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 REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Microsoft Corporation respectfully submits this brief in reply to Plaintiff Curtis J. Neeley, Jr.'s opposition to Microsoft's Motion to Dismiss Mr. Neeley's Amended Complaint for failure to state a claim.

I. INTRODUCTION

In its Motion to Dismiss Mr. Neeley's Amended Complaint for failure to state a claim on which relief can be granted (Dkt. No. 14-15), Microsoft explained that it had failed to discern any cognizable claim or legal theory in Mr. Neeley's pleading (which appeared to hint at, but did not assert, notions of privacy or copyright). Now, in his opposition brief, Mr. Neeley appears to characterize his Amended Complaint as seeking relief for breach of contract. Specifically, Mr. Neeley suggests that when Microsoft Customer Support staff allegedly explained to him how the Bing search engine refreshes its search results, an "implied contract" between him and Microsoft arose, imposing on Microsoft a "DUTY to perform." Dkt. No. 31 at 3. This claim is defective on its face, and Microsoft could not have discerned Mr. Neeley's breach of contract theory from

any of the allegations in his Amended Complaint. Accordingly, Microsoft respectfully asks the Court to dismiss Mr. Neeley's claims as to Microsoft with prejudice.

II. ARGUMENT

Mr. Neeley fails to allege any facts in his Amended Complaint or in his opposition that suggest a contract existed between him and Microsoft. A binding contract requires an offer, acceptance of that offer, and an exchange of consideration. *See, e.g.*, *Pruitt v. Dickerson Excavation, Inc.*, 379 S.W.3d 766, 772 (Ark. Ct. App. 2010) ("burden of proving a contract" entails proving "offer, acceptance, and consideration"). Mr. Neeley's theory fails on all three counts.

An offer must be "promissory in nature" and "sufficiently definite in [its] terms to create a contract." *Crawford v. Gen. Contract Corp.*, 174 F. Supp. 283, 298 (W.D. Ark. 1959). Mr. Neeley's alleged exchanges with Microsoft cannot constitute offers. A simple description of Bing's standard practice, explaining that changes to a third-party website "will reflect in Bing on our normal refresh cycle," does not entail any commitment specific to Mr. Neeley and lacks definiteness as to both time and the specific search results at issue. Dkt. No. 31 at 3. Moreover, even if such an explanation were deemed an offer, nothing in Mr. Neeley's allegations suggests that he accepted, or that the parties ever exchanged or contemplated exchanging any consideration. Mr. Neeley's claim for breach of contract is defective on its face.[1]

That Mr. Neeley now characterizes his claims as ones for breach of contract only highlights the defects in his Amended Complaint. As noted, the allegations in Mr. Neeley's

[1] Mr. Neeley does not appear to press a claim for promissory estoppel, and he cannot do so. His Amended Complaint and opposition brief make no suggestion that Microsoft should have expected to induce any action or forbearance on Mr. Neeley's part, or that he undertook any action or forbearance based on any alleged statements by Microsoft. *See Ralston Purina Co. v. McCollum*, 611 S.W.2d 201, 203 (Ark. Ct. App. 1981) (under the doctrine of promissory estoppel, a promise is binding "if the promissor should reasonably expect to induce action or forbearance of a definite and substantial character by the promissee, and if that action is induced").

pleading do not come close to describing the basic elements of an enforceable contract, and nothing else in the Amended Complaint gave Microsoft any indication that Mr. Neeley intended to press such a legal theory. Indeed, the word "contract" does not appear in the pleading. Thus, even if Mr. Neeley could somehow articulate a cognizable claim for breach of contract, he has failed to plead it in the first instance and cannot now use his opposition brief to cure such a glaring defect. *See, e.g., Morgan Distrib. Co., Inc. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989) ("[I]t is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss.") (citations and internal quotation marks omitted).

While Mr. Neeley's opposition references a new, defective legal theory, it is based on essentially the same allegations Mr. Neeley has made against Microsoft before, and that this Court has already refused to entertain. Mr. Neeley's opposition does not address his repeated attempts to sue Microsoft. But as established in Microsoft's moving papers, because of these repeated attempts the Amended Complaint should be dismissed as to Microsoft with prejudice. *See* Dkt. No. 15 at 2-4, 10; *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").

III. CONCLUSION

For the foregoing reasons, the Court should dismiss Mr. Neeley's Amended Complaint as to Microsoft with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marshall S. Ney, hereby certify that on January 8, 2013, 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:

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