Filing # 78053854 E-Filed 09/18/2018 01:12:02 PM

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

DANIEL RIGMAIDEN,

Plaintiff, Case No.: 2018-015032-CA13

v.

NBCUNIVERSAL MEDIA, LLC,
and KURTIS PRODUCTIONS, LTD.,

Defendants.
____/

DEFENDANTS NBCUNIVERSAL AND KURTIS PRODUCTIONS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendants, NBCUniversal Media, LLC and Kurtis Productions, Ltd. ("Defendants"), move to dismiss the First Amended Complaint ("FAC" or "complaint"), pursuant to Fla. R. Civ. P. 1.140(b)(6) and other applicable rules. In support, Defendants state:

Introduction and Background

1. At its core, this is a defamation action brought by Daniel Rigmaiden, a convicted felon who spent many years behind bars for committing multiple federal felonies. His case arises from an episode of the documentary series *American Greed*, which describes his criminal activities and subsequent prosecution. Careful scrutiny of his complaint, however, reveals that Rigmaiden simply is trying to escape his past, which led to confinement for nearly six years, a guilty plea, and ultimately a sentence for time served and probation. In this regard, Rigmaiden seeks an unconstitutional prior restraint, along with impermissible claims for unfair trade practices and misappropriation. His complaint accordingly must be dismissed.

2. In the complaint, Rigmaiden admits that he pled guilty to federal charges in Arizona and was sentenced to 68 months of time-served. (*See id.* FAC ¶¶ 17-18) But he now attacks

Defendants for having produced and aired a segment about his documented criminal past because, according to him, it contains certain factual inaccuracies that have tarnished his reputation. The first seventeen causes of action in Rigmaiden's 72-page pleading are all based on those alleged inaccuracies and are grounded in defamation. (*See* FAC ¶¶ 80-261) The first problem he faces, however, is that by seeking an injunction on those claims, he is requesting that the Court enter an unconstitutional prior restraint.

3. In addition, Rigmaiden has thrown into his pleading a facially defective class action under Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"). (*See* FAC ¶¶ 262-270) Not only do his underlying factual allegations undermine and defeat that claim as a matter of law, but the claim is improperly based on the very same alleged conduct that forms the basis for his string of defamation claims -- namely, that "the Segment contains false facts about [him]" and is allegedly a "fabricated story" about him. (*Id.* ¶¶ 267-268) Such a claim cannot legally proceed under Florida's longstanding single-action rule.

4. Rigmaiden's final claim (entitled "Violation of Florida Common Law Right of Publicity and Rights under Fla. Stat. 540.08") is likewise flawed. In it, he essentially blames Defendants for using his name or likeness to advertise *American Greed*. But this type of situation is not even covered, much less prohibited, by the statute that he cites.

5. Before discussing the specific grounds for dismissal, a few words should be said about Rigmaiden's allegation in ¶ 10, claiming that because he is a *pro se* litigant, his pleading "however inartfully pleaded, must be liberally construed and held to less stringent standards than formal pleadings drafted by lawyers." This is misleading. The case upon which he relies -- *Haines v. Kerner*, 404 U.S. 519 (1972) -- involved claims brought by a prisoner for damages arising from his solitary confinement. That is not even remotely similar to Rigmaiden's defamation case here.

But more importantly, Florida case law addressing *Haines* has made it clear that *Haines* merely stands for the proposition that *pro se* litigants are afforded "leniency in technical matters." *See, e.g.*, *Barrett v. City of Margate*, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999) ("pro se litigants are not immune from the rules of procedure"). The deficiencies in Rigmaiden's complaint, however, run deeper and concern the substance of the claims he asserts. Rigmaiden has not and cannot cite to any authority that would afford him any leniency as to the substance of his claims. As *Barrett* explains, any "complaint, whether filed by an attorney or *pro se* litigant, must set forth factual assertions that can be supported by evidence which gives rise to legal liability." *Id.* at 1162–63. This is where his complaint falls flat and is subject to dismissal.

Grounds for Dismissal

I

Dismissal is Required Because the Complaint Seeks an Impermissible Prior Restraint (All Causes of Action)

6. As shown by the allegations of his First Amended Complaint -- as well as its very title that leads off with injunctive relief[1] -- Rigmaiden's primary objective in filing this lawsuit is to prevent any further broadcast or use of the *American Greed* segment that features him. This is underscored by the very relief that he requests in ¶ 282 as to his 17 defamation-based claims -- namely, that the Court enter a preliminary and permanent injunction directing Defendants to "cease any and all activity that would cause the distributing, disseminating, publishing, displaying, posting for view or access on or through television, the Internet, or any other matter or media

[1] The full title is "First Amended Complaint for Injunctive, Declaratory and Other Relief."

outlet, broadcasting, transferring, licensing, selling, offering to sell or license" the *American Greed* segment at issue. (*See also* ¶¶ 283, 287 -- requesting injunction on statutory claims)

7. This effort by Rigmaiden to use this lawsuit as a tool to muzzle Defendants is legally impermissible at its very core because it seeks a prior restraint on speech, which is barred by the First Amendment of the United States Constitution. Consistent with that notion, injunctive relief is not available in Florida to prohibit the making of allegedly defamatory statements. On these points, the Court should be aware of the following:

➢ As the United States Supreme Court has made clear time and time again, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (citations omitted). In fact, the Supreme Court "has *never* upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (emphasis added). The Supreme Court has thus found, for example, that the First Amendment right to publish must prevail even under compelling circumstances such as confidentiality claims of rape victims, *Fla. Star v. B.J.F.*, 491 U.S. 524, 532 (1989), and minors charged with murder, *Okla. Publ'g Co. v. Dist. Court in and for Okla. Cty.*, 430 U.S. 308, 311 (1977).

➢ Consistent with that precedent, Florida courts have likewise acknowledged that "[p]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights," and that "[a]s such, prior restraints are presumed unconstitutional" and "only in '*exceptional* cases,' will the courts consider censorship of

publication acceptable." *Gagliardo v. Branam Children*, 32 So. 3d 673, 674 (Fla. 3d DCA 2010) (emphasis added) (citation omitted); *see also Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 968 So. 2d 608, 610 (Fla. 5th DCA 2007) (same).

➢ To put it mildly, this case does not even remotely come close to the level of an "exceptional" case worthy of overcoming the presumption of unconstitutionality. Indeed, it has been filed by a convicted felon who admits to pleading guilty to federal crimes and spending nearly six years behind bars, yet he now blames Defendants rather than himself for damaging his reputation, and seeks to restrain them from publishing their report about him.

➢ Even if the requested injunctive relief did not constitute an unconstitutional *prior* restraint (which it clearly does), Rigmaiden plainly is not, as a matter of law, entitled to injunctive relief on any of his claims. As the courts have recognized, an injunction cannot be issued to prevent the initial or continuing publication of an alleged defamation. As the Supreme Court has explained, "'imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.'" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 23 (1990) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 93 (1966) (Stewart, J., concurring)). Thus, all counts of the First Amended Complaint should be dismissed as they improperly seek injunctive relief.

➢ Courts in this state have routinely recognized that injunctive relief is unavailable as a remedy in defamation cases. *See Santilli v. Van Erp*, No. 8:17-cv-1797-T-33MAP, 2018 WL 2172554, at *3 (M.D. Fla. Apr. 20, 2018), *adopted*, 2018 WL 2152095 (M.D. Fla. May 10, 2018) ("[u]nder Florida law, 'there is a well-settled rule prohibiting injunctive relief in defamation cases'"); *Chevaldina v. R.K./FL Mgmt., Inc.*, 133 So. 3d 1086, 1090 (Fla. 3d DCA 2014) ("[i]njunctive relief is not available to prohibit the making of defamatory or libelous

statements"); *see also Vrasic v. Leibel*, 106 So. 3d 485, 486 (Fla. 4th DCA 2013) ("Florida's courts have long held that temporary injunctive relief is not available to prohibit the making of defamatory or libelous statements").

8. Because the very underpinning of this lawsuit is a demand that this Court grant relief that is plainly unconstitutional and prohibited by Florida law, the First Amended Complaint must be dismissed.

II

Florida's Single-Action Rule Bars All Non-Defamation Theories in Amended Complaint as a Matter of Law (Eighteenth & Nineteenth Causes of Action)

9. It is well-settled that in a defamation action, the plaintiff is barred from pursuing additional claims based on the same broadcast/publication. This is known as the single-action rule, and it has been in effect for decades in Florida. *See Fridovich v. Fridovich*, 598 So. 2d 65, 69 (Fla. 1992) (dismissing claim based on alleged defamation because "plaintiff is not permitted to make an end-run around a successfully invoked defamation privilege by simply renaming the cause of action and repleading the same facts."); *Callaway Land & Cattle Co., Inc. v. Banyan Lakes C. Corp,* 831 So. 2d 204, 208-09 (Fla. 4th DCA 2002) (rejecting tortious interference and abuse of process claims under the "single action rule"); *Seminole Tribe of Fla. v. Times Pub'g Co., Inc.*, 780 So. 2d 310, 318 (Fla. 4th DCA 2001) (dismissing interference claim because "this is a defamation case in the clothing of a different tort"); *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607, 609 (Fla. 4th DCA 1975) ("a single wrongful act gives rise to a single cause of action, and . . . the various injuries resulting from it are merely items of damage arising from the same wrong").

10. Likewise, federal courts in Florida have routinely applied the single-action rule. *See, e.g., Ward v. Triple Canopy, Inc.*, No. 8:17-cv-802-T-24 MAP, 2017 WL 3149431, at *4

(M.D. Fla. July 25, 2017) (observing that "Florida's single action rule prohibits defamation claims from being re-cast as additional, separate torts"); *Klayman v. Judicial Watch, Inc.*, 22 F. Supp. 3d 1240, 1256 (S.D. Fla. 2014), *aff'd*, No. 14-13855 (11th Cir. Feb. 17, 2015) ("a plaintiff may not proceed on multiple counts for what is essentially the same defamatory publication or event"); *cf. Pierson v. Orlando Reg'l Healthcare Sys., Inc.*, No. 6:08–cv–466–Orl–28GJK, 2010 WL 1408391, at *22 (M.D. Fla. Apr. 6, 2010), *aff'd*, 451 F. App'x 862 (11th Cir. 2012) ("[a]ttempts by plaintiffs in other cases to pursue claims sounding in defamation by calling them by the name of another tort have been repeatedly rejected by courts in this state"); *Maverick Boat Co. v. Am. Marine Holdings Inc*, Nos. 02–14102–CIV, 02–14283–CIV., 2004 WL 1093035 (S.D. Fla. Feb. 10, 2004) (where defamation claim failed, claims for product disparagement, unfair competition, and unfair trade practices were similarly barred).

11. In *Fridovich*, the Florida Supreme Court dismissed a tag-along tort claim in a defamation action, holding that "a plaintiff cannot transform a defamation action into a claim for intentional infliction of emotional distress simply by characterizing the alleged defamatory statements as 'outrageous.'" *Fridovich*, 598 So. 2d at 69-70. Though that arose in the context of an emotional-distress claim, the Court's holding demonstrated the broader principle that a plaintiff is barred from pursuing any other claim that is merely based on the same core facts as a defamation claim. *Id.* As *Fridovich* and its progeny make clear, the rationale for this rule is that a plaintiff cannot be allowed to make an "end-run" around privileges and defenses applicable to defamation claims merely by recharacterizing his or her claim under another label. *Id.*

12. In his eighteenth and nineteenth causes of action (under FDUTPA and § 540.08 respectively), Rigmaiden is attempting to do exactly what the above cases prohibit -- *i.e.*, base alternate claims on the same facts as defamation. Indeed, both of these statutory claims explicitly

incorporate *every single allegation* contained within his section entitled "Facts giving rise to defamation, defamation per se, defamation by implication, and defamation per se by implication." (*See* FAC ¶¶ 262 & 271; *see also* ¶¶ 30-65) Moreover, his FDUTPA claim itself includes additional allegations that "the Segment contains false facts about [him]" and that it is a "fabricated story" about him. (*Id.* ¶¶ 267-268) As such, these are just defamation claims with a different label and must therefore be dismissed.

13. Even setting aside the single-action rule, the eighteenth and nineteenth causes of action fail as a matter of law for separate and independent reasons. These are discussed below.

III

Claim Under FDUTPA Fails to State Valid Cause of Action and Must Be Dismissed (Eighteenth Cause of Action)

14. ***The FDUTPA Claim*** In his eighteenth cause of action, Rigmaiden purports to state a claim under FDUTPA (Chapter 501.201, Florida Statutes, *et seq.*). In it, he pursues an individual claim as well a claim on behalf of "all Florida consumers who purchased or otherwise paid to view or download the *American Greed* episode containing the Segment" about him. The basis of his FDUTPA theory is that Defendants allegedly advertised[2] the *American Greed* series to the public as "depicting true stories based on in-depth reporting" (¶¶ 66, 263); that this advertisement is false because the episode at issue contains "false facts about [him] and his tax refund fraud scheme" (¶¶ 70, 264); that as such, all consumers including himself who purchased

---

[2] Rigmaiden also claims that "true-crime stories" is an "understood premise" of the series. (¶¶ 69, 263) But such a nebulous assertion would not bring his claim within the scope of FDUTPA. By its very terms, FDUTPA requires that the defendant's deceptive conduct be an "act" or "practice." *See* §§ 501.202(2) & 501.204(1). While an alleged false advertisement may suffice, an unspecified and tacit "premise" would fall woefully short.

this episode received a "falsely advertised" product (¶¶ 70, 264); and that all such consumers including himself suffered an actual loss in the amount of their respective purchases (¶ 265).

15. ***Fatal Flaws in Claim.*** As explained fully in the prior section (*see* § II *supra*), this FDUTPA claim cannot go forward based on the single-action rule because it is based on the very same accusations of falsity as his defamation claims. Rigmaiden does not allege, as the basis for his FDUTPA claim, that the advertisement for the episode is false because it misrepresents the topic of the episode, or its duration, or who the episode's narrator is, or otherwise makes a statement about the episode *as a product*. Rather, Rigmaiden's FDUTPA claim rests entirely on his allegation that the content of the episode itself is false, and therefore the advertisement is false too. This is simply a defamation claim in other clothes, and it should be dismissed on that basis.

16. Moreover, Rigmaiden is improperly attempting to use the injunctive relief available under FDUTPA as an end-run around the well-established prohibition against such relief in defamation actions and to skirt the protections of the First Amendment. *See* Section I, *supra*; *see also Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 329 (S.D.N.Y. 2006) (dismissing FDUTPA claim where defendants' "ideas are protected by the First Amendment").

17. While each of these points constitutes a sufficient basis upon which to dismiss the FDUTPA claim in its entirety, there are a host of other legal deficiencies requiring dismissal both as to his individual claim and his claim on behalf of the putative class. Each of these points is separately discussed.

(a) ***Individual Claim Fails.*** It is well settled that both causation *and* actual damages from a FDUTPA violation are required elements in an action brought under this statute. *See, e.g.*, *Kai Motors Am. Corp. v. Butler*, 985 So. 2d 1133, 1140 (Fla. 3d DCA 2008) ("FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and

(3) actual damages"). As to Rigmaiden's individual claim, however, those two elements are not only missing but are *directly negated* by the allegations pled. More specifically, in ¶ 71 of his pleading, Rigmaiden alleges that *on August 4, 2018* he paid $2.99 to purchase the "falsely advertised" episode from Amazon and that this amount constitutes his actual loss from Defendants' alleged FDUTPA violation (*i.e*, the allegedly false advertisement). But based on that purchase date alone -- which was just a few weeks ago -- it is clear that his purchase occurred during this litigation. That is significant because in his initial complaint that he filed *three months earlier* in May of 2018, Rigmaiden was already claiming that the segment about him was substantially false. He even cited to specific time-stamped excerpts within the episode that he claimed were false. As such, his *later* purchase of the episode from Amazon in August could not possibly have been "caused" by the alleged false advertisement about "true stories" upon which this claim is based,[3] nor could the $2.99 that he paid fall into the category of an "actual damage" incurred a result of being duped by that allegedly false advertisement.[4] Since the elements of causation and actual damages are negated by the very allegations pled, Rigmaiden has no valid individual FDUTPA claim as a matter of law. It must therefore be dismissed. *See, e.g.*, *Molina v. Aurora Loan Servs.*,

---

[3] This is bolstered by the fact that courts utilize an *objective* standard in this context. Such a standard, by its very nature, looks to what a reasonable person *in the plaintiff's position* would do. *See, e.g.*, *Grogan v. Heritage NH, LLC*, 126 So. 3d 262, 264 (Fla. 3d DCA 2010) ("objectively reasonable" means "judged from the perspective of a reasonable person in the plaintiff's position"). As applied here, no reasonable person -- who had already filed a lawsuit declaring that the segment about him is false and citing specific time-stamped excerpts in support -- would *later* be misled into purchasing that same episode just because an advertisement says that it is "true." To do so would make no logical sense at all.

[4] Given the admitted timing of Rigmaiden's purchase of the episode from Amazon -- which was just two weeks before he filed his amended complaint -- it is obvious that his purchase of the episode was simply to manufacture a new claim for his amended 72-page pleading. In other words, this was a litigation stunt. It was *not* a purchase by some unsuspecting member of the public who was legitimately duped by false advertising. As such, the consumer-protection and unfair-competition policies that underpin FDUTPA do not apply here. *See* § 501.202, Fla. Stat.

LLC, 635 F. App'x 618, 627 (11th Cir. 2015) (affirming dismissal of FDUTPA claim for lack of sufficient factual allegations to support causation where there was no "but for" allegation); *Taviere v. Precision Motor Cars, Inc.*, No. 8:09-cv-467-T-TBM, 2010 WL 557347, at *5 (M.D. Fla. Feb. 12, 2010) (dismissing FDUTPA claim with prejudice because complaint contained "no allegations demonstrating causation"); *Kais v. Mansiana Ocean Residences, LLC*, No. 08–21492–CIV, 2009 WL 825763, at *2 (S.D. Fla. Mar. 26, 2009) (dismissing FDUTPA claim for failure to allege how deceptive act caused damage to plaintiff or caused him "to act differently in any way"); *see generally Prunty v. Sibelius*, 2014 WL 6676951, at *4 (M.D. Fla. Nov. 20, 2014) (in FDUTPA claims, "[c]ausation must be direct, rather than remote or speculative"), *adopted as modified on other grounds*, 2014 WL 7066430 (M.D. Fla. Dec. 12, 2014).

(b) ***No Valid Basis for Class Treatment.*** If this Court agrees that Rigmaiden's individual FDUTPA claim fails, it necessarily follows that he cannot serve as a class representative nor pursue any class action. But even if this Court were to conclude that Rigmaiden's individual FDUTPA claim may go forward, the class portion of the claim still fails. The simple reason is that many of the threshold requirements for a class action are *directly negated* by the very allegations set forth in the claim itself. *See* Fla. R. Civ. P. 1.220. Four of the threshold requirements are set forth in subsection (a) of that rule as follows:

> Before any claim or defense may be maintained on behalf of a class by one party or more suing or being sued as the representative of all the members of a class, the court shall first conclude that (1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim or defense of the representative party raises questions of law or fact *common* to the questions of law or fact raised by the claim or defense of each member of the class, (3) the claim or defense of the representative party is *typical* of the claim or defense of each member of the class, and (4) the representative party can *fairly and adequately protect and represent* the interests of each member of the class.

(Emphasis added). Plus, as to the damage portion of Rigmaiden's claim, there are two additional threshold requirements set forth in subsection (b)(3) -- namely, that the "questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class *predominate* over any question of law or fact affecting only individual members of the class" and that "class representation is *superior* to other available methods for the fair and efficient adjudication of the controversy." Fla. R. Civ. P. 1.220(a)(3) (emphasis added). Rigmaiden's attempt to plead a class action fails at nearly every step -- any one of which requires dismissal of the class allegations. For instance:

- *No Commonality or Predominance*. The commonality and predominance requirements in subsections (a)(2) and (b)(3) respectively are missing. First, as with his individual claim, Rigmaiden has failed to allege that the loss incurred by *any* class member (*i.e*, payment for the episode) was actually caused by the alleged FDUTPA violation here (*i.e*, the allegedly false advertisement). As such, he has not stated a valid FDUTPA cause of action as to *any* class member, and thus there are no issues -- common or otherwise -- to be resolved. Moreover, causation and resulting damages in this particular context would need to be decided on an individual basis rather than a class-wide basis. Indeed, there are any number of individualized inquiries on such issues, not the least of which is that there may well be class members who purchased this episode solely to see parts that had nothing to do with Rigmaiden at all. The presence of individualized inquiries automatically defeats a class action. *See, e.g*, *Volkswagen of Am., Inc. v. Sugarman*, 909 So. 2d 923, 924 (Fla. 3d DCA 2005) (reversing class certification where "key element of causation mandates individual inquiry into each plaintiff's claim"); *see also Kia Motors, supra*, at 1141 (reversing class certification of FDUTPA claim and observing that "where individual issues outnumber common issues, trial courts should be hesitant to certify class

actions"); *Miami Auto. Retail, Inc. v. Baldwin*, 97 So. 3d 846, 854 (Fla. 3d DCA 2012) (reversing class certification of FDUTPA where individualized issues predominated over common issues).

➢ *No Typicality*. The typicality requirement in subsection (a)(3) fails on its face because the claim of Rigmaiden (who would be the putative class representative) is inherently different than the claim of all other class members. As his own allegations highlight, he is the *sole* subject of the segment that he is complaining about. The contents of the segment are not about anyone else, much less about any other class member. As such, Rigmaiden's self-interest in pursuing this case necessarily differs from the interests of other class members, thereby defeating typicality. In addition, it is obvious from his own allegations that he purchased the episode long after he had already filed suit alleging its falsity (*see* n. 4 *supra*), whereas the other class members are alleged to have made the purchase based on the alleged advertisement about "true stories." As such, this highlights a material difference between his claim and those of his putative class members, thereby negating typicality. *See, e.g.*, *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1093 (Fla. 4th DCA 2003) (typicality defeated as to FDUTPA claim based on false advertising where some class members read label but others did not); *State Farm Mut. Auto. Ins. Co. v. Kendrick*, 822 So. 2d 516, 517 (Fla. 3d DCA 2002) (typicality defeated where "plaintiff was in a totally different position than the putative class members she would represent"); *cf. Miami Auto.*, 97 So. 3d at 853-54 (even where claims of all class members including class representative involve same legal interests, typicality is defeated if there are potential defenses to claim of class representative that are unique).

➢ *No Adequacy of Protection/Representation*. The adequacy requirement in subsection (a)(4) is likewise missing. In fact, Rigmaiden's own pleading underscores that he is not equipped to pursue such complex litigation on behalf of others. As he readily acknowledges,

he has retained no lawyer. Plus, his pleading contains no allegations that he has any prior class action experience, that he has adequate available resources to handle the volume of work attendant to class litigation, or that he has the financial wherewithal to absorb the cost thereof. *See, e.g. Miami Auto*, 97 So. 3d at 854-55 (reversing class certification of FDUTPA where plaintiff failed to show that she was capable of representing the class *even though she was represented by counsel*). While Rigmaiden alleges that he may hire a lawyer at some point after the pleading stage, he certainly needs to retain counsel *before* he starts representing a class -- not at some unspecified time afterward. Indeed, given how flimsy his FDUTPA claim is, he may never find a lawyer willing to pursue it as a class action.

➢ *No Superiority*. The superiority requirement in subsection (b)(3) is also missing. As the Third District has explained:

> [C]lass treatment is not a superior method for resolving the issues in this FDUTPA claim *where the common facts do not predominate*, and individual plaintiffs may bring their own suits, as FDUTPA provides attorney's fees to a prevailing plaintiff. *See* § 501.2015(1), Fla. Stat. (2008).

Miami Auto, 97 So. 3d at 859 (emphasis added). That logic applies equally here where factual determinations as to causation and resulting damages will necessarily be unique to each putative class member, thereby requiring a series of mini-trials and defeating any notion that a class action is the superior method of resolving this claim.

18. For these reasons, the FDUTPA claim must be dismissed in its entirety.

IV

His Final Claim Must Also Be Dismissed Because the Allegations Do Not Fall Within Scope of Such a Claim (Nineteenth Cause of Action)

19. In his final cause of action, Rigmaiden purports to plead a claim for common law right of publicity, also known as commercial misappropriation. In Florida, that common law right

has been codified in § 540.08, Florida Statutes. Regardless of how such a claim may be characterized in a complaint (*i.e*, statutory or common law), the requirements are the same and are specified in that statute.[5] *See, e.g.*, *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1320 n.1 (11th Cir. 2006); *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205, 1215 (M.D. Fla. 2002); *Heath v. Playboy Enters., Inc.*, 732 F. Supp. 1145, 1147-48 (S.D. Fla. 1990). To that end, subsection (1) of § 540.08 provides that:

> No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use …

20. Rigmaiden alleges that Defendants violated this prohibition by including his name or likeness in advertisements for *American Greed* without his consent. In so arguing, however, he completely overlooks a well-established rule of law -- namely, that relief is not available where a person's name or likeness has merely been used to advertise a product that involves the very same person. *See* *Tyne v. Time Warner Entm't. Co., LP*, 901 So. 2d 802, 807-08 (Fla. 2005) (section 540.08 prevents use of person's name or likeness to directly promote a product or service because of the way the use associates the person's name or personality "with something else").

21. As the case law reflects, statutory protection is available only if a person's name or likeness were used to advertise some *unrelated* product, which is not the situation here. In *Fuentes*

[5] *See Lane*, 242 F. Supp. 2d at 1220 ("[u]nder Florida law, the elements of common law invasion of privacy–commercial misappropriation of likeness coincide with the elements of unauthorized publication of name or likeness in violation of Fla. Stat. § 540.08"). As such, common law misappropriation claims fail to the same extent as their statutory counterpart. *See, e.g.*, *Almeida*, 456 F.3d at 1320 n.1 (noting district court holding that both statutory and common law misappropriation claims "should be resolved on the same basis" and holding claims failed because plaintiff could not show defendant used her name directly to promote a product or service); *Fuentes v. Mega Media Holdings, Inc.*, 721 F. Supp. 2d 1255, 1259-60 (S.D. Fla. 2010) (dismissing common law and statutory misappropriation claims on same grounds).

v. Mega Media Holdings, Inc., 721 F. Supp. 2d 1255, 1258-59 (S.D. Fla. 2010), for example, an author sued the producer of a television program, claiming its use of his name without his consent in short video clips on YouTube that promoted its television show (which also included his name) constituted a violation of § 540.08. The court ruled that this was not the type of scenario that would fall within the scope of this statute. As the court pointed out, "[t]o maintain a cause of action for a violation of section 540.08, a plaintiff must allege that his or her name or likeness is used to directly promote a commercial product or service, such as T-shirts, hats, coffee mugs, etc." *Id.* at 1258. In dismissing the claim brought under § 540.08, the court further explained that plaintiff "does not allege that his name and likeness were used to promote a product or service *separate and apart* from the television show." *Id.* at 1260 (emphasis added).

22. The court similarly ruled in *Spilfogel v. Fox Broad, Co.*, No. 09-80813-CIV-RYSKAMP/VITUNAC, 2009 WL 10666811 (S.D. Fla. Dec. 2, 2009). In *Spilfogel*, the plaintiff sued for an alleged violation of section 540.08 arising from use her image in an episode of the television series *COPS*. *Id.* at *1. The plaintiff also alleged a violation of that section by use of her likeness on defendant's website to promote both the specific episode in which she involuntarily appeared, as well as the series. *Id.* at *5. The court dismissed plaintiff's claim, finding that section 540.08 did not prohibit such uses in "advertising incidental" to plaintiff's appearance in the particular episode of a larger series. As the court explained:

> This would be a different case if [plaintiff] alleged that her image was used to promote a certain brand of plastic sandwich bags, headlights, or traffic safety school, for example. However, alleging that her image was used to promote *the very episode and television series* that she appeared in is not sufficient to support a cause of action for violation of § 540.08.

Id. (emphasis added); *see also Spilfogel v. Fox Broad., Co*, 2010 WL 11504189, at *4 (S.D. Fla. May 4, 2010) (dismissing subsequent pleading for same reasons).

23. Case after case reflects this exact same limitation as to the scope of the statute. *See, e.g.*, *Acosta v. Spanish Broad. Sys. of Del., Inc.*, No. 15–21837–Civ–COOKE/TORRES, 2015 WL 11237016 (S.D. Fla. Nov. 12, 2015) (recommending dismissal of § 540.08 claim because "use of Plaintiff's image or likewise in promoting his motion picture cannot give rise to liability under Section 540.08"), *adopted*, 2015 WL 11237017 (S.D. Fla. Dec. 4. 2015); *Tyne*, 204 F. Supp. 2d at 1341 (granting judgment to movie producers on § 540.08 claim where their use of the decedents' name or likeness was merely used in "promotion and advertising" of the very motion picture in which those individuals were characters); *Lane*, 242 F. Supp. 2d at 1212-1215 (rejecting § 540.08 claim as a matter of law because "while [plaintiff's] image and likeness were used to sell copies of *Girls Gone Wild*, her image and likeness were never associated with a product or service *unrelated to that work*" in which she was featured) (emphasis added).

24. Here, Rigmaiden is attempting to plead exactly what that line of cases precludes and has failed to allege that his name or likeness was used to promote anything separate and apart from *American Greed*. This is fatal to his claim and requires dismissal.

WHEREFORE, Defendants NBCUniversal Media, LLC and Kurtis Productions, Ltd. request that this Court dismiss the First Amended Complaint, together with such other relief as the Court deems appropriate.

CERTIFICATE OF SERVICE

I hereby certify that on this **18th** day of **September, 2018** a true and correct copy of the foregoing has been efiled via the Florida Court's E-Filing Portal with electronic notification being sent to Daniel Rigmaiden, ddrigmaiden@gmail.com, *Pro se Plaintiff.*

THOMAS & LOCICERO PL
915 Middle River Drive
Suite 309
Fort Lauderdale, FL 33304
Telephone: (954) 703-3416
Facsimile: (954) 400-5415

By: /s/ Dana J. McElroy
Dana J. McElroy, Esq.
Florida Bar No. 845906
dmcelroy@tlolawfirm.com

Attorneys for Defendants NBCUniversal and Kurtis