

**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 OPPOSITION TO PLAINTIFF'S  
MOTION FOR LEAVE TO FURTHER AMEND THE AMENDED COMPLAINT**

Microsoft Corporation respectfully submits this brief in opposition to Plaintiff Curtis J. Neeley, Jr.'s Motion for Leave to Further Amend the Amended Complaint.

Plaintiff has attempted to state claims against Microsoft on several occasions, each time based on essentially the same set of factual allegations. This Court rejected Mr. Neeley's first two attempts, and Microsoft's motion explaining why his third attempt should not succeed is currently before the Court. Mr. Neeley now seeks yet another opportunity to restate the same set of claims. *See* Dkt. No. 48. He should not be allowed to do so.

As an initial matter, Mr. Neeley has not submitted a copy of his proposed Second Amended Complaint with his Motion. The Eighth Circuit has repeatedly held that "in order to preserve the right to amend the complaint, a party must submit the proposed amendment along with its motion," and has affirmed denial of motions for leave to amend where a party has failed to do so. *Clayton v. White Hall School Dist.*, 778 F.2d 457, 460 (8th Cir. 1985); *see In re 2007 Novastar Fin. Inc., Sec. Lit.*, 579 F.3d 878, 884-85 (8th Cir. 2009). Microsoft recognizes that

Local Rule 5.5(e) exempts *pro se* litigants from providing copies of proposed amendments with a motion for leave to amend. However, Mr. Neeley's failure to do so here creates obvious prejudice for Microsoft: The Motion for Leave to Amend itself gives no indication of what clarifications and revisions the amended pleading might contain, making it difficult for Microsoft to address the merits of any proposed amendments. Save for stating that he intends to "clarify" his claims and to revise the prayer for relief "to be realistic rather than being so absurd," Mr. Neeley's moving papers offer no hint of what his amended complaint would contain. Dkt. No. 48 at 1.<sup>1</sup> Mr. Neeley's Supplemental Brief (Dkt. No. 51) is similarly unhelpful. These omissions suffice for the Court to deny Mr. Neeley's request.

In any event, no amended pleading that Mr. Neeley now files could meet the standard of Rule 15. Under that standard, "plaintiffs do not have an absolute or automatic right to amend" their pleadings. *U.S. ex rel. Lee v. Fairview Health Sys.*, 413 F.3d 748, 749 (8th Cir. 2005). Rather, a "district court may refuse to grant leave to amend if the plaintiff had an earlier opportunity to cure a defect in her complaint but failed to do so." *Egerdahl v. Hibbing Cmty. Coll.*, 72 F.3d 615, 620 (8th Cir. 1995). In doing so, the court may consider the plaintiff's unsuccessful attempts to state the same claim in an earlier action. *See Carroll v. Fort James Corp.*, 470 F.3d 1171, 1175 (5th Cir. 2006).

This Court has now entertained Mr. Neeley's attempts to state claims against Microsoft on two occasions over the past three years, and both times it has found those attempts inadequate. Mr. Neeley first sought to add Microsoft as a defendant to Case No. 09-5151, asserting that Microsoft had "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 that motion. Case No. 09-

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<sup>1</sup> Mr. Neeley has submitted copies of proposed amended pleadings in prior litigation and should therefore be capable of doing so now. *See* Case No. 09-5151, Dkt. No. 111, Ex. 1.

5151, Order of May 20, 2010 Dkt. No. 125 at 10. Mr. Neeley next filed a complaint in Case No. 12-5074 that named Microsoft among the defendants and alleged that searches for the term “curtis neeley” returned “nudes by Neeley as well as scores of nudes not done by Neeley.” Case No. 12-5074, Dkt. No. 1 at 14. The Court dismissed Mr. Neeley’s claims as to Microsoft (and all other defendants) for failure to state a claim. *See* Case No. 12-5074, Order of August 1, 2012, Dkt. No. 21 at 8.

In dismissing Mr. Neeley’s complaint, the Court noted that most of his claims “stem from the same underlying facts and occurrences that were the basis for the claims made in case #09-5151.” *Id.* at 4. Mr. Neeley’s Amended Complaint in the present case covers, once again, the same ground. Mr. Neeley has now had ample opportunity to attempt to cure the defects in his prior pleadings. As Microsoft explains in its pending Motion to Dismiss Mr. Neeley’s Amended Complaint, he has failed to do so in his third attempt as well. *See* Dkt. No. 15. No amendment could cure the defects that both this Court and Microsoft have previously identified, and Mr. Neeley should not be permitted a fourth attempt.

### **CONCLUSION**

For the foregoing reasons, the Court should deny Mr. Neeley’s Motion for Leave to Amend.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Marshall S. Ney, hereby certify that on January 25, 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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