity" led him to believe that the Atkins diet "would keep him safe as long as he strictly limited carbohydrates." Compl. ¶¶ 31, 40, 41. As the Complaint acknowledges, this section of the Book states that "there are individuals who are fat-sensitive and will develop a less favorable cholesterol level on a high-fat diet than on a low fat diet." Compl. ¶ 31. Although plaintiff alleges that this section of the Book advises such fat-sensitive persons to continue with the regular Atkins diet if, after trying the lower-fat version of it, they are not satisfied, Compl. ¶ 41, he fails to mention the cautionary language on the very next page:

> Go back to the original free-use-of-fat system long enough to have another [lipid] profile. If it bounced back up from the previous one, *then you are fat-sensitive and should follow the fat-restricted variation of the diet.* Our studies have shown that there is generally a steady improvement on the regimen, and therefore a falling cholesterol level is expected. A cholesterol level elevation runs counter to the anticipated trend and would be significant.

Dr. Atkins' New Diet Revolution at 186. (Judicial Notice Request, Exh. A) (emphasis in original).[3]

Also omitted from the Complaint is a section of the 2002 edition of the Book entitled "Time to Retest," which underscores the importance of undergoing blood and medical tests after several

[3] As noted in footnote 1, true and correct copies of the 1999 and 2002 paperback editions of the Book and significant portions of the website previously were provided to the Court as Exhibits A through C to Defendants' Judicial Notice Request (cited herein as "Judicial Notice Request, Exh. ___.").

weeks on the Atkins diet. *See Dr. Atkins' New Diet Revolution* at 175 (Judicial Notice Request, Exh. B). The Book notes that participants should see either a significant drop in their cholesterol or a "dramatic" increase in HDL (good cholesterol). *Id.* The text further notes that "[i]f your cholesterol has not improved to a level that represents reduced risk factors," one may continue to do Atkins but should (i) take cholesterol-lowering nutritional supplements and (ii) repeat the blood test in a month and continue to get retested every three months until the figures are satisfactory. *Id.* at 176. (The Complaint does not allege that plaintiff took supplements or had his blood tested every three months as the Book recommends.)

In addition, a disclaimer on the copyright page of both the 1999 and 2002 editions of the Book states that "the advice offered in this book, although based on the author's experience with many thousands of patients, is not intended to be a substitute for the advice and counsel of your personal physician." *See Dr Atkins' New Diet Revolution* (Judicial Notice Request, Exhs. A, B). Both editions of the Book also recommend that, before starting the diet, one should first have a complete medical check up, advice plaintiff does not allege he followed. *Id.*, Exh. A. at 85-88 and Exh. B at 107, 109-10.

Finally, plaintiff admits that he ate "large amounts of pastrami and cheesecake because the Atkins diet allows unlimited pastrami and Atkins, Inc. sells a cheesecake that is 'Atkins friendly.'" Compl. ¶ 51. However, nowhere does the Book (or the ANI website) state that either of these foods is low in carbohydrates, much less endorse their consumption in large quantities. On the contrary, the only time that pastrami is specifically mentioned in the Book is in reference to the pre-Atkins eating habits of one of Dr. Atkins' patients – a patient who lost fifty pounds after switching to an Atkins-approved diet. *See* Dr. Atkins' *New Diet Revolution* (Judicial Notice Request, Exh. A. at 76 and Exh. B at 71). However, the Book also warns against consumption of "luncheon" or "processed" meats with "nitrates or sugars added" that may include carbohydrates. *Id.*, Exh. A at 97 and Exh. B at 124. Notably, plaintiff does not allege that he ever bought or consumed cheesecake sold by ANI.

The Website

Plaintiff also alleges that the ANI website claims that it is "safe for all persons to eat a high fat diet as long as carbohydrate consumption [is] restricted," Compl. 61, that the website "gave assurances" that "increased cholesterol levels are not a reason to go off the diet," Compl. ¶ 42, and that the website recommends "strict conformity with the diet" for dieters whose cholesterol levels have increased. *Id.*

In fact, the "Frequently Asked Questions" web page appended to the Complaint as Exhibit K (*see also* Judicial Notice Request, Exh. C at Tab 5) conveys quite different advice. The page warns that "if you've been following Atkins for some time and your cholesterol levels have not come down, something else is going on." In conjunction with this warning, the page notes that "high cholesterol that has a genetic component usually responds to changes in diet, but may be difficult to address with diet alone," and it encourages such dieters to take supplements to assist in lowering their cholesterol (advice that plaintiff does not allege he followed). The web page also notes that exercise is an important element of keeping cholesterol down, and it encourages dieters to "[cut] back on meats processed with nitrates, such as most bacon, sausage and cold cuts, and limiting intake of hard cheese."

SUMMARY JUDGMENT STANDARD

The movant for summary judgment bears the burden of proving the absence of any disputed material fact. Although the court must draw reasonable inferences in favor of the nonmoving party, once the movant tenders competent evidence to support its motion, the opposing party must come forward with counterevidence sufficient to reveal a genuine issue. *Landers v Milton*, 370 So.2d 368, 370 (Fla. 1979) ("It is not enough for the opposing party merely to assert that an issue does exist."); *Holl v Talcott*, 191 So.2d 40, 43-44 (Fla. 1966); Fla.R.Civ.P. 1.510. As explained below, applying this standard to the facts of this action dictates that summary judgment be granted to defendants on all three of plaintiff's spurious claims.

ARGUMENT

I. THE FIRST AMENDMENT AND THE FLORIDA CONSTITUTION MANDATE SUMMARY JUDGMENT ON ALL CLAIMS AS TO THE BOOK AND WEBSITE

Plaintiff's claims relate almost entirely to constitutionally protected ideas, information and advice contained in the Atkins Materials. Accordingly, these claims are barred by the First Amendment to the U.S. Constitution and by Article I, Section 4 of the Florida Constitution.[4] This Court need review nothing more than the Atkins Materials themselves to properly so hold.[5]

The First Amendment proscribes Congress and the states[6] from making any law "abridging the freedom of speech, or of the press." At its core, this means that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (citations omitted). This proscription – which applies to speech-restrictive judicial rulings as well as to legislation[7] – follows from the central concern of the

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[4] Article I, section 4 of the Florida Constitution provides, in pertinent part: "Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." Florida courts have consistently interpreted this section to be co-extensive with the First Amendment. *See, e.g., Café Erotica v. Florida Dep't of Transp*, 830 So. 2d 181, 183 (Fla. 1st Dist. DCA 2002) ("The scope of the Florida Constitution's protection of freedom of speech is the same as required under the First Amendment."); *Dep't of Educ. v. Lewis*, 416 So. 2d 455, 461 (Fla. 1982) ("The scope of the protection accorded to freedom of expression in Florida under article I, section 4 is the same as is required under the First Amendment."). Thus, as plaintiff's claims are barred by the First Amendment's guarantee of free speech, so too are they barred by the Florida Constitution.

[5] *See, e.g., Gordon and Breach Science Publishers S.A. v. American Institute of Physics*, 859 F. Supp. 1521 (S.D.N.Y. 1994) (holding on a motion to dismiss that academic articles challenged under the Lanham Act were not commercial speech based on the allegations in the complaint and review of the articles, which were attached to the complaint); *United States Olympic Comm. v. American Media, Inc.*, 156 F. Supp. 2d 1200, 1204, 1206-09 (D. Colo. 2001) (holding on motion to dismiss that magazine attached to complaint was not commercial speech); *Lacoff v. Buena Vista Publ'g, Inc.*, 183 Misc. 2d 600, 705 N.Y.S.2d 183 (S. Ct. N.Y. Co. 2000) (determining on motion to dismiss that investment book was not commercial speech).

[6] The Fourteenth Amendment extended the protections of the First Amendment to the states. U.S. Const. amend. XIV; *Gitlow v. New York*, 268 U.S. 652, 663 (1925).

[7] *See, e.g., Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199, 204 (S.D. Fla. 1979) ("improper judicial limitation of first amendment rights is as offensive as unwarranted legislative incursion into that area").

First Amendment that there be "a free flow from creator to audience of whatever message a film or a book might convey." *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 77 (1976) (Powell, J., concurring).

This principle of the free exchange of ideas embodied in the First Amendment reflects the recognition that "novel and unconventional ideas might disturb the complacent, but [the authors of the First Amendment] chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). The framers of the First Amendment understood that it was essential that "men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion . . ." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

The classic expression of the First Amendment concept that the truth will best emerge from the unfettered competition of ideas is that of Justice Oliver Wendell Holmes in *Abrams*:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

This case, dealing with health and nutrition – a vital and controversial subject of ongoing public debate – squarely implicates Holmes' principle (long a mainstay of First Amendment jurisprudence) that debate and discussion on matters of public concern must be permitted to proceed in the marketplace of ideas, unhindered by government interference (here, in the form of potential civil liability and mandated warnings). The Book and website are, literally, contributions to the marketplace of ideas regarding weight loss and nutrition. As such, they are entitled to unqualified First Amendment protection.

The conclusion that the Atkins materials are fully protected by the First Amendment is amply supported by a uniform body of court decisions addressing tort claims brought by persons

allegedly injured as a consequence of assertedly false and/or dangerous thoughts and ideas expressed in books, on websites, or in other media. *See, e.g.*, *Winter v. G.P. Putnam & Sons*, 938 F.2d 1033, 1038 (9th Cir. 1991) (affirming on First Amendment grounds grant of summary judgment to publisher of mushroom encyclopedia who had been sued by mushroom enthusiasts who became ill from eating mushrooms based on erroneous information in the book that the mushrooms were safe); *Barden v. HarperCollins Pub., Inc.*, 863 F. Supp. 41 (D. Mass. 1994); *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802 (S.D. Tex. 1983) (refusing on First Amendment grounds to permit estate of a young man who hanged himself to sue publisher of article describing method of autoerotic asphyxiation); *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990 (E.D.N.Y. 1977) (publisher's encyclopedia of chemicals and drugs protected under the First Amendment from liability for alleged misstatement of chemical's toxicity); *Lacoff v. Buena Vista Pub., Inc.*, 183 Misc. 2d 600, 705 N.Y.S.2d 183 (2000) (noting "clear constitutional protection" the First Amendment afforded a "how to" book relating the story of an investment group formed by inexperienced investors); *Smith v. Linn*, 563 A.2d 123 (Pa. Super. Ct. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 202 Cal. App. 3d 989 (1988) (declining, on First Amendment grounds, to hold songwriters, musicians, publishers, and distributors liable for death of plaintiffs' son, who shot himself while listening to Ozzy Osbourne album); *Gutter v. Dow Jones, Inc.*, 490 N.E.2d 898 (Ohio 1986); *Walter v. Bauer*, 109 Misc. 2d 189, 439 N.Y.S.2d 821 (Sup. Ct. Erie Co. 1981), *aff'd as modified*, 88 A.D.2d 787, 451 N.Y.S.2d 533 (4th Dep't 1982) (refusing to allow plaintiff to amend his complaint to state a strict tort liability cause of action against book publisher because of "chilling effect it would have on the First Amendment").

Smith, supra, is strikingly similar to the instant case. *Smith* involved a claim on behalf of a reader who allegedly died while following a diet plan outlined in a book titled *When Everything Else Fails ... The Last Chance Diet*. 563 A.2d at 124-25. The appellate court, finding that the book did not fall within any established exception to First Amendment protection, affirmed the trial court's grant of summary judgment in favor of the defendants. *Id.* at 126, 127. Holding that the publisher of the diet book was entitled to full First Amendment protection, the court stated that "it is evident that without

scrupulous protection of the first amendment right by the courts, governments can oppress the people and in effect rewrite history when the people are suppressed in their expressions ...." *Id.* at 127.

Similarly, in *Barden*, *supra*, plaintiff, an adult victim of child abuse, brought an action against the publisher of a book on surviving child abuse to recover for an alleged misrepresentation (the book listed allegedly qualified attorneys who, plaintiff argued, were ill-equipped to handle her case). 863 F Supp. at 42. In holding that the action was barred by the First Amendment, the court noted the "pandora's box" that would be opened if such a claim were permitted. *Id.* at 45.

In *Gutter*, *supra*, the plaintiff sued Dow Jones, owner and publisher of the *Wall Street Journal*, for losses incurred in the purchase and sale of securities based upon information reported in that newspaper. 490 N.E.2d at 899. The court recognized that "[n]o action for damages lies against a newspaper for merely inaccurately reporting when the publication does not constitute libel." *Id.* at 899-900 (citing *Langworthy v Pulitzer Pub Co.*, 368 S.W.2d 385, 390 (Mo. 1963)). Dismissing plaintiff's action as barred by the First Amendment, the court held that imposing liability on Dow Jones for negligent misrepresentation "would serve neither justice nor the public interest because of its manifestly chilling effect upon the right to disseminate knowledge." *Id.* at 902.

The Atkins Materials are no less entitled to full First Amendment protection than the expressive speech at issue in the cases cited above. Dr. Atkins' important contribution to the ongoing public debate over health and nutrition – a debate that occupies a prominent place in our national cultural and scientific dialogue – constitutes speech that the First Amendment seeks to foster by precluding claims such as those asserted here. Plaintiff's claims seek to stifle the free speech rights of those with whom he and his backers disagree and to hold defendants' words, rather than plaintiff's actions, responsible for whatever harm he may have suffered. It is hard to imagine claims more antithetical to core First Amendment principles. Under the First Amendment, the marketplace of ideas, not this Court, is the proper venue for evaluation of Dr. Atkins' advice.

Plaintiff argued, in opposing defendants' motion to dismiss, that the Atkins Materials are pure commercial speech – nothing more than product promotion. This argument is misguided.

Commercial speech, which is subject to less than full First Amendment protection, is "usually defined as speech that *does no more than* propose a commercial transaction." *United States v. United Foods Inc.*, 533 U.S. 405, 409 (2001) (emphasis added). A review of both the Book and website reveal that they do far more than merely propose the sale of Atkins products. In fact, both are overwhelmingly noncommercial in nature, devoted almost entirely to explaining the distinctive nutritional approach about which Dr Atkins had been writing for more than 30 years (see Compl. ¶ 6), long before any Atkins products existed.

The Atkins Materials contain at most isolated passages of what is arguably commercial speech in that they encourage readers to purchase ANI products. But any such speech is intertwined with, and incidental to, the health and nutrition advice that is clearly not commercial. As the Supreme Court has held, where the main purpose of a work is noncommercial, and the commercial and noncommercial component parts are "inextricably intertwined," the Court "cannot parcel out the speech, applying one test to one phrase and another test to another phrase. . . . Therefore, we apply our test for fully-protected expression." *Riley v. Nat'l Federation of the Blind*, 487 U.S. 781, 795-96 (1988), *see also Schaumburg v Citizens for a Better Environment*, 444 U.S. 620 (1980), *Oxycal Laboratories, Inc. v. Jeffers*, 909 F. Supp. 719 (S.D. Cal 1995), *The Monotype Corp. v. Simon & Schuster Inc.*, No. 99 C 4128, 2000 WL 1852907, at *7 (N D. Ill. Sept. 8, 2000).

Courts consistently have held that publications containing primarily noncommercial ideas intertwined with some element of commercial promotion are entitled to full First Amendment protection. In *Monotype Corp., supra*, defendant published a book and CD-ROM set; the book provided technical information on the science of typography designed to accompany a collection of typographic fonts contained on the CD-ROM. Plaintiff, an owner of trademarks used in connection with the distribution of digitized typeface designs, sued defendant for, *inter alia*, false advertising, insofar as the statements in the book mischaracterized the plaintiff's fonts. In granting summary judgment to defendant on this claim, the court held that even though there was an undeniable commercial component (namely, to sell the CD-ROM), and there were commercial statements within its text, the 270-page book was "technical" and

"non-commercial" in nature and thus in its entirety constituted protected noncommercial speech. 2000 WL 1852907 at *7. Similarly, the Atkins Materials were created for the principal purpose of disseminating the principles of the ANA – principles Dr. Atkins had advanced in his books for over three decades – and as such are fully protected under the First Amendment.

Similarly, in *Oxycal, supra*, the plaintiff alleged that statements in a book violated the Lanham Act by falsely stating that the plaintiff's specifically-identified products contained a carcinogen. 909 F. Supp at 720. The court found that the book was noncommercial speech even though it contained suggestions about foods to eat, products to buy, and shops to patronize (including one in which two defendants had an interest). *Id* at 725. After considering "whether the speech is primarily motivated by commercial concerns" and whether "the central message of the Book is commercial," the court denied plaintiff's preliminary injunction motion, holding that the book was protected noncommercial speech:

> The Court, at this stage in the proceedings, finds that the purpose of the Book is to advance [the author-defendant's] theories on the causes of cancer and the ways to eliminate cancer. That her methods recommend the use of certain products is secondary. That her theories may lack scientific foundation is not for this Court to decide. [The author-defendant]'s Book is non-commercial speech which is afforded First Amendment protection.

909 F. Supp. at 726.

United States v. Schiff, 379 F.3d 621 (9th Cir. 2004), upon which plaintiff will no doubt rely, as he did in opposing defendants' motion to dismiss, is inapposite. *Schiff* must be understood against the backdrop of the illegal tax-avoidance activities in which the defendant had long been engaged and the *sui generis* body of federal statutory and case law authorizing enjoining the marketing and promotion of fraudulent tax shelter schemes. *See, e.g.*, 26 U.S.C. § 6700 and *United States v Estate Preservation Services*, 202 F.3d 1093 (9th Cir. 2000). The Atkins Materials, and the alleged health and nutrition-oriented business activities of defendants at issue here are far removed from the facts presented in *Schiff*. To extend the reasoning of *Schiff* outside its specific factual setting would endanger not only the health and nutrition book market but the entire market for self-help and advice books where those involved in the publication also engage in related lawful business activities.

The adverse consequences of a ruling that the Atkins Materials are not fully protected speech would be a checkered flag to activists on a wide range of subjects to attempt to suppress speech with which they disagree by bringing or threatening litigation. Any such ruling would be the first of its kind and would represent an inversion of the fundamental principle that government has no power outside the realm of commercial speech to decide which ideas are valid and which are not.

In sum, the First Amendment and the parallel protections of the Florida Constitution mandate summary judgment in defendants' favor on all claims against the Atkins Materials.

II. SUMMARY JUDGMENT SHOULD BE GRANTED ON ALL OF PLAINTIFF'S CLAIMS AS A MATTER OF FLORIDA LAW

Even if this Court should conclude, after review of the Book and website, that a genuine issue of material fact exists concerning the level of constitutional protection to which the Atkins Materials are entitled, all of plaintiff's claims are otherwise defective as a matter of Florida law.

A. Summary Judgment Should Be Granted on Plaintiff's Negligent Misrepresentation Claim

The elements of a negligent misrepresentation cause of action are that (i) the defendant misrepresented a material fact; (ii) the defendant either knew of the misrepresentation, made the representation without knowledge as to its truth or falsity, or made the representation under circumstances in which he or she ought to have known of its falsity; (iii) the defendant intended that the representation induce another to act on it; and (iv) the plaintiff acted in justifiable reliance on the misrepresentation and suffered injury as a result. *See Atlantic Nat. Bank of Florida v. Vest*, 480 So. 2d 1328, 1331-32 (Fla. 2d DCA 1985); *Wallerstein v. Hospital Corp. of Am.*, 573 So. 2d 9, 10 (Fla. 4th DCA 1990). As a prerequisite to maintaining such an action, however, the defendant must owe a duty of care toward the plaintiff.

The gravamen of plaintiff's negligent misrepresentation claim is that defendants claimed falsely that it was "safe for all persons to eat a high-fat diet, as long as carbohydrate intake was restricted." Compl. ¶ 61. As detailed below, this claim fails as a matter of law because (i) defendants –

an author and distributor – owe no duty of care to plaintiff; and (ii) neither the Book nor the website contain the claimed misrepresentation.

1. **Defendants Owed No Duty of Care to Plaintiff**

As a prerequisite to obtaining redress for negligence, it is "necessary to show a duty owed to the injured party by the wrongdoer, and a violation of that duty." J.D. Lee and Barry A. Lindahl, MODERN TORT LAW, LIABILITY AND LITIGATION § 3.3 (2d ed. 2002). Courts throughout the country – informed by considerations flowing from the First Amendment – consistently have rejected efforts by readers to subject authors (such as Dr. Atkins) and distributors (such as ANI) of generally disseminated works to tort liability under a theory of negligent misrepresentation.

With respect to the claim against Dr. Atkins' estate, *Bailey v. Huggins Diagnostic & Rehabilitation Ctr., Inc.*, 952 P.2d 768 (Colo. Ct. App. 1997), is particularly instructive. In *Bailey*, the plaintiff brought a negligent misrepresentation claim against the author of a book that denounced the use of amalgams (which are used to fill cavities in teeth), alleging that the book prompted her to have her amalgams removed and to replace them with a material of inferior quality. Noting the absence of a dentist-patient relationship and the fact that the defendant had played no role in treating the plaintiff, the court held that the defendant "could not be liable for any alleged negligent misrepresentation made to plaintiff because he owed her no duty of due care." *Id.* at 771. Here, likewise, no doctor-patient relationship existed between
plaintiff and Dr. Atkins, and no duty of care was owed solely as a result of Dr. Atkins' authorship of a book that plaintiff purchased and purported to follow.

In *Demuth Dev. Corp. v. Merck & Co.*, *supra*, 432 F. Supp. 990, the court examined whether an alleged misstatement of the toxicity of a chemical used in plaintiff's product in a Merck's encyclopedia of chemicals and drugs, which, could subject Merck to liability for negligent misrepresentation. The court remarked that "[l]iability in such cases arises only where there is a duty, if one speaks at all, to give the correct information." *Id.* at 992-93 (citation omitted). Noting that there was no relationship between the parties that would place the defendant under "any duty towards plaintiff or its

business," the court concluded that the plaintiff's claim for negligent misrepresentation was superseded by the defendant's First Amendment right to "publish free of fear of liability" and "the overriding societal interest in untrammeled dissemination of knowledge." *Id.* at 993. As the court noted, "even a 'reasonable anticipation that the [alleged misstatement] will be communicated to others whose identity is unknown to the defendant . . . is not sufficient to create a duty of care towards them.'" *Id.* (quoting W. Prosser, LAW OF TORTS 708 (4th ed. 1971)).

The lack of any duty of care on the part of a publisher toward the reader is equally well established. *See, e.g., Brandt v. The Weather Channel, Inc.*, 42 F. Supp 2d 1344, 1346 (S.D. Fla.), *aff'd*, 204 F.3d 1123 (11th Cir. 1999) ("It is well established that mass media broadcasters and publishers owe no duty to the general public who may view their broadcasts or read their publications."); *First Equity Corp. v. Standard & Poor's Corp.*, 869 F.2d 175 (2d Cir. 1989) (publisher of financial information not liable under Florida law to subscriber for negligent misrepresentation); *Barden v. HarperCollins Pub., Inc.*, *supra*, 863 F. Supp. at 45 (granting summary judgment for publisher on negligent misrepresentation claim on ground that imposing on publishers duty to check every fact in books they publish is "outside the realm of their contemplated legal duties"); *Winter v. G.P. Putnam & Sons*, *supra*, 938 F.2d at 1038 (no duty of care owed by publisher of mushroom encyclopedia to mushroom enthusiasts who became ill from eating mushroom erroneously deemed safe by the book); *Gutter v. Dow Jones, Inc.*, *supra*, 490 N.E.2d 898 (publisher of *Wall Street Journal* not liable to subscriber for alleged negligent misrepresentation relied upon by reader in purchasing securities).

The law makes it even more difficult to hold a distributor liable for the content of materials sold or distributed. Under this body of law, a distributor "will be considered to have published the material only if [it] knew, or had reason to know" that the material was actionable. Restatement (Second) of Torts §581 (1977). This knowledge requirement, which is not applicable to claims against authors and publishers, who are presumed to know the content of what they write or publish, is an *additional* hurdle to holding a distributor liable, premised on the practical impossibility of requiring

distributors to be familiar with the content of every book they sell and the chilling effect of imposing such a requirement.[8]

In this case, the lack of any duty of care towards plaintiff is made explicit in the form of the disclaimer on the copyright page of the Book, which states "the advice offered in this book, although based on the author's experience with many thousands of patients, is not intended to be a substitute for the advice and counsel of your personal physician." *Dr Atkins' New Diet Revolution* (1999 and 2002 eds.) at copyright page (Judicial Notice Request, Exhs. A, B). This cautionary note puts the reader on notice that the author and publisher had no intention of establishing or maintaining a duty of care toward him. More specifically, the disclaimer alerts the reader to the fact that the author's only duty of care is to his own patients, and it encourages the reader to rely upon the advice of his own physician, as opposed to following the Book without such guidance. Unfortunately, plaintiff seems to have ignored the disclaimer and blindly adhered to his own idiosyncratic version of the ANA, despite having received clear signs that adjustments were required. *See* Compl. ¶¶ 39, 43.

In sum, the absence of a duty of care on the part of either defendant toward plaintiff is an independently sufficient ground for granting summary judgment on Count I.

2. The Purported Misrepresentation Does Not Exist

In addition to failing to establish the prerequisite duty of care, Plaintiff's allegations that defendants claimed falsely that the diet was "safe for everyone, regardless of the amount of high-fat food eaten," Compl. ¶ 26, "safe for all persons to eat a high-fat diet, as long as carbohydrate intake was restricted," Compl. ¶ 61, and "safe for all customers" and "fool-proof," Compl. ¶ 78, also suffer from the

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[8] *See Lewis v Time Inc.*, 83 F.R.D. 455, 464 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983). *See also Cardozo v True*, 342 So. 2d 1053, 1057 (Fla. 2d DCA 1977) (holding that bookseller is not liable to purchaser of a cookbook "absent allegations that a book seller knew that there was reason to warn the public as to contents of a book"); *Spence v. Flynt*, 647 F. Supp. 1266 (D. Wyo. 1986) (plaintiff must prove that distributor actually knew of the specific, allegedly false statement or had sufficient knowledge of the allegedly false statement to create a duty to investigate); *Janklow v Viking Press*, 378 N.W.2d 875 (S.D. 1985) (unless there are "special circumstances that should warn a dealer that a certain publication is defamatory, he is under no duty to ascertain its innocent or defamatory character"); *Osmond v. Ellis Enterprises, Inc.*, 153 Cal. App.3d 842 (Cal. Ct. App. 1984) (distributor of information published by another can avoid liability by showing that it had no knowledge of the libelous matter).

fundamental defect that nowhere do the Atkins Materials actually make these statements. Ironically, these purported misrepresentations are themselves concocted misrepresentations of what the Book and the ANI website actually say. Review of the Atkins Materials establishes that there is no genuine issue of material fact concerning the absence of the purported misrepresentations. Because plaintiff cannot properly allege any misrepresentation, his allegations necessarily also fail to satisfy the other elements of the negligent misrepresentation cause of action.

a. The Book does not misrepresent the safety of the Atkins Nutritional Approach™

The allegation that the Book claims that the Atkins diet is "safe for everyone" is contradicted even before page one: a prominent disclaimer on the copyright page states that "the advice offered in this book, although based on the author's experience with many thousands of patients, is not intended to be a substitute for the advice and counsel of your personal physician." *Dr.Atkins' New Diet Revolution* (1999 and 2002 eds.) at copyright page (Judicial Notice Request, Exhs. A, B). This disclaimer – which the Complaint neglects even to mention – clearly conveys to the reader that the nutritional advice contained in the book may not be effective for everyone and that those wishing to follow the Atkins approach should consult with a personal physician who is knowledgeable about one's medical history. Yet, despite the fact that plaintiff had an extensive family history of heart disease, *see* Compl. Exh. L, and had recently had a CT scan performed on the blood vessels surrounding his heart, Compl. ¶ 37, he apparently chose to ignore the warning and to substitute his own perverse interpretation of the Atkins program for the advice of his personal physician. Indeed, if anyone has been negligent, it has been plaintiff, not defendants.

The negligent misrepresentation claim focuses on a section of the Book entitled "Testing for Fat Sensitivity," which plaintiff claims led him to believe that "the diet would keep him safe as long as he strictly limited carbohydrates." Compl. ¶ 40. Any such purported understanding on plaintiff's part is contradicted by the Book itself. The "Fat Sensitivity" section of the Book cautions that "there are individuals who are fat-sensitive and will develop a less favorable cholesterol level on a high-fat diet than

on a low-fat diet." Compl. ¶ 31. According to the Complaint, the Book advises such fat-sensitive persons to continue with the regular Atkins diet if, after trying the lower-fat version of it, they are not happy. Compl. ¶ 41. However, plaintiff fails to cite the critical cautionary language that follows on the very next page:

> Go back to the original free-use-of-fat system long enough to have another [lipid] profile. If it bounced back up from the previous one, *then you are fat-sensitive and should follow the fat-restricted variation of the diet.* Our studies have shown that there is generally a steady improvement on the regimen, and therefore a falling cholesterol level is expected. A cholesterol-level elevation runs counter to the anticipated trend and would be significant.

Dr. Atkins' New Diet Revolution at 186. (Judicial Notice Request, Exh. A) (emphasis in original). In other words, the book does *not* instruct fat-sensitive persons to consume as much fat as they wish. Instead, it encourages readers to determine if they are fat-sensitive and, if so, instructs them to adjust their diet accordingly.

Plaintiff's description of Dr. Atkins' advice is further exposed as false by a section of the Book entitled "Time to Retest," which highlights the importance of undergoing blood and medical tests after several weeks on the Atkins diet. *See Dr. Atkins' New Diet Revolution* (2002 ed.) at 175 (Judicial Notice Request, Exh. B). The Book notes that participants should see either a significant drop in their cholesterol or a "dramatic" increase in HDL (good cholesterol). *Id.* It continues that "[i]f your cholesterol has not improved to a level that represents reduced risk factors," one may continue to do Atkins but should "take the cholesterol-lowering nutritional supplements outlined on p. 309 and repeat the [blood] test in a month" and "continue to get retested every three months until the figures are satisfactory." *Id.* at 176.[9] The Complaint omits these important warnings, which plaintiff seems to have

[9] The 1999 edition of the Book contains a similar section, entitled "Medical Indicators," which stresses the importance of closely monitoring one's cholesterol readings. *Dr. Atkins' New Diet Revolution* (1999 ed.) at 126 (Judicial Notice Request, Exh. A). The 1999 edition notes that dieters whose cholesterol has not dropped to a healthy level should "take the cholesterol-lowering nutritional supplements outlined on pages 193-198 and repeat the [blood] test within a month." *Id.*

ignored despite having received troubling blood test results after purportedly following the Atkins diet for two months. *See* Compl. ¶ 39.

It is clear, in short, that plaintiff's claimed belief that "the diet would keep him safe as long as he strictly limited carbohydrates," Compl. ¶ 40, was not grounded in what *Dr. Atkins' New Diet Revolution* actually says. Accordingly, there is no basis for holding defendants legally responsible for plaintiff's reckless conduct.[10]

b. The website does not misrepresent the safety of the Atkins Nutritional Approach™

Plaintiff also claims that the Atkins website misrepresents the diet as "safe for all persons" and counsels that "increased cholesterol levels are not a reason to go off the diet." Compl. ¶ 42. Citing the question "Since I have been on Atkins, my cholesterol has gone up. Why? And what can I do about it?" that was posted on the "Frequently Asked Questions" section of the website, *see* Compl. Exh. K (see also Judicial Notice Request, Exh. C at Tab 5), the Complaint alleges that the response from ANI

[10] Plaintiff's negligent misrepresentation claim is also undermined by his failure to follow the ANA. For instance, despite plaintiff's erroneous belief that the ANA "allows unlimited pastrami," Compl. ¶ 51, review of the Book reveals no such thing. First, pastrami is mentioned in the Book in reference to the "pre-Atkins" eating habits of one of Dr. Atkins' patients – a patient who lost fifty pounds after switching to an Atkins-approved diet. *See Dr. Atkins' New Diet Revolution* (1999 ed.) at 76 (Judicial Notice Request, Exh. A). In light of the fact that pastrami was a factor in the patient's initial weight problem and that pastrami was later removed from the patient's diet, it is obvious that the Book in no way endorses the consumption, let alone overconsumption, of this deli meat. In fact, the Book also specifically warns against consumption of luncheon meats with "nitrates or sugars added." *See id.* at 97. The 2002 edition of the Book has a similar warning. *Dr. Atkins' New Diet Revolution* (2002 ed.) at 124 (Judicial Notice Request, Exh. B). Further, the website warns dieters with genetically high cholesterol to "cut[ ] back on meats processed with nitrates, such as most bacon, sausage and cold cuts." Compl. Exh. K (see also Judicial Notice Request, Exh. C at Tab 5). In view of these attempts to steer dieters clear of cured meats such as pastrami, defendants cannot be held responsible for the consequences of plaintiff's self-imposed "unlimited pastrami" regimen.

Similarly, plaintiff alleges that he "had been eating large amounts of . . . cheesecake." Compl. ¶ 51, and notes that this nutritional decision was premised on the fact that "Atkins, Inc. sells a cheesecake that is Atkins friendly." *Id.* While Atkins does sell an "Atkins friendly" cheesecake through its catalogue, the Complaint fails to allege that the cheesecake plaintiff consumed in large quantities was sold by Atkins. *Id.* Indeed, plaintiff's allegations that he purchased only $25 worth of ANI products during the 2 ½ years he says he followed the diet and that he purchased "Advantage Bars, Pancake Mix and Pancake Syrup," Compl. ¶¶ 44, 84, appears to rule out any suggestion that the "large amounts" of cheesecake plaintiff gorged on were Atkins' cheesecake.

suggests "strict conformity with the diet" and makes "no suggestion that the customer should consider going off the diet." Compl. ¶ 42. This inaccurate summary is another example of plaintiff's deliberate mischaracterization of the nutritional advice in the Atkins Materials.

In fact, the website's response begins by asking "Have you been following Atkins correctly?" – an apt question here given plaintiff's admission of non-compliance vis-à-vis eating "large amounts of pastrami and cheesecake." Compl. ¶ 51; *see also infra* Section II.A.2. Further, while suggesting that an increase in cholesterol levels may be only temporary, the ANI response also encourages the dieter to monitor his HDL (good cholesterol) and triglyceride levels – *i.e.*, it recommends additional blood tests. However, despite the concerns raised by his blood test on June 26, 2001, Compl. ¶ 39, plaintiff does not allege that he checked his cholesterol levels again during the 28 months he says he remained on the diet after this initial unfavorable test.

In addition, the ANI response warns that "if you've been following the ANA for some time and your cholesterol levels have not come down, something else is going on." Compl. Exh. K (see also Judicial Notice Request, Exh. C at Tab 5). In conjunction with this warning, the website notes that "high cholesterol that has a genetic component usually responds to changes in diet, but may be difficult to address with diet alone" and encourages such dieters to take supplements to assist in lowering their cholesterol. Yet, despite plaintiff's "very significant family history of coronary artery disease," *see* Admission History & Physical, dated Oct. 27, 2003 (Compl. Exh. L), he does not allege that he took any of the ANI-recommended supplements.

The ANI response concludes by noting that exercise is an important element of keeping cholesterol down and encourages dieters to "[cut] back on processed meats, such as bacon, sausage and cold cuts and [limit] your intake of hard cheese." Compl. Exh. K (see also Judicial Notice Request, Exh. C at Tab 5). Notwithstanding this warning – which, as with the others, the Complaint fails to disclose – plaintiff evidently continued his diet of "large amounts of pastrami and cheesecake," Compl. ¶ 51, and did not, according to the Complaint, make any effort to increase his level of physical fitness.

B. Summary Judgment Should Be Granted on Plaintiff's Product Liability Claim

Plaintiff's product liability claim is that "the books, nutritional supplements, minerals, and herbs" sold by ANI and Dr. Atkins are defective and unreasonably dangerous because they purportedly increase the "risk of cardiovascular disease and other illnesses." Compl. ¶¶ 66-72 (Count II). This claim fails as a matter of law as to both the Book and the ANI products.[11]

It is axiomatic that a product liability claim can be stated only with respect to a product. Florida courts have adopted section 402A of the RESTATEMENT (SECOND) OF TORTS, *see West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976), which states, in pertinent part, that "[o]ne who sells *any product* in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer ...." RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965) (emphasis added).

Summary judgment is required on the product liability claim with respect to the content of the Book because the content of a book is not a product. While a physical book – the binding, the cover, the paper of the pages – is a product, *see Cardozo*, 342 So. 2d at 1056, the ideas expressed therein are not. *Id.* In *Cardozo*, the plaintiff became violently ill and was hospitalized after preparing a meal from a recipe in a cookbook. The plaintiff sued the bookseller for failing to warn him that one of the ingredients in the recipe was poisonous if not cooked. The court noted that while books are considered "goods" under the U.C.C., it was essential to "distinguish between the tangible properties of these goods and the thoughts and ideas conveyed thereby." *Id.* at 1056. The court concluded that the ideas expressed in books "are not equivalent to commercial products." *Id.*[12]

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[11] Plaintiff's product liability claim is not directed to the ANI website.

[12] The RESTATEMENT (THIRD) OF TORTS defines product as "tangible personal property distributed commercially for use or consumption." RESTATEMENT (THIRD) OF TORTS §19(a) (1998). The commentary to section 19(a) expressly notes that books are considered "intangible personal property" and are therefore outside the scope of strict products liability. *Id.* at cmt. (d).

Cardozo is consistent with rulings across the country that have rejected the contention that ideas or expression constitute a "product" subject to product liability law. For example, in *Walter v Bauer, supra*, 109 Misc. 2d 189, 439 N.Y.S.2d 821, the court ruled that a student who was injured while performing a science experiment described in his science textbook could not maintain a product liability action against the textbook's publisher. The court concluded that the textbook "cannot be said to be a defective product, for the infant plaintiff was not injured by use of the book for the purpose for which it was designed, i.e., to be read." 109 Misc. 2d at 191, 439 N.Y.S.2d at 822. In *Jones v J.B. Lippincott Co.*, 694 F. Supp. 1216 (D. Md. 1988), a nursing student was injured while treating herself with a constipation remedy listed in nursing textbook. The court refused to hold the defendant publisher strictly liable for the content of its textbook, noting that "[n]o case has extended Section 402A to the dissemination of an idea or knowledge in books or other published material." *Id.* at 1217. Likewise, in *Winter v G.P. Putnam and Sons, supra*, the plaintiffs became critically ill and required liver transplants after consuming wild mushrooms deemed "safe to eat" by the defendant publisher's *Encyclopedia of Mushrooms*. In declining to expand product liability law to the ideas and expressions contained in the encyclopedia, the court noted that "[a] book containing Shakespeare's sonnets consists of two parts, the material and print therein, and the ideas and expression thereof. The first may be a product, but the second is not." 938 F.2d at 1034.[13]

Finally, the court in *Smith v. Linn, supra*, 563 A.2d 123, held, on facts similar to those alleged here, that a diet book is not a product for purposes of strict liability. In *Smith*, the publisher of a diet book was sued after a reader died from complications caused by the liquid protein diet described in the defendant's book. Citing *Cardozo*, the court declined to hold the publisher strictly liable, finding that the ideas and expressions in the book were not products. *Id.* at 126-27. Similarly here, the fact that

[13] *See also James v Meow Media, Inc.*, 300 F.3d 683, 701 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003); *Garcia v Kusan, Inc.*, 655 N.E.2d 1290, 1293-94 (Mass. Ct. App. 1995); *Way v Boy Scouts of America*, 856 S.W.2d 230, 239 (Tex. App. 1993); *Birmingham v Fodor's Travel Publ'ns, Inc.*, 833 P.2d 70, 74-78 (Haw. 1992); *Watters v TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990); *Herceg v Hustler Magazine, Inc., supra*, 565 F. Supp. at 803.

defendants sell products that correspond to the dieting advice espoused in the Book does not convert the Book into a product.

Summary judgment on Count II is also required with respect to the ANI products plaintiff claims to have purchased. The only actual "products" that plaintiff alleges he purchased from ANI over the course of two years on the diet is approximately $25 worth of Advantage bars, pancake mix, and pancake syrup, and other food products. Compl. ¶ 44, 84. The Florida Standard Jury Instructions provide that a product is defective if it is "in a condition unreasonably dangerous to the user and if the product is expected to and does reach the user without substantial change affecting that condition." *See* Fla. Std. Jury Instr. (Civ.) PL-4. Nowhere in the Complaint does plaintiff allege that these products – specifically, the Advantage bars, pancake mix, and pancake syrup, and other food products – were inherently "unreasonably dangerous" or that such an insignificant amount of products was the primary contributor to his alleged cardiovascular problems, which allegedly occurred over a 2 ½ year period. Indeed, it appears that plaintiff is instead attempting to allege that these products are *ineffective*. Under Florida law, however, damage from ineffective, rather than defective, products is not compensable. *See Monsanto Agric. Prods. Co. v. Edenfield*, 426 So. 2d 574 (Fla. 1st DCA 1982). Accordingly, summary judgment on the product liability claim is also required as to the Atkins products.

C. Summary Judgment Should Be Granted on Plaintiff's Florida Deceptive and Unfair Trade Practices Act Claim

Plaintiff alleges that defendants engaged in unfair or deceptive acts or practices within the meaning of Fla. Stat. § 501.204(1) by: (i) promoting the Atkins diet and products as safe for all customers; (ii) failing to give adequate warnings about the adverse health consequences of a high-fat diet; and (iii) claiming that the diet was "fool-proof" and a guaranteed success. Compl. ¶ 78.

Section 501.204(1), Florida Statutes, proscribes "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." A fundamental flaw in plaintiff's FDUTPA claim is that the nutritional advice contained in the Atkins Materials does not constitute "trade or commerce," as the statute requires. Fla. Stat. § 501.203

defines "trade or commerce" as 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, or any other article, commodity, or thing of value, wherever situated." *See* Fla. Stat. § 501.203. This definition encompasses only commercial speech ("advertising" or "soliciting"), *i.e.*, speech that is clearly tied to trade or commerce ("good[s] or services, "property," "article[s]" or "commodit[ies]").[14] Since the nutritional advice contained in the Atkins Materials is not commercial speech (*see supra* section I), the content of these materials falls outside the scope of FDUTPA, thus requiring summary judgment on plaintiff's FDUTPA claim.[15]

In any event, even if the Atkins Materials were commercial speech, the absence of the claimed misrepresentation/deception dooms the FDUTPA claim. As demonstrated in Section II.A above, the claimed misrepresentation does not exist. The Book and website are replete with warnings that the ANA may not be equally effective for all persons; that the diet should be followed in conjunction with the guidance of a physician; that dieters should undergo regular blood tests, and that the diet should be modified or supplemented when necessary. Consequently, the claim of "unfair or deceptive acts or practices" must also be dismissed because it is factually baseless.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court grant summary judgment in defendants' favor on all counts in plaintiff's Complaint.

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[14] This is consistent with Federal Trade Commission and federal court interpretations of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C § 45(a)(1). According to law construing 15 U.S.C. § 45(a)(1), the contents of a book are outside the realm of the Federal Trade Commission's regulatory power. For instance, in *Koch v. FTC*, 206 F.2d 311 (6th Cir. 1953), the court held that the FTC could not take action against a physician based on a book he had written in which explained his medical theories and detailed a number of case histories, since the book primarily set forth matters of opinion. The court noted that if section 45(a)(1) were interpreted to prohibit dissemination of books that set forth matters of opinion, it would violate the First Amendment.

[15] Defendants also have a pending motion for judgment on the pleadings on Count III, providing yet another, independently sufficient ground upon which this Court should reject plaintiff's FDUTPA claim.

CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendants' Motion for Summary Judgment and Supporting Memorandum of Law was served by facsimile copy and U.S. Mail this 26th day of January, 2005, on James K. Green, Suite 1630, Esperante, 222 Lakeview Avenue, West Palm Beach, Florida 33401 (fax 561-655-1357) and Daniel Kinburn, 5100 Wisconsin Avenue, N.W., Washington, D.C. 20016 (fax: 202-686-2216).

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