UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CURTIS J. NEELEY JR.,	§	
	§	
PLAINTIFF	§	
	§	
VS.	§	**CIVIL ACTION NO. 09-5151**
	§	
NAMEMEDIA, INC., NETWORK SOLUTIONS, INC., GOOGLE INC.	§	
	§	
DEFENDANT	§	

GOOGLE INC.'S RESPONSE IN OPPOSITION TO PLAINTIFF'S OBJECTION TO REPORT AND RECOMMENDATION OF DOCKET 225

Plaintiff's objections to the Magistrate Judge's Report and Recommendation regarding Plaintiff's motion for injunctive relief are without merit, are contrary to his sworn testimony in this case, and should be overruled by the Court for the following reasons:

1. Magistrate Setser had authority to hear the injunction motion.

Plaintiff's motion was properly referred to Honorable Magistrate Judge Setser under 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.1. Under 28 U.S.C. § 636(b)(1)(B), a district judge may "designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A) . . . ." (emphasis added). *See, e.g., Katz v. Looney*, 733 F. Supp. 1284 (W.D. Ark. 1990) (Chief Judge Waters referring a motion for preliminary injunction to a magistrate pursuant to local rules and 28 U.S.C. § 636(b)(1)(B)). Contrary to Plaintiff's argument that Judge Setser "determined" the preliminary injunction motion, this matter was "referred to United States Magistrate Judge Erin L. Setser for

report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B)"—not for determination. Dkt. No. 192. The Court's referral of the preliminary injunction motion for a report and recommendation was proper under the law. Thus, Plaintiff's objection on this point is without merit and should be denied.

2. Magistrate Setser properly recommended that Plaintiff failed to meet the standard for granting an injunction.

Judge Setser's reasoned analysis and recommendation to deny the preliminary injunction are supported by the law. In ruling on a motion for preliminary injunction, the Court must consider: (1) the threat of irreparable harm to the moving party; (2) the weight of this harm as compared to any injury an injunction would inflict on other interested parties; (3) the probability that the moving party will succeed on the merits; and (4) the public interest. *General Motors Corp. V. Harry Brown's, LLC*, 563 F.3d 312, 316 (8th Cir. 2009) (citing *Dataphase Sys., Inc. V. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)(en banc)); *see Oglala Sioux Tribe v. C&W Enters., Inc.*, 542 F.3d 224, 233 (8th Cir. 2008) (ceasing a *Dataphase* analysis after finding no likelihood of success on the merits). Judge Setser's recommendation properly analyzed these factors and determined that Plaintiff was not likely to succeed on the merits for several reasons.

First, Plaintiff acknowledged that his request for a preliminary injunction does not stem from any claim asserted against Google in this case. *See* December 6, 2010 Transcript from Hearing before the Honorable Erin Setser at p. 8:22-9:9.[1] As such, an injunction will not stand. *See General Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 316 (8th Cir. 2009) (stating that moving part has burden of proofing the necessity of a preliminary injunction).

Second, even assuming that Plaintiff's injunction motion related to his state law outrage claim, he cannot succeed on that claim as it is preempted against Google in this case by the

[1] For ease of reference, relevant portions of the Transcript from the December 6 hearing before Judge Setser are attached as Exhibit A.

Communications Decency Act, 47 U.S.C. § 230. *See Parker v. Google, Inc.*, 242 Fed. Appx. 833, 837 (3rd Cir. 2007); *see also, Goddard v. Google,* 640 F. Supp. 2d 1193 (N.D. Cal. 2009) (Google, as an online service provider, is immune to state law claims such as defamation); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010)(holding that the Communication Decency Act provides online service providers with federal immunity against state tort defamation action that would make service providers liable for information originating with third-party users of the service).

Third, even assuming that the outrage claim was not preempted, Plaintiff's sworn testimony negates the elements of the claim. Specifically, Plaintiff must show that: 1) Google intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of its conduct; 2) the conduct was extreme and outrageous, beyond all possible bounds of decency, and was utterly intolerable in a civilized community; 3) the actions of Google were the cause of the Plaintiff's distress; and 4) the emotional distress sustained by the Plaintiff was so severe that no reasonable person could be expected to endure it. *Rees v. Smith*, 2009 Ark. 169, 301 S.W. 3d 467, 471-472 (2009) (emphasis added). Plaintiff confirmed under oath that he, not Google, placed the pictures of which he now complains on the Internet and that he could remove those pictures. *See* December 6, 2010 Transcript from Hearing before the Honorable Erin Setser at p. 53:17-21; 56:8-10; 60:21-25. Thus, Plaintiff's actions caused his own alleged distress. In addition, neither Plaintiff's sworn testimony at the hearing, nor his objections, point to any facts that would support a determination that he is likely to succeed on his claim of outrage.

Finally, Plaintiff did not demonstrate an irreparable harm. First, Plaintiff admitted that the pictures in question have been on the Internet for at least two years. *See* December 6, 2010

Transcript from Hearing before the Honorable Erin Setser at p. 15:14-20. Next, Plaintiff admitted that he was responsible for placing the nude photographs online, and he linked the photo of Mr. Peven in his own blog site. *Id.* at p. 15:5-13; 41:5-14. Finally, Plaintiff testified that he should have the ability to remove the pictures in question from the Internet. *Id.* at p. 53:17-21.

3. Conclusion.

Plaintiff's motion was properly referred to Honorable Magistrate Judge Setser under 28 U.S.C. § 636 (b)(1)(B) and Local Rule 72.1, and Judge Setser's recommendations are well reasoned and conform to the controlling law. Indeed, Plaintiff fails to make a cogent argument to the contrary. For these reasons and all those set forth in Defendant Google's oppositions to Plaintiff's motion for preliminary injunction [Docket Nos. 205 and 211], Defendant Google Inc. respectfully requests that the Court overrule Plaintiff's "Objections to Report and Recommendation of Docket 225."

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT GOOGLE INC.

CERTIFICATE OF SERVICE

I, Joshua R. Thane, hereby certify that on January 13, 2011, I electronically filed the foregoing GOOGLE INC'S RESPONSE IN OPPOSITION TO PLAINTIFF'S OBJECTION TO REPORT AND RECOMMENDATION OF DOCKET 225 with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following list:

H. William Allen
Brooks White
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212 Center Street
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and I hereby certify that I have mailed the document by the United States Postal Service to the following non-CM/ECF participants:

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/s/ Joshua R. Thane
Joshua R. Thane