UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CURTIS J. NEELEY JR.,	§	
	§	
PLAINTIFF	§	
	§	
VS.	§	**CIVIL ACTION NO. 12-5208-JLH**
	§	
FEDERAL COMMUNICATIONS COMMISSION, MICROSOFT CORPORATION, AND GOOGLE, INC.	§	
	§	
DEFENDANTS	§	

GOOGLE'S BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant Google, Inc. ("Google") moves the Court to dismiss Plaintiff Curtis J. Neeley Jr.'s, ("Mr. Neeley") 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 U.S.C. § 1983 ("Complaint") (Dkt. No. 5), pursuant to 1) the principle of res judicata, 2) Federal Rule of Civil Procedure 12(b)(6), because it fails to state a claim, and also 3) because it is frivolous, malicious, vexatious, and fails to comply with Rule 11.

BACKGROUND

This is Mr. Neeley's third attempt to sue Google over virtually identical allegations. As this Court previously stated:

> Most of the claims plaintiff makes in the present case 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 plaintiff's name. As Google was a party to case #09-5151 and that case was resolved by a judgment on the merits, res judicata precludes those claims in the present action against Google.

Order ("Hendren Order") at 4, *Curtis J Neeley, Jr. v. NameMedia, Inc., et al.*, Case No. 5:12-cv-5074-JLH ("*Neeley II*") (Aug. 1, 2012) (Dkt. No. 21).[1] Nothing has changed since Judge Hendren wrote those words, and Mr. Neeley's Complaint does not allege any facts differing from the Court's synopsis. This is just another version of Mr. Neeley's ongoing feud against Google, which this Court has entertained for the past three years. The Court is well versed in the case history, and it will only briefly be repeated here.[2]

Mr. Neeley's first case, *Curtis J Neeley, Jr. v. NameMedia, Inc., et al.*, Case No. 5:09-cv-5151-JLH ("*Neeley I*"), purported to claim trademark and copyright violations and intentional infliction of emotional distress. The case ended in summary judgment against Mr. Neeley (*Neeley I*, Dkt. Nos. 97, 268), which was subsequently affirmed by the Eighth Circuit. (*Neeley I*, Dkt. Nos. 166-1, 166-2, and 290-1).

The second case, again arising out of the same circumstances as the first, was filed on April 18, 2012. *Neeley II* alleged invasions of privacy, defamation, and violation of artist's moral rights under 17 U.S.C. § 106A. On August 1, 2012 this Court adopted Magistrate Judge Setser's Recommendation and dismissed Mr. Neeley's complaint under the doctrine of res judicata and pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and (ii). Hendren Order at 8.

In his third attempt to relitigate the issues regarding the same images being returned in internet searches for his name, Mr. Neeley now couches his complaint as various invasions of privacy, attribution, violation of the exclusive right to control creations and undefined civil rights under 42 U.S.C. § 1983. No matter the label Mr. Neeley attempts to put on his complaint, it is still based on the same fact pattern. Mr. Neeley is troubled by the fact that sometimes when a

[1] Google incorporates by reference, in their entirety, both Judge Hendren's Order (Dkt. No. 21) and Magistrate Judge Setser's Magistrate Judge's Report and Recommendation ("Recommendation"), *Neeley II*, (July 13, 2012) (Dkt. No. 18).

[2] Judge Setser provided a detailed overview of the history of this litigation in her Recommendation at 3-13.

person searches for his name on the internet, the search returns photographs attributed to Mr. Neeley which he freely uploaded to the internet and published in a book. This claim has been entertained again and again by the Court, proven groundless, and repeatedly dismissed.

APPLICABLE LAW

1. Res Judicata

The preclusion principle of res judicata prevents "the relitigation of a claim on grounds that were raised or could have been raised in the prior action." *Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir. 1990). The Eighth Circuit uses a three part inquiry to determine whether res judicata applies: "(1) whether the prior judgment was rendered by a court of competent jurisdiction; (2) whether the prior judgment was a final judgment on the merits; and (3) whether the same cause of action and the same parties or their privies were involved in both cases." *Banks v. Int'l Union Elec., Elec., Tech., Salaried & Mach. Workers*, 390 F.3d 1049, 1052 (8th Cir. 2004) (citing *Lane*, 899 F.2d at 741). The "same cause of action" element "turns on whether [the later suit]'s claims arise out of the 'same nucleus of operative facts as the prior claim.'" *Daley v. Marriott Int'l, Inc.*, 415 F.3d 889, 896 (8th Cir. 2005) (quoting *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 673 (8th Cir. 1998)).

2. FED. R. CIV. P. 12(b)(6)

Federal Rule of Civil Procedure 8(a) requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). Accordingly, Federal Rule of Civil Procedure 12(b)(6) provides that a party may move to dismiss a complaint that fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Dismissal under Rule 12(b)(6) "is proper when the plaintiff's complaint fails to state a claim upon which relief can be granted." *Northstar Indus., Inc. v. Merrill Lynch & Co.*, 576 F.3d 827, 831-832 (8th Cir. 2009).

A complaint must set forth the "circumstances, occurrences, and events in support" of each claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007). A motion to dismiss should be granted if the plaintiff's factual allegations are not sufficient "to raise the right to relief above the speculative level." *Id.* at 555; *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695 (8th Cir. 2003); *Parkhurst v. Tabor*, No. 07-2068, 2007 U.S. Dist. LEXIS 80725, *7 (W.D. Ark. Oct. 30, 2007). "Courts are required to dismiss legal claims that are destined to fail regardless of whether they are nearly viable." *Parkhurst*, 2007 U.S. Dist. LEXIS 80725 at *7. Although "leave to amend should be granted freely 'when justice so requires,'" it may be denied if an amendment would be futile. *Stricker v. Union Planters Bank, N.A.*, 436 F.3d 875, 878 (8th Cir. 2006) (citing *Migliaccio v. K-tel Int'l, Inc.* (*In re K-tel Int'l, Inc. Sec. Litig.*), 300 F.3d 881, 899 (8th Cir. 2002)).

3. FED. R. CIV. P. 11

Federal Rule of Civil Procedure 11 requires parties to sign all pleadings, motions, or other papers presented to the court to certify that the paper is, to the best of the signer's "knowledge, information, and belief, formed after reasonable investigation under the circumstances." FED. R. CIV. P. 11(b). The first thing the signer must certify is that the pleading is not made for any improper purpose, including harassment or unnecessary delay, or to needlessly increase the cost of litigation. FED. R. CIV. P. 11(b)(1). The signature also certifies that the claims and legal contentions are warranted by existing law, "or a nonfrivolous argument for extending, modifying, or reversing existing law," and the factual contentions have evidentiary support. FED. R. CIV. P. 11(b)(2), (3). A case is frivolous if it fails these three requirements. *Kurkowski v. Volcker*, 819 F.2d 201, 204 (8th Cir. 1987). Even pro se complaints, given a liberal construction, may still be frivolous "if filed in the face of previous dismissals involving the exact same parties under the same legal theories." *Id.* Litigation is malicious and

vexatious if it is brought solely to harass. *See Ruderer v. U.S.*, 462 F.2d 897, 899 (8th Cir. 1972) *appeal dismissed* 409 U.S. 131.

ARGUMENT

1. Res Judicata Prevents Mr. Neeley From Relitigating His Claims, Regardless Of The Label He Applies To Them

This Court recently applied res judicata to dismiss Mr. Neeley's claims in *Neeley II*. It should do so again. The Court aptly summed up the basis for all of Mr. Neeley's litigation against Google: "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 plaintiff's name." Hendren Order at 4. Mr. Neeley offers nothing further to undergird his newest round of claims. This lawsuit is solely based on the same "nucleus of operative facts" and is therefore barred from relitigation by res judicata.

Mr. Neeley's Complaint restates the previous fact pattern, but now couched in terms of an invasion of privacy. *See* Complaint at 8-11. Mr. Neeley claims now that Google violates his privacy for continuing to associate his name with the nude images which Mr. Neeley himself originally uploaded to the internet and sold to be published. *Id.* Mr. Neeley makes no new allegations, and his complaint clearly stems from the same factual situation which he has previously litigated – and lost – twice. Res judicata must now bar this and any further attempts to relitigate these claims.

2. Mr. Neeley's Third Suit Fails To State A Claim Upon Which Relief Can Be Granted And Must Be Dismissed Pursuant To FED. R. CIV. P. 12(b)(6)

Mr. Neeley's Complaint should also be dismissed because it fails to plead facts upon which relief can be granted. Mr. Neeley's allegations supporting his claim for false light invasion of privacy fail to "state a claim for relief which is plausible on its face." *Twombly*, 550 U.S. at 570. Mr. Neeley cannot blame Google for any false light that falls on him as a result of

his publication of his own artwork. Furthermore, Mr. Neeley fails again to show how he can possibly be cast in a *false* light for publicly available images correctly attributed to him. *See* Hendren Order at 5. False light requires a falsity. *Dodrill v. Ark. Democrat Co.*, 265 Ark. 628, 638 (1979).

Mr. Neeley's invasion of privacy claim flowing from the publication of his artwork in the photography collection book suffers from the same fault. It was Mr. Neeley, not Google, who published his images. Complaint at 10 ("Yes, Publication was once done by Plaintiff intentionally…"). The fact that Mr. Neeley now disagrees that his previous work should be available to the public and properly linked to his name is another matter entirely. *See* Transcript of Proceedings Before the Honorable Erin Setser, United States District Court Magistrate ("Transcript") at 52-54, 56, *Neeley I*, (Dec. 6, 2010) (Dkt. No. 216).[3] In his Complaint, Mr. Neeley has not "alleged any falsity associated with the artwork or any malice in the manner in which it was published." Hendren Order at 5. Nor can he. Therefore, Mr. Neeley's Complaint fails to state a claim for relief which is sufficient to pass the requirements of *Twombly* and FED. R. CIV. P. 12(b)(6) and should be dismissed.

3. This Suit Is Legally and Factually Baseless and Fails to Comply with Rule 11

As Mr. Neeley's claims have been previously adjudicated against him, they are now barred from relitigation. By definition, this new suit has no legally cognizable basis.

[3] For example, the following exchange:

> Q Okay. And reproducing your work without alteration and attributing it to your name disparages you how?
> A Because I do not believe that – I do not believe that a minor child or a practicing Muslim should be exposed to my art.
> Q Okay. Are you free to remove your postings from Wikipedia?
> A Yes.
> Q Why have you not done so?
> A Why would I?
> Q To prevent Muslims and children from being able to see them.
> A That's easily done by asking Google not to show them.

Transcript at 56.

Mr. Neeley's Complaint attempts to make out a claim of false light invasion of privacy. To recover for false light, the plaintiff must show 1) the plaintiff was put in a false light which would be highly offensive to a reasonable person, 2) the defendant acted knowingly or in reckless disregard as to the falsity of the matter or the false light in which the plaintiff would be placed, and 3) actual malice. *Murphy v. LCA-Vision, Inc.*, 776 F. Supp. 2d 886, 899 (E.D. Ark. 2011) (citing *Dodrill*, 265 Ark. at 638).

Mr. Neeley's false light claim is legally and factually baseless for several reasons. Most importantly, Mr. Neeley has admitted that he sold the images to be published and uploaded them to the internet. Complaint at 9, 10; Transcript at 53-56. Whatever light is now placed on Mr. Neeley is the result of his own actions, not Google's. As the Court stated, "Plaintiff has failed to explain how the publishing of his own artwork places him in a negative false light . . . ." Hendren Order at 5. No legal argument can be made from that factual premise and, as such, the Complaint should be dismissed.

This suit is simply a recasting of Mr. Neeley's previous litigation. It is repetitive of every issue which has already been decided, appealed, and affirmed in *Neeley I* and regurgitated in *Neeley II*. A lawsuit is frivolous if it is repetitive of previous causes of action, and malicious if it is intended to harass the defendants. *Kurkowski*, 819 F.2d at 204; *Ruderer*, 462 F.2d at 899 (finding bad faith and personal vendetta against defendants where plaintiff previously had full opportunity to pursue his claims). The tone of Mr. Neeley's pleadings is abusive towards the defendants and the Court, swinging from the nonsensical to personal attacks. Even still, the Complaint again fails to allege facts necessary to carry his alleged cause of action. Finally, Mr. Neeley's conduct throughout has been offensive: his repetitive and multiplicitous filings reveal a total disregard for the limited resources of the Court, a lack of respect towards the Court,

defendants, defense counsel, and disdain for the time, effort, and expense required on behalf of the defendants and the Court to entertain his claims.[4]

4. The Dismissal Of Neeley's Claims Should Be With Prejudice

Federal Rule of Civil Procedure 41 provides that any dismissal, except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19, operates as an adjudication on the merits. FED. R. CIV. P. 41(b). Adjudications on the merits are prohibited from relitigation by res judicata, that is, they are dismissals with prejudice.

Mr. Neeley has had his chance to fully flesh out his claims and state facts which would support them. He has not been able to do so. His previous cases have all been adjudicated against him for various reasons. These prior adjudications built the wall of res judicata that prevents Mr. Neeley's current and future attempts to relitigate them. Further, as Rule 41(b) states and as presumed by Rule 12(b)(6), Mr. Neeley's claims have been dismissed on their merits in *Neeley II*. *Neeley II* dismissed his claim without prejudice because it was the first time Mr. Neeley alleged an invasion of privacy. The dismissal without prejudice allowed Mr. Neeley the opportunity to replead the issues and restate his allegations to support them. Unfortunately, Mr. Neeley has once again failed to allege any new facts to support his claims and they necessarily fail. As this is the third attempt by Mr. Neeley to drag Google and the Court through exhausting, factually baseless, legally meritless, and vexatious litigation to further his personal feud, dismissal should act as a full adjudication on the merits. This case should be dismissed with prejudice to prevent further relitigation which will both drive up the costs to defend and waste the Court's limited resources.

[4] Mr. Neeley does seem to recognize that there is a cost connected with his litigiousness, "Defendant Google Inc (sic) spent hundreds of thousands in legal fees. . ." Complaint at 16. This is a fact, one of the few alleged in the Complaint.

5. Google Intends To Seek Appropriate Remedies Preventing Further Litigation of These Claims

In the course of this litigation, Mr. Neeley's refusal to accept his losses or state any viable claims for recovery against Google are all too apparent. Even in 2010 Judge Hendren accurately described Mr. Neeley's litigation tactics:

> [t]he defendants have been required to address multiple frivolous motions, including several that were filed and later withdrawn. The tenor of much of Neeley's pleadings, as noted in the Court's Order of March 1, 2010, indicates 'that he is more interested in wreaking revenge on the defendants than obtaining legal redress for any economic injury to himself.' These facets of the case suggest that the delays that have troubled this case to date are prejudicial, and are the result of bad faith or dilatory motive.

Order at 7, *Neeley I*, (May 20, 2010) (Dkt. No. 125). Both Judge Hendren and Magistrate Judge Setser have cautioned Mr. Neeley about the possibility of sanctions. *See* Order at 2 ¶ 4, *Neeley I*, (Oct. 27, 2010) (Dkt. No. 189) ("If … frivolous motions continue to be filed, the opposing party may seek sanctions pursuant to F.R.C.P. 11."); Transcript at 61, 64-65, Magistrate's Report and Recommendation at 9, *Neeley I*, (Dec. 16, 2010) (Dkt. No. 225). Google intends to seek the appropriate remedies to prevent Mr. Neeley from continuing his frivolous and malicious vendetta, including seeking a prohibition on further filings based on these same facts without prior approval from this Court.

CONCLUSION

Mr. Neeley has run his course. The Complaint represents the third attempt to relitigate issues which this Court and the Eighth Circuit have both previously decided against him and are now, therefore, barred by res judicata. The Complaint also fails to allege any new facts which could provide a cognizable basis for him to recover for the perceived wrongs. Mr. Neeley's Complaint is frivolous, malicious, and vexatious because it is legally unsound, factually baseless, and repetitious of his prior lawsuits, *Neeley I* and *Neeley II*. For all these reasons, Google

respectfully requests that Mr. Neeley's Complaint be dismissed with prejudice, and that this and future attempts by Mr. Neeley to relitigate claims stemming from the public availability of his own artwork be barred by res judicata, and for all other relief as the Court deems equitable, just or appropriate.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT GOOGLE INC.

CERTIFICATE OF SERVICE

I, Jennifer H. Doan, hereby certify that on November 29, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to CM/ECF participants, and I hereby certify that I have mailed the document by the United States Postal Service to the following non-CM/ECF participants:

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\s\ *Jennifer H. Doan*
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