Daniel Rigmaiden
PO Box 398041
Miami Beach, FL 33239
Telephone: (480) 389-4831
Email: ddrigmaiden@gmail.com

Daniel Rigmaiden
Pro Se, Plaintiff

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT

IN AND FOR MIAMI-DADE COUNTY, FLORIDA

Daniel Rigmaiden, Plaintiff, v. (1) NBCUniversal Media, LLC, DBA CNBC (2) Kurtis Productions, LTD, (3) Dennis Wagner, and (4) Phoenix Newspapers, Inc, DBA The Arizona Republic.	Case No.: 2018-015032-CA-01 PLAINTIFF'S RESPONSE TO DEFENDANTS NBCUNIVERSAL AND KURTIS PRODUCTIONS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff, Daniel Rigmaiden, appearing *pro se*, respectfully submits *Plaintiff's Response to Defendants NBCUniversal and Kurtis Productions' Motion to Dismiss Plaintiff's First Amended Complaint* (Doc. #78053854). Plaintiff respectfully requests that Defendants' motion be denied.

* * *

Plaintiff's filings, however inartfully drafted, must be liberally construed and held to less stringent standards than formal pleadings drafted by lawyers. *See* Haines v. Kerner, 404 U.S. 519, 520 (1972).

I. Introduction

In their motion, defendants NBCUniversal, LLC, and Kurtis Productions, LTD (hereafter "Defendants") do not deny that they fabricated a story about Plaintiff. Rather, they argue that the First Amendment gives them free reign to engage in defamation, including false claims that Plaintiff committed murder, shot at law enforcement, threatened to kill innocent people, and had ideas to engage in terrorism. Defendants believe that when a person is "a convicted felon who spent many years behind bars for committing multiple [][white collar related] felonies,"[1] it is okay to name him as the culprit in a slew of violent acts and conspiracies, including MURDER and TERRORISM, of which he was neither accused nor convicted of in court. Defendants attempt to use the First Amendment as a shield for their misconduct. We all have the right to say what we want, but that right is not without conditions. *See Florida Declaration of Rights*, Article 1, Section 4.

Defendants claim that Plaintiff is trying to "escape his past,"[2] but the so-called "past" referred to by Defendants is a defamatory one that they invented. If it means higher ratings and increased profits for a multi-billion dollar entertainment network, Defendants argue that the law and common decency go out the window. The editorializing in Defendants' motion makes clear that they see Plaintiff as discarded trash, a person they can paint in any negative false light they please, merely because he has a conviction on his record. This is morally offensive and will not stand.

Defendants further argue that Plaintiff's additional claims are barred by Florida's single action rule, that his FUDTPA claim is invalid for both himself and the class, and that his common law right of publicity, Fla. Stat. § 540.08, claim is also invalid. As articulated below, Defendants misinterpret the law on every point and ignore many relevant facts alleged in Plaintiff's *First Amended Complaint*.

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1. *Defendants NBCUniversal and Kurtis Productions' Motion to Dismiss Plaintiff's First Amended Complaint* (Doc. #78053854), p. 1.

2. *Id*.

II. Argument

A. It is not an unconstitutional prior restrain to issue a *permanent* injunction at the conclusion of a civil action if it addresses a preexisting broadcast proven to be defamatory.

1. Defendants did not challenge Plaintiff's request for a *permanent* injunction.

First, Defendants falsely claim that Plaintiff seeks "a ***preliminary*** and permanent injunction..."[3] Contrary to Defendants' disingenuous characterization, Plaintiff is *not* seeking a *preliminary* injunction. Nowhere in his *First Amended Complaint* does he make such a request. Plaintiff is only seeking a *permanent* injunction with respect to defamation and other claims. Furthermore, all of Defendants' prior restraint arguments are irrelevant considering they are made only in the context of the nonexistent *preliminary* injunction. Because Defendants did not raise any direct arguments or cite any case law addressing Plaintiff's request for a *permanent* injunction, they concede the issue.

2. Defendants' prior restraint argument fails, anyway.

If the Court wishes to apply Defendants' *preliminary* injunction prior restraint argument to Plaintiff's request for a *permanent* injunction, it still fails. Once Plaintiff proves Defendants' statements and material to be defamatory, they lose all First Amendment protections. The *Florida Declaration of Rights*, Article 1, Section 4, states that "[e]very person may speak, write and publish his sentiments on all subjects but shall be responsible for the **abuse of that right**." *Id.* (emphasis added). One of those abuses —which gets no pass under the First Amendment—is the tort of defamation. Defendants' straw-man argument claims that "injunctive relief is not available in Florida to prohibit the making of **allegedly** defamatory statements[,]"[4] and cites to various First

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3. *Defendants NBCUniversal and Kurtis Productions' Motion to Dismiss Plaintiff's First Amended Complaint* (Doc. #78053854), p. 3 (emphasis added).

4. *Id.*, p. 4 (emphasis added).

Amendment prior restraint cases that either do not address injunctions in defamation cases at all, or address only *preliminary* injunctions in defamation cases.

As noted above, Plaintiff does not seek a *preliminary* injunction, which only applies to statements and material merely **alleged** to be defamatory. Instead, he seeks a *permanent* injunction, which applies to statements and material **proven** to be defamatory at the conclusion of the lawsuit. Defendants' prior restraint arguments and cited cases do not carry over from the *preliminary* injunction phase (First Amendment protections intact) to the *permanent* injunction phase (First Amendment protections lost).

Defendants cited the following irrelevant defamation cases, which ***only*** make the case for prior restraint during the ***preliminarily*** injunction phase of a defamation cause of action: (1) 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) ("Plaintiffs moved for the third time to **preliminarily enjoin Defendants**..." and the court addressed the issue in "Plaintiffs' motion for a **preliminary injunction**[.]" (emphasis added)); (2) Chevaldina v. R.K./FL Mgmt., Inc., 133 So. 3d 1086, 1090 (Fla. 3d DCA 2014) ("In this appeal, we review a **temporary injunction** in the circuit court action[.]" (emphasis added)); and (3) 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" (emphasis added)).

Applying Defendants' argument to a *permanent* injunction also raises due process issues. Defendants' objection to the requested *permanent* injunction necessarily assumes the following: (1) Defendants will lose the defamation claim, and (2) after losing the claim, Defendants plan to continually disseminate the defamatory broadcast to the public. If Defendants have no intention of disseminating the defamatory broadcast after losing the claim, there would be no reason for them to complain about a *permanent* injunction barring that very behavior.

If the Court were to graft *preliminary* injunction prior restraint case law onto the requested *permanent* injunction, Plaintiff will be statutorily barred from seeking further relief or damages while Defendants disseminate the challenged defamatory material after losing the claim. Florida law establishes a two-year statute of limitations for actions for libel and slander. *See* Fla. Stat. § 95.11(4)(g) (2014). Florida also applies the "first publication rule," Fla. Stat. § 770.07 (2018)), which prevents the statute of limitations from restarting each time the *same* defamatory material is broadcast after the date of first publication. By the time the present case is concluded, the date of first publication will be long past the two-year statute of limitations. Plaintiff will be statutorily barred from filing a new civil action addressing broadcasts of the *same* defamatory material made after Defendants lose the claim. Therefore, if there is no *permanent* injunction issued after Defendants lose the claim, Plaintiff will have no avenue for relief, as the Court will have no jurisdiction over Defendants' planned continual dissemination of the defamatory broadcast.[5]

Finally, even if the Court were to agree with Defendants that Plaintiff cannot request a *permanent* injunction on a defamation claim, it does not mean that "all counts of the First Amended Complaint should be dismissed[,]"[6] as Defendants request. There is no case law supporting such a remedy. Defendants admit that Plaintiff is requesting other relief in addition to the *permanent* injunction,[7] e.g., declaratory relief and monetary damages. Finding one (of many) requested avenues of relief impermissible is no reason to dismiss the complaint outright.

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5. Again, if Defendants have no intention of disseminating the defamatory broadcast after losing the claim, there would be no reason for them to complain about a *permanent* injunction barring that very behavior.

6. *Defendants NBCUniversal and Kurtis Productions' Motion to Dismiss Plaintiff's First Amended Complaint* (Doc. #78053854), p. 5.

7. *See id.*, p. 3.

B. The single action rule does not bar Plaintiff's additional claims because they are supported by additional, independent facts.

Defendants misunderstand the single action rule and incorrectly argue that Plaintiff is categorically barred "from pursuing additional claims based on the same broadcast/publication."[8] Florida case law holds that the single action rule only bars additional claims if they rely *solely on* the facts in support of defamation, and are otherwise unsupported by additional, independent facts. For example, in Brown v. Suncoast Beverage Sales, LLP, the court allowed a separate claim, which relied partially on the defamation facts, because "Plaintiff's allegations of intentional infliction of emotional distress d[id] not rest **solely on** the defamation claim..." *Id.*, Case No. 2:09-cv-498-FtM-29DNF, 2010 WL 555675 (M.D. Fla. Feb. 10, 2010) (emphasis added); *see also*, *c.f.* Fridovich v. Fridovich, 598 So.2d 65, 70 (Fla.1992) (dismissal appropriate when "the **sole basis** for the latter cause of action is the defamatory publication." (emphasis added)).

In the present case, Plaintiff alleges separate, independent facts and separate wrongful acts in support of his additional causes of action. He is therefore permitted to seek recovery "upon separate causes of action pled upon the existence of independent facts." Ortega Trujillo v. Banco Cent. Del Ecuador, 17 F. Supp. 2d 1334, 1340 (S.D.Fla.1998).

Defendants incorrectly rely on Klayman v. Judicial Watch, Inc., which states:

> When claims are based on analogous underlying facts and the causes of action are intended to **compensate for the same alleged harm**, a plaintiff may not proceed on multiple counts for what is essentially the same defamatory publication or event.

Id., 22 F.Supp.3d 1240, 1256 (2014) (emphasis added).

Unlike in *Klayman*, any "analogous underlying facts" used to support additional claims in the instant case compensate for **different** (*i.e.*, not the same) alleged harms, and are also supported by additional, independent facts that have no relation to the defamation claims.

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8. *Id.*, p. 6.

The following subsections show how each of Plaintiff's additional claims are intended to compensate for **different** alleged harms, and are supported by additional, independent facts.

1. The single action rule does not apply to the FDUTPA cause of action because it addresses false advertising, a different alleged harm, and is supported by additional facts.

In his Florida's Deceptive and Unfair Trade Practices Act (FDUTPA) cause of action, Plaintiff alleges that Defendants continue to engage in the wrongful act known as false advertising:

> As recent as August 4, 2018, Defendants NBCUniversal and Kurtis Productions continue to falsely advertise the *American Greed* episode containing the Segment as depicting a true story based on in-depth reporting. For example, on the CNBC website Defendant NBCUniversal advertises the American Greed television series as depicting **true stories** based on **in-depth reporting**[.]
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> *Plaintiff's First Amended Complaint* (Doc. #76653837), p. 21, ¶ 66.

False advertising is a wrongful act wholly different from the wrongful act known as defamation. Plaintiff supports his FDUTPA claim with six (6) additional factual paragraphs in his complaint, which are independent from the facts supporting the defamation claim. *See id.*, pp. 21-22, ¶¶ 66-71.[9] Furthermore, the harm Plaintiff alleged as a result of the FDUTPA claim is a loss of $2.99 he suffered after purchasing the falsely advertised *American Greed* episode containing the Segment. *See id.*, p. 22, ¶ 71. This $2.99 loss is harm different from the harm he is suffering as a result of Defendants' defamation, and he seeks relief for that harm separate from the relief he seeks for the harm caused by defamation. *See id.*, p. 70, ¶¶ 283-285.

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9. Defendants claim that Plaintiff "does not allege, as the basis for his FDUTPA claim, that the advertisement for the episode is false because [][the advertisement]… makes a statement about the episode *as a product*." *Defendants NBCUniversal and Kurtis Productions' Motion to Dismiss Plaintiff's First Amended Complaint* (Doc. #78053854), p. 9. This is false. Plaintiff alleged that Defendant NBCUniversal falsely "advertises the American Greed television series as depicting true stories based on in-depth reporting[.]" *Plaintiff's First Amended Complaint* (Doc. #76653837), p. 21, ¶ 66.

Defendants' incorrectly argue that Plaintiff is presenting a "defamation claim in other clothes[]"[10] by alleging that the "content of the episode itself is false, and therefore the advertisement is false[.]"[11] Contrary to Defendants' argument, Plaintiff is permitted to incorporate the defamation facts into his FDUTPA claim as long as it "d[oes] not rest **solely on** the defamation[,]"[12] and it does not seek to "compensate for the same alleged harm[.]"[13] Both of those conditions are met by Plaintiff (*see Section* II(B), *supra*) and the single action rule does not apply.

2. The single action rule does not apply to the common law right of publicity, Fla. Stat. § 540.08, cause of action because it addresses unauthorized use of Plaintiff's name, likeness, etc., a different alleged harm, and is supported by additional facts.

In his common law right of publicity and Fla. Stat. § 540.08 cause of action (hereafter "right of publicity claim"), Plaintiff alleges that Defendant NBCUniversal continues to use his name, image, photograph, identity, character, persona, likeness, and/or back story to advertise new episodes of *American Greed* without Plaintiff's permission:

> Defendant NBCUniversal used and continues to use clips of the Segment in internet advertisements for the on-demand purchase of full episodes and complete seasons of *American Greed*.
>
> *Plaintiff's First Amended Complaint* (Doc. #76653837), p. 22, ¶ 72.
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> Plaintiff did not give consent to Defendant NBCUniversal to use his name, image, photograph, identity, character, persona, likeness, and/or back story for any advertising purposes—whether it be to advertise shows about murderers, former prostitutes, stolen valor, drug peddling doctors, or otherwise.
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> *Id.*, p. 24, ¶ 78.

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10. *Defendants NBCUniversal and Kurtis Productions' Motion to Dismiss Plaintiff's First Amended Complaint* (Doc. #78053854), p. 9.

11. *Id*.

12. Brown v. Suncoast Beverage Sales, LLP, WL 555675 (emphasis added).

13. Klayman, 2 F.Supp.3d at 1256.

Violating a person's right of publicity is a wrongful act wholly different from the wrongful act known as defamation. Plaintiff supports his right of publicity claim with eight (8) additional factual paragraphs in his complaint, which are independent from the facts supporting the defamation claim. *See id.*, pp. 22-24, ¶¶ 72-79. Furthermore, the harm Plaintiff suffered under the right of publicity claim is a lack of "royalties for the continuing, near two (2) year publicity, and... damages he has suffered from having his name... likeness... associated with murderers, stolen valor, a former prostitute plotting murder, opioid drug peddling doctors, and the other heinous crimes depicted and told in the episodes of *American Greed* advertised by Defendant NBCUniversal using clips of the Segment." *See id.*, p. 24, ¶ 79. This harm is different from the harm he is suffering as a result of the defamation claim, and he seeks relief for that harm separate from the relief he seeks for the harm caused by defamation. *See id.*, p. 69, ¶¶ 279(5), 280(5), 281(5); p. 71, ¶¶ 286-87.

As supported by the cases cited in *Section* II(B), *supra*, Plaintiff is permitted to incorporate the defamation facts into his right of publicity claim as long as it "d[oes] not rest **solely on** the defamation[,]"[14] and it does not seek to "compensate for the same alleged harm[.]"[15] Both of those conditions are met by Plaintiff and the single action rule does not apply.

C. Plaintiff's FDUTPA cause of action survives the rest of Defendants' challenges.

In addition to the invalid single action rule argument, Defendants also incorrectly argue that Plaintiff's FDUTPA claim should be dismissed because (1) Plaintiff seeks injunctive relief, which runs afoul of the First Amendment, and (2) FDUTPA's elements of causation and actual damages are negated by Plaintiff being aware of the alleged false

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14. Brown v. Suncoast Beverage Sales, LLP, WL 555675 (emphasis added).

15. Klayman, 2 F.Supp.3d at 1256.

advertising at the time he purchased the *American Greed* episode. The following two subsections show how Defendants' arguments fail.

1. Defendant NBCUniversal's false advertising under FDUTPA is not protected by the Fist Amendment and Plaintiff's request for a *permanent* injunction under FDUTPA is valid.

Defendants argues that Plaintiff is "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."[16] This is not the case.

First, Plaintiff is seeking a *permanent* injunction, not a *temporary* or *preliminarily* injunction, so there is no prior restraint under the First Amendment. *See* Section II(A)(1) and (2), *supra* (same arguments apply, here). The *permanent* injunction only comes into play *after* Plaintiff proves the false advertising under FDUTPA.

Second, the *permanent* injunction requested under the FDUTPA claim would enjoin Defendants from activity "that would cause **Florida consumers** to exchange money for a copy of the **falsely advertised** *American Greed* episode containing the Segment,"[17] while the *permanent* injunction requested under the defamation claims would enjoin Defendants from "any and all activity that would cause the distributing... of the Segment[.]"[18] In other words, the FDUTPA *permanent* injunction is statutory, and only affects false advertising to Florida consumers, while the defamation *permanent* injunction affects the *American Greed* Segment as a whole and distribution to everyone. If Plaintiff were to lose the defamation claim, but win the FDUTPA claim and have the FDUTPA injunction go into effect, Defendants could arguably continue to disseminate

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16. *Defendants NBCUniversal and Kurtis Productions' Motion to Dismiss Plaintiff's First Amended Complaint* (Doc. #78053854), p. 9.

17. *Plaintiff's First Amended Complaint* (Doc. #76653837), p. 70, ¶ 283 (emphasis added).

18. *Id.*, pp. 69-70, ¶ 282.

the *American Greed* episode containing the Segment, but would have to accurately and honestly advertised it as a fabricated fiction.

2. Plaintiff has adequately met the causation and damages elements of FDUTPA.

Defendants incorrectly argue that Plaintiff's FDUTPA claim does not satisfy the causation and damages elements of FDUTPA because, as Defendants allege, Plaintiff was aware of the alleged false advertising when he purchased the *American Greed* episode containing the Segment, and therefore could not have *subjectively* relied upon it to make his purchase.[19] This argument fails because the FDUTPA standard "does not require subjective evidence of reliance, as would be the case with a common law action for fraud." Davis v. Powertel, Inc., 776 So. 2d 971, 974 (Fla. 1st DCA 2000). "That is so because the question is not whether the plaintiff actually relied on the alleged deceptive trade practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstances." *Id*.

In the instant case, causation under FDUTPA is satisfied, using the required *objective* analysis, considering Plaintiff alleged sufficient facts showing that (1) the *American Greed* episode purchased by Plaintiff and other Florida consumers contains a false story based on false facts,[20] and (2) a Florida consumer acting reasonably in the same circumstances (i.e., buying the *American Greed* episode after being exposed to Defendant's false advertising) would be led to believe that it depicts "true stories" based on "in-depth reporting."[21] Actual damages under FDUTPA are also satisfied

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19. *See Defendants NBCUniversal and Kurtis Productions' Motion to Dismiss Plaintiff's First Amended Complaint* (Doc. #78053854), pp. 9-11.

20. *See Plaintiff's First Amended Complaint* (Doc. #76653837), pp. 2-22, ¶¶ 1-71.

21. *See id.*, pp. 21-22, ¶¶ 66-71 & Ex. 01 (CNBC, *American Greed* website "About" page).

considering Plaintiff, a Florida consumer, spent $2.99 to purchase the falsely advertised *American Greed* episode after being exposed to Defendants' false advertising.[22]

In a footnote, Defendants incorrectly argue that an *objective* standard necessitates defining a consumer in the same circumstances as Plaintiff as one "who had already filed a lawsuit declaring that the segment about him is false and... later be[ing] misled into purchasing that same episode just because an advertisement says that it is 'true.'"[23] This argument fails because the psychoanalysis performed on Plaintiff be Defendants is purely *subjective*. A true *objective* standard under FDUTPA has "no necessity to establish the subjective misunderstanding or reliance of particular customers." WS Badcock Corp. v. Myers, 696 So. 2d 776, 779 (Fla. 1st DCA 1996). This is because "FDUTPA is designed to protect not only the rights of litigants, but also the rights of the consuming public at large." State Office of Atty. Gen. v. Wyndham Intern., Inc., 869 So. 2d 592, 598 (Fla. 1st DCA 2004) (citation and internal quotation marks omitted).

D. Plaintiff's FDUTPA cause of action is entitled to class representation.

Defendants raise various incorrect arguments in support of their claim that Plaintiff has no valid basis for class representation. The following subsections address each argument.

1. Plaintiff has met the commonality requirement for the FDUTPA class action.

First, Defendants incorrectly claim that Plaintiff "has failed to allege that the loss incurred by any class member (i.e., payment for the episode) was actually caused by the

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22. *See id.*, p. 22, ¶ 71 & Ex. 02 (Amazon Video Direct invoice for *American Greed* episode containing the Segment).

23. *See Defendants NBCUniversal and Kurtis Productions' Motion to Dismiss Plaintiff's First Amended Complaint* (Doc. #78053854), p. 10, fn. 3.

alleged FDUTPA violation[.]"[24] However, Plaintiff made these commonality allegations in his complaint:

> The questions of law that are common to the claim of Plaintiff and each class member are whether Defendants NBCUniversal and Kurtis Productions violated Florida's Deceptive and Unfair Trade Practices Act (FDUTPA).
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> *Plaintiff's First Amended Complaint* (Doc. #76653837), p. 66, ¶ 267.
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> The particular facts and circumstances showing the claim advanced by Plaintiff is typical of the claim of each class member are: (1) he/she was misled by Defendants NBCUniversal and Kurtis Productions' false advertising and presentation of the Segment as depicting and telling a true-crime story; and (2) he/she suffered an actual monetary loss by purchasing the American Greed episode containing the Segment, considering he/she expected to receive or view a true-crime story, as opposed to the fabricated story depicted in the Segment.
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> *Id.*, p. 66, ¶ 268.

2. Plaintiff has met the predominance requirement for the FDUTPA class action.

Second, Defendants incorrectly claim that Plaintiff fails to meet the predominance requirement as follows:

> [C]ausation 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.
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> *Defendants NBCUniversal and Kurtis Productions' Motion to Dismiss Plaintiff's First Amended Complaint* (Doc. #78053854), p. 12.

Defendants' legal research is flawed considering "members of a class proceeding under the Deceptive and Unfair Trade Practices Act need not prove individual reliance on the alleged representation." Davis v. Powertel, Inc., 776 So. 2d at 974. It also makes no difference whether a class member "purchased this episode solely to see parts that had

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24. *Defendants NBCUniversal and Kurtis Productions' Motion to Dismiss Plaintiff's First Amended Complaint* (Doc. #78053854), p. 12.

nothing to do with Rigmaiden at all[,]"[25] because each class member **still purchased a falsely advertised product** under the *objective* analysis required in FDUTPA claims. *See* Section II (C)(2), *supra* (citing cases supporting an *objective* analysis standard). "The standard of proving that an act is deceptive and therefore a violation of the statute is the same in a class action as it is in an action initiated by an individual consumer." Davis v. Powertel, Inc., 776 So. 2d at 974.

The fact that the *American Greed* episode is falsely advertised as depicting "true stories" based on "in-depth reporting,"[26] and that Florida consumers are purchasing the episode, is enough for the class claims to predominate any individual varieties. Just like in Davis v. Powertel, Inc., "[i]ssues pertaining to the proof of the alleged deceptive practice and issues relating to causation and damages will be common to all members of the class." *Id.* at 975.

3. Plaintiff has met the typicality requirement for the FDUTPA class action.

Third, Defendants incorrectly claim that Plaintiff fails to meet the typicality requirement because his "self-interest in pursuing this case necessarily differs from the interests of other class members, thereby defeating typicality."[27] Plaintiff does not lose typicality merely because he brought this suit and is depicted in the falsely advertised *American Greed* episode. Defendants cite to no case law supporting a "self-interest" lack of typicality argument.

Defendants further incorrectly claim that Plaintiff fails to meet the typicality requirement because he "purchased the episode long after he had already filed suit

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25. *Defendants NBCUniversal and Kurtis Productions' Motion to Dismiss Plaintiff's First Amended Complaint* (Doc. #78053854), p. 12.

26. *See id.*, pp. 21-22, ¶¶ 66-71 & Ex. 01 (CNBC, *American Greed* website "About" page).

27. *Defendants NBCUniversal and Kurtis Productions' Motion to Dismiss Plaintiff's First Amended Complaint* (Doc. #78053854), p. 13.

alleging its falsity"[28] while other class members "made the purchase based on the alleged advertisement about 'true stories.'"[29] Whether Plaintiff had *subjective* knowledge of the *American Greed* episode's falsity prior to purchase does not affect typicality because an *objective* analysis is required in FDUTPA claims. *See* Section II (C)(2), *supra* (citing cases supporting an *objective* analysis standard).

4. Plaintiff has met the adequacy requirement for the FDUTPA class action.

Fourth, Defendants incorrectly claim that Plaintiff fails to meet the adequacy requirement because "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."[30] As Plaintiff stated in his complaint:

> Plaintiff will fairly and adequately protect and represent the interests of each member of the class considering he expects to retain an attorney to prosecute this case after the pleading stage, notwithstanding the fact that Plaintiff is capable of prosecuting a class action himself. It is within the Court's discretion to issue a conditional order, requiring that Plaintiff retain an attorney in order for the claim to be maintainable on behalf of the class.
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> *Plaintiff's First Amended Complaint* (Doc. #76653837), p. 66, ¶ 269.

If the Court finds that Plaintiff meets all other requirements for class representation on his FDUTPA claim, it is within the Court's discretion to issue a conditional order requiring that Plaintiff retain an attorney before the FDUTPA claim continues on behalf of the class. *See* Fla. R. Civ. P. 1.220(d)(1). If the Court issues such an order, Plaintiff will retain an attorney with the required experience and resources to

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28. *Id*.
29. *Id*.
30. *Id.*, p 14.

prosecute the class action. *See Plaintiff's First Amended Complaint* (Doc. #76653837), p. 66, ¶ 269.

5. Plaintiff has met the superiority requirement for the FDUTPA class action.

Fifth, Defendants incorrectly claim that Plaintiff fails to meet the superiority requirement as follows:

> [F]actual 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.
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> *Defendants NBCUniversal and Kurtis Productions' Motion to Dismiss Plaintiff's First Amended Complaint* (Doc. #78053854), p. 14.

The underlying claims in support of Defendants' superiority argument are identical to the underlying claims in support of Defendants' predominance argument addressed by Plaintiff in Section II(D)(2), *supra*, hereby incorporated into this section by reference. Furthermore, damages are the same for each class member, i.e., the cost of the falsely advertised *American Greed* episode containing the Segment.

E. Plaintiff's common law right of publicity and rights under Fla. Stat. § 540.08 cause of action is valid.

Plaintiff alleges, in part, the following facts in support of his right of publicity claim:

> Defendant NBCUniversal used and continues to use clips of the Segment in internet advertisements for the on-demand purchase of full episodes and complete seasons of American Greed. Some advertisements do not offer for purchase the season ten (10) episode of American Greed containing the Segment, and instead seek to sell entire seasons and single episodes of American Greed as recent as and from season twelve (12).
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> *Plaintiff's First Amended Complaint* (Doc. #76653837), p. 22, ¶ 72.

> The most recent episode from season twelve (12) aired August 13, 2018. See CNBC, American Greed, "Operation Crook, Line and Stinker," Season 12 Episode 161 (first aired Aug 13, 2018), available at http://www.cnbc.com/live-tv/american-greed/full-episode/operation-crook-line-and-stinker/1298627139942 (last accessed: Aug 19, 2018). **In other words, nearly two (2) years after the original air date of the Segment (August 25, 2016), Defendant NBCUniversal continues to use Plaintiff's name, image, photograph, identity, character, persona, likeness, and/or back story to advertise new episodes of American Greed that don't depict Plaintiff**[.]
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> *Id.*, pp. 22-23, ¶ 73 (emphasis added).
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> For example, Defendant NBCUniversal's **YouTube based advertisement**, published on its "CNBC Prime" YouTube channel, uses Plaintiff's name, image, photograph, identity, character, persona, likeness, and back story to advertise season twelve (12) of American Greed for $12.99. See CNBC Prime YouTube channel, American Greed Season 12 advertisement, https://www.youtube.com/watch?v=kAh5xwFosi4 (last accessed: Aug 9, 2018) (print-out at EXHIBIT 03).
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> *Id.*, p. 23, ¶ 74 (emphasis added).
>
> Plaintiff did not give consent to Defendant NBCUniversal to use his name, image, photograph, identity, character, persona, likeness, and/or back story for any advertising purposes—**whether it be to advertise shows about murderers, former prostitutes, stolen valor, drug peddling doctors, or otherwise**.
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> *Id.*, p. 24, ¶ 78 (emphasis added).

Defendants argue that Plaintiff's right of publicity claim is invalid and cite to a series of unpublished court opinions that only act to **support** Plaintiff's position. Defendants also rely on Fuentes v. Mega Media Holdings, Inc., 721 F. Supp. 2d 1255 (S.D. Fla. 2010) and Lane v. MRA Holdings, LLC, 242 F. Supp. 2d 1205 (M.D. Fla. 2002), but these cases also only act to **support** Plaintiff's position.

Defendants cite to Spilfogel v. Fox Broad. Co.,[31] an unpublished opinion wherein the court dismissed a right of publicity claim based on the following facts:

> In her complaint, Spilfogel pled that the defendants published, without her knowledge or consent, one or more photographs of her encounter with the Sheriff's officer on the official "COPS" website. Spilfogel contends that

31. *Id.*, No.: 09-80813-CIV-RYSKAMP/VITUNAC, 2009 WL 10666811 (S.D. Fla. Dec. 2, 2009); *see also* Spilfogel v. Fox Broad. Co., 2010 WL 11504189 (S.D. Fla. May 4, 2010) (rejecting duplicate of argument in 2009 WL 10666811).

> defendants used her photo to not only promote the episode in which she appeared, but also the COPS television program and the webpage as a whole.
>
> *Id.*, No.: 09-80813-CIV-RYSKAMP/VITUNAC, Doc. 45, p. 10.

In dismissing the claim, the court reasoned that plaintiff failed to "assert factual allegations sufficient to establish that his or her likeness was used by the defendant to promote a product or service **other than the expressive work in which the plaintiff appears**." *Id.* (emphasis added) (*citing* Tyne v. Time Warner Entmt. Co., 901 So. 2d 802, 807-08 (Fla. 2005)).

The instant case is distinguishable from *Spilfogel* considering Plaintiff has alleged (1) Defendants are using Plaintiff's likeness to promote season twelve (12) of American Greed via a YouTube based advertisement **with a stated price of $12.99**, (2) every episode from season twelve (12) is ***not*** the expressive work in which Plaintiff appears, and (3) the YouTube based advertisement is also promoting the "CNBC Prime YouTube channel," which is an on-demand, pay-per-view service. In *Spilfogel*, the plaintiff merely alleged that defendant was "promot[ing] the episode in which she appeared,"[32] and "the COPS television program and the webpage as a whole."[33] In the instant case, Plaintiff points to an actual advertisement containing his likeness, alleges promotion of specific additional creative works that do not depict him, and alleges promotion of Defendant NBCUniversal's service, i.e., the "CNBC Prime YouTube channel" where on-demand, pay-per-view CNBC programming can be purchased.

The instant case is more like Gritzke v. M.R.A. Holding, LLC, No. 4:01CV495-RH, 2002 WL 32107540 (N.D. Fla., March 15, 2002),[34] wherein the court found a valid right of publicity claim after defendant published plaintiff's photograph on the cover of a "Girls Gone Wild" VHS tape without her consent. The *Gritzke* case is aptly distinguished

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32. Spilfogel, No.: 09-80813-CIV-RYSKAMP/VITUNAC, Doc. 45, p. 10.

33. *Id*.

34. Defendants failed in its duty to bring *Gritzke* to the Courts attention despite it being cited as opposing authority in *Spilfogel* and being fully analyzed in *Acosta*.

from *Spilfogel* in the body of another unpublished opinion cited by Defendants, Acosta v. Spanish Broad. Sys. of Del., Inc., No. 15–21837–Civ–COOKE/TORRES, 2015 WL 11237016 (S.D. Fla. Nov. 12, 2015). In *Acosta*, the court distinguished *Gritzke* as follows:

> [T]he defendants in *Gritzke* used Gritzke's image on the front cover of the VHS tapes and used her likeness on defendant's website in an attempt to sell a series of other unrelated video products *in which Gritzke did not appear*. In other words, *Gritzke* dealt with the commercialization and marketing of the plaintiff in unrelated commercial products owned by the defendants.
>
> *Id.*, No. 15–21837–Civ–COOKE/TORRES, Doc. 25, p. 11 (emphasis in original; citation omitted).

Therefore, both *Acosta* and *Gritzke* support Plaintiff's position, as the facts of the instant case track well with the facts of *Gritzke*, wherein the court denied defendant's motion to dismiss the right of publicity claim.

Defendants also rely on *Lane* to support dismissal, but *Lane* holds that the "use of another's identity in a novel, play, or motion picture is not ordinarily an infringement unless the name or likeness is used solely to attract attention to a work that is not related to the identified person." Lane, 242 F. Supp. 2d at 1213 (M.D.Fla.2002) (*citing* Section 47 of the Restatement (Third) of Unfair Competition, comment c) (internal ellipses and brackets omitted). As argued above, the instant case is distinguishable because Defendants are using Plaintiff's likeness to attract attention to works that do not depict him, and to attract attention to Defendant NBCUniversal's "CNBC Prime YouTube channel" service.

Defendants reliance on the dismissal in *Fuentes* is also misplaced considering the *Fuentes* complaint "merely states that Defendants published or displayed his name and home movies during a broadcast on Maria Elvira Live and on the show's website without his consent." *Id.*, 721 F. Supp. 2d at 1258. In comparison, the complaint in the instant case points to an actual advertisement containing Plaintiff's likeness, alleges promotion of specific additional creative works that do not depict Plaintiff, and alleges promotion of

Defendant NBCUniversal's commercial service, i.e., the "CNBC Prime YouTube channel" where on-demand, pay-per-view CNBC programming can be purchased.

* * *

Based on the foregoing, Plaintiff respectfully requests that Defendants' motion be denied.

Respectfully Submitted: November 12, 2018

DANIEL RIGMAIDEN,
Pro Se Plaintiff:

/s/ Daniel Rigmaiden
Daniel Rigmaiden
PO Box 398041
Miami Beach, FL 33239
Telephone: (480) 389-4831
Email: ddrigmaiden@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2018, a true and correct copy of the foregoing has been efiled via the Florida Court's E-Filing Portal and has been served via electronic mail upon: (1) Dana J McElroy, 915 Middle River Drive, Suite 309, Fort Lauderdale, FL 33304, dmcelroy@tlolawfirm.com, counsel for Defendant NBCUniversal Media, LLC, and Defendant Kurtis Productions, LTD, and (2) Deanna K. Shullman, 2101 Vista Parkway, Suite 4006, West Palm Beach, FL 33411, dshullman@shullmanfugate.com, counsel for Defendant Phoenix Newspapers and Defendant Dennis Wagner.

Executed in Miami Beach, Florida, on November 12, 2018.

/s/ Daniel Rigmaiden
Daniel Rigmaiden