
United States Court of Appeals

for the

Eleventh Circuit

TERRENCE DAVIDSON,

Plaintiff-Appellant,

– v. –

ONIKA MARAJ, an individual, and PINK PERSONALITY, LLC,
a Delaware limited liability company,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF GEORGIA, ROME DIVISION, CASE NO. 1:14-CV-00507-HLM
THE HONORABLE HAROLD L. MURPHY

BRIEF FOR DEFENDANTS-APPELLEES

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Case No. 14-14811-DD
Terrence Davidson v. Onika Maraj, et al.

**CERTIFICATE OF INTERESTED
PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh
Circuit Rule 26.1-1, counsel for Appellees Onika Maraj and Pink Personality, LLC
certifies that the Certificate of Interested Persons and Corporate Disclosure
Statement in the Brief of Appellant Terrence Davidson is complete.

STATEMENT REGARDING ORAL ARGUMENT

Appellees Onika Maraj and Pink Personality, LLC do not seek an oral argument.

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STATEMENT OF ISSUES FOR REVIEW

A. Did the District Court correctly dismiss Mr. Davidson's *quantum meruit* and unjust enrichment claims because the Amended Complaint alleges facts that, if true, would tend to prove an express contract existed between Mr. Davidson and Ms. Maraj?

B. Did the District Court correctly dismiss Mr. Davidson's promissory estoppel claim that was premised on Ms. Maraj's alleged promises concerning business ventures with Mr. Davidson because they were too vague and indefinite to be enforceable?

C. Under Georgia law, may Mr. Davidson prevent Ms. Maraj from using wig designs that lack novelty in that they merely combine hair colors and hairstyles – the two necessary components of any wig design?

D. Did the District Court correctly dismiss the Amended Complaint with prejudice and deny leave to amend on futility grounds because Mr. Davidson had already amended his original complaint in response to a motion to dismiss and had never filed a motion to amend?

STATEMENT OF THE CASE

A. Nature Of The Case

Mr. Davidson is a self-described hairstylist and wig “designer,” who in 2013 stopped working for Onika Maraj p/k/a Nicki Minaj, the well-known musical artist. (Doc. No. 14 at 3, 14, ¶¶ 6, 37.)

By his lawsuit, Mr. Davidson attempted to prevent Ms. Maraj from using hairstyles he “designed” for her and for which she paid him. The wig designs at issue contain essential characteristics of any wig: one or more hair colors and a hairstyle. (*Id.* at 5-9, ¶¶ 12-22.)

In addition, Mr. Davidson sued Ms. Maraj and Pink Personality, LLC (“Pink Personality”) over claimed promises to “pursue” business ventures for which none of the material terms were ever identified or accepted. (*Id.* passim.) As alleged, these purported ventures, a wig line and a reality TV show, amounted to nothing more than preliminary proposals and discussions. The First Amended Complaint, filed on June 5, 2014 (the “Amended Complaint”) focuses more on a reality TV show Mr. Davidson pursued for himself than any TV show featuring Ms. Maraj and him.

The absence of any enforceable agreement or promise to pursue these ventures with each other explains why Mr. Davidson, despite two failed attempts to plead a claim against Ms. Maraj and Pink Personality, never alleged a breach of

contract claim and cannot properly plead any equitable claim. (Doc. Nos. 1 and 14.)

Mr. Davidson's lawsuit was not about Ms. Maraj's entitlement to wear or keep wigs that Mr. Davidson allegedly "designed" for her. He does not dispute she paid him for the wigs. (Doc. No. 24 at 11-12.) Rather, Mr. Davidson claimed Ms. Maraj allegedly discussed *potential* ventures with him and separately promised to pursue them with him. (Doc. No. 14 *passim*.) But as the court below ruled, these alleged promises were too indefinite, vague, and uncertain to be enforceable. (Doc. No. 28 at 12-16.)

Mr. Davidson's lawsuit was about his improvident attempt to monopolize unprotectable hairstyles. While barbers and hairstylists may make customers look good, they cannot prevent customers or others from reusing their hairstyles or wig designs. Mr. Davidson has no protectable interest in his alleged wig designs and cannot stop Ms. Maraj or Pink Personality from pursuing a wig line without him.

B. The Proceedings And Dispositions Below

Mr. Davidson filed his original complaint on February 21, 2014 (the "Original Complaint"). (Doc. No. 1.) That pleading purported to allege claims for tortious interference, breach of implied contract, unjust enrichment/*quantum meruit*, conversion/wrongful misappropriation of personal property, a violation of

the Georgia Fair Business Practices Act, injunctive relief, and punitive damages. (*Id.*)

Ms. Maraj and Pink Personality moved to dismiss the Original Complaint (the “First Motion to Dismiss”). (Doc. Nos. 4 through 4-4.) Instead of responding to the motion, Mr. Davidson amended his pleading under Fed. R. Civ. P. 15(a)(1)(B).

The Amended Complaint was substantially different from the Original Complaint. (Doc. No. 14.) Mr. Davidson added 32 pages of new allegations. He abandoned the counts for tortious interference with prospective business relations, conversion/wrongful misappropriation of personal property, injunctive relief, and punitive damages. (*Compare* Doc. No. 1 with Doc. No. 14.) He kept three claims from the Original Complaint, but attempted to plead them differently. And he added four new claims: promissory estoppel, trade dress infringement, violation of the Georgia Deceptive Trade Practices Act, and litigation expenses claim. (Doc. No. 14.)

Because the Amended Complaint failed to state a claim like the prior pleading, Ms. Maraj and Pink Personality filed a second motion (the “Second Motion to Dismiss”). (Doc. Nos. 19 through 19-4.) The Amended Complaint was no better than the Original Complaint. Mr. Davidson did not attempt to defend some of his claims and the District Court dismissed those claims he tried to save.

The District Court granted the Second Motion to Dismiss, agreeing with Ms. Maraj and Pink Personality that Mr. Davidson failed to allege any claim against them. It dismissed the *quantum meruit* and unjust enrichment claims because the Amended Complaint “plead[ed] facts” inconsistent with those theories of relief. The District Court found factual allegations “tend[ing] to prove the existence of an express contract between Plaintiff and Defendant Maraj.” (Doc. No. 28 at 11.) It also dismissed the promissory estoppel claim because “Defendant Maraj’s promises were too indefinite and vague to be enforceable, and Plaintiff unreasonably relied on them.” (*Id.* at 14.) The District Court found Mr. Davidson lacked a trade dress infringement claim under federal and state law because he “fail[ed] to plead facts plausibly showing that the design and color of the wigs have secondary meaning[.]” (*Id.* at 24-25.) Lastly, the District Court dismissed Mr. Davidson’s litigation expenses claim because his “independent tort claims against Defendants cannot survive a motion to dismiss.” (*Id.* at 26.)

The District Court dismissed all claims against Pink Personality because the “Amended Complaint contain[ed] no allegations of wrongdoing relating to Defendant Pink Personality.” (*Id.* at 25.) Mr. Davidson does not appeal the dismissal of the claims against Pink Personality.

Lastly, the District Court dismissed the Amended Complaint “with prejudice” because it recognized that another amendment would be futile:

“Plaintiff already re-pleaded his complaint once and it does not appear that Plaintiff can amend his complaint to allege viable claims[.]” (*Id.* at 27.)

C. Statement Of Alleged Facts

1. Mr. Davidson Provided Hairstyling Services And Wigs To Ms. Maraj

In 2010, Mr. Davidson began providing hairstyling services to Ms. Maraj. (Doc. No. 14 at 3, ¶ 6.) As her hairstylist, he allegedly “designed” wigs that Ms. Maraj, on occasion, wore at public events and appearances. (*Id.* at 3-10, 20, ¶¶ 6, 10-22, 45.)

In September 2010, Mr. Davidson allegedly “created” several pink wigs for Ms. Maraj to wear at an MTV Network telecast. (*Id.* at 4, ¶ 11.) Ms. Maraj purportedly chose to wear a wig that combined the color pink with a bun hairstyle, which Mr. Davidson called the “Pink Upper Bun Wig.” (*Id.* at 5, ¶ 12.) Ms. Maraj allegedly wore other Davidson-designed wigs for other public appearances into 2011. (*Id.* at 5-10, ¶¶ 13-22.) All of these alleged creations combined one or more colors with a hairstyle. (*Id.* at 4-10, ¶¶ 11-22.) Some wigs have straight hair, (*id.* at 5-8, ¶¶ 12, 14, 18), while others have curls (*id.* at 6-10, 19, ¶¶ 16, 20, 22, 42).

No written agreement is alleged to exist between Mr. Davidson and either Ms. Maraj or Pink Personality concerning his services and the wigs made for Ms. Maraj. Despite the absence of a writing, Mr. Davidson alleges Ms. Maraj “was to use the wigs for her personal use only.” (*Id.* at 3, ¶ 6.) Mr. Davidson claims he did

not “receive[] any compensation for Defendants’ *commercial use* of his wigs and wig designs.” (*Id.* at 23, 26, ¶¶ 55, 68 (emphasis added).) He admits only that the compensation he received “was solely for his services to provide a personal hair style for a specific celebrity appearance by [Ms.] Maraj on a specific date.” (*Id.* at 24, ¶ 60.)

2. Potential Wig And Reality Show Ventures Were Allegedly Discussed

Mr. Davidson claims that in November 2011, Ms. Maraj’s purported “brand manager” allegedly “*began discussing* various business ventures with Mr. Davidson for Maraj’s brand-specific wigs,” (*id.* at 10, ¶ 23 (emphasis added) and 27, ¶ 73), as well as a reality television show (*id.* at 30, ¶ 82).

a) The Alleged Reality TV Show

Mr. Davidson allegedly told Ms. Maraj *he* had “a television contract on the table” for a show to find the next top celebrity hairstylist. (*Id.* at 11, ¶ 24.) He claims he was told to hold off pursuing the “reality television” show because of a supposed “*promise[]* that [he] and [Ms.] Maraj would appear on a reality show together.” (*Id.* at 11, ¶ 25.) Mr. Davidson claims he complied. (*Id.* at 28, ¶ 76.)

Later the same month, Mr. Davidson’s alleged “broker,” his “manager,” and Ms. Maraj’s “brand manager” purportedly participated in a conference call “*to discuss joint business ventures* between Mr. Davidson and [Ms.] Maraj, ... specifically, the creation of a wig line from Mr. Davidson’s designs and a reality

TV show featuring Mr. Davidson and [Ms.] Maraj.” (*Id.* at 10-11, ¶¶ 23, 26 (emphasis added).) According to Mr. Davidson, the outcome of that discussion was that “the parties agreed that they would *continue to pursue* the joint wig and reality TV show ventures.” (*Id.* at 11, ¶ 26 (emphasis added).) Mr. Davidson also claims that Ms. Maraj “promise[d] to pursue ... a reality TV show contract.” (*Id.* at 30, ¶ 82.)

Mr. Davidson admits that his contact with TV executives was limited to “discuss[ing] the hair reality television show[.]” (*Id.* at 12, ¶ 27; *see also id.* at 28, ¶ 77.) He allegedly sent them video “footage,” which is not identified. (*Id.* at 12, ¶ 28.)

b) The Alleged Wig Venture

Mr. Davidson claims that Ms. Maraj “also *promised to pursue* a wig venture” with him. (*Id.* at 29, ¶ 78 (emphasis added); *see also id.* at 30, ¶ 82.) On that bare promise, Mr. Davidson claims he “no longer pursued any wig deals on his own.” (*Id.* at 29, ¶ 79.)

In November 2011, an unnamed representative from an undisclosed hair company purportedly emailed “a full business *proposal* for the *proposed* wig line” to Mr. Davidson’s manager and Ms. Maraj’s brand manager. (*Id.* at 12, ¶ 29 (emphasis added); *see also id.* at 29, ¶ 81.) Mr. Davidson allegedly informed Ms.

Maraj about it and announced only that her brand manager “should be contacting her soon” (*Id.* at 12, ¶ 30; *see also id.* at 29, ¶ 81.)

Mr. Davidson claims that “[b]y the end of 2011, many promising business ventures *were on the table* for Mr. Davidson and [Ms.] Maraj to pursue together.” (*Id.* at 13, ¶ 31 (emphasis added).) He alleges that Ms. Maraj and “her team” were unresponsive. (*Id.* at 13-14, ¶¶ 31, 35-36.)

3. Ms. Maraj’s Purported Use Of Mr. Davidson’s Wig Designs

In 2013, after Mr. Davidson was no longer Ms. Maraj’s hairstylist, he claims “that [Ms.] Maraj took a number of his popular wig designs, without his consent, and used them to start her own wig line.” (*Id.* at 14, ¶¶ 37-38.) He further claims that those wig styles are being sold on “numerous retail websites, as well as [Ms.] Maraj’s website[.]” (*Id.* at 15, 21, 24-25, ¶¶ 39, 48, 62.) The wigs available at www.mypinkfriday.com appear under the tab: “**Halloween Costumes.**” (Doc. No. 19-4 (Ex. B to the Declaration of Jonathan D. Davis, dated July 22, 2014); *see also* Doc. No. 14 at 15-18, ¶ 39 (depicting costume wigs).)

D. Standard Of Review

Three standards of review apply here: First, this Court reviews *de novo* any dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, accepting all of the well-pleaded allegations in the complaint as true and drawing all

reasonable inferences in favor of the plaintiff.¹ *Montgomery County Comm’n v. Fed. Housing Fin. Agency*, __ F.3d __, 2015 WL 223699, at *4 (11th Cir. 2015) (citing *Simmons v. Sonyika*, 394 F.3d 1335, 1338 (11th Cir. 2004)).

Drawing all reasonable inferences in plaintiff’s favor does not require the court to draw plaintiff’s inference. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012) (citing *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005)).

A complaint must “identify[] facts that are suggestive enough to render [each required element] plausible.” *Rivell v. Private Health Care Sys., Inc.*, 520 F.3d 1308, 1310 (11th Cir. 2008) (*per curiam*) (quoting *Watts v. Fla. Int’l Univ.*, 495 F.3d 1289, 1296 (11th Cir. 2007)). “Determining whether a complaint states a plausible claim for relief ... [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009).

¹ Mr. Davidson incorrectly states the Rule 12(b)(6) standard by asserting that complaints are dismissed only when “no set of facts” can support a claim. (Brief of Appellant Terrence Davidson, filed December 30, 2014 (“Appellant’s Brief”) at 8.) In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), the Supreme Court retired the “no set of facts” standard, noting that it had been “questioned, criticized, and explained away long enough.” *Id.* at 561-63, 127 S. Ct. at 1968-69.

A complaint is insufficient if it “tenders naked assertions devoid of further factual enhancement.” *Id.* at 678 (internal quotations, alterations, and citation omitted). “[U]nwarranted deductions of fact” and legal conclusions are not accepted as true. *Aldana*, 416 F.3d at 1248. When such allegations masquerade as facts, they will not prevent dismissal. *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002). A reviewing court does not have “license to serve as *de facto* counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action.” *Lewis v. Charlotte Corr. Inst. Employees*, __ F. App’x __, 2014 WL 5293401, at *1 (11th Cir. 2014) (quoting *GJR Invs. v. County Of Escambia, Fla.*, 132 F.3d 1359, 1369 (11th Cir. 1998), *overruled on other grounds, as recognized in Randall v. Scott*, 610 F.3d 701, 709 (11th Cir. 2010)); *see also Hearn v. Int’l Bus. Machines*, 588 F. App’x 954, 956 (11th Cir. 2014).²

Second, this Court reviews a denial of leave to amend based on an abuse of discretion standard, but where the denial is based on futility, *de novo* review is applied. *Spaulding v. Poitier*, 548 F. App’x 587, 593-94 (11th Cir. 2013) (citing

² “[T]he doors of discovery” cannot be used to save “a plaintiff armed with nothing more than conclusions” in a complaint. *Iqbal*, 556 U.S. at 678–79, 129 S. Ct. at 1950; *see also Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997). Assessing the facial sufficiency of a complaint presents a purely legal determination because the facts alleged are accepted as true. *Chudasama*, 123 F.3d at 1367.

Cockrell v. Sparks, 510 F.3d 1307, 1310 (11th Cir. 2007)); *SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 600 F.3d 1334, 1336 (11th Cir. 2010).

And third, this Court may affirm a district court's decision on "any adequate ground, even if it is other than the one on which the district court actually relied." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997) (citing *Parks v. City of Warner Robins*, 43 F.3d 609, 613 (11th Cir. 1995)). "If a decision of law is correct [it is irrelevant on appeal] that the lower court incorrectly reasoned its way to that decision[.]" *Collins v. Seaboard Coastline R.R. Co.*, 681 F.2d 1333, 1335 (11th Cir. 1982); *see generally Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1059 (11th Cir. 2007).

SUMMARY OF ARGUMENT

By this appeal, Mr. Davidson wants to set a dangerous precedent that: (1) transforms a hairstylist into a business partner merely by performing customary and typical services of his trade and (2) entitles him to monetize Ms. Maraj's celebrity for himself. Each claim he seeks to restore is defective as a matter of law.

The District Court, drawing on its judicial experience and common sense, identified factual allegations that would tend to prove a contractual relationship existed between Mr. Davidson and Ms. Maraj for his hairstyling and wig services.

That recognition was and remains fatal to Mr. Davidson's *quantum meruit* and unjust enrichment claims.

Nevertheless, Mr. Davidson ignores the alleged contract because it neither encompasses the obligations he wants to impose on Defendants nor the remedies he demands against them. Because he cannot claim Ms. Maraj or Pink Personality breached any contract with him, he alleged equitable claims. But equity cannot amend an agreement under which Mr. Davidson was paid to design Ms. Maraj's wigs.

Mr. Davidson's argument that his *quantum meruit* and unjust enrichment claims are unaffected by the contract the parties made is legally unsupportable. When a contract exists between parties, an equitable claim is barred unless the party asserting it provided "extra services" beyond those contemplated by the parties' agreement. Here, Mr. Davidson provided no extra services for which he seeks to recover. His services were complete upon his delivery of each wig to Ms. Maraj. Georgia law does not permit Mr. Davidson to resort to equity to obtain more compensation for services when he was paid for them.

The District Court properly dismissed Mr. Davidson's promissory estoppel claim because he unreasonably relied on vague, indefinite promises of an uncertain duration. For a promise to support that claim, it must be a sufficiently specific promise that is capable of being enforced.

Ms. Maraj's alleged promises to "*pursue*" a wig venture and a reality television show lack the material details necessary for their enforcement. The alleged promises lack any details concerning what constitutes "pursuit." Also absent are the material details concerning each venture Ms. Maraj allegedly promised to pursue. The dearth of information concerning these ventures means there are no promises to enforce. And because the promises are so vague and indefinite, Mr. Davidson's alleged reliance on them was unreasonable as a matter of law.

In addition, a separate and independent ground supports the District Court's decision to dismiss the Amended Complaint. The alleged wig designs lack novelty as a matter of law. The "designs" are unworthy of any legal protection under Georgia law because they are no more than a combination of one or more hair colors and a hairstyle. These non-novel wigs cannot support any cause of action that challenges or restricts Ms. Maraj's purported use of the designs. The wig designs, like all hairstyles, belong in the public domain where they are available for everyone to use.

Lastly, the District Court properly exercised its discretion when it denied Mr. Davidson leave to re-plead his complaint for a third time. The Original Complaint included seven deficient claims that were withdrawn after Defendants filed the First Motion to Dismiss. The District Court granted Defendants' Second

Motion to Dismiss the Amended Complaint. Mr. Davidson never moved for leave to amend, relying instead on a *pro forma* request for leave buried at the end of his opposition to the Second Motion to Dismiss. He failed to submit a proposed pleading or argue why justice required that he be given another chance to amend his complaint.

ARGUMENT

POINT I

MR. DAVIDSON FAILED TO STATE A CLAIM FOR QUANTUM MERUIT OR UNJUST ENRICHMENT

A. Legal Standards For Quantum Meruit And Unjust Enrichment

The essential elements of a claim for *quantum meruit* are: (1) the performance of valuable services; (2) accepted by the recipient or at her request; (3) the failure to compensate the provider would be unjust; and (4) the provider expected compensation at the time services were rendered. *Amend v. 485 Props.*, 280 Ga. 327, 329, 628 S.E.2d 565, 567 (Ga. 2006); *Stuart v. Resurgens Risk Mgmt., Inc.*, No. 1:11-CV-04251-RWS, 2013 WL 2903571, at *7 (N.D. Ga. June 12, 2013).

An unjust enrichment claim requires the plaintiff to establish “that the plaintiff conferred a benefit on the defendant” and that “equity requires the defendant to compensate the plaintiff for this benefit.” *J’Carpc, LLC v. Wilkins*, 545 F. Supp. 2d 1330, 1340 (N.D. Ga. 2008) (internal quotations and citation

omitted). The claim is premised on the principle that a party cannot induce, accept or encourage another to furnish or render something of value to another and avoid payment for the value received. *Scott v. Mamari Corp.*, 242 Ga. App. 455, 458, 530 S.E.2d 208, 212 (Ga. Ct. App. 2000).

These equitable claims are unavailable when a contract exists between the parties. *Joseph M. Still Burn Centers, Inc. v. Amfed Nat'l Ins. Co.*, 702 F. Supp. 2d 1371, 1376 (S.D. Ga. 2010) (addressing *quantum meruit*); *McCaughey v. Bank of Am., N.A.*, 279 F. App'x 794, 797 (11th Cir. 2008) (addressing unjust enrichment). There “cannot be an express and implied contract for the same thing existing at the same time between the same parties.” *Life Care Ambulance, Inc. v. Hosp. Auth. of Gwinnett County*, 202 Ga. App. 864, 867, 415 S.E.2d 502, 504 (Ga. Ct. App. 1992) (quoting *Gilbert v. Edmondson*, 193 Ga. App. 593, 594, 388 S.E.2d 713, 714 (Ga. Ct. App. 1989)).

When compensation for services has been provided under a contract, there is neither a “failure to compensate the provider [that] would be unjust,” *Amend*, 280 Ga. at 329, 628 S.E.2d at 567, nor a reason for equity to “require[] the defendant to compensate the plaintiff.” *J'Carpc, LLC*, 545 F. Supp. 2d at 1340. *See also Amfed Nat'l Ins. Co.*, 702 F. Supp. 2d at 1376 (citing *Nelson & Hill, P.A. v. Wood*, 245 Ga. App. 60, 64, 537 S.E. 2d 670, 675 (Ga. Ct. App. 2000)) (recognizing that plaintiff must show failure to receive compensation for the

reasonable value of his goods or services); *Reidling v. Holcomb*, 225 Ga. App. 229, 232, 483 S.E.2d 624, 626 (Ga. Ct. App. 1997) (explaining that unjust enrichment prevents party from “avoid[ing] payment for the value received”).

Neither claim can be used to extract more money from a defendant when the compensation a plaintiff expected to receive, and did receive under a contract, is, in hindsight, not perceived to be enough. *See generally Rodriguez v. Vision Correction Group, Inc.*, 260 Ga. App. 478, 580 S.E.2d 266 (Ga. Ct. App. 2003).

B. The Alleged Contract Between The Parties Required Dismissal Of The Quantum Meruit And Unjust Enrichment Claims

The District Court correctly observed that *quantum meruit* and unjust enrichment claims are unavailable when a contract exists between the parties. (Doc. No. 28 at 10-11.) Because the Amended Complaint alleged “facts that, if true, would tend to prove the existence of an express contract between Plaintiff and Defendant,” Georgia law required dismissal of the claims. (*Id.* at 11.)

Mr. Davidson does not refute a contract existed between him and Ms. Maraj for the creation, design, and delivery of the wigs. He acknowledges that “reasonable inferences” support the existence of an express contract for his creation and delivery of the wigs to Ms. Maraj. (Appellant’s Brief at 13-14.)

Even though Mr. Davidson acknowledges an express contract, he claims that because there is no express contract that can be “reasonably inferred ... between Mr. Davidson and [Ms.] Maraj for [her] subsequent duplication and

commercial sale of the wigs,” (*id.* at 14), he may nevertheless challenge that alleged use in equity. He is wrong because the existence of a contract between the parties for hairstyling services and wigs forecloses Mr. Davidson’s equitable claims.

The limited exception that allows a *quantum meruit* claim to proceed when a contract exists between two parties does not apply here. Under Georgia law, even when there is an express contract, “if services not contemplated by the original agreement become necessary to achieve the contractual objective and are rendered and accepted, the law implies and enforces performance of a promise to pay for such *extra services*.” *One Bluff Drive, LLC v. K.A.P., Inc.*, 330 Ga. App. 45, 766 S.E.2d 508, 512 (Ga. Ct. App. 2014) (emphasis added) (quoting *Puritan Mills, Inc. v. Pickering Const. Co.*, 152 Ga. App. 309, 310(1), 262 S.E.2d 586, 588 (Ga. Ct. App. 1979)); *see also Dep’t of Transp. v. Claussen Paving Co.*, 246 Ga. 807, 813, 273 S.E.2d 161, 166 (Ga. 1980); *see generally Everett v. Goodloe*, 268 Ga. App. 536, 541, 602 S.E.2d 284, 289-90 (Ga. Ct. App. 2004).

Mr. Davidson does not allege the performance of any “extra services” to support a *quantum meruit* claim. After Mr. Davidson created, designed, and delivered the wigs to Ms. Maraj for her use, he did nothing more that entitled him to compensation. Any “design” work was complete upon releasing each wig to Ms. Maraj.

**C. Mr. Davidson Has Not Properly Pleaded His
Quantum Meruit Or Unjust Enrichment Claims**

The *quantum meruit* and unjust enrichment claims are deficiently pleaded against Ms. Maraj because Mr. Davidson has not alleged any facts that her alleged failure to compensate him for any purported commercial use of his wig designs is unjust or inequitable. Mr. Davidson does not allege he is owed compensation for his hairstyling services. Instead, he alleges that “to the extent [he] received any compensation ... for his work, such compensation was solely for his services to provide a personal hair style for a specific celebrity appearance by [Ms.] Maraj on a specific date.” (Doc. No. 14 at 24, ¶ 60.)

Mr. Davidson seeks to remedy what he apparently believes was inadequate compensation for his hairstyling services. But equity has no role here. If Ms. Maraj found another use for the services and wigs he provided to her, equity does not require her to pay him again. Moreover, because the non-novel wig designs are unprotectable (and therefore lack value), no claim against Ms. Maraj exists for her purported other uses of those wig styles. *See infra*, Point III at 29.

Finally, Mr. Davidson cannot protect his claimed wig designs from being copied by others. Hairstyles are in the public domain. And Mr. Davidson lacks any copyright, trademark, or patent protection over his purported designs.

POINT II

THE PROMISSORY ESTOPPEL CLAIM WAS PROPERLY DISMISSED

The District Court dismissed Mr. Davidson's promissory estoppel claim because Ms. Maraj's alleged promises to *pursue* future business opportunities were too indefinite and vague to be enforceable, and because Mr. Davidson's reliance on them was unreasonable. (Doc. No. 28 at 14-15.)

A. The Legal Standard For Promissory Estoppel

To state a promissory estoppel claim a plaintiff must allege that: (1) defendant made a promise to the plaintiff; (2) defendant should have expected that plaintiff would rely on the promise; (3) the plaintiff relied on such promise to his detriment; and (4) injustice can be avoided only by enforcing the promise. Ga. Code Ann. § 13-3-44(a) (2014).

Promissory estoppel requires "some enforceable promise," that is "a manifestation of an intention to act ... in a specified way" that justifies the plaintiff's understanding "that a commitment has been made." *Foley Co. v. Warren Eng'g, Inc.*, 804 F. Supp. 1540, 1544-45 (N.D. Ga. 1992); *Mooney v. Mooney*, 245 Ga. App. 780, 783, 538 S.E.2d 864, 868 (Ga. Ct. App. 2001); *see also Amfed Nat'l Ins. Co.*, 702 F. Supp. 2d at 1381. The promise must be something approaching a meeting of the minds or a mutual understanding. "If there is no promise to be enforced, then promissory estoppel will not apply."

Foley Co., 804 F. Supp. at 1545. Mr. Davidson acknowledges that all terms of the promise must be “clear and certain” for it to be enforceable under the promissory estoppel doctrine. (Appellant’s Brief at 19 (citing *Rental Equip. Group, LLC v. MACI, LLC*, 263 Ga. App. 155, 157, 587 S.E.2d 364 (Ga. Ct. App. 2003)).)

The promise must be communicated with sufficient particularity to enforce the commitment, *Mooney*, 245 Ga. App. at 783, 538 S.E.2d at 868, because promissory estoppel does not apply to *vague, indefinite promises* or to promises of uncertain duration. *Ga. Invs. Int’l., Inc. v. Branch Banking & Trust Co.*, 305 Ga. App. 673, 675-76, 700 S.E.2d 662, 664-65 (Ga. Ct. App. 2010) (holding that promise of future loan too vague when only duration term alleged);³ *see also Mariner Healthcare, Inc. v. Foster*, 280 Ga. App. 406, 412-13, 634 S.E.2d 162, 168 (Ga. Ct. App. 2006).

Important here, a promise to “work something out” in the future cannot support a promissory estoppel claim, and neither can a promise to give one’s business to another for an indefinite period. *Mooney*, 245 Ga. App. at 783, 538 S.E.2d at 868; *see also Mariner Healthcare, Inc.*, 280 Ga. App. at 412-13, 634

³ The principles in *Branch Banking* apply generally to all promissory estoppel claims. The procedural posture of the case is irrelevant. Summary judgment decisions show the boundaries of plausible claims just like decisions resulting from motions to dismiss. That *Branch Banking* concerned a loan agreement is also not a meaningful distinction. (Appellant’s Brief at 25-26.) The case demonstrates that before a promise can be enforced through promissory estoppel, the court must be able to determine what the promise is. The absence of one or more material terms is sufficient to render the promise impermissibly vague and unenforceable.

S.E.2d at 168 (holding promise to extend terms of lease for as long as plaintiff paid rent and continued to negotiate was vague and indefinite).

A plaintiff's reliance on the promise must also be reasonable. *Discrete Wireless, Inc. v. Coleman Tech., Inc.*, 422 F. App'x 777, 782-83 (11th Cir. 2011) (citing *W.R. Grace & Co.-Conn. v. Taco Tico Acquisition Corp.*, 216 Ga. App. 423, 426, 454 S.E.2d 789, 791 (Ga. Ct. App. 1995)). It is unreasonable when, for example, the promise is too vague to be enforced, or when the promise is too substantial to not have been reduced to writing. *Johnson v. Univ. Health Servs., Inc.*, 161 F.3d 1334, 1340-41 (11th Cir. 1998); *Reindel v. Mobile Content Network Co., LLC*, 652 F. Supp. 2d 1278, 1291 (N.D. Ga. 2009) (holding that reliance on oral promise to receive 5% of company's stock, an "extraordinary transaction," was unreasonable as a matter of law).⁴

B. The Alleged Promises Were Too Indefinite And Vague

The promises alleged in the Amended Complaint are devoid of the necessary details to be enforceable. Mr. Davidson claims that "[Ms.] Maraj [made] promises to pursue a wig venture and a reality TV show contract[.]" (Doc. No. 14

⁴ Mr. Davidson argues that oral promises may be enforced using the promissory estoppel doctrine. (Appellant's Brief at 31.) Ms. Maraj has not argued otherwise. While some promissory estoppel claims may proceed absent a writing, not all such claims may do so. This Court's decision in *Johnson* makes that point. *Johnson*, 161 F.3d at 1340 (recognizing "promissory estoppel allows enforcement of promises that would otherwise be defeated by the statute of frauds" but recognizing that it "usually is unreasonable to rely on a substantial promise that has not been reduced to writing") (emphasis added).

at 30, ¶ 82 (emphasis added); *see also id.* at 29, ¶ 78.) He also alleges that Ms. Maraj and her representative “promised that Mr. Davidson and [Ms.] Maraj would appear on a reality show together.” (*Id.* at 11, 27-28, ¶¶ 25, 73, 75; *see also id.* at 29, ¶ 78.) Mr. Davidson further alleges that he and Ms. Maraj “*agreed* that they would continue to pursue the joint wig and reality TV show ventures.” (*Id.* at 11, ¶ 26 (emphasis added).) Even if “continu[ing] to pursue” the ventures was another purported “promise,” the Amended Complaint alleges no facts to transform these vague, indefinite statements into enforceable promises.⁵

The alleged discussions for a wig venture that began in November 2011 never ripened into anything more than barbershop talk. Nothing required either Ms. Maraj or Mr. Davidson to accept the “full business *proposal* for the *proposed* wig line” created by a “representative from a hair company.” (*Id.* at 12, ¶ 29 (emphasis added).) And Mr. Davidson never alleged that he and Ms. Maraj accepted the proposal or reached any agreement about their roles in either venture. Neither the length of pursuing either venture nor the details concerning the parties’ obligations to pursue them is defined.

⁵ Contrary to the allegations in the Amended Complaint, Mr. Davidson now claims that Ms. Maraj “promised to engage in a joint venture to create a hair reality TV show with Mr. Davidson.” (Appellant’s Brief at 22 (citing Doc. No. 14 at 11, 28).) And he makes a similar claim concerning the purported promise to pursue a wig venture. (*Id.* at 24.) There are no such allegations in the Amended Complaint. But even if he had included those allegations, his claim for promissory estoppel would still fail for the same reasons the claim, as actually pleaded, was rejected by the court below.

Not only is there no factual detail about what would constitute pursuit of the wig venture, there is no detail about the type of wig venture Mr. Davidson claims he and Ms. Maraj were supposed to pursue. The type of wig line is undisclosed and so are terms that would control the parties' rights, duties, and obligations to one another or to any third-party. There are no factual allegations concerning, among other things, whether the wigs would be for every-day wear or for use as a novelty item; whether they would be cheap or expensive; whether they would be made using human or synthetic hair; how the wigs would be marketed; how and where they would be manufactured; who would bear the risk of failure; and how profits and losses would be split.

Ms. Maraj's alleged promise to appear on a reality TV show with Mr. Davidson suffers from the same infirmities as the alleged promise to pursue a wig venture. It is a vague, indefinite promise of an "uncertain duration" that lacks particularity. The alleged promise is nothing more than a prediction about an outcome that neither Ms. Maraj nor Mr. Davidson could control. A decision to create and cast a reality television show with Ms. Maraj and Mr. Davidson rests with television and network executives. Moreover, the alleged reality show promise contains no information concerning, among other things, the show's length, location, format (competition/elimination or documentary), concept, producer, and sponsors. Nor are there any factual allegations concerning creative

control or compensation. The alleged promise is akin to an athlete's promise to bring home the championship trophy. It is the kind of promise that can neither be enforced nor taken seriously. No one would expect such a promise to induce reliance. And any reliance on the promise would be unreasonable.

The District Court correctly found that the Amended Complaint pleaded promises that were unenforceable as a matter of law. They lack "any such material terms or specificity with regard to financing, product, each party's obligations, or particular business ventures to pursue." (Doc. No. 28 at 14-15.) And they contained "no time limit" concerning when the promise "to jointly pursue business opportunities would no longer be effective." (*Id.* at 15.)

The District Court properly concluded that Ms. Maraj's alleged promises were "too indefinite and vague to be enforceable" because, at best, they were nothing more than "agreements to agree in the future on another agreement." (*Id.* at 14-16 (citing *Branch Banking & Trust Co.*, 305 Ga. App. at 676, 700 S.E.2d at 664; *Sierra Assocs., Ltd. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 169 Ga. App. 784, 790, 315 S.E.2d 250, 256 (Ga. Ct. App. 1984); *Wachovia Bank of Ga., N.A. v. Mothershed*, 210 Ga. App. 853, 854, 437 S.E.2d 852, 854 (Ga. Ct. App. 1993).))

Mr. Davidson's reliance on *Insilco Corp. v. First Nat'l Bank of Dalton*, 248 Ga. 322, 283 S.E.2d 262 (Ga. 1981), is misplaced and does not support

reversal. (Appellant's Brief at 20-21.) In *Insilco Corp.*, the Georgia Supreme Court reversed a Court of Appeals decision that incorrectly held that the promissory estoppel doctrine was unavailable in Georgia. 248 Ga. at 322, 283 S.E.2d at 263. The Supreme Court held that the written promise to provide a specific notice (*i.e.*, concerning the borrowers' delinquency) before a specific event (*i.e.*, the filing of a foreclosure action) supported a promissory estoppel claim. *Insilco Corp.* is not about whether future promises are enforceable using promissory estoppel claims because promises always concern future conduct. Moreover, the promise sought to be enforced in *Insilco Corp.* shares no resemblance to those alleged here, which lack the concreteness of the senior lender's written promise in *Insilco Corp.* to provide a junior lender notice before exercising its foreclosure rights.⁶

Houston v. Houston, 267 Ga. App. 450, 600 S.E.2d 395 (Ga. Ct. App. 2004), is also inapposite. *Houston*, like *Insilco Corp.*, involved a specific promise by a father to cover half of the costs of his daughter's education at "a private historically African-American college or university," including "tuition, room, board, books, and other expenses[.]" *Id.* at 450-51, 600 S.E. at 396. Although the

⁶ If Mr. Davidson cited *Insilco Corp.* for the procedural standards governing a motion to dismiss, he has overlooked that the Federal Rules of Civil Procedure apply to "all civil actions" in the district courts. *See* Fed. R. Civ. P. 1. The Georgia standard recited in *Insilco Corp.* is not consistent with the current federal standard.

daughter attended a school that triggered her father's performance, he refused to pay. The court found the daughter's complaint supported a promissory estoppel claim. The promise in *Houston* is unlike the vague and indefinite promises alleged by Mr. Davidson.

Mr. Davidson's personal assessment of his factual allegations ignores the plausibility standard that governs pleadings challenged under Rule 12(b)(6). To be plausible, a promissory estoppel claim requires a promise capable of being enforced. Mr. Davidson attaches self-serving labels to his allegations and summarily concludes he pleaded enough facts to state a claim. But labels and legal conclusions are insufficient when relied on in a pleading. No different result occurs if they are relied on in a brief. Nothing about the alleged promises push Mr. Davidson's promissory estoppel claim across the line from possible to plausible.

If Mr. Davidson's Amended Complaint succeeds based on what he has alleged, promissory estoppel claims will be immune from challenge under Rule 12(b)(6). That result would deny a district court a necessary tool to dispose of complaints that only allege facts *consistent* with a promissory estoppel claim, but that fail to state one. Plaintiff has not cited a single case where a promissory estoppel claim has withstood a motion to dismiss based on a promise like the vague and indefinite promises he attributed to Ms. Maraj. There is no support for

his assertion that the District Court “applied too stringent of standard (sic)” in dismissing his claims. (Appellant’s Brief at 25.)

C. Mr. Davidson’s Alleged Reliance Was Unreasonable

The District Court correctly found Mr. Davidson’s purported reliance on the alleged promises was unreasonable. Not only were the alleged promises “agreements to agree” that were too vague and indefinite to support any reliance; they were “substantial promises” that were made orally. (Doc. 28 at 15-16.) The lack of any alleged writing and the fatal indefiniteness of the alleged promises, regardless of their source, make Mr. Davidson’s reliance all the more unreasonable. *See Johnson*, 161 F.3d at 1340-41; *Reindel*, 652 F. Supp. 2d at 1291.

Mr. Davidson’s argument that the District Court made impermissible legal and factual determinations is puzzling. It is the District Court’s role to make legal determinations when deciding a motion to dismiss based on the facts alleged in the challenged pleading. It performed that function in dismissing Mr. Davidson’s promissory estoppel claim. Even though reasonable reliance is “ordinarily a factual inquiry for a jury to resolve,” that did not preclude the District Court from determining, as it did, that insufficient facts were pleaded to

plausibly allege “reasonable reliance.”⁷ (Doc. No. 28 at 13 (quoting *Gilmour v. Am. Nat’l Red Cross*, 385 F. 3d 1318, 1321 (11th Cir. 2004) (emphasis added).)

POINT III

THE LACK OF NOVELTY OF THE WIGS INDEPENDENTLY WARRANTED DISMISSAL OF THE *QUANTUM MERUIT*, UNJUST ENRICHMENT, AND PROMISSORY ESTOPPEL CLAIMS

The wig “designs” Mr. Davidson claims belong to him are not protectable and cannot be owned.⁸ His *quantum meruit*, unjust enrichment, and promissory estoppel claims fail because he cannot pursue *any claim* for the purported unauthorized use of non-novel ideas.

Because the wig designs embodied in the wigs at issue are nothing more than a combination of colors and a hairstyle, the designs lack novelty under Georgia law, which deprives Mr. Davidson of the value necessary to support *quantum meruit* and unjust enrichment claims. Georgia law favors a “bright line rule” to stamp out *fictional* property rights. For these reasons, Mr. Davidson cannot prevent Ms. Maraj from using his purported wig designs under any legal

⁷ Mr. Davidson inadvertently attributed a statement to the District Court that it never made. It did not “state[] in its opinion that the question of [reasonable reliance] is a question of fact for jury determination.” (Appellant’s Brief at 29.)

⁸ The *Merriam-Webster Unabridged Dictionary* defines “wig” as “a manufactured covering of hair for the head usually made of human hair that is woven or attached to a piece of net or a skullcap and worn as a cover for baldness or thin hair or as part of theatrical costume, official or professional dress, or fashionable attire.” (Doc. No. 27-1.)

theory because those designs are not protectable and can be used and exploited by anyone.

Non-novel ideas do not constitute protectable property interests. *Burgess v. Coca-Cola Co.*, 245 Ga. App. 206, 210, 536 S.E.2d 764, 769 (Ga. Ct. App. 2000). They are “inadequate as consideration, and ‘when one submits [such] an idea to another, no promise to pay for its use may be implied, and no asserted agreement enforced.’” *Id.* (quoting *Downey v. Gen Foods Corp.*, 31 N.Y.2d 56, 61, 286 N.E.2d 257, 259 (N.Y. 1972)).

Moreover, claims for *quantum meruit*, unjust enrichment, or promissory estoppel cannot rest on non-novel ideas. *Id.* *Quantum meruit* and unjust enrichment claims fail because non-novel ideas confer no benefit. *Id.*; *see also Morton B. Katz & Assocs., Ltd. v. Arnold*, 175 Ga. App. 278, 280, 333 S.E.2d 115, 117 (Ga. Ct. App. 1985). Similarly, a promissory estoppel claim cannot be based on “the unauthorized use of another’s nonnovel (sic) idea” because its use “would not result in an injustice, a necessary element in a promissory estoppel claim.” *Burgess*, 245 Ga. App. at 210, 536 S.E.2d at 769.

Indeed, the “[l]ack of novelty in an idea is fatal to *any* cause of action for its unlawful use.” *Id.* (emphasis in original) (internal quotations omitted). Public policy favors this bright line because “business, trade, and the professions [must] be free from encumbrance with alleged property rights in ideas or concepts *unless*

such ideas or concepts are truly unique and original.” Morton B. Katz & Assocs., Ltd., 175 Ga. App. at 281, 333 S.E.2d at 117 (emphasis added).

Under Georgia law, “to be *novel* the concept must be peculiar and not generally available or known to others in the trade. To be *protected*, an idea must possess genuine novelty and invention, which it cannot have if it merely is an adaptation of existing knowledge, albeit, a clever, useful, or sensible adaptation.” *Burgess*, 245 Ga. App. at 209, 536 S.E.2d at 768 (emphasis added) (internal quotations and citation omitted). Novelty does not result from creating a variation on an existing theme or “a new and better way of doing something already existent,” *id.* (internal quotations and citation omitted), or from “the fact that something already known and in use is put to a new use.” *Morton B. Katz & Assocs., Ltd.*, 175 Ga. App. at 281, 333 S.E.2d at 117 (internal quotations and citation omitted).

A commonsense application of the novelty standard to Mr. Davidson’s wigs mandates the determination that his wigs and “designs” are not novel as a matter of law. Applying one or more colors to a hairstyle is not novel. Women and men around the world have applied color to their hair for centuries. Applying any color to a wig or in combination with other colors is not novel, even if it had never been done before, because, at best, it would be “an adaptation of existing

knowledge[.]” *Burgess*, 245 Ga. App. at 209, 536 S.E.2d at 768 (internal quotations and citation omitted).

Walking around any city or neighborhood, or even one’s office or household, reveals people sporting different, and frequently the same, hairstyles. Hairstyles do not belong to anyone and cannot be controlled. And using them requires no permission or license.

Mr. Davidson may argue that it would be “premature” to make a novelty determination based only on the allegations in the Amended Complaint. He is mistaken for at least two reasons: First, the well-pleaded allegations in the Amended Complaint are accepted as true. Second, discovery would not change what Mr. Davidson’s wig designs look like and what is plain from the pictures in the Amended Complaint.

The dispute is a legal one: whether Mr. Davidson may control a non-novel hairstyle or wig design. Georgia law says no. And a plaintiff cannot simply delay that legal consequence based on his mere say-so that novelty exists. Because legal conclusions are insufficient to establish novelty, Mr. Davidson’s assertions to the contrary are insufficient as a matter of law.

Mr. Davidson’s wig designs are not novel now and will not become novel if any of his claims are restored. If, for example, a plaintiff designs a pencil with a “unique” shape and a “unique” lead color that make it more attractive as a

pencil, its purported “uniqueness” would not make it “novel” in the legal sense. The same holds true for Mr. Davidson’s wig designs. No matter what their shape and color, his “designs” are for wigs that lack any alleged trademark, copyright, or patent protection.

Mr. Davidson neither invented wigs as an accessory item, nor the colors applied to them. And he cannot lay claim to a portion of the world’s hairstyles and thereby prevent Ms. Maraj from using them. She does not need his permission to sell wigs embodying hairstyles that she paid him for and may have worn at one or more public appearances.

Lastly, because the parties dispute the novelty of the wig designs does not render that issue premature for summary disposition. Courts do not avoid dismissing legally deficient claims because a complaint incorporates or references material that is the subject of the dispute.⁹

⁹For example, in the copyright context, when a court is asked to apply the “lay listener” or “lay observer” test to dismiss a copyright infringement claim under Rule 12(b)(6), it considers the works referenced in or attached to the complaint. *See, e.g., Marquardt v. King*, No. 1:10-CV-3946-JEC, 2011 WL 5042054, at *7-8 (N.D. Ga. Aug. 10, 2011); *see also Pyatt v. Raymond*, 462 F. App’x 22, 24 (2d Cir. 2012); *see generally Robbins v. Artits-Usher*, No. CV411-193, 2011 WL 5840257 (S.D. Ga. Aug. 29, 2011).

POINT IV

**THE DISTRICT COURT PROPERLY
EXERCISED ITS DISCRETION IN DENYING
LEAVE TO FILE A SECOND AMENDED COMPLAINT**

A district court does not abuse its discretion when it denies leave to re-plead an amended complaint that was never the subject of a motion requesting such leave. The single sentence in Mr. Davidson's opposition to the Second Motion to Dismiss was insufficient to preserve the issue on appeal.

Even so, the District Court properly denied Mr. Davidson further leave to amend on futility grounds. Mr. Davidson failed to plead any plausible claim against Ms. Maraj or Pink Personality and he failed to demonstrate that he had any claim to plead.

Instead of pleading a claim he has offered two unsuccessful complaints full of desperate claims to see if anything would gain traction. The claims against Pink Personality were nothing more than an undeveloped afterthought for which the District Court found "no allegations of wrongdoing." (Doc. No. 28 at 25-26.) The District Court similarly rejected his pleading as implausible, vague, and/or indefinite. Justice does not require Mr. Davidson to be given yet another chance.

A. Legal Standard

"The proper method for requesting leave to amend a complaint is by filing a motion" which must "either set forth the substance of the proposed

amendment or attach a copy of the proposed amendment.”” *Rance v. Winn*, 287 F. App’x 840, 841 (11th Cir. 2008) (quoting *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999)); *see also Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1255 n.4 (11th Cir. 2008)).

A district court properly exercises its discretion by dismissing a complaint with prejudice where a party’s only request to amend is made in a brief related to another motion and fails to set forth the *additional facts or substance of the proposed amendment*. *Perlman v. Bank of Am.*, 561 F. App’x 810, 814 (11th Cir. 2014) (finding no abuse of discretion in denying leave to amend where request is in a footnote to a brief); *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009) (finding no abuse of discretion in denying leave to amend *sub silentio* when request for leave in opposition brief); *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1361-62 (11th Cir. 2006) (same); *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209, 1222 (11th Cir. 1999) (same). Because the purpose behind the Federal Rules of Civil Procedure is “to secure the just, speedy, and inexpensive determination of every action,” Fed. R. Civ. P. 1, a district court is not required to grant leave to amend when a proper request is not made. *See Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542-43 (11th Cir. 2002).

Even where a request to amend is properly brought, a district court will grant leave to amend only “when justice so requires.” Fed. R. Civ. P. 15(a).

Though a “court should freely give leave” to amend a pleading, such relief can be denied on numerous grounds, including “futility of [the] amendment.” *Equity Lifestyle Props., Inc. v. Fla. Mowing & Landscape Serv., Inc.*, 556 F.3d 1232, 1241 (11th Cir. 2009) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962)).¹⁰ “[J]ustice does not require district courts to waste their time on hopeless cases.” *Roelle v. Cobb County School Dist.*, No. 1:13-CV-3045-WSD, 2014 WL 4457235, at *10 (N.D. Ga. Sept. 10, 2014) (quoting *Mizzaro*, 544 F.3d at 1255).¹¹

A court may also deny leave to amend where the potential amendment would add claims or allegations that are inconsistent with the party’s prior pleadings or the court’s prior rulings in the case. *Whitesell Corp. v. Electrolux Home Prods., Inc.*, No. CV 103-050, 2014 WL 4674847, at *2-3 (S.D. Ga. Sept. 18, 2014). It is not an abuse of discretion to deny leave to amend where an

¹⁰ Courts also deny leave to amend based on “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, [and] undue prejudice to the opposing party by virtue of allowance of the amendment[.]” *Equity Lifestyle Props., Inc.*, 556 F.3d at 1241 (quoting *Foman*, 371 U.S. at 182, 83 S. Ct. at 230); see also *Maynard v. Bd. of Regents of the Div. of the Univs. of the Fla. Dep’t of Educ.*, 342 F.3d 1281, 1287 (11th Cir. 2003) (quoting *Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281, 1284 (11th Cir. 2000)).

¹¹ The futility threshold is akin to that for a motion to dismiss. An amendment is futile, and leave to amend is properly denied, when the amendment would not survive Rule 12(b)(6) scrutiny. See *Grant v. Countrywide Home Loans, Inc.*, No. 1:08-CV-1547-RWS, 2009 WL 1437566, at *8 (N.D. Ga. May 20, 2009).

amendment is “a simple attempt to have it both ways, a position that rarely, if ever, succeeds.” *Id.* at *2.

B. Mr. Davidson Is Not Entitled To Another Amendment

The District Court did not abuse its discretion when it denied Mr. Davidson leave to file a third complaint. Mr. Davidson never filed a motion for leave to amend, never submit a proposed second amended complaint, and never even “set forth the substance of the proposed amendment[.]” *See Rance*, 287 F. App’x at 841; *Mizzaro*, 544 F.3d at 1255 n.4.

In his opposition, Mr. Davidson merely stated: “Should the Court find any of Plaintiff’s claims are insufficiently pled against one or both Defendants, Plaintiff respectfully requests that he be granted leave to file a second amended complaint.” (Doc. No. 24 at 25.) But seeking the right to amend as an afterthought in an opposition brief is not enough. *See Perlman*, 561 F. App’x at 814; *Rosenberg*, 554 F.3d at 967; *U.S. ex rel. Atkins*, 470 F.3d at 1361-62; *Posner*, 178 F.3d at 1222.

Had the District Court, on the record before it, granted Mr. Davidson’s *pro forma* request, it would have impermissibly “serv[ed] as *de facto* counsel for” Mr. Davidson, or engaged in “rewrit[ing] an otherwise deficient pleading in order to sustain an action.” *Lewis*, 2014 WL 5293401, at *1.

The District Court did not abuse its discretion in denying leave to Mr. Davidson because justice does not require litigants without a claim to have serial amendments that serve only to prolong meritless litigation. Mr. Davidson has no plausible claim against Defendants, and his pleadings conclusively demonstrated that fact.

Mr. Davidson has been in search of a legal theory to support his implausible claims since he filed the Original Complaint. Despite the myriad claims and theories he pursued, he never attempted to allege a breach of contract claim against Ms. Maraj or Pink Personality. That decision was not an oversight. It was his recognition that no such claim existed because no contract between the parties was breached.

When Defendants filed their First Motion to Dismiss that targeted every claim alleged in the Original Complaint, Mr. Davidson amended his pleading as of right under Rule 15(a)(1)(B). He recognized the shortcomings of that pleading, and expended great effort to correct them by adding 32 pages containing 64 paragraphs. (*Compare* Doc. No. 1 with Doc. No. 14.) He also added new claims for promissory estoppel, trade dress infringement (under state and federal law), and litigation expenses. (Doc. No. 14 at 27-30, 34-50, ¶¶ 71-85, 98-148.)

For this appeal, Mr. Davidson latches on to language in the District Court's ruling to contend he *may have* a breach of contract claim. His argument is

based on nothing more than the fact that the District Court observed the Amended Complaint contains allegations that, if accepted as true, tend to show a contract existed between Mr. Davidson and Ms. Maraj. But Mr. Davidson decided to forego alleging any purported *breach* of contract claim. And that strategic decision establishes the futility of permitting Mr. Davidson leave to file a third complaint. He cannot state any breach of contract claim for the alleged contract that was “suggest[ed]” by the allegations because Mr. Davidson does not allege that he was not paid for his services.¹² (Doc. No. 28 at 11.) If he were permitted to allege a

¹² While the District Court described the alleged oral contract as limiting the use of the wigs to personal use (Doc. No. 28 at 11), even if that term existed, it implicitly recognized that the limitation was unenforceable. Because this term is of unlimited duration, foreclosing Ms. Maraj’s entrance into the wig market is an unenforceable restraint of trade that violates Georgia’s public policy. It also cannot be enforced as a non-compete or a restrictive covenant because it lacks temporal or geographic limitations. *See, e.g., Fuller v. Kolb*, 238 Ga. 602, 234 S.E.2d 517 (Ga. 1977); *see also Gordon Document Prods., Inc. v. Serv. Technologies, Inc.*, 308 Ga. App. 445, 447-49, 708 S.E.2d 48, 52-53 (Ga. Ct. App. 2011); *see generally Wachovia Ins. Servs., Inc. v. Fallon*, 299 Ga. App. 440, 682 S.E.2d 657 (Ga. Ct. App. 2009). The limitation’s indefiniteness also renders it terminable at will, assuming it was even capable of enforcement. *Gatins v. NCR Corp.*, 180 Ga. App. 595, 597, 349 S.E.2d 818, 820 (Ga. Ct. App. 1986) (citing *Wood v. Dan P. Holl & Co.*, 169 Ga. App. 839, 840, 315 S.E.2d 51 (Ga. 1984)); *see generally Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 276 F. Supp. 2d 1276, 1295 (S.D. Ga. 2003) (“a contract where duration is undeterminable is unenforceable”). Here, any such limitation in the oral contract was terminated when the wigs were used for non-personal purposes. Mr. Davidson also cannot seek equitable relief to enforce an unenforceable covenant not to compete. *See Hilb, Rogal & Hamilton Co. of Atlanta, Inc. v. Holley*, 295 Ga. App. 54, 55-57, 670 S.E.2d 874, 875-77 (Ga. Ct. App. 2008). Because equity is unavailable when there is a “failed attempt to do that which [Georgia] law forbids[, there is] no reason to depart from the rule that

breach of contract claim concerning the purported reality television show and wig ventures, the amendment would contradict Mr. Davidson's two previous unsuccessful pleadings that were grounded solely in equity based on vague and indefinite alleged promises.

Moreover, the District Court unambiguously ruled that the alleged promises were "too indefinite and vague to be enforceable" because they lacked necessary material terms. (Doc. No. 28 at 14.) Those promises were insufficient to support a claim for promissory estoppel, let alone one for a valid contract. (*Id.* at 14-16.) Because his unjust enrichment and *quantum meruit* claims failed, Mr. Davidson now "attempt[s] to have it both ways," by seeking to add a contract claim. *See Whitesell Corp.*, 2014 WL 4674847, at *2. The Federal Rules of Civil Procedure do not permit a party to shop his claims with the Court until one is sustained.

Finally, Mr. Davidson is not entitled to another opportunity to plead a promissory estoppel claim. There is no requirement for a plaintiff to receive a particular number of attempts to plead a specific claim, and Mr. Davidson cites no such supporting authority.

courts will leave parties to an illegal contract where they stand." *Id.* at 57, 670 S.E.2d at 876-77.

Justice did not require the District Court to grant Mr. Davidson leave to file a third pleading to attempt to plead a promissory estoppel claim. Rule 15 is drafted to “force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments of the motion.” Fed. R. Civ. P. 15, Advisory Committee Notes, 2009 Amendments. Thus, when Mr. Davidson opted to amend his pleading he had to plead the factual allegations required to make his claim plausible. His attempt to plead the terms of the promises made to him and upon which he relied failed to state a claim because the promises lacked the required specificity and definiteness.

Mr. Davidson’s admission that he needs discovery to pursue his purported promissory estoppel claim is revealing. It shows he has no additional facts to allege. Discovery cannot help him allege a plausible claim because he must allege the promises supporting his detrimental reliance. Only Mr. Davidson knows what those alleged promises were because he allegedly relied on them. Although promissory estoppel claims may be fact-specific, discovery is never needed to state a claim, it is only needed to prove a claim.

CONCLUSION

For all of the foregoing reasons, the Judgment of the District Court should be affirmed in all respects.

Dated: This 12th day of February, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains a total of 9,948 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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)
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ss.:

**AFFIDAVIT OF SERVICE
BY OVERNIGHT EXPRESS
MAIL**

I, Maryna Sapyelkina, being duly sworn, depose and say that deponent is not a party to the action and is over 18 years of age.

On February 12, 2015

deponent served the within: **Brief for Defendants-Appellees Onika Maraj and Pink Personality, LLC**

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the address(es) designated by said attorneys for that purpose by depositing **1** true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

The Brief has been E-filed and 7 copies have been sent to the Court in the same manner as above on the same date as above.

Sworn to before me on February 12, 2015

**s/Maria Maisonet
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Notary Public State of New York
No. 01MA6204360
Qualified in Bronx County
Commission Expires Apr. 20, 2017**

s/Maryna Sapyelkina

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