

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION**

<b>CURTIS J. NEELEY JR.,</b>	§	
	§	
<b>PLAINTIFF</b>	§	
	§	
<b>VS.</b>	§	<b>CIVIL ACTION NO. 12-CV-5208-JLH</b>
	§	
<b>FEDERAL COMMUNICATIONS</b>	§	
<b>COMMISSION, MICROSOFT CORP.,</b>	§	
<b>AND GOOGLE INC.,</b>	§	
	§	
<b>DEFENDANTS</b>	§	

**DEFENDANT GOOGLE INC.’S REPLY  
IN SUPPORT OF ITS MOTION TO DISMISS**

Plaintiff Curtis J. Neeley’s (“Mr. Neeley”) Brief Supporting Motion Opposing Docket #16 (Google Inc.’s Motion to Dismiss) (“Response”) (Dkt. No. 29) raises no new issues against dismissal of his Amended Complaint.<sup>1</sup> Defendant Google Inc. (“Google”) repeats its original arguments for dismissal: all of Mr. Neeley’s claims are barred by res judicata, the allegations in the Amended Complaint fail to state a cause of action and should be dismissed under Rule 12(b)(6), and this lawsuit is frivolous, malicious, and vexatious and should be dismissed for failing to comply with Rule 11.

**DISCUSSION**

Res judicata prevents relitigation of claims previously asserted or those that could have been asserted, if the claims have been previously decided by a competent court and arise out of the “same nucleus of operative facts as the prior claim.” *Daley v. Marriott Int’l, Inc.*, 415 F.3d

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<sup>1</sup> 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 (“Amended Complaint”) (Dkt. No. 5).

889, 896 (8th Cir. 2005) (quoting *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 673 (8th Cir. 1998)). This is Mr. Neeley's third lawsuit against Google for various claims, all of which arise from the same fact pattern. Mr. Neeley's Amended Complaint alleges no new facts and raises no new issues which warrant further litigation in this Court. Simply put, Mr. Neeley has had his day in court and does not deserve another.

Mr. Neeley's Amended Complaint also fails to allege facts to support his renewed invasion of privacy claims. 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). The allegations in the Amended Complaint do not support this cause of action and necessarily fail. Mr. Neeley fails to allege falsity or malice, both required elements of a false light invasion of privacy. Mr. Neeley now feels his own images should not be publicly available. But this does not mean Google has invaded his privacy in any way. It was Mr. Neeley, not Google, who published his images on the internet. It was Mr. Neeley, not Google, who gave a Creative Commons License for use of those images. And it is Mr. Neeley, not Google, who can request that the images be withdrawn from the third-party sites on which they reside – a request that Mr. Neeley admitted he has not attempted to make.<sup>2</sup> Therefore, as this Court has already held in *Neeley II*, Mr. Neeley's Amended Complaint fails to state a claim for invasion of privacy which is sufficient to pass the requirements of *Twombly* and FED. R. CIV. P. 12(b)(6), and should be dismissed again.

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<sup>2</sup> Transcript of Proceedings Before the Honorable Erin Setser, United States District Court Magistrate at 50-56, *Curtis J. Neeley v. NameMedia, Inc., et al.*, Case No. 5:09-cv-5151, Dkt. No. 216 (December 6, 2010).

This lawsuit is simply a continuation of a personal vendetta against Google. It is repetitious of previously litigated facts and causes of action, is factually baseless and legally meritless, and is intended solely to harass and vex Google. It fails to comply with Fed. R. Civ. P. 11 and should be dismissed.

To the extent a direct reply to Mr. Neeley's Response is necessary, Google notes that he has improperly attempted to add various allegations and newly defined claims, even though these still arise from the same set of operative facts. A response to a motion to dismiss is not the proper vehicle for such attempted amendments.

Finally, we note that Mr. Neeley is mistaken in his assertion that his prior Complaint (*Neeley II*) was dismissed "without prejudice." Unlike the claims against some of the other parties in that lawsuit, all of the claims against Google other than the "invasion of privacy" claim were dismissed on res judicata grounds, which can only be with prejudice. *Neeley II*, Dkt. Nos. 21 (Order adopting Magistrate's recommendations); 24 (Order denying motion to alter judgment).

As for the "invasion of privacy" claim, Mr. Neeley made no amendment, instead filing a Motion to Alter or Amend Judgment. *Id.*, Dkt. No 22. That motion was denied, Mr. Neeley made no amendment, and the dismissal of *Neeley II* thus became final. That dismissal is now also res judicata in this, Mr. Neeley's third lawsuit.

### CONCLUSION

This is the final chapter of a seemingly never-ending story, as all of Mr. Neeley's claims are barred by res judicata. They have all been previously addressed, the facts adjudicated, and the claims decided. Therefore, the Court should dismiss Mr. Neeley's Amended Complaint with prejudice.

Google does not believe Mr. Neeley's Response raises any other genuine issues for analysis. Should the Court desire further briefing on the Motion to Dismiss, Google will of course promptly respond to any such request.

Respectfully submitted,

\s\ Jennifer H. Doan

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**ATTORNEYS FOR DEFENDANT  
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**CERTIFICATE OF SERVICE**

I, Jennifer H. Doan, hereby certify that on December 28, 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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