UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LARRY JOE DAVIS, JR., an individual,

Plaintiff,

v.

Case No.: 8:10-CV-2352-T27 TBM

AVVO, INC., a Washington corporation d/b/a Avvo.com,

DISPOSITIVE MOTION

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS
THIRD AMENDED COMPLAINT
AND SUPPORTING MEMORANDUM OF LAW

Pursuant to Rules 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure, Defendant Avvo, Inc. ("Avvo"), by its attorneys, hereby moves to dismiss the Third Amended Complaint filed by Plaintiff Larry Joe Davis, Jr. ("Davis). For the reasons detailed below, Avvo respectfully submits that all counts are facially insufficient as matter of law, that this Court lacks subject matter jurisdiction with respect to Counts I and III, and that the Third Amended Complaint should be dismissed with prejudice.

INTRODUCTION

Davis is a lawyer practicing in Pinellas County. Avvo is the owner of a website ("Avvo.com") that collects and publishes information about lawyers, including Davis. Davis claims that Avvo published an incorrect business address, an inaccurate primary practice area and an unauthorized photograph on Davis' "profile page" on Avvo.com. The Third Amended Complaint purports to assert claims for false advertising, unfair and deceptive trade practices,

and commercial misappropriation resulting from that publication. These claims fail to state a cause of action, under Washington or Florida law, even before applying Rule 9(a)'s heightened pleading standard to Counts I and III.[1]

In summary, Count I (false advertising) fails to allege an intentional and knowing false statement of fact, justifiable reliance by Davis, or resulting injury. Count II (commercial misappropriation) fails to allege that Avvo used Davis' image to directly promote a separate product or service of Avvo. Count III (Florida Deceptive and Unfair Trade Practices Act or "FDUTPA") fails to allege adequately that Davis is a "consumer," that Avvo committed a deceptive or unfair act, actual damages or causation. Consequently, the pleadings are again fatally defective and should be dismissed. In addition, the single action rule applies to Counts I and III, which are simply restatements of a defective defamation claims, and requires dismissal with prejudice because Davis' original defamation is time-barred by his failure to properly comply with statutory presuit notice requirements prior to the expiration of the relevant statute of limitations, which requirements are jurisdictional conditions precedent and their failure divests this Court of subject matter jurisdiction over Counts I and III.

BACKGROUND

Avvo.com, developed for non-experts, aims to "make clearer the murky process of understanding lawyers' backgrounds." (doc. 9, Tab 3).[2] Avvo rates attorneys in three basic

[1] In an attempt to avoid the effect of the choice of law and venue provisions in the Avvo.com website Terms of Use, Davis purports to "specifically disavow, at this time, reliance on any fact which occurred after Plaintiff logged on to the Avvo.com site (August 17, 2010)" and further states that "[a]ll claims in this action accrued prior to this arguable 'start date' of the Terms of Use. As such, the Terms of Use are not applicable to any aspect of this action." (doc. 26, ¶26). At the same time, however, the pleading is replete with allegations about events occurring after Davis claimed his profile or wholly irrelevant to the underlying claims. (doc. 26, ¶¶ 27, 28, 29, 31, 32, 34, and 41). Contemporaneously herewith, Avvo has filed a Motion to Strike such allegations (along with allegations relating to supposed injuries to numerous and various nonparties). (doc. 30).

areas: experience, industry recognition, and professional conduct. (doc. 9, Tabs 3, 13, 16, 18). To do this, Avvo gathers and displays publicly available material about attorneys from state bar associations and websites-including years of experience and disciplinary sanctions. (doc. 9, Tabs 3, 16, 18, 20, 25, 27). Attorneys may update their profiles with relevant information at no cost. (doc. 9, Tabs 1, 3). Consumers can submit reviews of their attorneys and attorneys may submit peer endorsements. (doc. 9, Tab 16).

Starting on August 17, 2010, in e-mails to Avvo's customer service department, Davis voiced his dissatisfaction with his Avvo rating, particularly insofar as it had given particular weight (or lack thereof) to his prior disciplinary history and his board certification. (doc. 17, tabs 2, 3, 5, 7, 9, 10, 11). On August 21, 2010, Davis sent an e-mail to Avvo's customer service department as follows:

> Your response to my email to the effect that I cannot be delisted from your service is unacceptable. Again, however, I am ordering you to cease and desist liting [sic] and rating me, primarily due to the fact that your service ignores Board Certified status, listed me and my photo without permission, categorized me wrongly as a 100% employment lawyer, had my wrong address, and rates my industry recognition lower than my professional conduct despite being Board Certified in Health law.

(doc. 17, tab 7). On August 26, 2010, Davis sued Avvo in state court alleging defamation, among other theories. (doc. 2). An Amended Complaint filed on September 14, 2010 replaced the defamation claim with a false light invasion of privacy. (doc. 3). Thereafter, Avvo timely removed this matter to federal court and moved to dismiss. (doc. 1, 8). After this Court struck a

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[2] The Third Amended Complaint relies heavily and repeatedly on information from Avvo.com. Under the incorporation-by-reference doctrine, the Court may consider the full text of the website. *See, e.g., SVM Holdings, Ltd. v. Banc of Am. Secs., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010); *Maxcess, Inc. v. Lucent Technologies, Inc.,* 433 F.3d 1337, 1340 (11th Cir. 2005) ("a document outside the four corners of the complaint may still be considered if it is central to the plaintiff's claims and is undisputed in terms of authenticity"); *Boatright v. School Board of Polk County*, 2009 W.L. 806801, *7 (M.D. Fla. 2009); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (incorporation by reference doctrine applies with equal force to Internet pages). *Accord Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 2007 WL 1461066, at *13, n. 13 (2007). Although Davis has not attached pages from Avvo.com to his most recent pleading, the website is clearly central to all of his claims.

Second Amended Complaint on December 15, 2010, Davis filed the Third Amended Complaint on April 25, 2011. (docs. 12, 14, 26). Although the legal theories vary from pleading to pleading, they rely on the same[3] factual allegations: Avvo allegedly published an incorrect business address, an inaccurate practice area listing and an unauthorized photo of Davis, in his Avvo.com profile. Also common to all pleadings is the absence of any alleged damages; rather, Davis complains that he has received *additional* client inquiries.[4]

ARGUMENT

The Third Amended Complaint fails to allege crucial elements of each of the claims, under Florida or Washington law and should be dismissed for failure to state a cause of action. Moreover, this Court lacks subject matter jurisdiction over the false advertising and unfair trade practices claims. Under the "single action rule," these claims are subject to the same defenses that apply to Davis' original defamation claim. Davis has never complied properly with Florida's statutory presuit notice requirement, which is a jurisdictional condition precedent to filing suit, precluding this Court's jurisdiction over the original defamation claim, which is now barred by the statute of limitations. This noncompliance with jurisdictional prerequisites is equally fatal to the false advertising and unfair trade practices claims and likewise divests this Court of jurisdiction over Counts I and III which, along with Count II, should be dismissed with prejudice.

[3] Davis has apparently abandoned his prior complaint about the rating(s) that were assigned to him in his Avvo.com profile, which were quintessential opinion, as discussed in detail in Avvo's First Motion to Dismiss. (doc. 8).
[4] Specifically, Davis claims that he received client inquiries regarding hostile work environment cases, "which Plaintiff does not take as a health lawyer," although he insists that he "is versed in employer-side human resources compliance, as noted on his own web site, and is capable of consulting on 'hostile work environment' claims and compliance." (doc. 26, ¶¶ 21, 24).

I. The Third Amended Complaint Must Be Dismissed Under Either Washington or Florida Law

The Court first must determine which state's law applies.[5] As discussed in detail in Avvo's First Motion to Dismiss and Motion to Transfer, an enforceable choice of law provision in the relevant website terms of use (the "Terms") governs the relationship of the parties and Washington law should be applied to Davis' claims. Davis attempts to dispense with the Terms with a dismissive, sweeping, and conclusory claim of unenforceability "either due to duress, mistake, procurement of contract by illegality, fraud in the inducement, unconscionability, unclean hands, or other theories," without a single factual allegation in support of any of these theories. Alternatively, he purports to "disavow[], *at this time*, reliance on any fact which occurred after Plaintiff logged on to the Avvo.com site (August 17, 2010)" (doc. 26) (emphasis added), while simultaneously reserving the right to "seek future leave of Court to supplement this action to allege post-filing allegations of fact and associated claims." (doc. 21). Nevertheless, Davis makes repeated allegations relating to Avvo's alleged "join-us-or-else" practice and other ongoing misconduct, none of which could have occurred vis-à-vis Davis on or before his "cut-off" date of August 17, 2010, particularly given his insistence that all of his claims accrued "in or around March, 2009." (doc. 26, ¶¶2-4). Besides, his purported "disavowal" of certain time frames does not alter the facts that supposedly gave rise to his alleged injury, i.e., incorrect business address, inaccurate practice area, and unauthorized photo. Davis' attempt to "draft around" the Terms should be rejected and the Court should enforce the choice of law provision and apply Washington law to Davis' claims arising out of the website.[6]

[5] Avvo previously briefed the choice of law issue in detail in its Motion to Dismiss and supporting Memorandum of Law (hereinafter "First Motion to Dismiss") and its Motion to Transfer Case to Western District of Washington, King County Division (hereinafter "Motion to Transfer"). (docs. 8, 15). Avvo expressly incorporates both such motions and their supporting memoranda of law by reference as if fully set forth herein.

[6] As noted earlier, Avvo previously has briefed the choice of law analysis in its First Motion to Dismiss, which has been incorporated herein by reference.

However, even if the Court applies Florida law, the Third Amended Complaint is deficient and should be dismissed with prejudice.

II. The Third Amended Complaint Cannot Survive a Rule 12(b)(6) Challenge By Relying on Conclusory Allegations and Unwarranted Factual Assertions

A Rule 12(b)(6) motion to dismiss tests the facial sufficiency of the pleadings and is read alongside Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Conclusory statements do not satisfy these requirements. *See, e.g., Auto Internet Mktg., Inc. v. Targus Information Corp.,* 2008 W.L. 5138302, *1 (M.D. Fla. 2008). The complaint must contain factual allegations that are "enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007). *Accord Davis v. Coca-Cola Bottling Co. Consol.*, 316 F.3d 955, 974 (11th Cir. 2008). Thus, while detailed factual allegations are not required, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp.,* 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "[A] complaint [must] contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Roe v. Aware Woman Ctr. for Choice, Inc.,* 253 F.3d 678, 683 (11th Cir. 2001) (quotations omitted).

Taking the facts as true, this Court may grant a motion to dismiss when, "on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *See Marshall Cty. Bd. of Educ. v. Marshall Cty. Gas Dist.,* 992 F.2d 1171, 1174 (11th Cir. 1993). Only well-pleaded factual allegations, not legal conclusions, are entitled to an

assumption of truth. *See Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009); *Lawrie v. The Ginn Cos.*, 2010 W.L. 3746725, *2 (M.D. Fla. 2010) (citations omitted). Although a 12(b)(6) motion to dismiss typically is limited to the "four corners" of the pleading and its attachments, this Court also may consider documents that are central to Davis' claims and referenced in the pleadings – here, the Avvo.com website in its entirety. *See supra* at n. 2.

III. Each Count of the Third Amended Complaint Fails to Allege the Necessary Elements of Each Cause of Action

None of the claims in the Third Amended Complaint sufficiently allege the elements required to state a prima facie cause of action, whether analyzed under Washington or Florida law.

A. Count I (False Advertising)

Count I fails to sufficiently allege a claim for false advertising under Section 817.41, Florida Statutes (2010). False advertising claims are considered claims for fraudulent inducement and require allegations that Davis relied on alleged misleading advertising by Avvo, and all other elements of fraud in the inducement, i.e., that (a) Avvo made a misrepresentation of material fact; (b) Avvo knew or should have known of the falsity of the statement; (c) Avvo intended that the representation would induce another to rely and act on it; and (d) Davis suffered injury in justifiable reliance on the representation. *See, e.g., Smith v. Mellon Bank*, 957 F.2d 856, 858 (11th Cir. 1992); *Third Party Verification, Inc. v. Signaturelink, Inc.*, 492 F. Supp. 2d 1314, 1322 (M.D. Fla. 2007). Count I does not allege that Avvo knowingly and willfully published an incorrect practice description and business address. Indeed, Davis repeatedly blames these asserted errors on Avvo's alleged failure to adequately debug software that was "not designed properly":

> On information and belief, Defendant generated the aforementioned false listings automatically via a computer program, without regard to the public information available. Defendant's choice of "practice area" for the aforementioned lawyers was performed recklessly and apparently the program used by Defendant to mine public information has not been "debugged". … Apparently because no human being was reviewing what Avvo.com was doing, Defendant failed to look at the [Plaintiff's] web site it linked to in order to discover what Plaintiff actually does for a living.

(doc. 26, ¶¶19, 37, 38). Notwithstanding Davis' opinion regarding the (in)adequacy of the underlying software architecture, a claim of fraudulent intent is not compatible with his allegations, given that the necessary scienter cannot be possessed by computer hardware and requires "actual human" involvement.

Although replete with conclusory references to Avvo's allegedly "reckless" conduct, and sprinkled liberally throughout with terms such as "fraud" and "fraudulent," the Third Amended Complaint does not allege that Avvo knew at the time of publication that the alleged publications were erroneous or that it made such statements deliberately or intending to defraud or that Davis relied upon such statements to his detriment. Conclusory references – no matter how repetitively articulated – do not carry the day for Davis.[7] This is especially true under Federal Rule of Civil Procedure 9(b), which subjects Davis' false advertising claim to "heightened pleading standards" that require "the circumstances constituting fraud ... [to] be stated with particularity." Fed. R. Civ. P. 9(b). Rule 9(b)'s particularity requirement is designed to "alert[] defendants to the 'precise misconduct with which they are charged' and protect[] defendants 'against spurious charges of immoral and fraudulent behavior'." *Durham v. Business Mgmt. Assocs.*, 847 F.2d 1505, 1511 (11th Cir. 1988).

Among other things, Count I does not satisfy Rule 9(b)'s requirement of setting forth how the alleged misstatements misled Davis (especially since his claims alleged accrued some

[7] The Washington equivalent is Revised Code of Washington Sections 9.04.010 and 9.04.050, which prohibit false or misleading advertising. Count I fails to state a claim under Washington law for the reasons set forth more fully in Avvo's First Motion to Dismiss (doc. 8).

seventeen (17) months before he was even aware of his profile on Avvo.com) and what Avvo obtained as a consequence of the fraud. *See, e.g., Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001); *Nationwide Mut. Co. v. Ft. Myers Total Rehab Center*, 657 F. Supp. 2d 1279, 1289 (M.D. Fla. 2009). Failure to satisfy Rule 9(b) is a ground for dismissal of the complaint. *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1012 (11th. Cir. 2005), *cert. denied*, 549 U.S. 810 (2006).[8] Count I fails to state a claim for false advertising and should be dismissed.

B. Count II (Misappropriation of Likeness)

Count II purports to allege a claim under Section 540.08, Florida Statutes (2010), which prohibits the nonconsensual use of another's name or likeness for a commercial purpose. *See* Fla. Stat. §540.08 (2010). Count II fails as a matter of law because it does not allege that Avvo used Davis' image to directly promote a separate product or service of Avvo.[9] *See Tyne v. Time Warner Ent. Co.*, 901 So. 2d 802 (Fla. 2005); *Badillo v. Playboy Ent. Group, Inc.*, 2006 W.L. 785707, *3 (M.D. Fla. 2006). Addressing a certified question from the Eleventh Circuit regarding the scope of Section 540.08, the *Tyne* Court approved an earlier decision in *Loft v. Fuller*, 408 So. 2d 619 (Fla. 4th DCA 1981), that:

> In our view, section 540.08, by prohibiting the use of one's name or likeness for trade, commercial or advertising purposes, is designed to prevent the unauthorized use of a name to directly promote the product or service of the publisher. Thus, the publication is harmful not simply because it is included in a publication that is sold for a profit, but rather because of the way it associates the individual's name or his personality with something else. Such is not the case here.

[8] Section 817.41(6), Florida Statutes (2010) provides that "[a]ny person prevailing in a civil action for violation of this section shall be awarded costs, including reasonable attorney's fees, and may be awarded punitive damages in addition to actual damages proven." Fla. Stat. § 817.41(6) (2010). Therefore, Avvo reserves the right to pursue a timely motion for costs and reasonable attorney's fees incurred in defending against this claim.

[9] The Washington equivalent is set forth in the Washington Personality Rights Act, R.C.W. 63.60.010, *et seq*. As more fully discussed in Avvo's First Motion to Dismiss (doc. 8), Count II also fails to state facts sufficient to support a claim for misappropriation of likeness under Washington law.

Tyne, 901 So. 2d at 806 (quoting *Loft*, 408 So. 2d at 622). Absent any allegation that Avvo used Davis' image to directly market a separate Avvo product or service (as opposed to Davis' own profile), Count II fails to state a claim under Section 540.08. *Accord Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1325 (11th Cir. 2006); *Fuentes v. Mega Media Holdings, Inc.*, 2010 W.L. 2634512 (S.D. Fla. 2010) (Section 540.08 requires allegation of use of plaintiff's image to directly promote a commercial product or service *separate and apart from the challenged publication*); *Lane v. MRA Holdings*, LLC, 242 F. Supp. 2d 1205, 1221 (M.D. Fla. 2002).

Davis is clearly challenging the publication of his image as part of his individual Avvo.com profile; he does not allege that Avvo has used his image to directly market an Avvo product or service separate from the challenged publication. Moreover, courts have recognized the great public importance of conveying attorney information to consumers.[10] The minimal and noncommercial use of Davis' image to illustrate his attorney profile clearly relates to matters of public interest and is entitled to the First Amendment protection. Davis' image is not being used to market Avvo's separate products or services. Only *Davis'* services are marketed in conjunction with his image. Thus, Count II fails to state a claim upon which relief may be granted.[11] Because this is the fourth attempt to assert a claim for commercial misappropriation based upon the display of his photograph, without identifying any new facts or allegations, Avvo submits that Count II should be dismissed with prejudice.

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[10] The Supreme Court has acknowledged the importance of conveying attorney information to consumers. *See, e.g., Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1985) ("The value of the information presented in [attorney] advertising is no less than that contained in other forms of advertising-indeed, insofar as appellant's advertising tended to acquaint persons with their legal rights who might otherwise be shut off from effective access to the legal system, it was undoubtedly more valuable than many other forms of advertising."); *see also Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977) (noting the public is "sophisticated enough to realize the limitations of advertising" and is better "trusted with correct but incomplete information" than "kept in ignorance" and that "for every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward" and "it will be in the latter's interest… to assist in weeding out those few who abuse their trust").

[11] Moreover, Davis' claim for injunctive relief is moot as his pleadings establish that he has removed the allegedly unauthorized photo from his Avvo.com profile and he does not allege that the photo has been or may be re-published. (doc. 26, ¶ 28).

C. Count III Fails to State a Claim for Unfair Trade Practices

Count III fails to allege the elements of a claim under Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Sections 501.201, et seq., Florida Statutes (2010), which prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." Fla. Stat. §501.204(1) (2010).[12] To pursue a claim for damages under FDUTPA, Davis must allege: "(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *See, e.g., Smith v. William Wrigley, Jr. Co.,* 663 F. Supp. 2d 1336, 1339 (S.D. Fla. 2009) (quoting *City First Mortgage Corp v. Barton*, 988 So. 2d 82, 86 (Fla. 4th DCA 2008)); *Bookworld Trade, Inc. v. Daughters of St. Paul, Inc.*, 32 F. Supp. 2d 1350, 1364 (M.D. Fla. 2007). FDUTPA claims are rooted in fraud and subject to the heightened pleading standards set out in Federal Rule of Civil Procedure 9(b). *See, e.g., Wrestlerunion, LLC v. Live Nation Television Holdings, Inc.,* 2008 W.L. 3048859 (M.D. Fla. 2008); *Florida Digital Network, Inc. v. North Telecom, Inc.*, 2006 W.L. 2523163 (M.D. Fla. 2006).

This Court repeatedly has held that only a "consumer" may bring private suit under FDUTPA. *See, e.g., Goodby's Creek LLC v. Arch Ins. Co.*, 2008 W.L. 2950112, *8 (M.D. Fla. 2008); *Badillo,* 2006 W.L. 785707 at *6; *Kelly v. Nelson, Mullins, Riley & Scarborough, LLP,* 2002 W.L. 598427, *8 (M.D. Fla. 2002). A "consumer" is an individual or entity that is a "purchaser" of goods or services. *Shibala v. Lim,* 2000 U.S. Dist. LEXIS 20053, 13-14 (M.D. Fla. 2000) (citing Florida law); *Badillo,* 2006 W.L. 785707 at *6. *cf. North Am. Clearing, Inc. v. Brokerage Computer Sys., Inc.*, 666 F. Supp. 2d 1299, 1310 (M.D. Fla. 2009). Davis specifically has confined his claims to those accruing as of March 2009 and arising out of the alleged

[12] Likewise, as more fully discussed in Avvo's First Motion to Dismiss, Count II fails to state facts sufficient to allege a cause of action under the Washington equivalent, the Washington Consumer Protection Act, R.C.W. 19.86.010, et seq. (doc. 8).

publication of an incorrect address, practice area and unauthorized photograph, which publication occurred without Davis' knowledge and did not arise out of the purchase by Davis of any goods or services from Avvo. Davis is not a "consumer" for purposes of, and therefore lacks standing to assert a FDUTPA claim arising out of, this publication.

Davis also has failed to allege actual damages or causation, both of which are required elements of a FDUTPA claim. Although Count III includes a conclusory reference to damages, elsewhere Davis specifically asserts that he received additional potential client calls because of the Avvo.com profile and nowhere does he allude to any lost business or other damages. FDUTPA does not permit Davis to recover nominal damages, speculative losses, or compensation for subjective feelings of disappointment. *See, e.g., City First Mortgage Corp v. Barton*, 988 So. 2d 82, 86 (Fla. 4th DCA 2008). Thus, any "panic" allegedly experienced by Davis by the alleged inaccuracies (doc. 26, ¶26) is not compensable in a FDUTPA claim. In short, Count III should be dismissed because Davis is a "consumer" for purposes of this case and he has failed to allege any damages caused by any alleged misconduct by Avvo.[13]

IV. This Court Can Consider Extrinsic Evidence in Ruling on the Subject Matter Challenge

Not only are Counts I and III inadequate on their face, but they are subject to dismissal for lack of subject matter jurisdiction under the single action rule and by noncompliance by Davis with certain jurisdictional conditions precedent. A federal court is powerless to hear a matter where subject matter jurisdiction is lacking. *Bochese v. Town of Ponce Inlet*, 405 F.3d

[13] Pursuant to Section 501.2105(1), Florida Statutes (2010), Avvo reserves the right to seek an award of costs and reasonable attorney's fees incurred in defending against this case. *See, e.g., Mandel v. Decorator's Mart, Inc.*, 965 So. 2d 311 (Fla. 4th DCA 2007); *Smith v. Bilgin*, 534 So. 2d 852 (Fla. 1st DCA 1988) (prevailing defendant was entitled to award of attorney's fees for defending the entire case where all counts rose out of the same transaction, absent proof that a portion of the fees were totally unrelated to the action).

964, 974-75 (11th Cir. 2005). Therefore, the Court is under a mandatory duty to dismiss a suit over which it has no jurisdiction. *See, e.g., First Union Nat'l Bank v. North Beach Professional Office Complex, Inc.,* 831 F. Supp. 399, 401 (M.D. Fla. 1993). Davis has the burden of demonstrating that this Court has subject matter jurisdiction. *See, e.g., Huang v. Napolitano,* 2011 W.L. 772755, *1 (S.D. Fla. 2011). A motion to dismiss challenging subject matter jurisdiction is properly asserted pursuant to Rule 12(b)(1). *See, e.g., Stalley v. Orlando Real Healthcare Sys., Inc.,* 524 F.3d 1229, 1232 (11th Cir. 2008); *Wilbesan Charter School, Inc. v. School Bd.,* 447 F. Supp. 1292, 1300 (M.D. Fla. 2006).

Pursuant to Federal Rule of Civil Procedure 12(b)(1), subject matter jurisdiction may be attacked facially or factually. *Morrison v. Amway Corp.,* 323 F.3d 920, 924 n. 5 (11th Cir. 2003); *Miller v. Support Collection Unit Westchester County,* 2010 W.L. 767043, *11 (M.D. Fla. 2010); *Keller v. Florida Dep't of Health,* 682 F. Supp. 2d 1302, 1308 (M.D. Fla. 2010); *Tampa Bay Americans with Disabilities Ass'n, Inc. v. Nancy Markoe Crafts Gallery, Inc.,* 2007 WL 2066361, *1 (M.D. Fla. 2007); *Wilbesan Charter School, Inc.,* 447 F. Supp. at 1300 n. 8. In a facial challenge, a court assumes the allegations in the complaint are true and determines whether the complaint sufficiently alleges a basis for subject matter jurisdiction. *See, e.g., Lawrence v. Dunbar,* 919 F.2d 1525, 1529 (11th Cir. 1999); *Keller,* 682 F. Supp. 2d at 1308.

By contrast, a factual attack challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings. *See Garcia v. Copenhaver, Bell & Assocs*., 104 F.3d 1256, 1261 (11th Cir. 1997). Therefore, "matters outside the pleadings, such as testimony and affidavits, are considered." *Lawrence,* 919 F.2d at 1529. *See also Sinaltrainal v. Coca-Cola Co.,* 578 F.3d 1252, 1260 (11th Cir. 2009); *Keller,* 682 F. Supp. 2d at 1308. A factual Rule 12(b)(1) motion allows the trial court "to weigh the evidence and satisfy itself as to the existence of its power to

hear the case'." *Lawrence*, 919 F.2d at 1529 (quoting *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981)). "In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id. Accord Dairyland Ins. Co. v. Chadwick*, 2008 W.L. 912428, *2 (M.D. Fla. 2008).

Avvo asserts a *factual* challenge to this Court's subject matter jurisdiction based on Davis' failure to properly comply with the statutory presuit notice requirement, as demonstrated by extrinsic evidence – i.e., the December 17, 2010 declaration of Joshua King, Avvo's General Counsel (doc. 17). *See Tampa Bay Americans with Disabilities Ass'n, Inc.*, 2007 WL 2066361 at *1; *Anderson v. United States*, 245 F. Supp. 2d 1217, 1221 (M.D. Fla. 2002) (dismissing pursuant to Rule 12(b)(1) because of non-compliance with statutory timing requirements). This Court has the power to make findings of fact and weigh the evidence because this challenge does not implicate any element of Davis' causes of action. *See, e.g., In re Waterfront License Corp.*, 231 F.R.D. 693, 697 (S.D. Fla. 2005).

A. The "Single Action" Rule Applies to Counts I and III

Davis originally asserted that the allegedly incorrect business address and practice area listing were defamatory. (doc. 2, ¶¶ 6, 7, 25, 61-63). However, Davis failed to allege proper compliance with Florida's presuit notice requirements prior to the expiration of the relevant statute of limitations, which is fatal to his original defamation claim, as more fully discussed below. Moreover, he failed to allege a prima facie claim for defamation because he did not identify any published statements of fact that were capable of defamatory meaning and resulted

in damages.[14] To the contrary, Davis consistently has complained that, as a result of his Avvo.com profile and its alleged errors, he actually received additional potential client calls within practice areas that he insists he was competent to handle. (doc. 26, ¶¶21, 24).

Davis cannot "plead around" the defenses that applied to the original defamation claim simply by recasting his claims as false advertising or unfair trade practices. In Florida, a single publication gives rise to a single cause of action. *See, e.g., Orlando Sports Stadium, Inc. v. Sentinel Star Co.,* 316 So. 2d 607, 609 (Fla. 4th DCA 1975); Fla. Stat. §770.05 (2010). The "single action rule" recognizes that the constitutional and other protections of speech are not peculiar to defamation actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement. *See, e.g., Hustler Magazine v. Falwell,* 485 U.S. 46, 54-57 (1988). If the defamation claim fails, other claims based on the same publication must fail as well. *Fridovich v. Fridovich,* 598 So. 2d 65, 70 (Fla. 1992). The purpose of this rule is to prevent a plaintiff from using alternative tort claims to evade the available privileges, protections, and defenses that apply to defamation cases, and thereby erode free speech safeguards simply by looking to a substitute cause of action. *Id.* at 69-70; *Gannett Co. v. Anderson,* 947 So. 2d 1, 2 (Fla. 1st DCA 2006), *aff'd on other grounds*, 994 So. 2d 1048 (Fla. 2008); *Orlando Sports Stadium, Inc.*, 316 So. 2d at 609. Thus, a defamation claim cannot simply be recast under different legal theories without the existence of different or independent conduct by defendant that forms the basis of that new claim. *See, e.g., Boyles v. Mid-Florida Tel. Corp.*, 431 So. 2d 627 (Fla. 5th DCA 1983); *Trujillo v. Banco Central Del Ecuador*, 17 F. Supp. 2d 1340 (S.D. Fla. 1998).

[14] Davis has failed to allege the necessary elements of a defamation claim under Washington law as well, as set forth more fully in Avvo's First Motion to Dismiss. (doc. 8).

In *Orlando Sports Stadium*, plaintiff filed a complaint for claims of defamation and tortious interference arising out of certain newspaper articles. 316 So. 2d at 608. Noting that both claims were based on the same articles and that the "thrust" of the complaint was that the articles had injured the plaintiff, the court held that the extraneous claims were "nothing more than separate elements of damage flowing from the alleged wrongful publications." *Id.* at 609. Therefore, plaintiff's failure to comply with Florida's presuit notice requirement for defamation claims, Section 770.01, Florida Statutes, equally barred his tortious interference claim. "A contrary result might very well enable plaintiffs in libel to circumvent the [Section 770.01] notice requirements . . . by the simple expedient of redescribing the libel action to fit a different category of intentional wrong." *Id.* (quotations omitted).

Courts in Florida and elsewhere repeatedly have applied the single action rule to bar a variety of claims premised upon allegedly injurious falsehoods. *See, e.g., Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So. 2d 204, 208-09 (Fla. 4th DCA 2002) (tortious interference and abuse of process); *Seminole Tribe v. Times Publ'g Co.*, 780 So. 2d 310, 318 (Fla. 4th DCA 2001) (interference and negligent supervision); *Ovadia v. Bloom*, 756 So. 2d 137, 138, 140-41 (Fla. 3d DCA 2000) (false light invasion of privacy, interference with advantageous business relationship, and conspiracy); *Presidio Enter., Inc. v. Warner Bros. Distrib. Corp*., 784 F.2d 674 (5th Cir. 1986) (unfair trade practices). The single action rule has applied even when no claim for defamation has been filed. *See, e.g., Gilliard v. New York Times Co.*, No. GC-01-59, 2001 WL 1147256 (Fla. Cir. Ct. May 22, 2001), *aff'd*, 826 So. 2d 296 (Fla. 2d DCA 2002). It is the essence of the wrongful conduct alleged, and not its name, that determines whether the single action rule applies. *Orlando Sports Stadium*, 316 So. 2d at 609. If the claim is premised upon allegedly false and defamatory speech, it is treated as a defamation claim. *Id; see also*

Gannett Co., 947 So. 2d at 2 (rejecting false light claim that "was not distinguishable in any material respect from a libel claim").

In Count I, Davis alleges that Avvo engaged in false advertising by publishing inaccurate information about his practice area, address and photograph. (doc. 26, ¶¶ 43-45). In Count III, Davis alleges that Avvo violated FDUTPA based on the same allegedly inaccurate publication. (doc. 26, ¶¶ 46-48). Davis' claim for defamation was based on precisely the same alleged publication. (doc. 2, ¶¶ 7, 10, 11, 14, 25, 26, 54, 59, 62, 65). Regardless of the newest labels assigned to these theories, i.e., "false advertising" and "unfair trade practices," their "gravamen" remains the "alleged injurious falsehood of a statement." Because the factual basis for his newest theories is the same alleged publication on which his earlier defamation claim was based, the most recent theories are subject to the same defenses as the defamation claim. *See, e.g., Trujillo*, 17 F. Supp. 2d at 1339-40.

In other words, Counts I and III are subject to the same conditions, elements, privileges, and defenses applicable to the earlier defamation claim, which was based on the same alleged inaccurate publication. *See Seminole Tribe*, 780 So. 2d at 318. As illustrated below, Davis' defamation claim was barred by his failure to properly comply with jurisdictional conditions precedent, thereby divesting this Court of subject matter jurisdiction over such claim. Under the single action rule, the FDUTPA and false advertising claims, as mere restatements of the failed defamation claim, are equally barred.

B. Failure to Comply with Section 770.01 Precludes this Court from Asserting Subject Matter Jurisdiction over Counts I and III

Florida law mandates certain presuit notice requirements in defamation actions arising out of publications in any "newspaper, periodical, or other medium..." Fla. Stat. § 770.01 (2010).

This section protects defendants who are engaged in the dissemination of news or other information through the media. *See, e.g., Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So. 2d 1376, 1380 (Fla. 4th DCA 1997) (prosecutor who wrote allegedly defamatory newspaper column entitled to presuit notice). The Internet is considered an "other medium"; therefore, defamation claims premised upon the dissemination of information through website publications require presuit notice.[15] *See, e.g., Holt v. Tampa Bay Television Inc.*, 34 Med. L. Rptr. 1540, 1542 (Fla. Cir. Ct. Mar. 17, 2005) (the Internet is an "other medium" and defamation actions related to stories published online must comply with presuit notice requirements), *aff'd*, 976 So. 2d 1106 (Fla. 2d DCA 2007) (per curiam); *Canonico v. Callaway*, 35 Media L. Rep. 1549, 1552 (Fla. Cir. Ct. Feb. 22, 2007) (same), *aff'd, question certified on other grounds*, 26 So. 3d 53 (Fla. 2d DCA), *rev. denied*, 36 So. 3d 83 (Fla. 2010). Recently, the Southern District of Florida agreed that the term "other medium" includes the Internet and websites. *Alvi Armani Medical, Inc. v. Hennessey*, 629 F. Supp. 2d 1302, 1307 (Fla. S.D. 2008) (citing *Canonico* and *Holt* with approval). *See also Zelinka v. Americare Healthscan, Inc.*, 763 So. 2d 1173, 1175 (Fla. 4th DCA 2000) (dictum) (noting "[i]t may well be that someone who maintains a web site and regularly publishes internet 'magazines' on that site might be considered a 'media defendant' who would be entitled to [presuit] notice" under section 770.01). The *Alvi Armani Medical* court agreed that there is no "legitimate justification for interpreting this phrase [an other medium] to exclude the internet, which 'has become a recognized medium for communication to the masses'." *Alvi Armani Medical, Inc.*, 629 F. Supp. 2d at 1308 (quoting *Holt*, 34 Med. L. Rptr. at 1542).

[15] Although Section 770.01 was originally passed in 1933 to protect newspapers and other print periodicals, the Florida Supreme Court has held that Chapter 770 is applicable to all civil litigants, both public and private, in defamation actions. *Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan*, 629 So. 2d 113, 115 (Fla. 1993).

Avvo is the publisher of a website dedicated to providing information to the public about attorneys and legal services. "Avvo's goal is to provide consumers with more guidance in solving their legal problems than they've ever had before." (doc. 9, tab 13). Most of the web pages prominently displayed the following call to action: "Find a Lawyer. Research Legal Issues. Ask a lawyer. Review a Lawyer." (doc. 9, tabs 1-15). "Lawyer profile information may come from various sources, including state bar associations, court records, and lawyer Web sites, as well as information that lawyers supply to Avvo. Avvo brings all this data together in one convenient, easy-to-use Web site, so you don't have to spend hours trying to find it all yourself." (doc. 9, tab 20).

Section 770.01's purpose is to protect the public's interest in the free dissemination of news and information. *Ross v. Gore*, 48 So. 2d 412, 415 (Fla. 1950). Because Avvo is engaged in the dissemination of news or information through the media (*i.e.*, the Internet), it is entitled to statutory presuit notice. *Accord Alvi Armani Medical, Inc.*, 629 F. Supp. 2d at 1307-08 (Section 770.01 applies to website that provides information to the public about the hair restoration and transplant industry). Section 770.01 required Davis to provide notice in writing to Avvo at least five (5) days prior to filing suit. *See* Fla. Stat. §770.01 (2010). Such notice was required to identify with particularity each of the allegedly false and defamatory statements so that Avvo had a full opportunity to analyze the claims and make corrections if appropriate. *See, e.g., Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1474 (S.D. Fla. 1987); *Hulander v. Sunbeam Tel. Corp.*, 364 So. 2d 845, 847 (Fla. 3d DCA 1978); *Gannett Fla. Corp. v. Montesano*, 308 So. 2d 599, 599-600 (Fla. 1st DCA 1975). Failure to comply with Section 770.01, which is a *jurisdictional* condition precedent to filing suit, requires immediate dismissal of a defamation claim (or any claim premised upon false and defamatory speech) for lack of subject matter

jurisdiction (and for failure to state a claim). *See, e.g., Ross*, 48 So. 2d at 415; *Bayliss v. Cox Radio, Inc.*, 2010 W.L. 4023459, *3 (M.D. Fla. 2010); *Canonico*, 26 So. 3d at 53; *Mancini*, 702 So. 2d at 1380; *Nelson*, 667 F. Supp. at 1474; *Davies v. Bossert*, 449 So. 2d 418, 419 (Fla. 3d DCA 1984).

On August 21, 2010, Davis sent Avvo an email demanding to be "delisted" from Avvo.com, at which time he stated that Avvo.com had misstated his business address and practice area. Assuming solely for the purposes of this motion that this email satisfied the requirement of a "writing" under Section 770.01, Davis could not file a complaint for defamation against Avvo any earlier than August 27, 2010. *See Canonico*, 26 So. 3d at 54-55. Instead, Davis filed his complaint one day too early, on August 26.

As noted above, Davis' non-compliance with Section 770.01 meant that the Court did not have subject matter jurisdiction over the complaint. *See, e.g., Ross*, 48 So. 2d at 416. Critically, Davis cannot "cure the defect of non-existence of [his] cause of action when suit was begun" by providing notice after he filed his lawsuit. *Orlando Sports Stadium*, 316 So. 2d at 610. As a result, this Court has never had subject matter jurisdiction over Davis' defamation complaint. To comply with the jurisdictional prerequisites, Davis had to file a wholly *new* defamation lawsuit on or after August 27, 2010. Davis did not so, which precludes this Court's exercise of subject matter jurisdiction over that claim. Under the single action rule, this deficiency is equally fatal to Davis' claims for false advertising and unfair trade practices, which were premised on the same precise publication and therefore subject to the same defenses. *See, e.g., Orlando Sports Stadium, Inc.*, 316 So. 2d at 607 (malicious interference and conspiracy claims barred by non-compliance with Section 770.01). Because this jurisdictional defect was not cured prior to the expiration of the two-year statute of limitations, both the defamation claim, and the subsequently

restated claims asserting "false advertising" and "FDUTPA" violations are equally and permanently barred.

C. Counts I and III Are Barred by the Statute of Limitations

In Florida, defamation claims are subject to a two-year statute of limitations. *See* Fla. Stat. § 95.11(4)(g) (2007)[16]; *Miller v. Support Collection Unit Westchester County*, 2010 W.L. 767043, *6 n. 3 (M.D. Fla. 2010). Under the "single publication rule," "any one edition of a book or newspaper, or any one radio or television broadcast, exhibition or a motion picture or similar aggregate communication is a single publication." RESTATEMENT (SECOND) OF TORTS § 557A (1977). *See also* Fla. Stat. §770.07 (2010).[17] The single publication rule also applies to Internet publications. *See, e.g., Mudd v. United States Army,* 2007 W.L. 2028832, *4 (M.D. Fla. 2007); *Holt,* 34 Med. L. Rptr. At 1542.

Davis claims that the allegedly false statements were published on Avvo's website no later than March 2009. The statute of limitations for any defamation claim arising out of such statements expired in March 2011. Because Davis failed to cure the jurisdictional defects by dismissing his defamation claim and filing a new defamation complaint on or after August 27, 2011 and prior to March 31, 2011 in accordance with Section 770.01, the defamation claim is time-barred. Under the single action rule, the same defense bar Counts I and III. *See, e.g., Callaway Land & Cattle Co.,* 831 So. 2d at 208; *Daytona Beach News-Journal Corp. v. FirstAmerica Dev. Corp.*, 181 So. 2d 565, 568 n. 1 (Fla. 3rd DCA 1966). In short, Davis' failure to properly satisfy a jurisdictional condition precedent to suit prior to the expiration of the statute

[16] Likewise, defamation claims in Washington must be filed within two (2) years. *See* Wash. Rev. Code §4.16.100(1).
[17] Washington also has adopted the single publication rule. *See, e.g., Herron v. King Broadcasting Co.,* 746 P.2d 295, 300 (Wash. 1987).

of limitations also requires dismissal of Counts I and III for lack of subject matter jurisdiction and with prejudice. *See, e.g., City of Coconut Creek v. City of Deerfield Beach*, 840 So. 2d 389, 390 (Fla. 4th DCA 2003).

V. The Failure of Davis' Defamation Claim to State a Cause of Action Is Fatal to Counts I and III Under Rule 12(b)(6)

Even if the Court had subject matter jurisdiction over Davis' original defamation claim, the original Complaint also failed to state a claim upon which relief may be granted and this failure is equally fatal to Counts I and III under the single action rule under Federal Rule of Civil Procedure 12(b)(6). To state a cause of action, a defamation plaintiff must allege: (1) the defendant published a false statement; (2) about the plaintiff; (3) to a third party; (4) negligently and (5) its falsity caused injury to the plaintiff. *See Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan*, 629 So. 2d 113, 115 (Fla. 1993) (Shaw, J., dissenting); *Miller v. Support Collection Unit Westchester County*, 2010 W.L. 767043, *6 (M.D. Fla. 2010) (citation omitted); *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 803-04 (Fla. 1st DCA 1997). *Accord Anthony Distribs., Inc. v. Miller Brewing Co.*, 951 F. Supp. 1567, 1577 (M.D. Fla. 1996).

A "false and defamatory statement" is "the '*sine qua non* for recovery in a defamation action'." *Johnson v. Clark*, 484 F. Supp. 2d 1242, 1246 (M.D. Fla. 2007) (quoting *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983)). *Accord Fortson v. Colangelo*, 434 F. Supp. 2d 1369, 1378 (S.D. Fla. 2006). The court has a "prominent function" in determining whether a statement is defamatory, and if a statement is not capable of a defamatory meaning, it should not be submitted to a jury. *See, e.g., Smith v. Cuban Am. Nat'l Football Fdtn.*, 731 So. 2d 702, 703 (Fla. 3d DCA 1999) (per curiam); *Valentine v. CBS, Inc.*, 698 F.2d

430, 432 (11th Cir. 1983); *Johnson*, 484 F. Supp. 2d at 1246; *Fortson*, 434 F. Supp. 2d at 1378; *Hay v. Independent Newspapers, Inc.*, 450 So. 2d 293, 295 (Fla. 2d DCA 1984). This standard does not require this Court to accept an interpretation which is tortured and extreme. *Valentine*, 698 F.2d at 432. "Nor does the law require perfect accuracy-the law requires only that the publication be substantially true." *Nelson*, 667 F. Supp. at 1478.

Not every incorrect or erroneous statement is actionable. A statement is "defamatory" if it "tends to subject one to hatred, distrust, ridicule, contempt or disgrace." *Keller v. Miami Herald Publ'g Co.*, 778 F.2d 711, 712 (11th Cir. 1985), *reh'g denied*, 783 F.2d 205 (11th Cir. 1986). *Accord Anthony Distribs., Inc.*, 951 F. Supp. at 1578. For example, statements that impute to another characteristics or conditions incompatible with the proper exercise of one's business, trade, profession or office are defamatory. *See, e.g., Davenport v. Dimitrijevic*, 857 So. 2d 957 (Fla. 4th DCA 2003); *Randolph v. Beer*, 695 So. 2d 401, n. 1 (Fla. 5th DCA 1997). Neither an incorrect business address nor an inaccurate practice area is a statement that is capable of a defamatory effect, i.e., it is not a "false statement which naturally and proximately result[s] in injury to another." *Byrd*, 433 So. 2d at 595. The statements upon which the defamation claims were based do not come close to exposing Davis to distrust, hatred, contempt, ridicule or obloquy and cannot be construed by the common mind as being defamatory. Thus, as a matter of law, these statements are not capable of defamatory meaning.

In addition, Davis has failed to allege any damages resulting from the allegedly inaccurate publication, other than a conclusory allegation. (doc. 26, ¶¶ 45, 51). To the contrary, Davis asserts that the inaccurate Avvo profile caused him to "receive[] numerous calls over the past year from prospective clients with hostile work environment cases," that he insists he was more than capable of handling. (doc. 26, ¶¶ 21, 24). This is simply insufficient.

> There is no question but that Plaintiff feels victimized by the nature of these proceedings and this result. But the result is fully protected by the First Amendment and must be understood as a price we pay for upholding a bill of rights which believes that the truth is best arrived at from "uninhibited, robust and wide-open" comment. The First Amendment, unfortunately as it may be, does not otherwise protect Plaintiff's subjective feelings. To allow this case to go to the jury, where Plaintiff cannot establish any triable issue, would truly place "an unjustified and serious damper on freedom of expression."

Nelson, 667 F. Supp. at 1485 (quoting *Appleby v. Daily Hampshire Gazette*, 478 N.E.2d 721, 725) (Mass. 1985)). Davis' underlying defamation claim is facially insufficient as a matter of law and, under the single action rule, his false advertising and FDUTPA claims based on the same facts likewise are barred.

CONCLUSION

The Third Amended Complaint in its entirety should be dismissed because each Count omits allegations of one or more essential elements of the relevant causes of action. Moreover, the single action rule precludes Davis from recycling a defective defamation claim as a shiny new theory, such as false advertising or unfair trade practices. Otherwise, Davis simply could avoid the legal protections afforded to speech simply by recasting the same facts as "false advertising" or "unfair trade practices." The single action rule and the statute of limitations are fatal and irremediable defects that mandate dismissal of Counts I and III for lack of subject matter jurisdiction. Count II also should be dismissed with prejudice in light of Davis' inability to allege any different or additional facts regarding the alleged misappropriation despite four (4) separate pleadings to date. For the reasons stated above, Avvo respectfully submits that this cause should be dismissed with prejudice.

Dated: May 23, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing is being electronically filed and will be furnished via CM/ECF to L. Joe Davis, Jr., Esq., 155 5th Avenue North, St. Petersburg, FL 33701 on this 23rd day of May, 2011.

__/s/ Susan Tillotson Bunch_____
Attorney