

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

CURTIS J. NEELEY, Jr.

APPELLANT

VS.

CASE NO. 10-2255

NAMEMEDIA, INC.;
NETWORK SOLUTIONS, INC.;
and GOOGLE INC.

APPELLEES

JOINT MOTION TO DISMISS INTERLOCUTORY APPEAL

Separate Appellees NameMedia, Inc. (“NameMedia”), Network Solutions, LLC (“Network Solutions”)¹ and Google Inc. (“Google”) move the Court to dismiss the interlocutory appeal of Appellant Curtis J. Neeley, Jr. (“Neeley”), and state as follows:

I. Introduction

The *pro se* Appellant Neeley has filed an improper interlocutory appeal from two non-final, and therefore non-appealable orders. This improper attempt is the latest chapter in Neeley's piecemeal, stream of consciousness, vexatious litigation the District Court described as "more interested in wreaking revenge on the defendants than obtaining legal redress for any economic injury to himself."

¹ Network Solutions has disputed Neeley's proper identification and service of it as a party-defendant. (*See* Docket #104 & 105).

(*see* Docket # 97 at 17). To be sure, at the time this appeal was filed, Neeley still had four motions pending -- two motions for reconsideration (Docket ## 128 & 130), a motion to file yet another Amended Complaint (Docket # 132) and a Motion for Preliminary Injunction (Docket # 134). Neeley contemptuously refers to the District Court using invective such as "dimwit" (Appellant's Brief at 21), "mental[ly] disable[ed]" (*Id.*), "idiotic" (*Id.*), "demonstrating poor tenor" (*Id.* at 30), "irrational" (*Id.*), "logical[ly] disable[ed]" (*Id.* at 32) and "absurd" (*Id.*). *See also* Appellant's brief at 35- 36 (threatening in the end to file a claim alleging "judicial disability"). As evidenced by the propensity toward diatribe in his brief, Neeley is attempting to broaden a dispute over two domain names and some nude photos (which Neeley himself voluntarily posted on the internet) into a crusade against internet pornography, the internet domain name registration process, and federal copyright law.

Whether Neeley's disregard for the system is based on a severe misunderstanding of law and procedure or disdain and disregard for Appellees and the District Court, his citation to the Bible and Q'uran , his claim that the Copyright Act was an "April Fool's HOAX," and his detailed biographical recitations are not enough to make the District Court's interlocutory rulings ripe for appeal. Under the well-established final judgment rule, interlocutory orders which do not end the

litigation on the merits are not appealable. Although there are exceptions to the rule, none apply to Neeley's appeal; therefore, it must be dismissed.

II. Procedural History

On July 22, 2009, Neeley filed his Complaint in the United States District Court for the Western District of Arkansas against NameMedia (*see* Docket #1). Neeley's original Complaint apparently asserted claims against NameMedia for cybersquatting under 15 U.S.C. §1125. Neeley's current Complaint, which also asserts claims against Google and Network Solutions, purports to contain claims of cybersquatting as well as copyright infringement, trademark infringement, and outrage (*see* Docket #53).

A. The March 1, 2010 Order (Docket # 97)²

On December 4, 2009, NameMedia filed a Motion for Partial Summary Judgment on Neeley's claims, asserting (1) that Neeley's claims of outrage were barred by the applicable limitations period, (2) that Neeley's claims of copyright infringement were not viable due to the absence of any copyright registration, and (3) that Neeley could not recover punitive or emotional distress damages (*see* Docket #19). On February 8, 2010, Google filed a Rule 12(b)(6) Motion to Dismiss Neeley's Complaint as to it, asserting (1) that Neeley's claims of

² A copy of the Order is attached hereto as Exhibit "A."

copyright infringement were not viable due to the absence of any copyright registration, (2) that Neeley failed to state a viable claim under 5 U.S.C. §552(f), and (3) that Neeley failed to state a claim against Google for any Lanham Act violation (*see* Docket #64).

In its Order dated March 1, 2010, the District Court granted NameMedia's Motion for Partial Summary Judgment as to Neeley's claims of outrage and for emotional and punitive damages. As to NameMedia's Motion for Summary Judgment on Neeley's copyright claim, the District Court denied the motion but dismissed the claim without prejudice due to the failure of Neeley to have any present copyright registrations. The Order also granted Google's Motion to Dismiss as to Neeley's claims of copyright infringement, dismissing said claim without prejudice; granted dismissal of Neeley's claims against Google for violation of 5 U.S.C. §552(f); and granted dismissal of Neeley's claim of contributory trademark infringement against Google.

B. The May 20, 2010 Order (Docket #125)³

On March 4, 2010, Neeley filed a Motion for Reconsideration of the rulings against him in the Court's March 1, 2010 Order (*see* Docket #99). Additionally,

³ A copy of the Order is attached hereto as Exhibit "B."

on March 17, 2010, Neeley filed a Motion to File a Third Amended Complaint (*see* Docket #111).

In its Order dated May 20, 2010, the District Court granted in part and denied in part Neeley's Motion for Reconsideration, denying it in all respects except the reinstatement of Neeley's outrage claim to the extent it related to events allegedly occurring as set forth in Paragraph 24 of Neeley's Complaint. The District Court denied Neeley's Motion to File a Third Amended Complaint based upon a number of factors going to the heart of the merits (or, rather lack thereof) of the claims he sought to assert in his amended pleading.

C. The Second May 20, 2010 Order (Docket #126)⁴

On March 11, 2010, Network Solutions filed a timely 12(b)(6) Motion to Dismiss all of Neeley's claims against it (*see* Docket #104). In its Second May 20, 2010 Order, the District Court granted Network Solutions' Motion to Dismiss in its entirety. The Court rejected Neeley's equitable tolling argument and concluded his trademark infringement claims against Network Solutions were barred by the applicable statute of limitations. (Docket #106 at 5). The District Court further rejected Neeley's copyright claims, punitive damage claims and Title 5 claims. (*Id.* at 5-6). The Court further found that Neeley lacked standing to pursue the

⁴ A copy of the Order is attached hereto as Exhibit "C."

injunctive relief he was seeking against Network Solutions. (*Id.* at 7). The District Court thus dismissed all of the claims Neeley asserted against Network Solutions with prejudice, with the exception of his copyright infringement and injunctive relief claims against Network Solutions, which were dismissed without prejudice.

D. Neeley's Appeal

On June 1, 2010, Neeley filed a "Notice of Appeal of Order Docket 97 and Order Docket 126 Dismissal per the Collateral Order Doctrine." (*see* Docket #137). In his appeal brief filed herein⁵, though it is far from clear, Neeley appears to cite the following as points of error from the two Orders: (1) that his failure to register copyrights should not preclude his claims of copyright infringement (*see* Appellant's Brief, pp. 25-30), (2) that his outrage claim is not in any way time-barred (*see Id.*, pp. 28-31), (3) that he should have been allowed to file a Third Amended Complaint (*see Id.*, p. 9), and (4) that Network Solutions should not have been dismissed from the action (*see Id.*). Neeley's brief also includes other content in which he seemingly asks this Court to afford relief which is not the subject of any order of the District Court. In particular, Neeley makes various allusions to

⁵ On July 13, Neeley filed a "Motion Requesting Leave to Pile (sic) an Amended Appellant Brief to Replace the Brief Now Filed." On July 14, the Clerk issued an Order granting this motion. As stated in Neeley's Motion, he posted the "Corrected Appellant Brief" online. The "Corrected Appellant Brief" does not appear to alter the points of error cited by Neeley in his filed Brief.

Network Solutions' Service Agreement which was not referenced by the District Court in any order being appealed. (*Id.*, pp. 5,7).

III. Argument

Congress has vested the Courts of Appeals with "jurisdiction of appeals from all final decisions of the district courts of the United States." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 173 L.E.2d 868 (2009), *quoting* 28 U.S.C. §1291. "A district court's order is a 'final decision' for the purposes of §1291 if it 'ends the litigation on the merits and leaves nothing more for the [district] court to do but execute the judgment.'" *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 618 (8th Cir. 2009), *quoting* *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).

Additionally, under F.R.C.P. 54(b):

[W]hen multiple parties are involved [in an action], the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties...."

See Wagner v. Farmers & Merchants State Bank, 787 F.2d 444, 445 (8th Cir. 1986) ("An order that dismisses fewer than all of the opposing parties is not a final appealable order in the absence of certification under Fed. R. Civ. P. 54(b)...").

In addition, the Eighth Circuit stated in *Auto Servs. Co. v. KPMG, LLP*, 537 F.3d 853 (8th Cir. 2008) that:

For purposes of the Federal Rules of Civil Procedure, "judgment" is defined to "include a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). Thus, "judgment" encompasses both a final judgment and an appealable interlocutory order. "Judgment" does not, however, encompass an order dismissing fewer than all of the opposing parties or claims unless the district court directs the entry of final judgment under Rule 54(b), or expressly indicates that the order is an immediately appealable interlocutory decision under 28 U.S.C. § 1292(b).

Id. at 856. The District Court has directed no entry of final judgment as to any claims or parties in this action.

Neeley's brief fails to set forth any legal basis for appealability of any of the District Court's orders. Though there are certain limited exceptions to the well-established final judgment rule, Neeley fails to set forth which if any of these exceptions he relies upon. His Notice of Appeal filed in the District Court (Docket #136) seemingly indicates that he is relying upon the collateral order exception. However, the only statement in this document approaching an explanation as to how the exception might apply is that his appeal involves issues "too important to the claim that to independent of the permitted defamation claim for an appellate decision to be deferred until the entire case is adjudicated." (Docket #136). In any event, the collateral order exception clearly does not apply here.

The collateral order doctrine allows appeal from a non-final order when the order: (1) conclusively determines the disputed question; (2) resolves an important issue separable from the merits; and (3) would be effectively unreviewable on appeal from a final judgment. *See In re Grand Jury Subpoena Duces Tecum*, 85 F.3d 372, 374 (8th Cir. 1996), (citing *Farmland Indus. v. Frazier-Parrott Commodities*, 806 F.2d 848, 850 (8th Cir. 1986) and *In re National Mortgage Equity Corp.*, 821 F.2d 1422, 1424-25 (9th Cir. 1987)). It is a “narrow exception to the requirement that all appeals under §1291 await final judgment on the merits.” *Lurie v. Blackwell (In re Popkin & Stern)*, 105 F.3d 1248, 1250 (8th Cir. 1997) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981)). In order to satisfy the third requirement, a party, at a minimum, must demonstrate that the interest it seeks to vindicate immediately would be “irretrievably lost” if it had to wait to appeal until after a final judgment. *See Alpine Glass, Inc. v. Ill. Farmers Ins. Co.*, 531 F.3d 679, 685 (8th Cir. 2008), quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872, 114 S.Ct. 1992, 128 L.Ed. 842 (1994).

Neeley provides no justification for invoking this narrow exception, as he cannot satisfy either element (2) or element (4) as to any of his citations of error.

A. Dismissal of Copyright Infringement Claims

The District Court dismissed Neeley's copyright claims without prejudice due to his failure to obtain registrations of any copyrights. This citation of error is clearly not separate from the merits of the claim; it is central to the claim in that the District Court, in dismissing the claim for failure to register, ruled that Neeley did not currently have a viable claim for copyright infringement. Furthermore, it clearly will not be effectively unreviewable on appeal from a final judgment.

B. Dismissal of Outrage Claim Due to Running of Limitations Period

Likewise, the dismissal of Neeley's outrage claim due to the running of the applicable limitations period is not separable from the merits of the claim, nor will it be effectively unreviewable on appeal from final judgment. Courts have continuously held that statute of limitations rulings do not fall within the collateral order exception. *See, e.g., Bell Atlantic-Pennsylvania, Inc. v. Pa. Pub. Util. Comm'n.*, 273 F.3d 337, 345-46 (3rd Cir. 2001); *Ratliff v. DeKalb County*, 62 F.3d 338, 340 (11th Cir. 1995) (citing *Digital Equip. Corp.*, 511 U.S. at 873).

C. Denial of Motion to Amend Complaint

Neither does the denial of Neeley's motion to amend his Complaint fall within the collateral order doctrine. *See, e.g., Kahn v. Chase Manhattan Bank, N.A.*, 91 F.3d 385, 388-89 (2^d Cir. 1996) (holding that doctrine did not apply to

district court's denial of motion to amend complaint since such denial would be reviewable on appeal from a final judgment of the district court); *Tenneco Resins, Inc. v. Reeves Bros., Inc.*, 736 F.2d 1508, 1510 (Fed. Cir. 1984) (same reasoning).

D. Dismissal of Claims Against Network Solutions

In its Order dismissing all claims against Network Solutions, the District Court (1) dismissed all Lanham Act claims against Network Solutions as being time-barred, (2) dismissed all copyright claims against Network Solutions for failure to register, (3) dismissed the Title 5 claim against Network Solutions on the ground that it is not a government agency, and (4) dismissed the claim against Network Solutions for injunctive relief on the ground that Neeley lacks standing to pursue the relief requested. As established above, each of these rulings goes directly to the merits of Neeley's claims and is not susceptible to interlocutory appeal, either explicitly under the Federal Rules of Appellate Procedure or under the collateral order doctrine.

IV. Conclusion

All of Neeley's citations of error are from non-appealable interlocutory orders of the District Court. The District Court has entered no final judgment or certification under F.R.C.P. 54(b). None of the limited exceptions, including the narrow collateral order doctrine, applies to give this Court jurisdiction to consider

the merits of Neeley's appeal. In short, Neeley's premature, piece-meal attempt at appeal is improper. For these reasons, the appeal should be dismissed in its entirety. In the unlikely event the Court allows the appeal to proceed, Appellees deny Neeley has raised any meritorious arguments and they will urge this Court to affirm the District Court's Orders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of July, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send immediate notification of such filing to the following:

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Pursuant to Local Rule 25A, I hereby certify that the original of this document was signed by me, as attorney for Appellee NameMedia, Inc., the party filing this document.

/s/ Brooks C. White
Brooks C. White

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

CURTIS J. NEELEY, JR.

PLAINTIFF

v. Civil No. 09-5151

NAMEMEDIA, INC., NETWORK
SOLUTIONS, INC.; and
GOOGLE, INC.

DEFENDANTS

O R D E R

Now on this 1st day of March, 2010, come on for consideration the following motions:

* **NameMedia's Motion For Partial Summary Judgment** (document #18);

* **plaintiff's Motion Seeking Summary Judgment Against NameMedia Inc. Counterclaim** (document #50);

* **plaintiff's Motion For Interlocutory Summary Judgment Leaving The Damages Question For A Jury Against Separate Defendant NameMedia Inc.** (document #56);

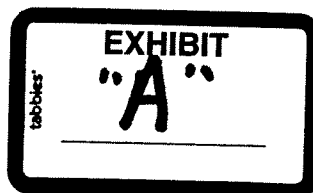
* **plaintiff's Motion For Scheduling Order** (document #57);

* **Google Inc.'s Motion To Dismiss For Failure To State A Claim** (document #63);

* **plaintiff's Motion Seeking Leave To Amend Summons** (document #74); and

* **plaintiff's Motion For A More Definite Statement** (document #84),

and from said motions, and the responses thereto, the Court finds



and orders as follows:

1. In this case, plaintiff Curtis J. Neeley, Jr. ("Neeley"), acting pro se, filed his initial Complaint against NameMedia, Inc. ("NameMedia"), wherein he claims rights in two interstate domain names -- eartheye.com and SleepSpot.com; contends that NameMedia registered and is using these names in bad faith; and alleges that NameMedia is "cybersquatting" in violation of **15 U.S.C. § 1125**. The Complaint seeks compensatory damages for emotional distress, statutory damages, and punitive damages.

(a) In an Addendum to his Complaint, Neeley makes the following further allegations:

* that eartheye.com was first registered for use in commerce on April 17, 1997 (presumably by Neeley himself);

* that his registration of eartheye.com expired on July 2, 2003, while he was hospitalized and incompetent;

* that NameMedia bought the domain name that same day of July 2, 2003;

* that he first complained to NameMedia about the matter at some "indeterminate date between 2003 and 2006," and formally complained on November 29, 2007;

* that he suffered a severe traumatic brain injury as a result of an accident on September 3, 2002, and was adjudged incompetent by the Circuit Court of Washington County, Arkansas, on February 24, 2003;

* that he was placed under guardianship, and remained incapacitated until January 25, 2006, when he regained his legal competency; and finally

* that he used the domain name SleepSpot.com, and that while it "is hardly mentioned in the original complaint," it "illustrates another action of violating trademarks."

(b) On November 24, 2009, Neeley amended his Complaint to add Network Solutions, Inc. ("Network") and Google Inc. ("Google") as defendants.

Also in that amendment Neeley fleshes out his allegation that NameMedia acquired the domain names "primarily for the purpose of selling, renting, licensing, or otherwise transferring the domain name registration" for consideration in excess of its out-of-pocket costs, in violation of **15 U.S.C. § 1125** and **17 U.S.C. § 106**, and alleges that all defendants conspired to cybersquat the two domains and ignored his alleged trademark rights. He further alleges therein that Network violated his copyright and trademark rights by advertising domain expiration dates, and that NameMedia registered and licensed the domains to Google.

Finally, the Amended Complaint alleges that NameMedia is violating Neeley's copyright in several photographs.

(c) The Amended Complaint prays for an order giving Neeley rights to eartheve.com and SleepSpot.com, as well as the internet site photo.net, whereat, he alleges, his copyrighted photographs

are being displayed by NameMedia.

Neeley also seeks injunctive relief preventing Network from advertising expiration dates of domain names, and directing Google to "stop licensing trademark infringing domains when made aware of the claims."

He also seeks compensatory, statutory, and punitive damages.

2. NameMedia answered, and counterclaimed, alleging that Neeley had "typosquatted" by obtaining a domain name, namemedias.com, that is confusingly similar to its own, in violation of **11 U.S.C. § 1125(d)**. NameMedia seeks statutory damages and injunctive relief.

3. Neeley amended his Complaint a third time on January 22, 2010, amplifying his claims of copyright infringement as to his photographs. He alleges that NameMedia and Google are violating his copyright in such photographs, and allowing minors access to his photographs of nudes.

4. In light of the foregoing pleadings, the Court will now first take up the various motions for summary judgment, as mentioned above.

Summary judgment should be granted when the record, viewed in the light most favorable to the nonmoving party, and giving that party the benefit of all reasonable inferences, shows that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Walsh v. United States, 31 F.3d 696

tolled by **A.C.A. § 16-56-116**. That statute provides, in relevant part, that

[i]f any person entitled to bring any action under any law of this state is under twenty-one (21) years of age or insane at the time of the accrual of the cause of action, that person may bring the action within three (3) years next after attaining full age, or within three (3) years next after the disability is removed. . . . When two (2) or more disabilities are existing at the time the right of action or entry accrued, the limitation prescribed shall not attach until all the disabilities are removed.

The Arkansas Supreme Court has explained when a mental infirmity will rise to the level of insanity, so as to trigger this statute:

If the brain has become so affected, irrespective of cause, as to appreciably contravert a person's power to reason, and in consequence the ordinary affairs of life are but dimly reflected on that mirror called mind, it is generally agreed that the impulse to act is not a result of intellectual motivation; hence, the attendant infirmity intervenes and protects one so afflicted from the penalty of conduct in respect of which the power to think and to plan according to accepted formulas is non-existent.

Barre v. Hoffman, 2009 Ark. 373, --- S.W.3d ---, 2009 WL 1810903 (Ark. 2009), quoting **Waggoner v. Atkins, 204 Ark. 264, 271, 162 S.W.2d 55, 58 (1942)**. Neeley bears the burden of proving, by a preponderance of the evidence, that this statute tolls the statute of limitations on his outrage claim. *Id.*

Neeley alleges in his Complaint that he was adjudged legally incompetent on February 24, 2003, and that his competency was restored on January 25, 2006. His Complaint was filed on July 22,

2009. This, on its face, indicates a delay of more than three years in filing suit. Neeley contends, however, that he was still under a disability that made it impossible for him to file, in that he has multiple disabilities.

There is no statutory basis for Neeley's "multiple disabilities" argument. The disabilities that will toll the statute of limitations are specifically listed, and although the last sentence of the statute suggests that a person might have more than two covered disabilities, that is because prior to a 1999 amendment, imprisonment outside the State of Arkansas was listed as a third covered disability. **Shelton v. Fiser, 340 Ark. 89, 8 S.W.3d 557 (Ark. 2000)**. Of the possible bases for tolling pursuant to § 16-56-116, only insanity would possibly apply to Neeley.

Both Neeley and NameMedia assume that Neeley qualified as "insane" during the period of time Neeley was under guardianship, and the Court will accept this assumption, without determining whether it is in fact a necessary one. Neeley's competency was restored on January 25, 2006, giving him a period of three years, until January 26, 2009, to file suit. Neeley contends that he was not competent during this period of time, and offers three affidavits in support of that contention.

Diana M. Hausam ("Hausam") avers, in an Affidavit dated December 18, 2009, that Neeley has "a severe traumatic brain

injury and although he was ruled to be legally competent his memory is still severely reduced." Hausam avers that Neeley "has not been able to act until now due to his severe mental and physical disabilities." Hausam also avers, however, that at some unstated time in the past, Neeley told her that "he was extremely upset by his domain names being stolen but figured they would not be sold till he could act on his own because the thieves were asking about a thousand dollars for them." On balance, the Hausam Affidavit does not support Neeley's tolling theory, but supports instead a conclusion that Neeley knew of his rights and considered them violated, but simply believed he could wait until he was in better shape to do something about it.¹

Neeley also offers a copy of his letter dated January 26, 2009, to Jason Minor at www.BuyDomains.com², in which he explains his legal theories and offers to settle his claims. This letter is dated January 26, 2009, the last day of the three-year period from the time Neeley regained his competence. This letter is evidence that by January 26, 2009, Neeley had thought through his claims and conducted research sufficient to formulate his suit, and that his "power to think and to plan according to accepted formulas" was not "non-existent."

¹The other Affidavits, those of Rachel A. Neeley and Terrie Myers, add little to the analysis, confirming that Neeley has disabilities that require considerable caregiving and that he has a brain injury, but not indicating inability to see to his legal rights.

²Another exhibit offered by plaintiff shows that BuyDomains.com is a wholly-owned subsidiary of NameMedia.

Even when the foregoing evidence is viewed in the light most favorable to Neeley, the Court finds that Neeley has failed to show by a preponderance of the evidence that he suffers from a mental impairment sufficient to trigger the provisions of **A.C.A. § 16-56-116**. NameMedia's motion will, therefore, be granted to the extent it seeks summary judgment on Neeley's claim of outrage.

(ii) The copyright claim:

Neeley does not dispute the contention that his copyright is not registered. Instead, he contends that his failure to register is no impediment to his copyright claim against NameMedia, because his time to register has not expired. From this he reasons that NameMedia is not entitled to summary judgment on the asserted basis that he has not registered his copyright.

The Eighth Circuit has held that while copyright in a work "subsists from its creation," **17 U.S.C. § 302(a)**, a "copyright owner may not sue for infringement under the federal Copyright Act until the owner has delivered the deposit, application, and fee required for registration to the United States Copyright Office. . . ." **Action Tapes, Inc. v. Mattson, 462 F.3d 1010, 1013 (8th Cir. 2006)** (internal quotation marks omitted).

It can be seen, thus, that Neeley cannot currently maintain suit on his copyright claim. That does not mean, however, that he can never maintain it, and the Court finds that summary judgment is not appropriate. Instead, under these circumstances, the Court

concludes that Neeley's copyright claim should be dismissed without prejudice.

(iii) The damages issues:

Neeley does not contend that emotional or punitive damages are recoverable on his Lanham Act and Copyright Act claims, relating such damages instead to his outrage claim. Because the outrage claim is subject to summary judgment, NameMedia is also entitled to summary judgment on Neeley's claims for emotional and punitive damages.

(b) **Neeley's Motion Seeking Summary Judgment Against NameMedia Inc. Counterclaim and Motion For Interlocutory Summary Judgment Leaving The Damages Question For A Jury Against Separate Defendant NameMedia Inc.:**

Neeley contends that he is entitled to summary judgment against NameMedia on various theories, but he has failed to offer any legal authority in support of his arguments, relying mainly on a recitation of various allegations found in his pleadings. Although Neeley is acting pro se, and his pleadings are read broadly, Haines v. Kerner, 404 U.S. 519 (1972), "he is bound, as are all litigants and counsel as well as this court, by the appropriate law and rules of procedure." Smith v. U.S., 369 F.2d 49 (8th cir. 1966).

Under the **Local Rules for the United States District Courts,**

Eastern and Western Districts of Arkansas³, a motion must be accompanied by a brief "consisting of a concise statement of relevant facts and applicable law." **Local Rule 7.2(a)**. While this rule may impose hardships on a pro se litigant, it would clearly be unfair to the defendants if the Court were to do Neeley's legal research or make his arguments for him. The Court will not do so, and these motions will be denied.

5. Neeley's **Motion For Scheduling Order**:

Neeley seeks an order requiring the parties' 26(f) conference to be held in person, rather than telephonically. Neeley notes that he is unable to use a telephone and take notes at the same time, due to injuries to his arm. He also states that he "can attend a pretrial conference and will file a separate 26(f) report."

It is common practice for litigants to conduct the 26(f) conference by telephone, and the Court is not persuaded that such is impossible in this case. Use of a speakerphone will accommodate Neeley's concerns, and if he does not otherwise have access to one, he is welcome to use a speakerphone in the Court's chambers to accommodate his physical condition during such a conference. Further, the Court will require a joint report of the conference, signed by all parties. This motion will, therefore, be denied.

³Available on the Court's website, www.arwd.uscourts.gov.

6. **Google Inc.'s Motion To Dismiss For Failure To State A Claim:**

(a) Google contends that Neeley fails to state a claim of copyright infringement because he has not registered his copyright. Neeley here takes a definitive stand -- stating that he "will never register a copyright," and that he will not need to do so when "copyright is recognized as a fundamental right not granted by any law."

For the reasons set forth in ¶4(a)(ii), *supra*, the Court finds that, in the absence of proper copyright registration, Neeley's copyright claim against Google must be dismissed without prejudice.

(b) Google also contends that, because it is not a government agency, it is not subject to Title 5 of the United States Code, citing **5 U.S.C. § 552(f)**. Neeley makes no cogent response to this argument, and the Court finds it has merit. This claim will be dismissed with prejudice.

(c) Finally, Google contends that, to the extent Neeley's pleadings can be read to assert a trademark infringement claim against it, that claim must fail because there is no allegation that Google has used any of Neeley's alleged trademarks in any way, the allegations being made as against NameMedia but not Google.

Neeley counters that he has sufficiently alleged contributory

infringement of trademark as against Google. He points out that his pleadings allege that all defendants conspired to cybersquat the two domains and ignored his alleged trademark rights, and that NameMedia registered and licensed the domains to Google.

The Court also notes that part of the relief Neeley seeks as against Google is an order directing Google to "stop licensing trademark infringing domains when made aware of the claims."

Neeley directs the Court to a website, secondarytrademarkinfringement.com, where the Court found an article citing Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 854 (1982). In Inwood, the Supreme Court held that

[e]ven if a manufacturer does not directly control others in the chain of distribution, it can be held responsible for their infringing activities under certain circumstances. Thus, if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorially responsible for any harm done as a result of the deceit.

This holding, it can be seen, imposes vicarious liability on one at the top of a product distribution chain for the conduct of those below it in the chain, and might be useful if Neeley sought to impose liability on NameMedia. As explained in Georgia-Pacific Consumer Product LP v. Myers Supply, Inc., 2009 WL 2192721 (W.D.Ark. 2009), to show contributory infringement, a plaintiff

must show that the defendant "either (1) intentionally induced a primary infringer to infringe, or (2) continued to supply an infringing product to an infringer with knowledge that the infringer is mislabeling the particular product supplied."

In this case, however, Neeley seeks to impose liability upon a downstream user (Google) for the conduct of an upstream distributor (NameMedia). This is not authorized under Inwood.

In Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980 (9th Cir. 1999), the Ninth Circuit examined the Inwood's contributory trademark infringement doctrine in the context of internet domain names, finding that "[d]irect control and monitoring of the instrumentality used by a third party to infringe the plaintiff's mark permits the expansion of *Inwood Lab's* 'supplies a product' requirement for contributory infringement." As in Inwood, the liability fell on an upstream supplier, rather than on a downstream user.

The Inwood holding is, as the Supreme Court has said, a narrow one, Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 439 fn 19 (1984). Neeley offers no cogent reason for this Court to expand it to fit his fact pattern, and the Court declines to do so.

For the foregoing reasons, the Court finds that Google's motion should be granted, insofar as it pertains to any theory of contributory trademark infringement. The motion will be denied,

however, insofar as Neeley alleges that Google conspired with the other defendants to infringe his trademark.

7. Neeley's **Motion Seeking Leave To Amend Summons:**

By this motion, Neeley says he "ask the Court grant leave to amend the Second Amended Complaint to act as the Summons served Defendant Network Solutions Inc. . . ."

The procedures for obtaining and serving summons are set forth in applicable procedural rules with considerable specificity, and must be followed scrupulously in order to afford due process. To the extent the Court understands this motion, there is no authority for it, and it will be denied.

8. Neeley's **Motion For A More Definite Statement:**

In this motion, Neeley contends that there are "misquotes or presentations of improper understandings of an email" and asks the Court to "direct the Defendant to make a more definite statement specifically of the statements outlined in the supporting statement. . . ."

Under **F.R.C.P. 12(e)**, a motion for more definite statement may be used to gain more specificity on a statement that is vague or ambiguous. It is not the proper vehicle to resolve disputed issues of fact, which must be resolved either on summary judgment or by the trier of fact at trial. This motion will, therefore, be denied.

9. In responding to the motion discussed in paragraph 8,

above, NameMedia contends that Neeley personally attacks it and its attorney, in violation of **F.R.C.P. 11(b)**, and asks the Court to issue a "show cause" order pursuant to **F.R.C.P. 11(c)(3)**.

The Court agrees with NameMedia that Neeley's brief is improper. In it, Neeley accuses NameMedia and its former counsel of lying to the Court in terms such as the following:

* "The Defendant Counsel . . . who is no longer the attorney of record lies in this section blatantly. . . ."

* "Defendant states a completely fabricated lie in the response to the undisputed facts of Docket #77 ¶# 15 and Plaintiff asks for a more definitive statement of the lie."

* "Plaintiff would like the lie to be more concisely described as it may describe a felony crime instead of just a quasi-crime."

* "Plaintiff is saddened to see [defense counsel] very obviously attempt to deceive the Court while teaching lawyers to do the same outrageous act. The actions of [defense counsel] are simply lies of a noted lawyer."

F.R.C.P. 11(b) provides that

[b]y presenting to the court a pleading, written motion, or other paper -- whether by signing, filing, submitting, or later advocating it -- an attorney or unrepresented party certifies that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances . . . it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

The Court has little doubt that Neeley is making these accusations about lying with an improper purpose, because it is clear from the context of his motion that he is exaggerating the situation. For example, Neeley accuses NameMedia's attorney of lying when the attorney writes "Plaintiff has stated he will not obey any order of this Court that will require him to cease [use of <NameMedias.com>]." Neeley attempts to demonstrate that this is untrue by quoting himself as saying "If a JURY joins NAMEMEDIA INC and say I can't use NAME MEDIAS.com for a First Amendment use, I will not obey any court demand to cease."

Without commenting on the substance of Neeley's statement, the Court observes that NameMedia's attorney's characterization of it does not appear to be a distortion -- and certainly cannot said to be false.

In addition, as noted in ¶8, *supra*, it will be the task of a jury to determine what facts are true if and when this matter proceeds to trial. It is not a proper purpose of pleadings to attempt to establish truth -- accordingly, the Court concludes that Neeley is making these accusations for an improper purpose, in violation of **F.R.C.P. 11**. While it is not necessary to determine what that improper purpose is, the Court notes that the overall tenor of Neeley's submissions indicate that he is more interested in wreaking revenge on the defendants than obtaining legal redress for any economic injury to himself. Given that

Neeley cannot obtain punitive damages on his viable claims, this is clearly an improper purpose.

Because Neeley is acting pro se, the Court will give him the benefit of the doubt that he did not previously understand the foregoing concepts. Thus the Court will, not, at this time, take any action on the matter -- other than to put Neeley on notice that no further conduct of this nature will be tolerated.

The truth about what happened in the matters now in litigation will be decided by the finder of fact at the proper time. This effort will not be aided or advanced by claims of untruthfulness in the pleadings and the Court will not tolerate further assertions of that nature. Should any further pleadings, motions, or briefs be filed which contain accusations such as those here under consideration, they will be stricken from the record, and a show cause order will issue forthwith.

IT IS THEREFORE ORDERED that **NameMedia's Motion For Partial Summary Judgment** (document #18) is **granted in part and denied in part**.

The motion is **granted** to the extent it seeks summary judgment in favor of NameMedia on Neeley's claims of outrage and his claims for emotional damages and punitive damages on his copyright claim, and those claims are **dismissed with prejudice**.

The motion is **denied** to the extent it seeks summary judgment in favor of NameMedia on Neeley's copyright claim, but for reasons

stated herein, that claim is **dismissed without prejudice**.

IT IS FURTHER ORDERED that plaintiff's **Motion Seeking Summary Judgment Against NameMedia Inc. Counterclaim** (document #50) is **denied**.

IT IS FURTHER ORDERED that plaintiff's **Motion For Interlocutory Summary Judgment Leaving The Damages Question For A Jury Against Separate Defendant NameMedia Inc.** (document #56) is **denied**.

IT IS FURTHER ORDERED that plaintiff's **Motion For Scheduling Order** (document #57) is **denied**.

IT IS FURTHER ORDERED that **Google Inc.'s Motion To Dismiss For Failure To State A Claim** (document #63) is **granted in part and denied in part**.

The motion is **granted** to the extent it seeks dismissal of Neeley's copyright claim, and that claim is **dismissed without prejudice**.

The motion is also **granted** to the extent it seeks dismissal of Neeley's claim pursuant to **5 U.S.C. § 552(f)**, and that claim is **dismissed with prejudice**.

The motion is also **granted** to the extent it seeks dismissal of Neeley's claim of contributory trademark infringement, and that claim is **dismissed without prejudice**.

The motion is **denied** to the extent it seeks dismissal of

Neeley's claim that Google conspired with the other defendants to infringe his trademark.

IT IS FURTHER ORDERED that plaintiff's **Motion Seeking Leave To Amend Summons** (document #74) is **denied**.

IT IS FURTHER ORDERED that plaintiff's **Motion For A More Definite Statement** (document #84) is **denied**.

IT IS SO ORDERED.

/s/ Jimm Larry Hendren
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE

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

CURTIS J. NEELEY, JR.

PLAINTIFF

v.

Civil No. 09-5151

NAMEMEDIA, INC., NETWORK
SOLUTIONS, INC.; and
GOOGLE, INC.

DEFENDANTS

O R D E R

Now on this 20th day of May, 2010, come on for consideration the following:

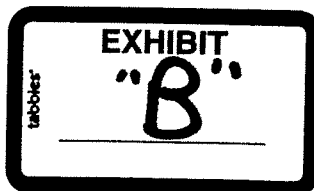
* plaintiff's **Motion Requesting Reconsideration Of Order Docket #97 And Requesting Leave To File Third Amended And Replaced Complaint** (docket entry #99);

* **Google Inc.'s Cross Motion For Reconsideration** (docket entry #107); and

* plaintiff's **Motion Requesting Leave To File Third Amended Replacement Complaint** (docket entry #111),

and from said motions, and the responses thereto, the Court finds and orders as follows:

1. Plaintiff Curtis J. Neeley, Jr. ("Neeley"), alleges trademark rights in two internet domain names, eartheye.com and sleepspot.com. He contends in this lawsuit that Network Solutions, Inc. ("Network") violated his trademark rights by advertising the domain registration expiration dates. He contends that NameMedia, Inc. ("NameMedia") registered these domain names



in bad faith, and licensed them to Google, Inc. ("Google"). All these actions are said to violate the anti-cybersquatting provisions of **15 U.S.C. § 1125(d)**. Neely further alleges that the defendants "conspired to cybersquat" his domains.

Other claims asserted by Neeley were dismissed by Order dated March 1, 2010.

2. Neeley moves the Court to reconsider its rulings dismissing some of his claims because they are time-barred. He contends that the Court misinterpreted **A.C.A. § 16-56-116**, which sets out the circumstances wherein statutes of limitations are tolled; that his outrage claim is timely because it includes conduct that has occurred since he filed suit; that his copyright claim should be treated as a claim of outrage under state law; and that the motion to dismiss should be reconsidered in light of Vulcan Golf, LLC v. Google, Inc.

(a) Neeley's first contention is that the Court should "re-interpret" **A.C.A. § 16-56-116** "in the light most favorable to the Plaintiff, and giving the Plaintiff the benefit of all reasonable processes of logical conclusions" Neeley appears to conflate the standard used to evaluate motions for summary judgment with the standard used to construe statutes. The two are not identical.

As the Eighth Circuit has explained, the goal of statutory analysis is to give effect to the intent behind enactment of the

statute. If the language of the statute, reading all parts together and giving full effect to each part, is plain and unambiguous, the analysis ends and the Court applies the plain meaning. Only if there is an ambiguity does the Court delve into legislative history or other authorities to determine legislative intent. **Estate of Farnam v. C.I.R., 583 F.3d 581, 584 (8th Cir. 2009)** .

The only ambiguity in the statute at issue here arises from the fact that it lists only two applicable disabilities, but contains a provision for "when two or more disabilities exist." The Court specifically addressed this ambiguity in its Order dated March 1, 2010, and found it did not inure to Neeley's benefit. Neeley offers neither factual nor legal argument that persuades the Court now to the contrary, and reconsideration on this basis will be denied.

(b) Neeley also suggests that the Court reconsider its dismissal of his outrage claim, because it includes conduct that has occurred since he filed suit. He refers to his allegations in docket entry #53, at ¶24, to the effect that NameMedia and Google have conspired to allow, and are currently allowing, minors access to nude photographs taken by Neeley, while contending that such access was allowed by Neeley himself. The Court has reconsidered this issue, and finds that Neeley's claim of outrage on the basis of the factual allegations made in docket entry #53, at ¶24, are

not time-barred.

(c) Neeley further contends that the Court should reconsider dismissal of his copyright claim, and treat it as a claim of outrage under state law. Most of his argument on this point goes to the issue addressed in subparagraph (b), *supra*. To the extent it covers different conduct, the Court finds no basis to reconsider its previous Order.

(d) Finally, Neeley contends that the Court should reconsider its March 1, 2010, Order in light of Vulcan Golf, LLC v. Google, Inc. No citation is given for this case, but it appears to be a reference to Vulcan Golf, LLC v. Google Inc., 552 F.Supp.2d 752 (N.D. Ill. 2008).¹ The Court is unable to follow Neeley's argument relating to Vulcan Golf. It appears to deal with forum shopping, but Neeley, as the person who selected the forum, is in no position to contend that the defendants engaged in forum shopping. The Court finds no basis to reconsider on this point.

3. Google also moves the Court to reconsider its Order of March 1, 2010. Google contends that "the tort of conspiracy to cybersquat does not exist" and that liability is expressly limited

¹It may be that Neeley desires the Court to read some intermediate order of the trial court in the Vulcan Golf case, as he offers a citation to PACER, the federal courts' public access site. He also cites to a website he apparently maintains himself. These sources are not precedential, and their bearing on the issues before this Court is so vaguely drawn that the Court declines to consult them. Even pro se parties are expected to point out the facts and law specifically applicable to the issues in the case at bar, rather than generally allege that the same issues have come up in another case and that the Court should look to that case for guidance.

to actual cybersquatters under **15 U.S.C. § 1125(d)**.

The statute in question provides that

[a] person shall be liable in a civil action by the owner of a mark . . . if, without regard to the goods or services of the parties, that person (i) has a bad faith intent to profit from that mark . . .; and (ii) registers, traffics in, or uses a domain name that--(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark; . . .

The statute goes on to provide that "[a] person shall be liable for using a domain name under subparagraph (A) only if that person is the domain name registrant or that registrant's authorized licensee." **15 U.S.C. § 1125(d)(1)(D)**. "Using" is only one way of violating **§ 1125(d)**, however. It can also be violated by registering and by trafficking in the domain name.

Under Arkansas law, civil conspiracy is

a combination of two or more persons to accomplish a purpose that is unlawful or oppressive or to accomplish some purpose, not in itself unlawful, oppressive, or immoral, by unlawful, oppressive or immoral means, to the injury of another. Such a conspiracy is not actionable in and of itself, but recovery may be had for damages caused by acts committed pursuant to the conspiracy.

Mason v. Funderburk, 247 Ark. 521, 529, 446 S.W.2d 543, 548 (1969).

The Court is not persuaded that there is any incompatibility between **§ 1125(d)** and the Arkansas law of civil conspiracy, and therefore Google's motion will be denied.

4. Neeley seeks leave to amend his Complaint, and to

substitute the amendment for all his previous pleadings. He attaches to his motion a document entitled "Complaint For Outrageous Torts Including Trademark, Copyright, And Privacy Violations Resulting In Several Intentional Defamations And Other Torts."

The Eighth Circuit takes a liberal approach to the amendment of pleadings, as does **F.R.C.P. 15**. Leave to amend must be granted except in the following circumstances:

- * where the amendment will result in prejudicial delay or other undue prejudice;
- * where it stems from bad faith or dilatory motive;
- * where it comes in the face of "repeated failure to cure deficiencies by amendments previously allowed"; or
- * where it would be futile.

Dennis v. Dillard Department Stores, Inc., 207 F.3d 523, 525 (8th Cir. 2000).

In the case at bar, the Court notes that since this matter was filed on July 22, 2009, Neeley has fleshed out his initial Complaint by Magistrate's Addendum, and amended it two more times. He moved to amend a third time but later withdrew that motion. Despite all this activity, the essential claims have not changed from those outlined in ¶1 of this Order. The Court concludes that, to the extent there are deficiencies in Neeley's pleadings, he has repeatedly failed to cure them.

The Court also notes that over nine months have passed since this case was commenced, without yet reaching the procedural point where the parties can be directed to conduct a 26(f) conference and commence discovery. The 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.

Finally, the text of the proposed amendment indicates that it would be futile, in that its claims -- insofar as they differ from those now before the Court -- would be subject to summary dismissal:

(a) Some six pages are devoted to alleging claims for intentional infliction of emotional distress, or the tort of outrage, an Arkansas state law claim which requires proof of (i) conduct so extreme and outrageous as to be "beyond all possible bounds of decency, and utterly intolerable in a civilized society," and (ii) distress "so severe that no reasonable person could be expected to endure it." Key v. Coryell, 86 Ark. App. 334, 343, 185 S.W.3d 98, 105 (Ark. App. 2004).

Neeley alleges that NameMedia committed the tort of outrage by "reminding" him and repeatedly "making him aware" of its alleged cybersquatting; deleting a posting and revising the "terms of use" of a domain; excluding an "attribution" to Neeley on the internet which resulted in excluding his photographs; and displaying nude photos taken by Neeley on a website to which minors had access.

He alleges that Network committed the tort of outrage by attempting to make him believe that it was required to advertise the expiration of domain names.

He alleges that Google committed the tort of outrage by asking him for more information before investigating his complaints.

Finally, Neeley contends that "[s]everal actions subject the Plaintiff and his father to public defamation in violation of A.C.A. § 16-63-207 regarding libel and slander," but he does not give any factual clue to his meaning.

A complaint for outrage consisting of only the above allegations² would not survive a motion to dismiss for failure to state a claim, and it would be futile to allow an amendment to state them.

(b) The next five or so pages are devoted to allegations

²The Court here excepts the allegation about displaying nude photos taken by Neeley on a website to which minors had access, which is already pled and will be allowed, as set forth in ¶2(b), *supra*.

relating to trademark violations. The "allegations" vis a vis Network are not really allegations, so much as offers to negotiate. These have no place in a pleading, and it would be futile to allow an amendment to state them.

The allegations vis a vis NameMedia are to the effect that all conduct of NameMedia is time-barred. The same can be said for the allegations as against Google, which also contain a long recitation of how Google allegedly cybersquats its own domains. It would be futile to allow an amendment to state these allegations.

The allegations which relate to the potential new defendants are either speculative, or they state directly that these defendants have "absolutely no trademark exposure."

None of these allegations would survive a motion to dismiss for failure to state a claim, and it would be futile to allow an amendment to state them.

(c) The next 5 pages are devoted to allegations regarding copyright. Given that Neeley refuses to register his copyright, there would be no purpose served by allowing any amendment to allege copyright violations.

(d) The document concludes with a section entitled "Other Generally Outrageous Acts." This is a generalized statement about pornography and the ease with which it can be accessed by children on the internet, not an allegation of specific wrongdoing by a

defendant. It would be futile to allow an amendment to make these allegations.

When the Court considers the Dennis factors, it concludes that the proposed amendment should not be allowed, and that this case should go forward on the basis of the Complaint and the amendments thereto which have already been filed.

IT IS THEREFORE ORDERED that plaintiff's **Motion Requesting Reconsideration Of Order Docket #97 And Requesting Leave To File Third Amended And Replaced Complaint** (docket entry #99) is **granted in part and denied in part.**

The motion is **granted** insofar as it requests reconsideration of Neeley's claims that NameMedia and Google have conspired to allow, and are currently allowing, minors access to nude photographs taken by Neeley, while contending that such access was allowed by Neeley himself. The Court has reconsidered this issue, and finds that Neeley's claims of outrage on the basis of these factual allegations, as made in docket entry #53, at ¶24, are not time-barred.

The motion is **denied** in all other respects.

IT IS FURTHER ORDERED that **Google Inc.'s Cross Motion For Reconsideration** (docket entry #107) is **denied.**

IT IS FURTHER ORDERED that plaintiff's **Motion Requesting Leave To File Third Amended Replacement Complaint** (docket entry

#111) is **denied**.

IT IS SO ORDERED.

 /s/ Jimm Larry Hendren
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE

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

CURTIS J. NEELEY, JR.

PLAINTIFF

v. Civil No. 09-5151

NAMEMEDIA, INC., NETWORK
SOLUTIONS, INC.; and
GOOGLE, INC.

DEFENDANTS

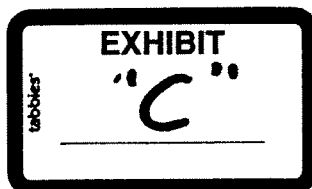
O R D E R

Now on this 20th day of May, 2010, comes on for consideration the **Motion To Dismiss** of defendant Network Solutions, Inc. (document #104), and from said motion, and the response thereto, the Court finds and orders as follows:

1. In this case, plaintiff Curtis J. Neeley, Jr. ("Neeley") alleges that Network Solutions, Inc. ("Network") violated his trademark rights by advertising the domain registration expiration dates for two domain names once owned by him. He also contends that NameMedia, Inc. ("NameMedia") registered these domain names in bad faith, and licensed them to Google, Inc. ("Google"). All these actions are said to violate the anti-cybersquatting provisions of **15 U.S.C. § 1125(d)**.

Neeley further alleges that the defendants "conspired to cybersquat" his domains, and that Network violated his copyright and trademark rights by advertising domain expiration dates.

Neeley also seeks injunctive relief preventing Network from advertising the expiration dates of domain names, and directing Google to "stop licensing trademark infringing domains when made



aware of the claims."

2. Network makes the following arguments for dismissal:

* that Neeley's claim it advertised the expiration dates of the domain names at issue herein is barred by the statute of limitations;

* that Neeley's copyright claims against it are subject to dismissal by reason of Neeley's failure to register his copyright;

* that punitive damages are not available for Neeley's trademark or copyright claims;

* that Neeley's claims under Title 5 must fail because Network is not a government agency;

* that Neeley lacks standing to object to Network's business practices except to the extent those practices affect the two domain names here in issue;

* that Neeley's trademark claims lack factual or legal basis; and

* that as a mere registrar of domain names, Network is not liable for trademark violations.

3. In response, Neeley contends that he is entitled to the benefit of equitable tolling of the statute of limitations, in that he did not know, nor could he have known -- before October 18, 2009 -- who the domain registrar in this case was.

4. Federal trademark law, embodied in the Lanham Act, does not prescribe a statute of limitations, so courts look to the

local statute which bears the closest resemblance to the Lanham Act and apply the statute of limitations contained in that statute. **Axcan Scandipharm Inc. v. Ethex Corp., 585 F.Supp.2d 1067, 1077 (D. Minn., 2007).**

Arkansas has a body of statutory trademark law (see **A.C.A. § 4-71-201 et seq.**), but like the Lanham Act it does not contain a statute of limitations. The Court, thus, turns to the general statute of limitations under Arkansas law, which places a three-year statute of limitations on actions involving the taking of goods or chattels. **A.C.A. § 16-56-105.**

Neeley does not dispute that a three-year statute of limitations applies, but contends that the statute of limitations should be equitably tolled as against Network. As explained by the Eighth Circuit,

[t]he doctrine of equitable tolling permits a plaintiff to sue after the statutory time period has expired if he has been prevented from doing so due to inequitable circumstances. Because statutes of limitations protect important interests of certainty, accuracy, and repose, equitable tolling is an exception to the rule, and should therefore be used only in exceptional circumstances.

Firstcom, Inc. v. Qwest Corp., 555 F.3d 669, 675 (8th Cir. 2009)

(internal citations and quotation marks omitted).

Under Eighth Circuit precedent "a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some

extraordinary circumstance stood in his way'." **Burns v. Prudden**, **588 F.3d 1148, 1150 (8th Cir. 2009)**. Equitable tolling requires that the plaintiff have acted reasonably and in good faith, and that despite due diligence he was "unable to obtain vital information bearing on the existence of [the] claim." **Sandoval v. American Bldg. Maintenance Industries, Inc.**, **578 F.3d 787, 792 (8th Cir. 2009)**.

The factual showing of Neeley on this issue is that he made inquiry of an internet group he had joined in July, 2009, for information about the registrar of the domain names. By a post dated October 18, 2009, he asked for help in determining "when I first registered eartheye.com and who was the registrar I once used?" Neeley indicated that he wanted the information because "[t]he judge asked,"¹ and that if it was publicly accessible information, "I know this is the group that would know."

Neeley received a response the same day, informing him that Network was the registrar he had used, and that the registration expired on April 18, 2003. This prompt response, from a group of which Neeley was a member and which he knew would have the information, indicates that he could have obtained the information about Network in a more timely manner. In addition, the Court

¹It appears Neeley made this inquiry in response to the Order of Magistrate Judge James Marschewski that Neeley complete an Addendum and return it to assist in the determination of whether the Complaint should be served, a common procedure with Complaints filed *in forma pauperis*.

notes that Arkansas law provides for filing a complaint against an unknown tortfeasor as a "John Doe" defendant, thereby tolling the statute of limitations. **A.C.A. § 16-56-125.** Neeley could have availed himself of this statute to sue an unknown domain registrar in a timely fashion.

Under these circumstances, the Court is not persuaded that equitable tolling should apply to Neeley's claims against Network. Neeley's claim of trademark infringement against Network arose on April 18, 2003, and was not asserted until his Amended Complaint was filed on November 24, 2009. The Court has already determined, for reasons set forth in its Order dated March 1, 2010, that Neeley's mental competency -- which he lost temporarily due to an accident -- was restored on January 25, 2006, giving him until January 26, 2009, to file suit. He did not file his trademark infringement claim against Network in that period of time, and it is now time-barred. It will be dismissed with prejudice for that reason.

5. Network also contends that Neeley's copyright claims against him are subject to dismissal by reason of Neeley's failure to register his copyright. For reasons set forth in the Court's March 1, 2010, Order, this argument has merit, and Neeley's copyright infringement claim against Network will be dismissed without prejudice.

6. Network contends that punitive damages are not available

for Neeley's trademark or copyright claims. Because those claims are subject to dismissal, the Court need not address this argument.

7. Network contends that Neeley's claim under Title 5 fails because Network is not a government agency. Neeley makes no response to this contention, and the Court finds it has merit. This claim will be dismissed with prejudice.

8. Network contends that Neeley lacks standing to object to its business practices except to the extent those practices affect the two domain names here in issue. This contention goes to Neeley's prayer for injunctive relief preventing Network from advertising expiration dates of domain names.

The Supreme Court has outlined the requirements of standing as follows:

the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical'." Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)

(internal citations omitted).

Even when Neeley's Complaint, with all amendments, is read

broadly,² it contains no sufficient allegation of an actual or imminent invasion of his rights. The gravamen of his Complaint against Network is the advertising of the expiration dates of the two domain names, an act which is past and completed. Given the unusual circumstances that led to Neeley being unaware of the expiration of the registrations for his domain names, it is exceedingly unlikely that it will ever recur, and thus any benefit to Neeley by the injunctive relief he seeks could be nothing more than speculative. He thus lacks standing to pursue this type of relief, and his claim for injunctive relief will be dismissed without prejudice.

9. Finally, Network contends that Neeley's trademark claims lack factual or legal basis, and that as a mere registrar of domain names, Network is not liable for trademark violations. Given that the trademark infringement claim is barred by the statute of limitations, the Court need not address this argument.

IT IS THEREFORE ORDERED that the **Motion To Dismiss** of defendant Network Solutions, Inc. (document #104) is **granted**.

IT IS FURTHER ORDERED that Neeley's claim of trademark infringement and any claim asserted under Title 5 against Network Solutions, Inc., are hereby **dismissed with prejudice**.

²In evaluating a motion to dismiss, the Court views the complaint in the light most favorable to the plaintiff, Krentz v. Robertson Fire Protection District, 228 F.3d 897, 905 (8th Cir. 2000), dismissing only if the plaintiff fails to assert facts that affirmatively and plausibly suggest that he has the right he claims, as opposed to asserting facts that are merely consistent with such right, Gregory v. Dillard's, Inc., 565 F.3d 464, 473 (8th Cir. 2009).

IT IS FURTHER ORDERED that Neeley's claim of copyright infringement and his claim for injunctive relief against Network Solutions, Inc., are hereby **dismissed without prejudice**.

IT IS SO ORDERED.

 /s/ Jimm Larry Hendren
JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE