

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION

CURTIS J. NEELEY, JR.

PLAINTIFF

v.

Civil No. 12-5208

FEDERAL COMMUNICATIONS COMMISSION;  
MICROSOFT CORPORATION; and  
GOOGLE INC.

DEFENDANTS

O R D E R

Now on this 15th day of February 2013, come on for consideration the following motions:

- \* **Microsoft Corporation's Motion to Dismiss for Failure to State a Claim** (document #14);
- \* **Google Inc.'s Motion to Dismiss** (document #16);
- \* **Federal Communications Commission's Motion to Dismiss Amended Complaint** (document #54); and
- \* **Motion for Sanctions Under Rule 11** (document #36).

The Court, being well and sufficiently advised, finds and orders as follows:

1. Plaintiff Curtis Neeley, Jr., acting pro se, filed this action on September 17, 2012, alleging privacy violations by the Federal Communications Commission (FCC), Microsoft Corporation (Microsoft), and Google Inc. (Google), based on the return of nude images attributed to Mr. Neeley in various internet searches. Mr. Neeley has previously filed two similar lawsuits involving the same parties. See *Neeley v. NameMedia, Inc., et al.*, Case No. 5:09-cv-5151 (*Neeley I*); *Neeley v. NameMedia, Inc., et al.*, Case

COURT  
EXHIBIT

1

No. 5:12-cv-5074 (*Neeley II*).

2. The Complaint was amended as a matter of course on October 2, 2012. Thereafter, each defendant filed separate motions seeking to dismiss the Amended Complaint. Mr. Neeley then filed his Second Amended Complaint (document #53-3), which does not significantly differ from the Amended Complaint. The Court will consider the arguments made in the motions to dismiss as applicable to the Second Amended Complaint.

#### **MICROSOFT'S MOTION TO DISMISS**

3. In the Second Amended Complaint, Mr. Neeley contends that Microsoft recklessly created "inappropriate text-image associations" between his name and "indecent images" and claims that Microsoft refuses to remove the associations without court orders. He argues that this creates the false appearance that Mr. Neeley desires "anonymous minors" to view the indecent material. He also contends that it violates his "personal common-law right to not be associated with art."

Mr. Neeley seeks an injunction requiring Microsoft to disassociate his name with indecent images in text searches. He further seeks compensatory and punitive damages.

4. Microsoft filed its Motion to Dismiss on November 29, 2012, arguing that Mr. Neeley's complaint, even if presumed true, fails to state a claim against Microsoft upon which relief can be granted.

5. Pursuant to Fed. R. Civ. P. 8(a), a complaint must contain, among other things, a short and plain statement of the claim showing that the complainant is entitled to relief. To survive a motion to dismiss for failure to state a claim, a complaint must contain sufficient facts stating a claim that is plausible on its face and will allow a court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

For purposes of deciding a motion to dismiss, the Court takes the alleged facts as true, construing all reasonable inferences arising from the complaint in the light most favorable to the plaintiff. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007).

6. Mr. Neeley's allegations against Microsoft consist of four short paragraphs located on pages 8 and 9 of his nineteen-page Second Amended Complaint. From these paragraphs and the incorporated exhibits, the Court can discern

- \* that Microsoft operates a search engine called Bing.com;
- \* that internet users can locate web sites containing nude images by inputting the name "curtis neeley;"
- \* that Mr. Neeley has requested that Microsoft

disassociate his name with the nude images; and

\* that Microsoft is unable or unwilling to do so without a court order.

7. Although Mr. Neeley states that Microsoft has created the false appearance that he desires minors to view inappropriate material, violating what he calls his "common-law right to not be associated with art," he fails to articulate what legal theory on which he seeks recovery. To the extent he attempts to allege the tort of false-light invasion of privacy, he must demonstrate

\* that Microsoft published something that placed Mr. Neeley in a false light;

\* that the publicity would be highly offensive to a reasonable person;

\* that Microsoft had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which Mr. Neeley would be placed; and

\* that Microsoft acted with malice.

*Dodrill v. Ark. Democrat Co.*, 265 Ark. 628, 638, 590 S.W.2d 840, 845 (1979).

8. Mr. Neeley has not alleged any falsity in the text-image associations, nor has he alleged that Microsoft acted with malice. Thus, he has failed to state a claim of false-light invasion of privacy against Microsoft.

9. If Mr. Neeley seeks relief on any other theory, it is

not readily apparent on the face of the Second Amended Complaint. In the previous lawsuit Mr. Neeley filed against Microsoft (*Neeley II*), the Court construed the complaint against Microsoft as a defamation claim but dismissed the complaint for failure to state sufficient facts. As Mr. Neeley has included no new facts or allegations against Microsoft in the current litigation, to the extent Mr. Neeley seeks to allege defamation, he likewise fails.

10. Accordingly, the Court finds that Mr. Neeley has failed to state a claim against Microsoft upon which relief can be granted, and Microsoft's Motion to Dismiss will be granted.

#### **GOOGLE'S MOTION TO DISMISS**

11. Mr. Neeley makes similar claims against Google in the Second Amended Complaint, asserting that Google associates the name "curtis neeley" with the presentation of indecent photographs placed by other people across the world, and that it provides insufficient safeguards to prevent certain internet users from viewing these images. Mr. Neeley contends that this violates his "common law copy right and common law privacy."

Mr. Neeley goes on to claim false light invasion of privacy based on Google's attributing to him -- accurately but against his wishes -- three "figure nude" photographs scanned from a book in a New York library.

12. Google filed its Motion to Dismiss on November 29, 2012, arguing that the complaint should be dismissed based on res

judicata and failure to state a claim upon which relief can be granted.

Google further argues that the complaint is frivolous and vexatious, in violation of Fed. R. Civ. P. 11. However, those arguments are more fully addressed in Google's Motion for Sanctions and will be discussed separately herein.

13. Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the "same nucleus of operative facts" as the prior claim." *Daley v. Marriott Int'l, Inc.*, 415 F.3d 889, 895-96 (8th Cir. 2005) (quoting *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 673 (8th Cir. 1998)). The Eighth Circuit uses a three-part inquiry to determine whether res judicata applies:

- \* whether the prior judgment was rendered by a court of competent jurisdiction;
- \* whether the prior judgment was a final judgment on the merits; and
- \* whether the same cause of action and the same parties or their privies were involved in both cases.

14. Mr. Neeley's claims against Google in the present case stem from the same underlying facts and occurrences that were the bases for the claims made in *Neeley I* and *Neeley II*.

- (a) In *Neeley I* -- which was resolved in Google's favor on

a motion for summary judgment -- Mr. Neeley complained, as he does here, that his artwork depicting nude figures was accessible to users who conducted an internet search of his name. Mr. Neeley made claims against Google based on those same facts in *Neeley II*. As Google was a party in *Neeley I* and that case was resolved by a judgment on the merits, the Court found that res judicata precluded those claims against Google in *Neeley II*.

Now Mr. Neeley makes a third attempt to bring a claim against Google based on that same set of facts. Yet neither the law nor the Court's reasoning has changed. Accordingly, Mr. Neeley's claim against Google regarding the association of his name with "indecent images" is barred by res judicata.

(b) In *Neeley II*, Mr. Neeley also complained, as he does here, that Google invaded his privacy by scanning three "figure nude" images from a New York library book. In the previous case, the Court dismissed this claim without prejudice due to Mr. Neeley's failure to state a claim upon which relief can be granted. Because that dismissal was without prejudice, Mr. Neeley was not barred from refiling that claim. See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001). Therefore, the Court will consider Google's arguments that Mr. Neeley has again failed to state a claim upon which relief can be granted.

As discussed above, to recover for a claim of false-light invasion of privacy, Mr. Neeley must show, among other things,

that Google had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which Mr. Neeley would be placed; and that Google acted with malice. *Dodrill*, 265 Ark. at 638, 590 S.W.2d at 845.

As in *Neeley II*, Mr. Neeley has failed to allege any falsity associated with the artwork that was attributed to him. And although he accuses Google of being negligent in scanning and uploading the photographs, Mr. Neeley has not shown that Google acted in reckless disregard of the falsity of the photographs. Thus, plaintiff has again failed to state a claim against Google upon which relief can be granted.

15. Accordingly, Google's Motion to Dismiss will be granted.

#### **FCC'S MOTION TO DISMISS**

16. FCC's Motion to Dismiss is grounded primarily on lack of subject-matter jurisdiction. FCC contends that Mr. Neeley failed to properly exhaust his administrative remedies before filing this lawsuit and further argues that the relief Mr. Neeley seeks -- an injunction or "admonishment" -- is unavailable to him. It also argues that, to the extent Mr. Neeley seeks review of FCC's orders, this court is not the proper forum to do so.

17. The federal government is generally immune to suit unless it has expressly waived its sovereign immunity. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The government has done so in a limited manner with the enactment of the Federal Tort

Claims Act (FTCA), which provides for district court jurisdiction over certain torts committed by federal employees. 28 U.S.C. § 1346(b)(1). The FTCA requires that a claimant present his claim in a particular manner, which includes a precise statement of the amount of money damages the claimant seeks. *Farmers State Sav. Bank v. Farmers Home Admin.*, 866 F.2d 276, 277 (8th Cir. 1989). The FTCA provides only for money damages, not injunctive relief. *E. Ritter & Co. v. Dep't of Army, Corps of Eng'rs*, 874 F.2d 1236, 1244 (8th Cir. 1989).

Mr. Neeley has made it clear -- in both his Second Amended Complaint and his response to FCC's Motion to Dismiss -- that he does not seek money damages from FCC. Rather, he seeks only the audience of a jury so that FCC can be publicly admonished, in the hope that this will motivate changes in the laws regarding regulation of the internet. This type of relief is not contemplated by the FTCA. It follows, then, that the federal government has not waived its immunity from this kind of suit, and this Court is without jurisdiction to hear it.

To the extent Mr. Neeley seeks review of FCC orders, Congress has set out a precise method for this, in which review is given exclusively to the jurisdiction of the courts of appeals, not the district courts. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a).

18. For these reasons, FCC's Motion to Dismiss will likewise be granted.

#### MOTION FOR SANCTIONS

19. In addition to seeking dismissal, Google has also filed a Motion for Sanctions under Rule 11, arguing that this is Mr. Neeley's third frivolous lawsuit regarding the same set of facts and that the Court has repeatedly warned Mr. Neeley about the possibility of sanctions for his actions. Google asks the Court to impose an injunction on Mr. Neeley that would require him to seek permission from the Court before filing any further motions, pleadings, or pro se complaints relating to events previously litigated.

20. Rule 11 requires every attorney or pro se litigant to certify that any pleading, motion, or other paper he presents to the Court is not being presented for any improper purpose, such as harassment or unnecessary delay, or to needlessly increase the cost of litigation. Fed. R. Civ. P. 11(b)(1). Presentation to the Court also certifies that the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law. Fed. R. Civ. P. 11(b)(2), (3).

Pro se complaints are read liberally, but they are still held to the requirements of Rule 11. *Kurkowski v. Volcker*, 819 F.2d 201, 204 (8th Cir. 1987). A pro se complaint "may be frivolous if it is filed in the face of previous dismissals involving the exact same parties under the same legal theories." *Id.*

If a litigant violates Rule 11, the Court may impose an appropriate sanction that is designed to deter repetition of the conduct. Fed. R. Civ. P. 11(c)(1), (4).

21. As discussed in detail above, this is Mr. Neeley's third lawsuit regarding artwork depicting nude figures that is accessible to users who conduct an internet search of his name. Mr. Neeley has applied various labels to describe his claims: copyright violations, invasion of privacy, defamation, "violation of artist's moral rights," and various other undefined common law rights, to name a few. However, none of his claims have held merit, and it is becoming increasingly obvious that Mr. Neeley feels compelled to pursue these baseless accusations until he is ordered to stop.

In his response to the Motion for Sanctions (document #40), Mr. Neeley writes

The District Court must either order this Plaintiff not to pursue Google Inc further for display of Plaintiff's naked female figures to the anonymous or Google Inc will face this claim again and again or over and over, if not repeatedly.

He goes on in his second response (document #43) to state that "[t]he United States District Courts are not the only venue pursued now by this Plaintiff."

In document #43, Mr. Neeley further admits

No naked images done by the Plaintiff are returned for the last few months on ANY networked wire communication searches for "curtis neeley" for the first time in history of wire searches. This is true even for searches

of "curtis neeley nude."

(Emphasis in original.) Given that document #43 was filed on January 7, 2013, the Court can only conclude that the text-image associations Mr. Neeley complains of have not even existed during the majority of this lawsuit, including when he filed his Second Amended Complaint.

In light of these facts, this lawsuit could be considered nothing but frivolous.

22. The Court finds that Mr. Neeley has violated Rule 11 by filing repeated frivolous lawsuits regarding the same facts and circumstances, which he now admits are no longer present. Therefore, he will be sanctioned accordingly.

23. The Court further finds that the sanction suggested by Google is appropriate and is limited to what suffices to deter repetition of Mr. Neeley's sanctionable conduct. Therefore, Mr. Neeley will be enjoined from filing any further motions, pleadings, or pro se complaints related to events previously litigated without first obtaining the permission of the Court.

**IT IS THEREFORE ORDERED** that

- \* **Microsoft Corporation's Motion to Dismiss for Failure to State a Claim** (document #14);
- \* **Google Inc.'s Motion to Dismiss** (document #16); and
- \* **Federal Communications Commission's Motion to Dismiss Amended Complaint** (document #54)

are all **granted**, and this matter is hereby **dismissed with**

prejudice.

IT IS FURTHER ORDERED that Google's **Motion for Sanctions Under Rule 11** (document #36) is **granted**. Mr. Neeley is hereby enjoined from filing any further motions, pleadings, or pro se complaints related to events previously litigated without first obtaining the permission of the Court.

IT IS SO ORDERED.

/S/ Jimm Larry Hendren  
JIMM LARRY HENDREN  
UNITED STATES DISTRICT JUDGE