

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

CURTIS J. NEELEY, Jr.

PLAINTIFF

VS.

CASE NO. 5:09-cv-05151-JLH

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

DEFENDANTS

**NAMEMEDIA'S STATEMENT OF DISPUTED MATERIAL FACTS
IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AS TO NAMEMEDIA'S COUNTERCLAIM**

I. NameMedia's Statement of Disputed Material Facts.

1. A genuine issue of material fact exists as to whether Plaintiff acted with a bad faith intent to profit. While Plaintiff claims he did not act with bad faith intent, this bad faith intent is evidenced by the following undisputed facts:

(a) NameMedia, Inc. ("NameMedia") on April 12, 2006 applied for, and on January 27, 2009 obtained a federal registration for its distinctive trademark.

(b) NameMedia also operates the website <NAMEMEDIA.com>.

(c) On October 15, 2009, Plaintiff registered the domain <NAMEMEDIAs.com>.

(d) The only difference between NameMedia's and Plaintiff's domain names is the letter "s."

(e) Plaintiff has no trademark or other intellectual property rights in the mark "NAMEMEDIA."

(f) The domain name <NAMEMEDIAs.com> does not consist of Plaintiff's legal name or a name commonly used to identify Plaintiff.

(g) Plaintiff has no prior use of <NAMEMEDIAs.com> in connection with the bona fide offering of any goods or services.

(h) Plaintiff directly solicits donations at <NAMEMEDIAs.com>.

(i) Plaintiff also advertises a link to his other website, <curtisneeley.com>, where Plaintiff offers his photographs for sale.

(j) The first sentence at <NAMEMEDIAs.com> shows that Plaintiff anticipates customer confusion.

(k) Plaintiff includes numerous references and links to NameMedia at <NAMEMEDIAs.com>.

(l) As a result, a Google search for "NAMEMEDIA" produces <NAMEMEDIAs.com> as the fourth highest result.

(m) Plaintiff boasts of his ability to manipulate search engines to produce the high ranking of <NAMEMEDIAs.com> in the results of search engines.

(n) In writing, Plaintiff has demanded between \$30 million and \$100 million to transfer his registration of the <NAMEMEDIAs.COM > domain name to NameMedia, stating: "This could be over for something between thirty million and 100 million. I would even give you <NAMEMEDIAS.COM>. . . I would agree to never discuss domain names again."

(o) In writing, Plaintiff has stated that \$100 million will allow NameMedia to silence his outrage.

(p) In writing, Plaintiff has stated he will not obey any order of this Court that will require him to cease use of <NAMEMEDIA.com>.

(q) In writing, Plaintiff has stated his intent is to destroy NameMedia's business and put NameMedia employees in jail.

2. A genuine issue of material fact exists as to whether Plaintiff acted at least partially in bad faith. While Plaintiff claims he did not act at least partially in bad faith, partial bad faith is evidenced by the undisputed facts stated above.

II. NameMedia's Response to Plaintiff's Statement of Facts

The above represents NameMedia's statement of material facts that remain in dispute regarding NameMedia's counterclaim. However, Plaintiff has submitted a laundry list of "undisputed facts" that are entirely irrelevant to the issue of Plaintiff's bad faith intent to profit. NameMedia responds to these "facts" as follows:

1. Plaintiff's stated facts in Docket # 52, ¶ 1, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states it is without knowledge or information sufficient to form a belief as to the truth of the facts proffered in this paragraph 1. These facts are denied and remain in dispute.
2. Plaintiff's stated facts in Docket # 52, ¶ 2, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia agrees that Plaintiff registered <sleepspot.com> domain name on July 30, 1999. NameMedia states it is without knowledge or information sufficient to form a belief as to the truth of the remaining facts proffered in this paragraph 2. These facts are denied and remain in dispute.

3. Plaintiff's stated facts in Docket # 52, ¶ 3, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states it is without knowledge or information sufficient to form a belief as to the truth of the facts proffered in this paragraph 3. These facts are denied and remain in dispute.
4. Plaintiff's stated facts in Docket # 52, ¶ 4, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states it is without knowledge or information sufficient to form a belief as to the truth of the facts proffered in this paragraph 4. These facts are denied and remain in dispute.
5. Plaintiff's stated facts in Docket # 52, ¶ 5, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states it disputes that any diagnosis by Dr. Matinchev established Plaintiff as legally incompetent. The issue of whether Plaintiff is or ever was legally incompetent remains in dispute.
6. Plaintiff's stated facts in Docket # 52, ¶ 6, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states it is without knowledge or information sufficient to form a belief as to the truth of the facts proffered in this paragraph 6. These facts are denied and remain in dispute.
7. Plaintiff's stated facts in Docket # 52, ¶ 7, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states that Plaintiff did not have a copyright or trademark in any domain name. NameMedia states that sixty-eight (68) days after Plaintiff, the previous registrant of the <eartheye.com> domain name registration allowed its registration of the <eartheye.com> domain name to expire on April 25, 2003, NameMedia, by its wholly-owned subsidiary, RareNames, Inc., the successor-in-interest to RareNames, WebReg, created a new <eartheye.com> domain name registration with the registrar Communigal d/b/a Galcomm on July 2, 2003, without

notice of any competing proprietary interests of any kind therein. During the intervening sixty-eight (68) days, the <eartheye.com> domain name registration could have been registered by any member of the consuming public, including Plaintiff or Plaintiff's representatives. When NameMedia acquired the <eartheye.com> domain name registration, it was freely available for any member of the consuming public including Plaintiff or Plaintiff's representatives, to register. Upon NameMedia's acquisition of the <eartheye.com> domain name registration, results for queries on "earth eye" and "eartheye" revealed zero active registrations or pending applications for an "earth eye" or "eartheye" trademark at the United States Patent & Trademark Office. NameMedia states it is without knowledge or information sufficient to form a belief as to the truth of the remaining facts proffered in this paragraph 7. These facts are denied and remain in dispute.

8. Plaintiff's stated facts in Docket # 52, ¶ 8, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). See Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states that Plaintiff did not have a copyright or trademark in any domain name. NameMedia states that seventy (70) days after Plaintiff, the previous registrant of the <sleepspot.com> domain name registration allowed its registration of the <sleepspot.com> domain name to expire on August 6, 2003, NameMedia, by its wholly-owned subsidiary, RareNames, Inc., the successor-in-interest to RareNames, WebReg, created a new <sleepspot.com> domain name registration with the registrar Communigal d/b/a Galcomm on October 15, 2003, without notice of any competing proprietary interests of any kind therein. During the intervening seventy (70) days, the <sleepspot.com> domain name registration could have been registered by any member of the consuming public, including Plaintiff or Plaintiff's representatives. When NameMedia acquired the <sleepspot.com> domain name registration, it was freely available for any member of the consuming public including Plaintiff or Plaintiff's representatives, to register. Upon NameMedia's acquisition of the <sleepspot.com> domain name registration, results for queries on "sleep spot" and "sleepspot" revealed zero active registrations or pending applications for an "sleep spot"

or “sleepspot” trademark at the United States Patent & Trademark Office. As the website associated with Plaintiff’s registration of the <sleepspot.com> domain name expired along with its registration of the same, NameMedia was accordingly unaware and therefore denies it was made aware of any copyright or TM notices Plaintiff purports to have displayed at the then- and now-defunct website. NameMedia states it is without knowledge or information sufficient to form a belief as to the truth of the remaining facts proffered in this paragraph 8. These facts are denied and remain in dispute.

9. Plaintiff’s stated facts in Docket # 52, ¶ 9, are irrelevant to NameMedia’s counterclaim and are irrelevant to Plaintiff’s reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states it is without knowledge or information sufficient to form a belief as to the truth of the facts proffered in this paragraph 9. These facts are denied and remain in dispute.
10. Plaintiff’s stated facts in Docket # 52, ¶ 10, are irrelevant to NameMedia’s counterclaim and are irrelevant to Plaintiff’s reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states that it advertised the <eartheye.com> domain name registration for sale for \$1488 through its wholly-owned BuyDomains.com subsidiary in 2004. NameMedia denies that advertising a domain name for sale violates either 15 U.S.C. § 1125(d) or Plaintiff’s “Constitutional Rights to Free Speech” or constitutes unclean hands.
11. Plaintiff’s stated facts in Docket # 52, ¶ 11, are irrelevant to NameMedia’s counterclaim and are irrelevant to Plaintiff’s reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states Plaintiff on March 26, 2005 posted a message on the “Wheelchair Wedding – need help” thread in the photography forums at Photo.net, but denies Plaintiff’s message provided NameMedia with anything approaching sufficient notice of any disability relevant to the instant case.
12. Plaintiff’s stated facts in Docket # 52, ¶ 12, are irrelevant to NameMedia’s counterclaim and are irrelevant to Plaintiff’s reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states Plaintiff again on January 19, 2006 posted a message on the “Wheelchair Wedding – need help” thread in

the photography forums at Photo.net, but denies Plaintiff's message provided NameMedia with anything approaching sufficient notice of any disability relevant to the instant case.

13. Plaintiff's stated facts in Docket # 52, ¶ 13, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states that, on January 26, 2006, Plaintiff was declared legally competent by an Arkansas court. The remaining statements in this paragraph constitute improper argument.
14. Plaintiff's stated facts in Docket # 52, ¶ 14, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia denies Plaintiff first created a Photo.net user profile on March 1, 2006; NameMedia instead states Plaintiff created a Photo.net user profile on May 9, 2004 and admits that NameMedia did not own Photo.net until April 9, 2007.
15. Plaintiff's stated facts in Docket # 52, ¶ 15, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states that Plaintiff has not suffered extreme emotional distress, nor has NameMedia engaged in conduct that could justify a cause of action for outrage under Arkansas law. NameMedia denies NameMedia or its employee, Ted Olson: a) offered <eartheye.com> to Plaintiff; b) ever acknowledged awareness of Plaintiff's desire and alleged distress allegedly created by anything allegedly resembling cybersquatting by NameMedia; b) advised Plaintiff to contact legal; c) provided only a physical address to contact Erik Zilinek; or d) learned of Plaintiff's disability(ies) on May 29, 2007. NameMedia instead states that on November 29, 2007, NameMedia or its employee, Ted Olson a) responded in writing, to Plaintiff's telephone inquiry about the asking price of the <eartheye.com> domain name registration; b) learned of Plaintiff's interest in the <eartheye.com> domain name registration as well as Plaintiff's disinterest in paying anything approaching fair market value for the same; c) provided Plaintiff with a physical address to provide NameMedia's

Legal Department with documentation that might support Plaintiff's claim of an alleged competing interest in the registration of the <eartheye.com> domain name registration, or, in the alternative, "[i]f you change your mind and would rather just purchase the domain – let [Ted Olson] know." However, NameMedia and its employee, Ted Olson, deny a) learning of Plaintiff's distress; b) that NameMedia was "cybersquatting"; and c) learning of any "extreme disab[ility]" of Plaintiff on November 29, 2007.

16. Plaintiff's stated facts in Docket # 52, ¶ 16, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states NameMedia publicly disclosed its April 2007 purchase of the Photo.net website and its related businesses. NameMedia denies it perpetrated any fraud or created any basis for reliance in this disclosure.
17. Plaintiff's stated facts in Docket # 52, ¶ 17, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia admits Plaintiff was declared legally competent by an Arkansas court. NameMedia states that Plaintiff has not suffered extreme emotional distress, nor has NameMedia engaged in conduct that could justify a cause of action for outrage under Arkansas law. NameMedia states that because Plaintiff provided its E-mail address to NameMedia on February 7, 2008 during a routine web-based sales inquiry and admits Plaintiff thereby agreed to NameMedia's terms of service that notified Plaintiff that its E-mail address would be added to NameMedia's domain name marketing mailing list. NameMedia admits Plaintiff received a routine marketing E-mail informing Plaintiff of NameMedia d/b/a BuyDomains.com's "winter sale reducing the price of eartheye.com" on January 26, 2009. NameMedia, however, denies that on January 26, 2009: a) it acknowledged its awareness, or that it was in anyway aware, of Plaintiff's "desire" or "distress" other than Plaintiff's disappointment that it no longer owned the <eartheye.com> domain name registration; b) it was "cybersquatting" or has ever "cybersquatted"; and c) that the discounts were in anyway "offered exclusively to the Plaintiff." NameMedia states it is without knowledge or

information sufficient to form a belief as to the truth of the remaining facts proffered in this paragraph 17. These facts are denied and remain in dispute.

18. Plaintiff's stated facts in Docket # 52, ¶ 18, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia denies NameMedia or its employee, Erik S. Zilinek, advised Plaintiff that NameMedia had read on January 30, 2009, much less ever read, the purported disclaimer attached to Plaintiff's correspondence because, in part, Plaintiff did not create the purported disclaimer or send it with correspondence to NameMedia until February 5, 2009.
19. Plaintiff's stated facts in Docket # 52, ¶ 19, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia states that Plaintiff has not suffered extreme emotional distress, nor has NameMedia engaged in conduct that could justify a cause of action for outrage under Arkansas law. NameMedia denies NameMedia or its employee, Erik S. Zilinek, acknowledged any awareness of Plaintiff's desire or distress or that NameMedia was engaged in anything resembling "cybersquatting." NameMedia instead admits its employee, Erik S. Zilinek informed Plaintiff that NameMedia was confident it would prevail should its good faith registration and *bona fide*, non-infringing use of <eartheye.com>, in short, its ownership ever be challenged in any court proceeding. NameMedia admits it received Plaintiff's so-called "amicable" message of February 5, 2009 and responded in a letter of February 13, 2009 that NameMedia was not interested in exchanging domain names with Plaintiff.
20. Plaintiff's stated facts in Docket # 52, ¶ 20, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia denies NameMedia or its employee, Erik S. Zilinek gave a legal opinion or offered to sell the <eartheye.com> domain name registration to Plaintiff on February 13, 2009 in violation of US Title 15 § 1125(d), or in violation of any other law—real or imagined. Instead, NameMedia admits its employee, Erik S. Zilinek on February 13, 2009 informed Plaintiff of a) NameMedia's

legal position as it related to its good faith registration and *bona fide*, non-infringing use of the <eartheye.com> domain name registration; b) its rejection of Plaintiff's offer of the <ozarkphotos.net> domain name registration in exchange for the <eartheye.com> domain name registration; and c) the opportunity, at Plaintiff's option, to further negotiate the sale of the <eartheye.com> domain name registration with the Sales Team at BuyDomains.com.

21. Plaintiff's stated facts in Docket # 52, ¶ 21, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia admits NameMedia d/b/a BuyDomains.com on April 6, 2009, sold the <eartheye.com> domain name registration to a third party and that DomainNameNews.com reported the sale on April 14, 2009.
22. Plaintiff's stated facts in Docket # 52, ¶ 22, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia admits it argued before a Panel of the National Arbitration Forum that "it ha[d] rights to and legitimate interests in the [registration of the] <cargills.com> domain [name] because [it was] comprised of no more than the plural or possessive form of a common surname widely used by numerous parties." NameMedia denies, however, that it argued or disputed before the NAF that "the CARGILL mark [Cargill.com] and the domain name <cargills.com> are confusingly similar" or gave a legal opinion that the plural of the registered trademark should not be thought confusingly similar;" or that there is equivalence between a trademark, e.g., CARGILL, and a domain name, e.g., <cargill.com>; or that that ownership of the former entitles one to the ownership of the latter.
23. Plaintiff's stated facts in Docket # 52, ¶ 23, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia denies that "the domain eartheye.com was finally listed with EDATS.com as the new registered owner" on July 2, 2009. NameMedia, instead, admits that the public record of the <eartheye.com> domain

registration indicates that its WHOIS record was “Last Updated on: 17-Apr-09” following its sale to a third party on April 6, 2009.

24. Plaintiff’s stated facts in Docket # 52, ¶ 24, are irrelevant to NameMedia’s counterclaim and are irrelevant to Plaintiff’s reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia admits Plaintiff began posting disparaging and defaming comments in the forums of NameMedia’s wholly-owned Photo.net subsidiary on July 12, 2009. NameMedia denies violating any rights provided under 17 U.S.C. § 106A and states that NameMedia is not a governmental entity subject to 5 U.S.C. § 552a.
25. Plaintiff’s stated facts in Docket # 52, ¶ 25, are irrelevant to NameMedia’s counterclaim and are irrelevant to Plaintiff’s reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia admits Plaintiff filed a lawsuit against NameMedia on July 14, 2009.
26. Plaintiff’s stated facts in Docket # 52, ¶ 26, are irrelevant to NameMedia’s counterclaim and are irrelevant to Plaintiff’s reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia admits Plaintiff began harassing NameMedia employees about Plaintiff’s suit on or about July 16, 2009. NameMedia further admits Plaintiff left a voicemail message with its employee, Erik S. Zilinek, inquiring about settling Plaintiff’s claims.
27. Plaintiff’s stated facts in Docket # 52, ¶ 27, are irrelevant to NameMedia’s counterclaim and are irrelevant to Plaintiff’s reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia admits that it, pursuant to Photo.net’s terms of service to which Plaintiff agreed upon its creation of an account with Photo.net, deleted Plaintiff’s disparaging and defaming posts in the forums at Photo.net on or about July 24, 2009. NameMedia states it is without knowledge or information sufficient to form a belief as to the truth of the remaining facts proffered in this paragraph 27. These facts are denied and remain in dispute.
28. Plaintiff’s stated facts in Docket # 52, ¶ 28, are irrelevant to NameMedia’s counterclaim and are irrelevant to Plaintiff’s reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket #

51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia admits Plaintiff did not take advantage of the routine “Unsubscribe Instructions” contained in NameMedia’s routine email marketing of January 26, 2009, namely, “You have received this email because you expressed an interest in a premium domain name. If you would like to be removed from this list, please click here.” Accordingly, Plaintiff remained on the NameMedia email marketing list and received another routine marketing email message on October 7, 2009, which invited Plaintiff to participate in NameMedia’s “What’s A Domain Worth?” webinar. NameMedia denies the invitation was sent to harass Plaintiff or sent with any particular or extraordinary intent as it relates to Plaintiff. NameMedia states it is without knowledge or information sufficient to form a belief as to the truth of the remaining facts proffered in this paragraph 28. These facts are denied and remain in dispute.

29. NameMedia admits Plaintiff registered the <NAMEMEDIA.com> domain name on October 15, 2009. NameMedia denies that Plaintiff engaged in constitutionally protected conduct. Instead, Plaintiff acted in deliberate bad faith, disregarded NameMedia’s distinctive, federally registered trademark and registered the <NAMEMEDIA.com> domain name to engage in Plaintiff’s commercial and continuing solicitation of donations to Plaintiff’s instant lawsuit. Other undisputed facts evidencing Plaintiff’s bad faith intent are discussed, *supra*, at pp. 1 – 3. Whether Plaintiff acted in bad faith or partially in bad faith is an issue of material fact that remains in dispute.
30. Plaintiff’s stated facts in Docket # 52, ¶ 30, are irrelevant to NameMedia’s counterclaim and are irrelevant to Plaintiff’s reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia admits its employee, Erik S. Zilinek, visited the forums available at the NamePros.com website. NameMedia, however, denies it or its employee(s) ever did anything more than skim the contents of Plaintiff’s posts. NameMedia states that Plaintiff has not suffered extreme emotional distress, nor has NameMedia engaged in conduct that could justify a cause of action for outrage under Arkansas law.

31. Plaintiff's stated facts in Docket # 52, ¶ 31, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia admits Plaintiff did not take advantage of the routine "Unsubscribe Instructions" contained in NameMedia's routine email marketing messages of January 26, 2009 or October 7, 2009, or their easy-to-follow instructions namely, "You have received this email because you expressed an interest in a premium domain name. If you would like to be removed from this list, please click here." Accordingly, Plaintiff remained on the NameMedia email marketing list and received another routine marketing email message on November 1, 2009, which informed Plaintiff that the <sleepspot.com> for \$2,788. NameMedia denies the marketing message was anything more than informational, i.e., it was not an "offer" Plaintiff could accept and further denies that informing a customer of available inventory on a mailing list violates any law much less 15 U.S.C. § 1125(d).
32. Plaintiff's stated facts in Docket # 52, ¶ 32, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia admits its Photo.net employee, Hannah Thiem, was, at one time, the registered DMCA agent of Photo.net. NameMedia states it is without knowledge or information sufficient to form a belief as to the truth of the remaining facts proffered in this paragraph 32 that describe the invasive, privacy-violating conduct of Plaintiff. These facts are denied and remain in dispute.
33. Plaintiff's stated facts in Docket # 52, ¶ 33, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia admits Plaintiff sent NameMedia's Photo.net employee, Hannah Thiem, a message to her personal, i.e., non-work, MySpace account to solicit information against her employer. NameMedia denies ever acknowledging any violation of any non-existent copyright in Plaintiff's unregistered images. NameMedia states it is without knowledge or information sufficient to form a belief as to the truth of the remaining facts proffered in this paragraph 33 that

describe the invasive, privacy-violating conduct of Plaintiff. These facts are denied and remain in dispute.

34. Plaintiff's stated facts in Docket # 52, ¶ 34, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia denies Erik S. Zilinek, or any other NameMedia employee, either viewed or received a "personal message sent through the NamePros.com forum" and further denies that Mr. Zilinek, or any other NameMedia employee, in the act of reading any correspondence from Plaintiff in turn acknowledged either Plaintiff's alleged disability, alleged distress or alleged "legal intent." NameMedia states it is without knowledge or information sufficient to form a belief as to the truth of the remaining facts proffered in this paragraph 34 that describe the invasive, privacy-violating conduct of Plaintiff. These facts are denied and remain in dispute.
35. Plaintiff's stated facts in Docket # 52, ¶ 35, are irrelevant to NameMedia's counterclaim and are irrelevant to Plaintiff's reliance upon 15 U.S.C. § 1125(d)(1)(B)(ii). *See* Docket # 51 at ¶¶ 4 – 5. To the extent a response is required, NameMedia admits it was served with a copy of Plaintiff's complaint on or about November 6, 2009. The remaining statements in this paragraph constitute improper argument.
36. Plaintiff's stated facts in Docket # 52, ¶ 36, are irrelevant to NameMedia's counterclaim. To the extent a response is required, NameMedia denies its Photo.net employee, Hannah Thiem: a) ever sent a message to Plaintiff; b) on November 15, 2009, sent a specific message requesting Plaintiff's invasive, privacy-violating tracking beacon be deleted; or c) ever agreed to allow Plaintiff to track Ms. Thiem with a tracking beacon.
37. Plaintiff's stated facts in Docket # 52, ¶ 37, are irrelevant to NameMedia's counterclaim. To the extent a response is required, NameMedia denies its Photo.net employee, Hannah Thiem: a) ever sent a message to Plaintiff; b) on January 6, 2010, sent a specific message requesting Plaintiff's invasive, privacy-violating tracking beacon be deleted; or c) ever agreed to allow Plaintiff to track Ms. Thiem with a tracking beacon.

Respectfully submitted,

H. WILLIAM ALLEN (ABN 69001)
KEVIN M. LEMLEY (ABN 2005034)
ALLEN LAW FIRM
A Professional Corporation
212 Center Street, 9th Floor
Little Rock, AR 72201
(501) 374-7100

By: /s/ H. William Allen
H. William Allen

By: /s/ Kevin M. Lemley
Kevin M. Lemley

Attorneys for Defendant and Counterclaimant
NameMedia, Inc.

CERTIFICATE OF SERVICE

I, Kevin Lemley, hereby certify that on this 16th day of February, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following attorneys of record:

Michael H. Page
Durie Tangri, LLP
217 Leidesdorff Street
San Francisco, CA 94111
mpage@durietangri.com

Jennifer H. Doan
jdoan@haltomdoan.com
Joshua R. Thane
jthane@haltomdoan.com
Haltom & Doan
Crown Executive Center, Suite 100
6500 Summerhill Road
Texarkana, TX 75503

I hereby certify that, on this 16th day of February, 2010, I mailed a copy of the foregoing to the following *pro se* plaintiff:

Mr. Curtis J. Neeley, Jr.
2619 N. Quality Lane, Apt. 123
Fayetteville, AR 72703

/s/ Kevin M. Lemley
Kevin M. Lemley