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

CURTIS J. NEELEY, JR.,

Plaintiff,

v.

FEDERAL COMMUNICATIONS COMMISSION, MICROSOFT CORP., GOOGLE INC.

Defendants.

Civil Action No.: 12-5208

MICROSOFT CORPORATION'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendant Microsoft Corporation submits this brief in support of its motion to dismiss Plaintiff Curtis J. Neeley, Jr.'s Amended Complaint. Mr. Neeley's pleading, even if presumed true, fails to state a claim against Microsoft upon which relief can be granted and, therefore, should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

I. INTRODUCTION

Mr. Curtis J. Neeley, Jr. has filed an Amended Complaint for "violations of privacy rights and failure to regulate safety for simultaneous wire and radio communications as well as violation of the exclusive right to control creations for a time protected by 42 USC §1983," naming as a Defendant Microsoft, along with Google Inc. and the Federal Communications Commission ("FCC"). *See* Dkt. No. 5 at 1. Although lengthy, Mr. Neeley's complaint consists of vague allegations from which Microsoft can discern neither the alleged conduct that gave rise to Mr. Neeley's grievances, nor the laws that Microsoft is said to have violated. Mr. Neeley's allegations do not alert Microsoft to any offending conduct, nor do they begin to explain *why* Mr.

Neeley's allegations would be offending under any legal theory. Moreover, Mr. Neeley already made the same allegations against Microsoft in an earlier case before this Court, and the Court dismissed those allegations for failure to state a claim.

The law is clear that a pleading so vague and lacking in coherence that it fails to apprise the defendant of its alleged wrongful acts does not meet the minimum standard of Federal Rule of Civil Procedure 8(a) and must be dismissed for failure to state a claim under Rule 12(b)(6). The Court has already found one lawsuit by Mr. Neeley wanting under this standard, and Mr. Neeley's Amended Complaint in the present case adds no new allegations. Accordingly, Microsoft asks the Court to dismiss the Amended Complaint as to it.

II. PROCEDURAL BACKGROUND AND THE AMENDED COMPLAINT'S ALLEGATIONS AS TO MICROSOFT

A. Procedural Background

Mr. Neeley is no stranger to this Court. On July 22, 2009, Mr. Neeley filed Case No. 09-5151, naming NameMedia Inc. and, later, Google as defendants. Mr. Neeley accused these defendants of cybersquatting, trademark infringement, and copyright infringement. *See Neeley v. NameMedia, Inc.*, No. 09-5151, Amended Complaint, Dkt. No. 14. Notably, during the course of that lawsuit, Mr. Neeley sought to add Microsoft as a further defendant. In a "Motion Requesting Leave to File Third Amended Replacement Complaint," Mr. Neeley alleged that Microsoft "defamed the Plaintiff" and "attributed [to him] images not allowed to be broadcast on TV to minors." Case No. 09-5151, Dkt. No. 112 at 1. The Court denied this motion. Case No. 09-5151, Order of May 20, 2010 Dkt. No. 125 at 10. Ultimately, the Court dismissed all of Mr. Neeley's claims, and the U.S. Court of Appeals for the Eighth Circuit affirmed. *See* Case No. 09-5151, Order of June 2, 2011, Dkt. No. 268; Mandate of USCA Affirming District Court Decision, April 3, 2012, Dkt. No. 290-1.

Mr. Neeley returned to the Court on April 18, 2012, filing a complaint in Case No. 12-5074 that named as defendants NameMedia, Google, Microsoft, the FCC, and the United States. *See Neeley v. NameMedia Inc.*, Case No. 12-5074, Dkt. No. 1. As to Microsoft, that complaint alleged that searches for the term "curtis neeley"—presumably on Microsoft's Bing search engine—returned "nudes by Neeley as well as scores of nudes not done by Neeley." *Id.* at 14. Mr. Neeley further alleged that Microsoft's search engine stopped returning these results on March 8, 2012 and resumed doing so on April 5, 2012. *Id.*

Microsoft was never served with that complaint and never made an appearance in that case. In considering Mr. Neeley's Motion for Service, Magistrate Judge Erin L. Setser reviewed Mr. Neeley's allegations as to Microsoft and found them to be "ambiguous at best." Case No. 12-5074, Magistrate Judge's Report and Recommendation, July 13, 2012, Dkt. No. 18 at 16. Her report construed Mr. Neeley's allegations as claims for both defamation and for violation of moral rights under 17 U.S.C. § 106A, and found the allegations wanting under both legal theories. *Id.* at 16-17. Accordingly, the report recommended that Mr. Neeley's Motion for Service be denied, and that his claims as to Microsoft (and all other defendants) be dismissed for failure to state a claim. *Id.*

The Court adopted the Magistrate Judge's Report and Recommendation in its entirety. *See* Case No. 12-5074, Order of August 1, 2012, Dkt. No. 21 at 8. In doing so, it noted that most of Mr. Neeley's claims "stem from the same underlying facts and occurrences that were the basis for the claims made in case #09-5151: plaintiff's artwork depicting nude figures, which he placed in the public domain, were accessible to users, including minors, by conducting an internet search of the plaintiff's name." *Id.* at 4. The Court concluded that Mr. Neeley could not have stated a claim of defamation against Microsoft on these facts, because he had pled no facts

that would allow the Court to "draw the reasonable inference that defendant Microsoft published plaintiff's nude artwork of its own accord." *Id.* at 6. The Court reached the same conclusion with regard to any claim under 17 U.S.C. § 106A, because "this section would not apply to copies of plaintiff's artwork on the internet." *Id.* It dismissed Mr. Neeley's complaint without prejudice. *Id.* at 8.

When Mr. Neeley moved for reconsideration, the Court denied his motion and added a further explanation of why he had failed to state a defamation claim against Microsoft. The Court explained that "computer-service providers, such as Microsoft and Google, are not considered 'publishers' for the purpose of defamation claims, so long as the published material was provided by another party." Case No. 12-5074, Order of September 5, 2012, Dkt. No. 24 at 5. Accordingly, the Court maintained its original dismissal of Mr. Neeley's claims. *See id.* at 7.

B. The Current Complaint's Allegations as to Microsoft

Undeterred by his two prior unsuccessful attempts to sue Microsoft, Mr. Neeley is back for another try; he should not be so indulged. In the present case, Mr. Neeley's Amended Complaint contains no counts and no clear prayer for relief. In its eighteen pages and sixty-seven paragraphs, it takes issue with decisions of the United States Supreme Court, makes frequent reference to indecency in "simultaneous wire and radio communications," and expresses concern for the safety of "unsupervised minors or pornography addicts." *See, e.g., id.* at 1, 2, 14. Like Mr. Neeley's complaint in Case No. 12-5074, however, it does not make any factual allegations that would support a cognizable legal claim against Microsoft. And, save for

invoking a grab-bag of partially coherent legal phrases in its opening pages,[1] the pleading makes no references to any violations of substantive law on the part of Microsoft.

Indeed, the bulk of Mr. Neeley's Complaint focuses on Defendants Google and the FCC. Only four paragraphs of the pleading appear to make any allegations regarding Microsoft, and these allegations roughly follow those in the earlier suit. First, Mr. Neeley alleges that "Microsoft Corporation searches of the indexed network of computers connected to wire and radio communications creates the false appearance the Plaintiff desires or desired anonymous minors to see Plaintiff's indecent creations or other indecency using 'curtis neeley' in searches of unsafe simultaneous **wire and radio** communications called 'open inter… + net', though perhaps not begun intentionally." *Id.* at 7. Mr. Neeley further alleges that "Microsoft Corporation refuses to halt this association without court orders after requested repeatedly that all indecent images be removed from search results for searches using the text 'curtis neeley.'"[2] *Id.* at 8. He demands "[i]njunctions requiring disassociating 'curtis neeley' text searches from indecent images," as well as "compensatory and punitive monetary damages." *Id*. at 8, 13.

III. LEGAL STANDARD

"[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Such a claim must meet the standard set forth in Federal Rule of Civil Procedure 8(a), which calls for "a short and plain statement . . . showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The plaintiff's statement of the claim

[1] These include "violations of privacy and presentation of the Plaintiff in simultaneous **wire and radio** communications in a false light," as well as "failure to regulate safety for simultaneous wire and radio communications" and "violation of the exclusive right to control creations for a time protected by 42 USC §1983." *Id.* at 1. Mr. Neeley does not elaborate on any of these passing references.

[2] Later in the Complaint, Mr. Neeley mentions, in passing, that "Microsoft Corporation admitted being made aware of obscene text-image associations and continued these for profit." *Id.* at 16.

should "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). This standard "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* Instead, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. A complaint "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct" does not satisfy Rule 8. *Iqbal*, 556 U.S. at 679.

Where the plaintiff fails to meet this standard, the court should dismiss its complaint for failure "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). *See also Northstar Indus., Inc. v. Merrill Lynch & Co.*, 576 F.3d 827, 831-32 (8th Cir. 2009) (dismissal under Rule 12(b)(6) "is proper when the plaintiff's complaint fails to state a claim upon which relief can be granted").

Courts routinely dismiss complaints for failure to state a claim where, as here, the plaintiff's allegations are so vague and lacking in coherence that they fail to apprise the defendant of its alleged wrongful acts. *See, e.g.*, *White v. U.S.*, 588 F.2d 650, 651 (8th Cir. 1978) (affirming dismissal of "virtually incomprehensible" complaint for failure to state a claim); *Moser v. Oklahoma*, 118 Fed. Appx. 378, 380, 381 (10th Cir. 2004) (affirming dismissal of pro se complaint described by district court as a "conglomeration of vague and conclusory allegations" because "[t]he Defendants could not have discerned Mr. Moser's claims or prepared a defense"); *Cofield v. Williams*, No. 96-5072, 1997 WL 68271, at *1 (D.C. Cir. 1997) ("Appellant's complaint and various pleadings fail to provide sufficient information for appellees or the court to discern what appellees allegedly did wrong."); *Corcoran v. Yorty*, 347 F.2d 222,

223 (9th Cir. 1965) (affirming dismissal of complaint because the pleading was "so verbose, confused and redundant that its true substance, if any, is well disguised").

Mr. Neeley's pro se status does not alter this standard. His pleadings must still conform to the Federal Rules of Civil Procedure. As this Court acknowledged in Case No. 09-5151, "[a]lthough Neeley is acting pro se, and his pleadings are read broadly, . . . 'he is bound, as are all litigants and counsel as well as this court, by the appropriate law and rules of procedure.'" *Neeley v. NameMedia, Inc.*, No. 09-5151, Order of March 1, 2010, Dkt. No. 97 at 10 (quoting *Smith v. U.S.*, 369 F.2d 49, 55 (8th Cir. 1966)).

IV. ARGUMENT

Mr. Neeley's Amended Complaint fails to meet even the minimal standard set forth in Rule 8 and, as a result, should be dismissed.

Mr. Neeley's allegations as to Microsoft take up just four paragraphs—scarcely more than half a page—of his pleading. *See* Dkt. No. 5 at 7-8. These paragraphs barely hint at Mr. Neeley's grievances, let alone what role, if any, Microsoft may have played. Nor does Mr. Neeley tie his thin allegations to any particular legal theories. As such, the Complaint falls short of giving Microsoft "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Mr. Neeley's allegations focus on "Microsoft Corporation searches of the indexed network of computers connected to wire and radio communications." Dkt. No. 5 at 7. Specifically, Mr. Neeley appears to claim that "using 'curtis neeley' in searches of unsafe simultaneous **wire and radio** communications called 'open inter… +net'" may lead a user to "Plaintiff's indecent creations or other indecency." *Id.* Presumably, Mr. Neeley's descriptions of "searches" refer to Microsoft's Bing search engine. That, however, is not clear from the face of the Complaint; it must be inferred from the emails between Mr. Neeley and Microsoft

Customer Support attached to the pleading as Exhibit B. On a charitable reading of these allegations, Microsoft can make out two propositions: first, Mr. Neeley claims that Microsoft operates an internet search engine; second, Mr. Neeley's "indecent creations" are accessible via the internet, and, presumably, through that search engine.[3]

Microsoft can discern little more. The search results Mr. Neeley describes are said to "create[] the false appearance the Plaintiff desires or desired anonymous minors to see Plaintiff's indecent creations or other indecency." *Id.* Mr. Neeley fails to explain how the search results create this particular false appearance, how Microsoft might be responsible, or why this alleged result offends. Mr. Neeley does not state what he means by his "indecent creations" or the "other indecency" to which he refers. In addition, Mr. Neeley's "anonymous minors" remain anonymous—his pleading says nothing about who these individuals are and why they are significant. Finally, and most important, there is no indication in the Amended Complaint of what role Microsoft may have played in this chain of events, and what laws it may have violated. But Mr. Neeley breezes past such details, demanding an injunction and damages to set right a grievance that his pleading has failed to describe.

Microsoft cannot understand how it could be responsible for the rather complicated "false appearance" Mr. Neeley alleges because, among other reasons, his Amended Complaint is silent

[3] The emails from Mr. Neeley to Microsoft Customer Support in Exhibit B to the Amended Complaint point to search results in which such content appears, and claim that this content has been removed from the sites that host it. But neither the Amended Complaint nor this correspondence give any clear indication of what rights of Mr. Neeley's would be violated were these allegations true. For instance, if Mr. Neeley is alleging copyright infringement, he has not stated so, identified specific works he asserts were infringed, or alleged that he has registered copyrights in any such works. Mr. Neeley's emails contain only passing accusations of "negligence," "defamation," and "presenting Mr. Neeley in a false negative light due to gross negligence." Exhibit B at 7, 3. The emails offer no further explanation for any of these labels, which appear alongside other vague and general threats of litigation, including that Microsoft should "begin mitigating damages," that Microsoft's Customer Support employees will lose their jobs, and that "[t]he Supreme Court will ultimately be involved in this case again as will Congress." *Id.* at 7, 1, 6. Exhibit B thus fails to clarify Mr. Neeley's grievances.

regarding any relevant conduct by Microsoft. Indeed, Mr. Neeley focuses on a single alleged instance of *in*action: the allegation that Microsoft "refuses to halt this association without court orders" and did not remove "all indecent images" from the search results Mr. Neeley refers to.[4] *Id.* at 8. It is impossible for Microsoft to determine how maintaining the status quo in this manner, as it is alleged to have done, could amount to even "the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679.

Nor does Mr. Neeley identify any legal theories under which these allegations would allow him to proceed with a case—and, based on his pleading, neither can Microsoft. As noted, Mr. Neeley's complaint contains no counts and makes only fleeting mention of an assortment of legal theories, at its very outset. These include "violations of privacy rights" and "presentation of the Plaintiff . . . in a false light," as well as more confusing charges, such as "failure to regulate safety for simultaneous wire and radio communications" and "violation of the exclusive right to control creations for a time protected by 42 USC §1983." Dkt. No. 5 at 1. Mr. Neeley does not tie this opening invocation to any of his allegations against Microsoft, and does not begin to explain how Microsoft's alleged choice to maintain the status quo with respect to search results would constitute misconduct under these rubrics, or under any others. This amounts to far less than even the "[t]hreadbare recital[] of the elements of a cause of action," which the Supreme Court has twice found inadequate to state a claim. *Iqbal*, 556 U.S. at 678; *see also Twombly*, 550 U.S. at 555.

Finally, that Mr. Neeley has failed to state a claim upon which relief can be granted is also clear from this Court's Order of August 1, 2012 in Case No. 12-5074, dismissing Mr.

[4] Mr. Neeley later alleges that Microsoft "admitted being made aware of obscene text-image associations and continued these for profit." Id. at 16. Microsoft does not understand Mr. Neeley's reference to profit, or what connection this might bear to Microsoft's alleged inaction.

Neeley's claims as to Microsoft. As noted above, the Court explained that Mr. Neeley's claims in that case flowed from his allegations that his "artwork depicting nude figures, which he placed in the public domain, were accessible to users, including minors, by conducting an internet search of the plaintiff's name." Case No. 12-5074, Order of August 1, 2012, Dkt. No. 21 at 4. There is no meaningful difference between those allegations and Mr. Neeley's allegations in the present case: He has alleged no new facts and put forth no new legal theories. The Court's previous dismissal of the same confused assertions in Case No. 12-5074 compels the same outcome here.

V. CONCLUSION

As before, Mr. Neeley has lodged against Microsoft a "conglomeration of vague and conclusory allegations." *Moser v. Oklahoma*, 118 Fed. Appx. at 380. His pleading fails the fundamental requirement of Rule 8: it "fail[s] to provide sufficient information for [Microsoft] or the court to discern what [Microsoft] allegedly did wrong." *Cofield v. Williams*, 1997 WL 68271, at *1. Accordingly, Microsoft respectfully asks this Court to dismiss Mr. Neeley's Amended Complaint for failure to state a claim upon which relief can be granted.

Because Mr. Neeley has already made essentially the same allegations against Microsoft, which were previously dismissed by this Court, the Amended Complaint should be dismissed as to Microsoft with prejudice. *See Mangan v. Weinberger*, 848 F.2d 909, 911 (8th Cir. 1988) (affirming dismissal of amended complaint with prejudice due to plaintiff's "deliberate persistence in refusing to conform his pleadings to the requirements of Rule 8").

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG
GATES & WOODYARD, P.L.L.C.
5414 Pinnacle Point Drive, Suite 500
Rogers, AR 72758
Telephone: (479) 464-5650
Facsimile: (479) 464-5680

By */s/ Marshall S. Ney*
Marshall S. Ney, Ark. Bar No. 91108
mney@mwlaw.com

Of Counsel
Simon J. Frankel (CA Bar No. 171552)
sfrankel@cov.com
Krzysztof Bebenek (CA Bar No. 279113)
kbebenek@cov.com
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111-5356
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

CERTIFICATE OF SERVICE

I, Marshall S. Ney, hereby certify that on November 29, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, and will send notification of such filing to the following:

Curtis J. Neeley, Jr.
2619 N. Quality Ln. Suite 123
Fayetteville, AR 72703-5523

By */s/ Marshall S. Ney*
Marshall S. Ney, Ark. Bar No. 91108
mney@mwlaw.com