C.A. NO. 09-2350

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AARON C. BORING and CHRISTINE BORING, husband and wife,
Appellants,

v.

GOOGLE, INC., a California corporation,
Appellee.

Appeal from Western District of Pennsylvania
2:08-cv-00694

APPEAL FROM ORDER DATED FEBRUARY 17, 2009, DISMISSING PLAINTIFFS' AMENDED COMPLAINT, GRANTING DEFENDANT'S 12(B)(6) MOTION ON ALL COUNTS; APPEAL FROM ORDER DATED APRIL 6, 2009, DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

APPENDIX VOLUME II (A21-A104)

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APPENDIX II - TABLE OF CONTENTS*

* Item Nos. 3 - 5, inclusive, designated by Google.

APPEAL, CLOSED, CONMAG

U.S. District Court
Western District of Pennsylvania (Pittsburgh)
CIVIL DOCKET FOR CASE #: 2:08-cv-00694-ARH

BORING et al v. GOOGLE INC.
Assigned to: Amy Reynolds Hay
Demand: $75,000
Case in other court: USCA, 09-02350
Court of Common Pleas of Allegheny County, GD-08-06615
Cause: 28:1441 Notice of Removal-Torts to Land

Date Filed: 05/21/2008
Date Terminated: 02/17/2009
Jury Demand: Plaintiff
Nature of Suit: 240 Torts to Land
Jurisdiction: Diversity

Plaintiff

AARON C. BORING

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Plaintiff

CHRISTINE BORING
husband and wife respectively

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A21

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V.

Defendant

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a Delaware corporation

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Date Filed	#	Docket Text
05/21/2008	1	NOTICE OF REMOVAL from Court of Common Pleas of Allegheny County, case number GD-08-6615 (Filing fee $ 350 receipt number 900158), filed by GOOGLE INC.. (Attachments: # 1 Civil Cover Sheet, # 2 Exhibit A - State Court Papers, including Complaint) (jv) (Entered: 05/21/2008)
05/21/2008		CLERK'S OFFICE QUALITY CONTROL MESSAGE re 1 Notice of Removal. ERROR: Party did not file disclosure statement as required pursuant L.R. 7.1.1 CORRECTION: Attorney advised to file statement within 7 days. This message is for informational purposes only. Disclosure Statement due by 6/2/2008. (jv) (Entered: 05/21/2008)
05/21/2008	2	MOTION for attorney Tonia Oullette Klausner, to Appear Pro Hac Vice, Filing fee $ 40 Receipt # 0315000000000900579 by GOOGLE INC.. (Attachments: # 1 Proposed Order) (Fagan, Brian) (Entered: 05/21/2008)
05/21/2008	3	MOTION for attorney Jason P. Gordon to Appear Pro Hac Vice, Filing fee $ 40 Receipt # 0315000000000900589 by GOOGLE INC.. (Attachments: # 1 Proposed Order) (Fagan, Brian) (Entered: 05/21/2008)
05/21/2008	4	MOTION for attorney Joshua A. Plaut to Appear Pro Hac Vice, Filing fee $ 40 Receipt # 0315000000000900595 by GOOGLE INC.. (Attachments: # 1 Proposed Order) (Fagan, Brian) (Entered: 05/21/2008)
05/21/2008	5	MOTION for attorney Elise M. Miller to Appear Pro Hac Vice, Filing fee $ 40 Receipt # 0315000000000900599 by GOOGLE INC.. (Attachments: # 1 Proposed Order) (Fagan, Brian) (Entered: 05/21/2008)
05/28/2008	6	ORDER granting 2 Motion to Appear Pro Hac Vice of Tonia Oullette Klausner; granting 3 Motion to Appear Pro Hac Vice of Joshua A. Plaut; granting 4 Motion to Appear Pro Hac Vice of Jason P. Gordon; granting 5 Motion to Appear Pro Hac Vice of Elise M. Miller. Signed by Magistrate Judge Amy Reynolds Hay on 5/28/2008. (dgg) (Entered: 05/28/2008)
05/28/2008	7	Disclosure Statement identifying None as corporate parent, by GOOGLE INC. (Fagan, Brian) Modified on 5/29/2008. (jv,) (Entered: 05/28/2008)
05/28/2008	8	MOTION to Dismiss *Complaint* by GOOGLE INC.. (Attachments: # 1 Proposed Order) (Fagan, Brian) (Entered: 05/28/2008)
05/28/2008	9	EXHIBITS in support of 8 Motion to dismiss - Table of Contents of by GOOGLE INC. (Fagan, Brian) (Entered: 05/28/2008)
05/28/2008	10	EXHIBITS to Exhibit 1 - Declaration of Tonia Ouellette Klausner in Support of 8 Motion to Dismiss, 9 Exhibits in Support by GOOGLE INC. (Attachments: #

		1 Exhibit A to Klausner Declaration, # 2 Exhibit B to Klausner Declaration, # 3 Exhibit C to Klausner Declaration, # 4 Exhibit D to Klausner Declaration, # 5 Exhibit E to Klausner Declaration, # 6 Exhibit F to Klausner Declaration, # 7 Exhibit G to Klausner Declaration, # 8 Exhibit H to Klausner Declaration) (Fagan, Brian) (Entered: 05/28/2008)
05/28/2008	11	BRIEF in Support re 8 Motion to Dismiss Complaint filed by GOOGLE INC. (Attachments: # 1 Exhibit Text of Streisand v. Adelman, No. SC 077-257 (Super. Ct. Los Angeles Co. Dec. 31, 2003) (unpublished opinion)) (Fagan, Brian) (Entered: 05/28/2008)
06/18/2008	12	ORDER that Plaintiff's Response re 8 Motion to Dismiss is due by 7/18/2008. Further that each party shall complete a consent form available on the court's website by 7/18/2008. Signed by Magistrate Judge Amy Reynolds Hay on 6/18/2008. (dgg) (Entered: 06/18/2008)
07/18/2008	13	CONSENT to Trial/Jurisdiction by US Magistrate Judge by GOOGLE INC. (Fagan, Brian) (Entered: 07/18/2008)
07/18/2008	14	BRIEF in Opposition re 8 Motion to Dismiss filed by AARON C. BORING, CHRISTINE BORING. (Attachments: # 1 Proposed Order, # 2 Exhibit, # 3 Exhibit) (Moskal, Dennis) (Entered: 07/18/2008)
07/18/2008	15	MOTION to Amend/Correct *Complaint* by AARON C. BORING, CHRISTINE BORING. (Attachments: # 1 Proposed Order, # 2 Exhibit Amended Complaint) (Moskal, Dennis) (Entered: 07/18/2008)
07/18/2008	16	MOTION to Seal *Exhibits 1, 2, 3 and 5*, MOTION to Seal Document by AARON C. BORING, CHRISTINE BORING. (Attachments: # 1 Proposed Order) (Moskal, Dennis) (Entered: 07/18/2008)
07/22/2008	17	ORDER denying 15 Motion to Amend/Correct complaint inasmuch as leave of court is not required; It is further ordered that the Clerk of Court shall file the amended complaint submitted by plainitffs in conjunction with their motion. Signed by Magistrate Judge Amy Reynolds Hay on 7/22/2008. (bb) (Entered: 07/22/2008)
07/22/2008	18	AMENDED COMPLAINT against GOOGLE INC., filed by AARON C. BORING, CHRISTINE BORING. (ksa) (Entered: 07/23/2008)
07/31/2008	19	STIPULATION *for an Extension of Time to Respond to Amended Complaint* by GOOGLE INC.. (Fagan, Brian) (Entered: 07/31/2008)
08/01/2008	20	Clarification of STIPULATION re 19 Stipulation by AARON C. BORING, CHRISTINE BORING. (Moskal, Dennis) Modified entry to reflect document on 8/4/2008. (jv) (Entered: 08/01/2008)
08/14/2008	21	CONSENT to Trial/Jurisdiction by US Magistrate Judge by AARON C. BORING, CHRISTINE BORING. (Moskal, Dennis) (Entered: 08/14/2008)
08/14/2008	22	MOTION to Dismiss re 18 Amended Complaint by GOOGLE INC. (Attachments: # 1 Proposed Order, # 2 Table Of Contents to Exhibits to Motion to Dismiss Amended Complaint, # 3 Exhibit No. 1 - Declaration of Tonia Oullette Klausner, # 4 Exhibit A to Klausner Declaration, # 5 Exhibit B to

		Klausner Declaration, # 6 Exhibit C to Klausner Declaration, # 7 Exhibit D to Klausner Declaration, # 8 Exhibit E to Klausner Declaration, # 9 Exhibit F to Klausner Declaration, # 10 Exhibit G to Klausner Declaration, # 11 Exhibit H to Klausner Declaration) (Fagan, Brian) Modified on 8/15/2008 to correct typos. (ksa) (Entered: 08/14/2008)
08/14/2008	23	BRIEF in Support re 22 Motion to Dismiss, *Amended Complaint* filed by GOOGLE INC. (Attachments: # 1 Exhibit 1 to Google Inc.'s Memorandum of Law in Support of Its Motion to Dismiss Amended Complaint) (Fagan, Brian) Modified on 8/15/2008 to correct typos. (ksa) (Entered: 08/14/2008)
08/15/2008	24	ORDER that Plaintiff's Response re 22 Motion to Dismiss Amended Complaint is due by 9/15/2008. Signed by Magistrate Judge Amy Reynolds Hay on 8/15/2008. (dgg) (Entered: 08/15/2008)
09/15/2008	25	BRIEF in Opposition re 22 Motion to Dismiss, filed by AARON C. BORING, CHRISTINE BORING. (Attachments: # 1 Proposed Order, # 2 Exhibit 4, # 3 Exhibit 6, # 4 Exhibit 7, # 5 Exhibit 8, # 6 Exhibit 9) (Moskal, Dennis) Modified to remove duplicative attachment description on 9/16/2008. (jv) (Entered: 09/15/2008)
09/15/2008	26	MOTION to Seal Document 25 Brief in Opposition to Motion, by AARON C. BORING, CHRISTINE BORING. (Attachments: # 1 Proposed Order) (Moskal, Dennis) (Entered: 09/15/2008)
09/18/2008	27	ORDER granting 26 Motion to file exhibits under Seal and said exhibits to Plaintiffs' brief 25 , in opposition to Defendant's motion to dismiss the Amended Complaint, may be filed under seal. Signed by Magistrate Judge Amy Reynolds Hay on 9/16/2008. (dgg) (Entered: 09/18/2008)
09/18/2008	28	SEALED DOCUMENT Exhibit 1 (Sealed) of 25 Brief in Opposition to 22 Motion to Dismiss by AARON C. BORING, CHRISTINE BORING (Attachments: # 1 Exhibit 2 (Sealed), # 2 Exhibit 3.2 (Sealed), # 3 Exhibit 3.2 (Sealed), # 4 Exhibit 3.3 (Sealed), # 5 Exhibit 5 (Sealed)) (jv) (Entered: 09/18/2008)
09/24/2008	29	MOTION for Extension of Time to Reply to Plaintiffs' 25 Response to Google's 22 Motion to Dismiss Amended Complaint by GOOGLE INC. (Attachments: # 1 Proposed Order) (Fagan, Brian) Modified to link to appropriate Document on 9/25/2008. (jv) (Entered: 09/24/2008)
09/25/2008	30	ORDER granting 29 Motion for Extension of Time to File Reply to Response re 22 MOTION to Dismiss Amended Complaint re 18 Amended Complaint and Google's Reply to Plaintiffs' response is due by 10/8/2008. Signed by Magistrate Judge Amy Reynolds Hay on 9/25/2008. (dgg) (Entered: 09/25/2008)
10/02/2008	31	MOTION for Leave to File Excess Pages by GOOGLE INC. (Attachments: # 1 Proposed Order) (Fagan, Brian) (Entered: 10/02/2008)
10/06/2008	32	ORDER granting 31 Motion for extension of time to reply to plaintiff's response to Google's Motion to Dismiss Amended Complaint and Google's reply to Plaintiff's response to Motion to Dismiss Amended Complaint is due

		by 10/8/2008. Signed by Magistrate Judge Amy Reynolds Hay on 10/6/2008. (dgg) (Entered: 10/06/2008)
10/06/2008		Google's Reply due by 10/8/2008. Text-only entry. No PDF document will issue. This text-only entry constitutes the Court's order or notice on the matter. (dgg) (Entered: 10/06/2008)
10/06/2008	33	Amended MOTION for Leave to File Excess Pages by GOOGLE INC.. (Attachments: # 1 Proposed Order) (Fagan, Brian) (Entered: 10/06/2008)
10/08/2008	34	ORDER granting 33 Amended Motion for Leave to Exceed five page limitation for Google's reply to Plaintiffs' response to Motion to Dismiss Amended Complaint. Google shall file its reply brief not to exceed ten pages. Signed by Magistrate Judge Amy Reynolds Hay on 10/7/2008. (dgg) (Entered: 10/08/2008)
10/08/2008	35	REPLY to Response to Motion re 25 Brief in Opposition to Motion, 22 To Dismiss Amended Complaint filed by GOOGLE INC. (Fagan, Brian) (Entered: 10/08/2008)
10/09/2008	36	CERTIFICATE OF SERVICE by GOOGLE INC. re 35 Reply to Response to Motion *to Dismiss Amended Complaint* (Fagan, Brian) (Entered: 10/09/2008)
10/23/2008	37	MOTION for Leave to File Sur-Reply Brief responding to Docket No. 35 by AARON C. BORING, CHRISTINE BORING. (Attachments: # 1 Proposed Order) (Moskal, Dennis) (Entered: 10/23/2008)
10/23/2008	38	Errata re 37 Motion for Leave to File *Sur-reply Brief* by AARON C. BORING, CHRISTINE BORING. Reason for Correction: Correct Order of Court. (Moskal, Dennis) (Entered: 10/23/2008)
10/24/2008	39	RESPONSE to Motion re 37 Motion for Leave to File *Sur-Reply Brief by Plaintiffs* filed by GOOGLE INC.. (Fagan, Brian) (Entered: 10/24/2008)
10/28/2008	40	Errata re 37 Motion for Leave to File *(Proposed Sur-Reply Brief attached)* by AARON C. BORING, CHRISTINE BORING. Reason for Correction: Proposed Sur-Reply Brief. (Moskal, Dennis) (Entered: 10/28/2008)
10/30/2008	41	MEMORANDUM ORDER denying 37 Motion for Leave to File sur-reply brief. Signed by Magistrate Judge Amy Reynolds Hay on 10/28/2008. (dgg) (Entered: 10/30/2008)
02/17/2009	42	MEMORANDUM AND OPINION. Signed by Magistrate Judge Amy Reynolds Hay on 2/17/2009. (dgg) (Entered: 02/17/2009)
02/17/2009	43	ORDER that Defendant Google's Motion to Dismiss Amended Complaint 22 is GRANTED and the action is dismissed with prejudice. Signed by Magistrate Judge Amy Reynolds Hay on 2/17/2009. (dgg) (Entered: 02/17/2009)
02/27/2009	44	NOTICE of Appearance by Gregg R. Zegarelli on behalf of AARON C. BORING, CHRISTINE BORING (Zegarelli, Gregg) (Entered: 02/27/2009)
02/27/2009	45	MOTION for Reconsideration re 43 Order Dismissing Case, 42 Memorandum & Opinion by AARON C. BORING, CHRISTINE BORING. (Attachments: # 1 Exhibit Restatement of Restitution, # 2 Proposed Order) (Zegarelli, Gregg)

		Modified to remove duplicative attachment description on 3/2/2009. (jv) (Entered: 02/27/2009)
02/28/2009	46	Errata re 45 Motion for Reconsideration *Restated with Exhibits for Convenience* by AARON C. BORING, CHRISTINE BORING. Reason for Correction: Page 2 quotation/citation to PA Constit S11 (exhibits included for convenience). (Attachments: # 1 Exhibit Restatement of Restitution, # 2 Proposed Order) (Zegarelli, Gregg) (Entered: 02/28/2009)
03/03/2009		ORDER that Defendant's Response re 45 Motion for Reconsideration is due by 3/20/2009. Signed by Magistrate Judge Amy Reynolds Hay on 3/3/2009. Text-only entry; no PDF document will issue. This text-only entry constitutes the Order of the Court or Notice on the matter. (dgg) (Entered: 03/03/2009)
03/20/2009	47	BRIEF in Opposition re 45 Motion for Reconsideration, filed by GOOGLE INC.. (Fagan, Brian) (Entered: 03/20/2009)
03/24/2009	48	REPLY BRIEF by AARON C. BORING, CHRISTINE BORING re 47 Brief in Opposition to Motion, 46 Errata, Response/Briefing Schedule, *Plaintiffs' Reply Brief* filed by AARON C. BORING, CHRISTINE BORING. (Zegarelli, Gregg) (Entered: 03/24/2009)
04/06/2009	49	MEMORANDUM OPINION re 45 MOTION for Reconsideration re 43 Order Dismissing Case. Signed by Magistrate Judge Amy Reynolds Hay on 4/6/2009. (dgg) (Entered: 04/06/2009)
04/06/2009	50	ORDER denying 45 Motion for Reconsideration. Signed by Magistrate Judge Amy Reynolds Hay on 4/6/2009. (dgg) (Entered: 04/06/2009)
05/04/2009	51	NOTICE OF APPEAL as to 50 Order on Motion for Reconsideration, 49 Memorandum & Opinion, 43 Order Dismissing Case, 42 Memorandum & Opinion by AARON C. BORING, CHRISTINE BORING. Filing fee $ 455, receipt number 0315000000001226158. Motion for IFP N/A. Certificate of Appealability N/A. Court Reporter(s): N/A. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. The Transcript Purchase Order form will NOT be mailed to the parties. The form is available on the Court's internet site. (Moskal, Dennis) (Entered: 05/04/2009)
05/14/2009	53	TRANSCRIPT REQUEST re 51 Notice of Appeal, by AARON C. BORING, CHRISTINE BORING, No transcript is being ordered (Moskal, Dennis) (Entered: 05/14/2009)
05/15/2009		Record complete for Appeal purposes. (jv) (Entered: 05/15/2009)

PACER Service Center			
Transaction Receipt			
08/17/2009 08:55:11			
PACER Login:	tg0212	Client Code:	boring
Description:	Docket Report	Search Criteria:	2:08-cv-00694-ARH

A27

Billable Pages:	5	Cost:	0.40

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

AARON C. BORING AND CHRISTINE BORING, husband and wife respectively,	CIVIL DIVISION
Plaintiffs,	CASE NO. 08-694 (ARH)
v.	
GOOGLE, Inc., a Delaware corporation,	
Defendant.	

AMENDED COMPLAINT IN CIVIL ACTION

AND NOW, comes Plaintiff, Aaron C. Boring and Christine Boring, by and through their legal counsel, Dennis M. Moskal, Esq., and files the within Amended Complaint in Civil Action against Google, Inc., and avers as follows:

THE PARTIES

1. Plaintiffs, Aaron C. Boring and Christine Boring, are adult individuals who reside at 1567 Oakridge Lane, Allegheny County, Pittsburgh, PA 15237, USA. They are husband and wife respectfully.

2. Defendant, Google, Inc., is a Delaware corporation with principal place of business located at 1600 Amphitheatre Parkway, Mountain View, California 94043, USA.

VENUE

3. Venue is proper in the United States District Court for the Western District of Pennsylvania as the occurrences occurred in said District.

COUNT I: INVASION OF PRIVACY

4. Plaintiffs hereby incorporate by this reference paragraphs one (1) through three (3) of this pleading, inclusive, as fully set forth herein at length.

5. On or about October 10, 2006, Plaintiffs had purchased their home on Oakridge Lane for a considerable sum of money. The home is not visible to the public eye. Rather, it is surrounded by trees and foliage. A major component of their purchase decision was a desire for privacy. The property includes the residence, two garages and swimming pool. There is also a fifty foot right of way to their home.

6. At the beginning of Oakridge Lane, there is a clearly marked "Private Road No Trespassing" sign.

7. On or about May 2007, Google, without any advanced notice to Pittsburgh residents, launched "Google Street View," a Maps-based project that offers a colorful 360-degree panoramic, navigable view of various streets and roads in major cities in the United States, including Pittsburgh, Pennsylvania. Upon information and belief, the scope of Google Street View was all paved, non-private roads.

8. In order to gather the pictures for Google Street View, Google mounts digital cameras on the roof of passenger cars and drives

around the various cities filming the street footage.

9. Plaintiffs, who live on a private road in the Franklin Park/North Hills section of Pittsburgh, discovered that Google had taken colored imagery of their residence, including the swimming pool, from a vehicle in their residence driveway months earlier without obtaining any privacy waiver or authorization.

10. As residents living on a private road, Plaintiffs had a reasonable expectation of privacy, as well as within their exclusive residence.

11. The acts of Defendant Google constitute an intentional and/or grossly reckless invasion on Plaintiffs' seclusion in that Oakridge Lane is clearly marked with a "Private Road, No Trespassing" sign. To drive up Plaintiffs' driveway and stop in proximity to the residence, garage and swimming pool, Defendant significantly disregarded Plaintiffs' privacy interests.

12. The invasion on Plaintiffs' seclusion was substantial and highly offensive to a reasonable person.

13. This private information was made known to the public at large as part of Google Street View.

14. Revealing this information has caused Plaintiffs' mental suffering and diminished the value of their property.

15. Defendant reckless conduct has exposed Plaintiffs' private information to the public at large with the commensurate risks that this is entails. Punitive damages are warranted to deter Defendant

from further invading on the privacy of Plaintiffs and others and failing to take measures to prevent such actions from occurring.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court to enter judgment in its favor against Defendant for compensatory, incidental and consequential damages, punitive damages, costs, all allowable attorneys' fees, and all other damages deemed to be just.

COUNT II: TRESPASS

16. Plaintiffs hereby incorporate by this reference paragraphs 1 through 15 of this pleading, inclusive, as fully set forth herein at length.

17. The conduct of Defendant constitutes an intentional trespass.

18. Defendant has no legal justification for driving on Oakridge Lane, filming and/or videotaping Plaintiffs' residence, and thereafter, without authorization or justification, publishing said imagery over their website.

19. Punitive damages are requested for Defendant's intentional and/or grossly reckless conduct.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court to enter judgment in its favor against Defendant for compensatory, incidental and consequential damages, punitive damages, costs, all allowable attorneys' fees, and all other damages deemed to be just.

COUNT III - INJUNCTION

20. Plaintiffs hereby incorporate by this reference paragraphs 1 through 19 of this pleading, inclusive, as fully set forth herein at length.

21. Plaintiffs do not have an adequate remedy at law, and so, request equitable relief, whereby Defendant shall immediately remove any and all pictures of Plaintiffs' residence and/or Oakridge Lane from Streets View and any other Internet presence, cease and desist from entering upon the street and/or taking any photographs of the street, and immediately revising and/or implementing adequate procedures to ensure the privacy of those living along private roads.

22. Plaintiffs' also request that Defendant destroy any and all films, videotapes, pictures, negatives, or other medium containing Plaintiffs' residence and/or Oakridge Lane.

WHEREFORE, Plaintiffs respectfully request that the Court grant a preliminary and permanent injunction whereby Defendant immediately remove any and all pictures of Plaintiffs' residence and/or Oakridge Lane from Streets View, cease and desist from entering upon the street and/or taking any photographs of the street, and immediately revising and/or implementing adequate procedures to ensure the privacy of those living along private roads.

COUNT IV - NEGLIGENCE

23. Plaintiffs hereby incorporate by this reference paragraphs 1 through 22 of this pleading, inclusive, as fully set forth

herein at length.

24. Defendant has a duty of care to the public to utilize proper internal controls to avoid trespassing on private property. Additionally, Defendant has a duty to utilize proper methods and controls to avoid publishing data over Street View, irrespective of how the data is captured, for the whole world to see without some advance method of filtering. Defendant breached said duty by its aforesaid actions, Plaintiffs have been injured, and such breach was the proximate cause of Plaintiffs' injury.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court to enter judgment in its favor against Defendant for compensatory, incidental and consequential damages, punitive damages, costs, all allowable attorneys' fees, and all other damages deemed to be just.

COUNT V: UNJUST UNRICHMENT

25. Plaintiffs hereby incorporate by this reference paragraphs 1 through 24 of this pleading, inclusive, as fully set forth herein at length.

26. Although discovery is continuing, Defendant has been unjustly enriched by the use of Plaintiffs' photography and/or its company policy that permits, authorizes and/or condones, and/or permitted, authorized and/or condoned, the actions asserted herein.

27. Defendant has profits of many billion dollars, some or all of which is attributable to the aforesaid actions herein, including its reckless failure to implement internal controls and policies designed to prevent the actions averred herein.

28. Plaintiff should be entitled to the benefit conveyed upon Defendant and/or the expenses saved by Defendant by failing to implement the policies and procedures necessary to prevent the aforesaid activities averred and otherwise stated herein.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court to enter judgment in its favor against Defendant for compensatory, incidental and consequential damages, punitive damages, costs, all allowable attorneys' fees, and all other damages deemed to be just.

July 18, 2008

s/Dennis M. Moskal
Dennis M. Moskal, Esq.
Attorney for Plaintiffs

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AARON C. BORING and CHRISTINE BORING, husband and wife respectively, Plaintiffs, v. GOOGLE, INC., a California corporation, Defendant.	)	Civil Action No. 08-cv-694 (ARH)

DEFENDANT GOOGLE INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS AMENDED COMPLAINT

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PRELIMINARY STATEMENT

"Street View" is an innovative feature that Google offers in connection with the Google Maps service on its website. Street View makes it easy for people to learn what an area looks like without having to actually go there. People shopping for real estate can view the neighborhood. People researching vacations can explore possible destinations on line. And people driving to an unfamiliar place can obtain a photographic view of a particular address in addition to directions and traditional maps. Google created the Street View tool by sending drivers to various cities across America with panoramic digital cameras mounted on the roofs of their cars, automatically recording the view that anyone would see while driving on the streets.

According to Plaintiffs Aaron and Christine Boring, although Street View is designed for public roads, Google's driver went down a private road, turned around in Plaintiffs' driveway, took unremarkable photos of the exterior of their home, and Google then made those photographs available through the Street View service. When Plaintiffs discovered these images, rather than using the simple removal option Google affords, they sued Google for invasion of privacy, trespass, negligence and conversion. In the face of a Motion to Dismiss filed by Google for failure to state a claim, Plaintiffs filed an Amended Complaint substituting unjust enrichment for conversion and adding a handful of allegations. Plaintiffs seek damages from "mental suffering" and diminished property value supposedly caused by the public accessibility of the photos. They claim these injuries even though similar photos of their home were already publicly available on the Internet, and even though they drew exponentially greater attention to the images in question by filing and publicizing this suit while choosing not to remove the images of their property from the Street View service.

Plaintiffs' claims have no merit. While privacy is an important interest, and Google takes numerous steps to protect it through its Street View service, that interest simply is not implicated here. Plaintiffs' privacy claims fail, among other reasons, because the view of the exterior of Plaintiffs' home from their driveway—which can be seen by any visitor, delivery person or telephone repairman—is not private. According to the Restatement,

> [c]omplete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he [or she] is a part.

Restatement (Second) of Torts § 652D cmt. c (1977). In other words, the law does not protect that which can be seen by third parties due to the ordinary incidents of community life. The exterior of Plaintiffs' house can be seen by anyone who approaches it for any reason—guests, tax collectors, repairmen, deliverymen, neighbors, friends of neighbors, police, lost drivers, etc.—and therefore it is not private for purposes of an invasion of privacy claim. Although Plaintiffs live on a privately-maintained road, the road is shared by several neighbors and there is nothing around their home intended to prevent the occasional entry onto their driveway. There is no gate, or "keep out" sign at the beginning of the driveway. There is no fence surrounding the property, nor is it located where the yard cannot be seen by satellite or low-flying aircraft. Indeed, as noted, images of Plaintiffs' property are already publicly-accessible online through their county assessors' office and several map sites offering satellite imagery, starkly reflecting that in the ordinary incidents of Plaintiffs' community life, exterior views of their home are not private. Thus, although they live on a "private road," the view about which Plaintiffs complain simply cannot support an invasion of privacy claim.

Plaintiffs' other claims fare no better. While Plaintiffs have amended their Complaint to plead around Google's motion to dismiss their trespass claim based upon implied consent,

Plaintiffs still fail to allege any damages proximately caused by the alleged momentary entry of a car upon their driveway. Plaintiffs do not seek any damages recoverable under a negligence theory. And Plaintiffs' unjust enrichment claim fails because it is nothing more than a repackaging of their tort claims and because there are no allegations to support a finding that Google benefited from the inclusion of the images at issue in the Street View feature. In short, there is no interpretation of any right alleged in the Amended Complaint that protects the view of Plaintiffs' home or gives rise to liability because of a brief entry upon their driveway. Accordingly, the Amended Complaint should be dismissed with prejudice.

STATEMENT OF FACTS[1]

I. The Parties

Plaintiffs Aaron C. Boring and Christine Boring are individuals residing on Oakridge Lane, in Pittsburgh, Pennsylvania. Am. Compl. ¶ 1. Detailed information regarding Plaintiffs' property, including a photograph of the exterior, may be found on the website of the Office of Property Assessments for Allegheny County, Pennsylvania.[2] There also are several aerial images of Plaintiffs' property and home available on various Internet map websites.[3] Klausner

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[1] This statement of facts is based upon the allegations of the Amended Complaint, the images that are integral to the claims, explicitly relied upon in the Amended Complaint, or upon which Plaintiffs' claims are based, *see In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997), and publicly available information that is subject to judicial notice, *see Anspach ex rel. Anspach v. City of Philadelphia, Dep't of Public Health*, 503 F.3d 256, 273 n.11 (3d Cir. 2007).

[2] *See* http://www2.county.allegheny.pa.us/RealEstate/Search.asp. A copy of these public records is attached as Exhibit B to the Declaration of Tonia Ouellette Klausner in Support of Google Inc.'s Motion to Dismiss Amended Complaint, dated August 14, 2008, and submitted herewith (hereinafter "Klausner Decl.").

[3] The Court may take judicial notice of the indisputable fact that these websites include aerial images of property associated with Plaintiffs' address, which fact can be readily determined by (continued...)

Decl. ¶¶ 5-7 & Exs. C-E. These images as well as the Street View images at issue reflect that there is no gate, fence or sign preventing people from driving up the right of way Plaintiffs use as a driveway, and that Plaintiffs' yard is visible from the air. *See id.* ¶¶ 5-7, 9, & Exs. C-E, G. The plot for Plaintiffs' property and the aerial photos of the street reflect that several properties share Oakridge Lane. *See id.* ¶¶ 5-8 & Exs. C-F. Plaintiffs allege that "[a]t the beginning of Oakridge Lane, there is a clearly marked 'Private Road No Trespassing' sign." Am. Compl. ¶ 6.[4]

Defendant Google Inc. ("Google" or "Defendant"), a Delaware corporation with its principal place of business in California, operates a well-known Internet search engine.[5] Google's mission is "to organize the world's information and make it universally accessible and useful." To this end, Google develops products that let its users more quickly and easily find, create, organize and share information. Google maintains the world's largest and most comprehensive index of web sites and other online content. Google makes the information it organizes freely available to anyone with an Internet connection.

(...continued from previous page)
examination of the websites themselves. Fed. R. Evid. 201; *see, e.g., Gordon v. Lewistown Hosp.*, 272 F. Supp. 2d 393, 429 (M.D. Pa. 2003) (taking judicial notice of distance as reported on MapQuest.com); *McLaughlin v. Volkswagen of Am. Inc.*, No. CIV. A. 00-3295, 2000 WL 1793071, at *3 n.3 (E.D. Pa. Dec. 6, 2000) (taking judicial notice of contents of website).

[4] Should this case proceed beyond the motion to dismiss phase, Defendant intends to prove that at the time of the events in question, any "Private Road No Trespassing" sign at the beginning of Oakridge Lane was not clearly marked or visible.

[5] Plaintiffs' caption incorrectly refers to Google as a California corporation.

II. Google Maps "Street View"

Google Maps is a service on Google's website that permits users to access map information. Google Maps gives users the ability to look up addresses, search for businesses, and get point-to-point driving directions—all plotted on interactive street maps or satellite or aerial images. *See* http://maps.google.com. Consistent with its mission, in around May 2007, Google launched Google "Street View," a feature on Google Maps that offers panoramic street-level navigable views of various streets and roads in major cities in the United States. Am. Compl. ¶ 7. The scope of Street View is public roads. *Id.* In order to create the Street View feature, drivers with panoramic digital cameras on the roofs of passenger cars drove around various cities automatically filming continuous footage of the view from the streets of these cities. *Id.* ¶¶ 7, 8. Pittsburgh is among the cities for which Google offers Street View. *Id.* ¶ 7.

Out of respect for individuals' preferences, Google makes it simple to request the removal of any image available on Street View, whether it is entitled to privacy protection under the law or not. *See* Klausner Decl. ¶ 10 & Ex. H. Whenever a Street View image is accessed, a link labeled "Street View Help" appears in the upper right corner of the image. Following this link takes the user to a dialogue box that includes two links, one of which is labeled "Report inappropriate image." *Id.* Following this link, the user can request that Google remove an image of their house. *Id.*

III. This Lawsuit

Rather than follow the simple removal procedures provided by Google, upon learning that photos of the exterior of their home were available on Street View, Plaintiffs sued Google in the Court of Common Pleas of Allegheny County, Pennsylvania. On May 21, 2008, Google

removed that action to this Court. On May 28, 2008, Google moved to dismiss the original Complaint in this action in its entirety. On July 22, 2008, following Plaintiffs' filing of a Motion to Amend, the Clerk of the Court filed Plaintiffs' Amended Complaint, thereby mooting Google's original motion. The Amended Complaint asserts claims for invasion of privacy, trespass, negligence, unjust enrichment and injunction, and seeks compensatory and punitive damages, as well as attorneys' fees.

ARGUMENT

In deciding a motion to dismiss, the Court may consider the allegations of the complaint, matters of public record, and documents upon which the complaint is based. *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). The standard to be applied on a motion to dismiss was recently clarified by the Supreme Court as follows:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007) (internal citations omitted); *see Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (interpreting *Bell Atlantic* to require sufficient factual allegations to raise a reasonable expectation that discovery will reveal evidence of each element of claim). Absent factual allegations to support each element of a cause of action, and which are sufficient to "state a claim to relief that is plausible on its face," the claim must be dismissed. *Bell Atlantic,* 127 S. Ct. at 1964-65, 1974 (claim based upon conclusory allegations should have been dismissed for failure to state a claim). Disregarding conclusory allegations, and in light of public records and what can be seen in the Street View images upon which this claim is based, the Amended Complaint must be dismissed under Rule 12(b)(6) for failure to state a claim.

I. PLAINTIFFS FAIL TO STATE A CLAIM FOR INVASION OF PRIVACY

Although it is not clear which of Pennsylvania's four possible invasion of privacy torts Plaintiffs are asserting, their allegations suggest either intrusion upon seclusion, or publicity given to private life, which are treated by the courts as two separate claims. *See* Am. Compl. ¶¶ 11, 12 (mentioning "seclusion"), ¶¶ 13, 15 (referring to "private information" made known "to the public at large"); *see generally Pacitti v. Durr*, No. Civ. A. 05-317, 2008 WL 793875, at *25 (W.D. Pa. Mar. 24, 2008) (listing four distinct invasion of privacy torts recognized under Pennsylvania law). As explained below, the Amended Complaint states neither.

A. The Conduct Alleged Does Not Amount To Intrusion Upon Seclusion

Even accepting Plaintiffs' allegations as true, their claim for intrusion upon seclusion fails as a matter of law. In order to state a claim for intrusion upon seclusion, Plaintiffs must allege conduct from which it could be found that "there was an intentional intrusion on the seclusion of their private concerns which was substantial and highly offensive to a reasonable person, and aver sufficient facts to establish that the information disclosed would have caused mental suffering, shame or humiliation to a person of ordinary sensibilities." *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 809 A.2d 243, 248, 570 Pa. 242, 248 (Pa. 2002). Publication is not a required element; recovery is for harm caused by the intrusion itself, which must have been substantial. *Harris by Harris v. Easton Pub. Co.*, 483 A.2d 1377, 1383-84, 335 Pa. Super. 141, 152-53 (Pa. Super. Ct. 1984) (adopting Restatement (Second) of Torts §§ 652B-652E). Plaintiffs' claim fails because Plaintiffs' driveway is not a private place for purposes of an invasion of privacy claim, and because turning around in a driveway while photographing the view in connection with the making of a photographic map is not a substantial intrusion and would not cause the ordinary reasonable person to suffer shame or humiliation.

1. **The view from Plaintiffs' driveway is not private.**

Intrusion upon seclusion requires an intrusion "into a private place" or an invasion of "a private seclusion that the plaintiff has thrown about his person or affairs." *Id.* 483 A.2d at 1383, 335 Pa. Super. at 153-154. Thus, not all privately owned property is "private" for purposes of an intrusion upon seclusion claim. *See Mulligan v. United Parcel Service, Inc.*, CIV. A. No. 95-1922, 1995 WL 695097, at *2 (E.D. Pa. Nov. 16, 1995) (walkway in front of private house not private place for invasion of seclusion claim); *Schiller v. Mitchell,* 828 N.E.2d 323, 327-29 (Ill. App. Ct. 2005) (privately owned garage, driveway, side-door area and backyard not private place for invasion of seclusion claim). As explained by the United States Supreme Court, "the common law of trespass furthers a range of interests that have nothing to do with privacy . . . ." *Oliver v. U.S.*, 466 U.S. 170, 184 n.15 (1984). Thus, whether a place is "private" for purposes of an intrusion upon seclusion does not depend upon whether the place at issue is privately owned. Indeed, courts have found a claim stated based upon an intrusion into a space owned by a third-party. *See, e.g., Benitez v. KFC Nat. Mgmt. Co.*, 714 N.E.2d 1002, 1003 (Ill. App. Ct. 1999) (women's restroom); *see generally* Restatement (Second) of Torts § 652B cmt. c (1977) (recognizing that invasion of privacy may occur in public place). Rather, whether the place at issue is private for purposes of an intrusion upon seclusion claim depends upon whether the plaintiff had a reasonable expectation of privacy in the place intruded upon. *Kline v. Security Guards, Inc.*, 386 F.3d 246, 260 (3d Cir. 2004) (intrusion upon seclusion claim requires reasonable expectation of privacy); *Konopka v. Borough of Wyoming*, 383 F. Supp. 2d 666, 684 (M.D. Pa. 2005) (in absence of reasonable expectation of privacy, plaintiff could not state intrusion upon seclusion claim).

In determining whether a plaintiff had a reasonable expectation of privacy in a place for purposes of an invasion of privacy claim, Pennsylvania Courts have relied upon cases

considering whether a reasonable expectation of privacy existed for purposes of the Fourth Amendment. *See DeBlasio v. Pignoli*, 918 A.2d 822, 825 (Pa. Commw. Ct. 2007); *Konopka*, 383 F. Supp. 2d at 679, 687-88. It is well-settled in the Fourth Amendment context that there is no reasonable expectation of privacy in a driveway, or any other route that a visitor would use to approach a residence. *See, e.g., United States v. Ventling*, 678 F.2d 63, 66 (8th Cir. 1982) (no reasonable expectation of privacy in what could be seen from driveway despite "no trespassing" sign).[6] This is true even if the home is located on a private, common access road. *See State v. Chaussee*, 866 P.2d 643, 647 (Wash. Ct. App. 1994). There also is no reasonable expectation of privacy in the exterior view of one's home that can be seen by any low-flying plane or helicopter. *See, e.g., California v. Ciraolo*, 476 U.S. 207, 215 (1986) (no reasonable expectation of privacy in view of fenced-in yard from fixed-wing aircraft); *Commonwealth v. Robbins*, 647 A.2d 555, 558-60, 436 Pa. Super. 177, 182-88 (Pa. Super. Ct. 1994) (no reasonable expectation of privacy in view of yard from helicopter even though home situated on secluded lane in wooded area).

Similarly, in the context of intrusion upon seclusion claims, numerous courts have found no intrusion into seclusion based upon the view that can be seen from the outside of a home. *See, e.g., Mulligan*, 1995 WL 695097, at *2 (view of plaintiff on walkway in front of yard not private for invasion of seclusion claim); *I.C.U. Investigations, Inc. v. Jones*, 780 So. 2d 685, 689-

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[6] *Accord, e.g., Johnson v. Weaver*, No. Civ. 06-4470, 2007 WL 2780914, at *2 (6th Cir. Sept. 24, 2007) ("[b]ecause the driveway constitutes an 'open field,' [plaintiff] holds no reasonable privacy expectation in it"); *United States v. Evans*, 27 F.3d 1219, 1228 (7th Cir. 1994) (no reasonable expectation of privacy in driveway); *New Jersey v. Domicz*, 907 A.2d 395, 405 (N.J. 2006) ("An area within the curtilage to which the public is welcome, such as a walkway leading to an entrance to a home, is not afforded Fourth Amendment protection because the resident has given implicit consent to visitors to approach the home that way.").

90 (Ala. 2000) (view of plaintiff in front yard not private); *Vaughn v. Drennon,* 202 S.W.3d 308, 320 (Tex. App. 2006) ("One cannot expect to be entitled to seclusion when standing directly in front of a large window with the blinds open or while outside."; no intrusion into seclusion where defendant viewed plaintiff with binoculars through window from neighbor's driveway); *Streisand v. Adelman*, No. SC 077-257, at 32 (Super. Ct. Los Angeles Co. Dec. 31, 2003) (unpublished opinion attached hereto as Ex. 1), at pp. 6; (photo of plaintiff's home posted to Internet that showed rear deck and swimming pool revealed "not truly private place" and thus could not be basis for invasion of privacy claim).

For example, in *Schiller v. Mitchell,* 828 N.E.2d 323 (Ill. App. Ct. 2005) the Appellate Court of Illinois affirmed the dismissal of an intrusion into seclusion claim based upon the 24-hour videotaping by a neighbor of the view of the plaintiffs' garage, driveway and side-door area. *Id.* at 326. The plaintiffs alleged that they had sought to protect their privacy by planting large trees and bushes in their yard and that the defendants' "all-hours personal surveillance" violated their right of privacy. *Id.* at 326-27. Applying Section 652A of the Restatement (Second) of Torts, the court held that the complaint failed to state a claim for intrusion upon seclusion "because the areas photographed by the camera were not private." *Id.* at 439. The court explained that in contrast to an intrusion into a restroom or medical examination room, "the complaint alleged merely that the camera was aimed at plaintiffs' garage, driveway, side-door area, and backyard. The complaint does not explain why a passerby on the street or a roofer or a tree trimmer could not see what the camera saw, only from a different angle." *Id.* at 329. Notably, Pennsylvania also follows Section 652A of the Restatement. *See Harris by Harris,* 483 A.2d at 1383-84, 335 Pa. Super. at 152-53.

Here, the alleged intrusion is significantly less than that at issue in *Schiller*. Plaintiffs' claim is based upon the allegation that a Google driver turned around in Plaintiffs' driveway while the Street View camera photographed the view from the car. Plaintiffs do not allege that they or any other person appeared in any of the photos. Although Plaintiffs allege that they live on a privately owned road marked with a "No Trespassing" sign, there are no allegations, and there is no indication in the Street View imagery at issue or otherwise, of a fence, gate, or anything else that would keep anyone approaching their home by their driveway from seeing the view at issue. Any delivery person, meter reader, telephone wire repair person, or guest of a neighbor who gets lost and turns around in Plaintiffs' driveway would see the same view as seen in the Street View images. *See* Klausner Decl. ¶ 9 & Ex. G. Plaintiffs added to their Amended Complaint a conclusory allegation that Plaintiffs' home "is not visible to the public eye." Am. Compl. ¶ 5. However, the images *at issue* reflect that anyone who drove in Plaintiffs' driveway for any purpose would see the same view upon which this action is based. *See* Klausner Decl. ¶ 9 & Ex. G. *See Brightwell v. Lehman*, No. Civ.A. 03-205J, 2006 WL 931702, at *3 (W.D. Pa. Apr. 10, 2006) (on motion to dismiss court need not accept allegation that is contradicted by document referred to in complaint). Thus, despite living on a private road, the Plaintiffs' driveway is not a private place for purposes of an intrusion upon seclusion claim.

In addition, the view of the exterior of Plaintiffs' home as well as other detailed information about Plaintiffs' home is already publicly available on the Internet. The County Assessor's website contains a photo of the front of Plaintiffs' home, and there are numerous aerial photos of Plaintiffs' property available on other Internet map websites. *See* Klausner Decl. ¶¶ 4-7 & Exs. B-E. Thus, the information allegedly intruded upon is not private for purposes of an intrusion into seclusion claim. *Shorter v. Retail Credit Co.*, 251 F. Supp. 329, 331 (D.S.C.

1966) ("there can be no right of privacy with respect to things which are matters of public record or which, by their very nature, cannot be kept private.").

In sum, because Plaintiffs could have no reasonable expectation of privacy in their driveway as a matter of law, their intrusion into seclusion claim must be dismissed. *See, e.g., Frankel v. Warwick Hotel,* 881 F. Supp. 183, 188 (E.D. Pa. 1995) (dismissing intrusion into seclusion claim where facts alleged, even if proven, would not establish an intrusion into a person's zone of seclusion); *DeBlasio,* 918 A.2d. at 825-26 (affirming dismissal where plaintiff had no reasonable expectation of privacy); *Schiller,* 828 N.E.2d at 327 (same).

2. The conduct alleged is not a substantial intrusion into privacy that would be highly offensive to a reasonable person.

The Complaint independently fails to state a claim for intrusion upon seclusion because the conduct alleged does not amount to an invasion of privacy that is substantial and highly offensive to a reasonable person. The "highly offensive" standard is "a difficult standard to satisfy." *Tucker v. Merck & Co.,* No. Civ. A. 02-2421, 2003 WL 25592785, at *13 (E.D. Pa. May 21, 2003). Conduct that would make an ordinary person feel uncomfortable is insufficient to establish the requisite level of offense. *Id.* Rather, the conduct must be so intrusive that the disclosure of the information at issue "would have caused mental suffering, shame or humiliation to a person of ordinary sensibilities." *Pro Golf,* 809 A.2d at 248, 570 Pa. at 248.

Here, no person of ordinary sensibilities would be shamed, humiliated or otherwise suffer mentally because a Google driver saw and photographed the view of their property from their driveway for purposes of making a map of their town, particularly where, as here, images of such home already are available on the Internet. The Western District of Pennsylvania recently determined that no reasonable juror could conclude that a defendant's unauthorized entry into the plaintiff's home to speak with a third party when the plaintiff was not there was highly offensive.

Pacitti, 2008 WL 793875, at *26. The Restatement recognizes that knocking on the door of a plaintiff's private residence is not a substantial intrusion that would be highly offensive to the ordinary reasonable person. Restatement (Second) of Torts § 652B cmt. d (1977). Driving up a driveway is even less of an intrusion than walking into a person's home or knocking on their front door. Moreover, the images at issue were part of a continuous set of images of Plaintiffs' entire town and were made available on the Internet in connection with a navigable map. Am. Compl. ¶ 7. Permitting others to see the same view of Plaintiffs' property that would be seen by any visitor, delivery person, neighbor or anyone else pulling in Plaintiffs' driveway in this context, simply would not be highly offensive to a reasonable person. *See GTE Mobilnet of S. Texas Ltd. P'ship v. Pascouet,* 61 S.W.3d 599, 618 (Tex. App. 2001) (workers on cell tower viewing adjoining yard not highly offensive); *Streisand v. Adelman,* No. SC 077 257, at pp. 35-36 (posting photos of plaintiff's home including deck and swimming pool on Internet as part of project displaying entire coastline not highly offensive to reasonable person). Because the disclosure alleged would not be highly offensive to a reasonable person, the claim should be dismissed with prejudice. *See DeAngelo v. Fortney,* 515 A.2d 594, 595, 357 Pa. Super. 127, 130-31 (Pa. Super. Ct. 1986) (affirming dismissal of intrusion upon seclusion claim and entry of judgment where complaint failed to allege a substantial and highly offensive intrusion).

B. The Conduct Alleged Does Not Amount to Publicity Given to Private Life

To establish a cause of action for publicity given to private life, the Plaintiff must allege facts from which it can be inferred that the defendant gave publicity to private facts concerning the life of the plaintiff and the matter publicized is of a kind that "(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Harris by Harris*, 483 A.2d at 1384, 335 Pa. Super. at 154 (quoting Restatement (Second) of Torts § 652D (1977)). The Amended Complaint fails to state a claim for publicity given to private life both because the

view of Plaintiffs' home is not a private fact, and disclosure of that view would not be highly offensive to a reasonable person.

First, a "private fact" is one that has not already been made public. *Id.* A photo of Plaintiffs' home has already been made available on the County's website, and numerous aerial view photos of the property already appear on the Internet. Therefore, the exterior view of Plaintiffs' home cannot be a private fact. *Strickland v. University of Scranton*, 700 A.2d 979, 987 (Pa. Super. Ct. 1997) (matters of public record are not private facts). Giving further publicity to the same information – what the exterior of Plaintiffs' property looks like—does not give rise to liability. Restatement (Second) of Torts § 652D cmt. b ("There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public."). Moreover, as explained above, even if Plaintiffs live on a private road, many people have already seen the "facts" at issue – that Plaintiffs' have a swimming pool and two garages. Therefore, Google has not "let the cat out of the bag," which is the essence of the tort. *Dowling v. Philadelphia Newspapers, Inc.*, 29 Phila. Co. Rptr. 135, 150 (C.P. Philadelphia Feb. 6, 1995) (no claim for publicity to private life where facts are already known to public); *Cohen v. Newsom,* No. C 08-01443, slip op. at 5 (N.D. Cal. May 21, 2008) (dismissing publicity to private life claim where video publicly played by defendants had already been made available by plaintiff to limited group of people with access to his website).

Finally, the disclosure by Google was merely to give information, *i.e.*, a virtual map. The line between public facts and private facts "is drawn 'when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.'" *Kelleher v. City of Reading*, No. Civ. A. 01-

3386, 2002 WL 1067442, at *9 (E.D. Pa. May 29, 2002) (quoting Restatement (Second) of Torts § 652D cmt. h). Many members of the public would have a legitimate interest in the view of Plaintiffs' property, including potential homebuyers of properties on the street, and anyone who was trying to locate Plaintiffs' property in order to get there—friends, relatives, delivery people, etc. There is no morbid sense of prying in photos of the exterior of a home that are publicized as part of a map. *See id.* (publication of fact of plaintiff's suspension would not offend standards of decency so no basis to proceed on claim for publicity to private life).

Second, the matter publicized is not of a kind that would be highly offensive to a reasonable person. It is the nature of the facts disclosed, and not the disclosure itself that must be highly offensive in order to meet this element. *Wells v. Thomas,* 569 F. Supp. 426, 437 n. 14 (E.D. Pa. 1983). For the reasons set forth above, publicizing images of the view of Plaintiffs' home from their driveway is not highly offensive. *See supra* Section I.A.2. Moreover, on a publicity to private life claim, "'[i]t is only where the intrusion has gone beyond the limits of decency that liability accrues.'" *Harris by Harris*, 483 A.2d. at 1385, 335 Pa. Super. at 156 (quoting *Aquino v. Bulletin Co.,* 154 A.2d 422, 426, 190 Pa. Super. 528, 533-34 (Pa. Super. Ct. 1959)). This threshold is met when the defendant revealed "intimate details of the life of one who has never manifested a desire to have publicity." *Jones v. WTXF-Fox 29*, 26 Phila. Co. Rptr. 291, 294 (C.P. Philadelphia Aug. 13, 1993). While Plaintiffs may not have injected themselves in to the public spotlight before this lawsuit,[7] the view of their property from their

[7] Ironically, through this invasion of privacy lawsuit, Plaintiffs have drawn the public eye upon themselves and the view of their home they claim is private. Plaintiffs did not seek to file their Complaint or Amended Complaint under seal, they unnecessarily included their street address in the Complaint and Amended Complaint, and they did not ask Google to remove the images of their property before they filed suit. Consequently, Plaintiffs themselves likely caused people who read the extensive press coverage given to this action, who would never have looked (continued...)

driveway is by no means an "intimate detail" of their life. Thus, they cannot state a claim for publicity to private life. *See, e.g., WTXF-Fox 29*, 26 Phila. Co. Rptr. at 294-95(dismissing with prejudice publicity to private life claim where facts given publicity not highly offensive to reasonable person).

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR TRESPASS

In their original Complaint, Plaintiffs alleged that at the beginning of their street there was a "clearly marked 'Private Road' sign." Compl. ¶ 6. Google moved to dismiss Plaintiffs' trespass claim on the ground that even if there were such a sign, that alone would not defeat the well-recognized privilege every member of the public enjoys to drive on any street and turn around in any driveway absent an express notice to the public not to enter. In their Amended Complaint Plaintiffs have tried to plead around Google's argument and now allege that at the beginning of their street there is a "clearly marked 'Private Road No Trespassing' sign." Am. Compl. ¶ 6. While Google vigorously disputes that any such sign was clearly marked at the time the Street View imagery at issue was taken, because Plaintiffs' new allegation must be taken as true for purposes of this motion, Google will not argue privilege on this motion to dismiss.

Despite taking the opportunity to amend their Complaint, however, Plaintiffs have still failed to allege any damage caused by the alleged brief entry upon their driveway. Under Pennsylvania law, damages on a trespass claim are limited to those proximately caused by the trespass. *See, e.g., C & K Coal Co. v. United Mine Workers of Am.*, 537 F. Supp. 480, 511 (W.D. Pa. 1982) ("Plaintiffs bear the burden of proving that the trespass was the legal cause, i.e.,

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at their home on Street View, to plug in the address on Google Maps and view the images Plaintiffs assert are private.

a substantial factor in brining about actual harm or damage in order to recover . . . ."), *aff'd in part, rev'd in part on other grounds,* 704 F.2d 690 (3d Cir. 1983). Although consequential and indirect damages are recoverable, there still must be a causal nexus between the trespass and any such damages. *In re One Meridian Plaza Fire Litig.,* 820 F. Supp. 1460, 1483 (E.D. Pa. 1993), *rev'd on other grounds,* 12 F.3d 1270 (3d Cir. 1993); *see* Restatement (Second) of Torts § 380 (1965) (trespasser liable for harm caused "during the continuance of his trespass").

Here, the only factual allegation of damages anywhere in the Amended Complaint is found under the "Invasion of Privacy" count and provides: "*Revealing this information* has caused Plaintiffs mental suffering and diminished the value of their property." Am. Compl. ¶ 14 (emphasis added). Plaintiffs do not allege any damage resulting from the Street View driver's alleged brief entry upon their driveway itself. *See* Am. Compl. ¶¶ 16-19. Because the only injury asserted by Plaintiffs allegedly was caused by the publication of the images and not by the alleged entry onto their property, any such damages cannot be recovered under their trespass claim. *See, e.g., In re One Meridian Plaza Fire Litig.,* 820 F. Supp. at 1483 (plaintiffs not entitled to recover economic losses on trespass claim where such losses not causally related to trespass); *Costlow v. Cusimano,* 34 A.D.2d 196, 201 (N.Y. App. Div. 4th Dep't 1970) (trespass claim arising out of photos taken of accident at plaintiff's home, which photos were subsequently published, should have been dismissed where alleged injury to reputation and for emotional distress resulted from publication after trespass, and not trespass itself). Finally, while nominal damages may be recovered in connection with a trespass claim, *see, e.g., C & K Coal Co.,* 537 F. Supp. at 511, Plaintiffs have not sought such damages in this action.

III. PLAINTIFFS FAIL TO STATE A CLAIM FOR NEGLIGENCE

As originally plead, Plaintiffs' negligence claim consisted of nothing more than a single sentence reciting the elements of negligence under Pennsylvania law. *See* Compl. ¶ 25. In their

Amended Complaint, Plaintiffs add factual allegations to explain their theory of negligence. While Google disputes that it owes any duty to Plaintiffs and that it breached the duty alleged, the Court need not address these issues on this motion. Plaintiffs' negligence claim must be dismissed because, despite the amendments, the damages alleged remain limited to mental suffering and diminished property value, Am. Compl. ¶ 14, neither of which is recoverable in connection with a negligence claim under the circumstances alleged.

First, Plaintiffs may not recover emotional distress damages in connection with their negligence claim. Pennsylvania law permits recovery for emotional distress as a result of defendant's negligence "only where the claim includes physical injury or in limited circumstances where the plaintiff witnesses injury to another." *Mest v. Cabot Corp.*, 449 F.3d 502, 519 (3d Cir. 2006). Here, Plaintiffs do not allege that they suffered physical injury or that they witnessed physical injury to another. Therefore, Plaintiffs' negligence claim must be dismissed to the extent that it seeks to recover emotional distress damages. *See, e.g., Brooks v. Hickman,* 570 F. Supp. 619, 619-20 (W.D. Pa. 1983); *see also Mest*, 449 F.3d at 519.

Plaintiffs are similarly barred as a matter of law from recovering for the alleged diminution in the value of their property because such damages constitute economic loss. *See Sovereign Bank v. BJ's Wholesale Club, Inc.*, --- F.3d ----, Nos. 06-3392, 06-3405, 2008 WL 2745939, at *14, *16 (3d Cir. July 16, 2008) (affirming dismissal of negligence claims solely alleging economic losses); *see also Lupinski v. Heritage Homes, Ltd.*, 535 A.2d 656, 658, 369 Pa. Super. 488, 492-93 (Pa. Sup. Ct. 1988). Pennsylvania's economic loss doctrine provides that "no cause of action exists for negligence that results solely in economic damages unaccompanied by physical or property damage." *Sovereign Bank*, 2008 WL 2745939, at *11 (internal quotation omitted); *see also Brunson Commc'ns, Inc. v. Arbitron, Inc.*, 266 F. Supp. 2d 377, 384 (E.D. Pa.

2003) (no negligence claim stated where only plausible damages were purely economic in nature). Here, Plaintiffs have not alleged any physical injury to person or property. Therefore, the pure economic loss doctrine bars Plaintiffs from recovering for the alleged diminution to the value of their property. *See, e.g., id.*

Because Plaintiffs have not alleged any damages recoverable under their negligence theory, the Court should dismiss the claim with prejudice.

IV. PLAINTIFFS FAIL TO STATE A CLAIM FOR UNJUST ENRICHMENT

Plaintiffs' newly added unjust enrichment claim is subject to dismissal for two independent reasons.

First, the doctrine of unjust enrichment is simply inapplicable to the facts alleged. Unjust enrichment is a quasi-contractual remedy that typically is invoked "when plaintiff seeks to recover from defendant for a benefit conferred under an unconsummated or void contract." *Steamfitters Union Local 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 936 (3rd Cir. 1999). Where the defendant's retention of benefits conferred by the plaintiff would be unjust, "the law implies a quasi-contract which requires the defendant to pay the plaintiff the value of the benefit conferred." *Ameripro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991, 2001 PA Super. 325 (Pa. Super. Ct. 2001). The fact that the defendant has benefited from the conduct at issue alone will not support a claim for unjust enrichment. *Sovereign Bank*, 2008 WL 2745939, at *16. It is only under circumstances where it would be appropriate to impose a quasi-contractual obligation that the courts will permit a claim for unjust enrichment. *See, e.g., Commerce Bank/Pennsylvania v. First Union Nat'l Bank*, 911 A.2d 133, 143, 2006 PA Super 305 (Pa. Super. Ct. 2006) (referring to unjust enrichment claim as synonymous with "quasi-contract"); *Styer v. Hugo*, 619 A.2d 347, 350, 422 Pa. Super. 262, 268 (Pa. Super. 1993) ("Where unjust enrichment is found, the law implies a contract between the parties pursuant to which the

plaintiff must be compensated for the benefits unjustly received by the defendant."), *aff'd,* 637 A.2d 276, 535 Pa. 610 (Pa. 1994). In situations where the plaintiff had no expectation of being paid, the retention of any benefit is not unjust, and a quasi-contract claim will not stand. *See, e.g., Allegheny Gen. Hosp. v. Philip Morris, Inc.,* 228 F.3d 429, 447 (3rd Cir. 2000) (retention of benefit conferred not unjust because no reasonable expectation of payment from defendant; district court properly dismissed unjust enrichment claim). Here, Plaintiffs' allegations do not support the imposition of a quasi-contract. There is no void or unenforceable contract at issue. And Plaintiffs do not, and cannot, allege that they ever expected to be paid for the use of the images of their house.

Rather, Plaintiffs' unjust enrichment claim is nothing more than a repackaging of their tort claims. As explained by the Pennsylvania Court of Common Pleas, an unjust enrichment claim "makes sense in cases involving a contract or a quasi-contract, but not, as here, where plaintiffs are claiming damages for torts committed against them by defendants." *Romy v. Burke,* No. 1236, 2003 WL 21205975, at *5 (C.P. Philadelphia May 2, 2003) (mem.) (dismissing unjust enrichment claim in suit alleging unauthorized use of plaintiffs' business plan and assets); *see Steamfitters Local 420,* 171 F.3d at 936 ("In the tort setting, an unjust enrichment claim is essentially another way of stating a traditional tort claim"; dismissing unjust enrichment claim where action sounded in tort and tort claims dismissed).[8] Notably, the Restatement of Torts does

[8] There is some confusion as to the meaning of the Court's statement in *Steamfitters. Compare Blystra v. Fiber Tech Group, Inc.,* 407 F. Supp. 2d 636, 644 n.11 (D.N.J. 2005) (relying upon *Steamfitters* in treating unjust enrichment claim as subsumed by tort claims), *with Flood v. Makowski,* No. 3:CV-03-1803, 2004 WL 1908221, at *37 n. 26 (M.D. Pa. Aug. 24, 2004) (interpreting *Steamfitters* to permit stand alone tort-based claim for unjust enrichment). However, neither *Steamfitters* nor any Pennsylvania State Court case that we are aware of has permitted an unjust enrichment count to proceed where it is based exclusively on alleged tortious conduct.

not recognize unjust enrichment as an independent tort. *See Blystra v. Fiber Tech Group, Inc.*, 407 F. Supp. 2d 636, 644 n.11 (D.N.J. 2005). Thus, while under appropriate circumstances a plaintiff may seek restitution for unjust enrichment in connection with a valid tort claim, an unjust enrichment count should be dismissed where the complaint sounds in tort and it is based on nothing more than the same allegations giving rise to the tort claims.[9] Because Plaintiffs' Amended Complaint sounds in tort and the unjust enrichment claim is based exclusively upon the allegedly tortious conduct, the Court should dismiss the claim for failure to state a claim. *Romy*, 2003 WL 21205975, at*5; *Pourzal v. Marriott Int'l, Inc.*, No. 2001-140, 2006 WL 2471695, at *3 (D.V.I. Aug. 17, 2006) (mem.) (dismissing unjust enrichment claim as duplicative of trespass claim).

Second, even if the facts alleged fall within the ambit of a quasi-contract claim, Plaintiffs' allegations do not satisfy the elements of a claim for unjust enrichment. A claim for unjust enrichment under Pennsylvania law requires a showing that (1) the plaintiff conferred a benefit on the defendant, (2) the defendant enjoyed an appreciation of such benefit, and (3) it would be inequitable for the defendant to retain such benefit without payment to plaintiff for the value of the benefit received. *See, e.g., Bouriez v. Carnegie Mellon Univ.*, No. Civ. A. 02-2104, 2005 WL 3006831, at *10 (W.D. Pa. Nov. 9, 2005). Here, the allegations do not reflect that Google received and appreciated any benefit conferred by Plaintiffs.

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[9] The Restatement of Restitution recognizes that the tort of trespass does not give rise to a duty of restitution in the current circumstances. *See* Restatement (First) of Restitution § 129(2) (1937) ("A person who has trespassed upon the land of another is not thereby under a duty of restitution to the other for the value of its use, except a person who has tortiously grazed his animals upon the other's land to which he makes no claim of right.").

The Amended Complaint's allegations of "benefit" are limited to (1) profits attributable to "the aforesaid actions"—presumably the alleged trespass and posting on Street View of the imagery of the exterior view of Plaintiffs' home, and (2) "the expenses saved by Defendant by failing to implement the policies and procedures necessary to prevent the aforesaid activities . . . ." Am. Compl. ¶¶ 27-28. However, the Amended Complaint contains no factual allegations to support the bald assertion that Google made a profit by including the image of Plaintiffs' residence on Street View. Plaintiffs do not allege that the Street View image at issue contained any advertising, or suggest any other possible manner in which Google could possibly have earned profits from the inclusion of the images at issue on Street View—a product that Plaintiffs' admit was designed for images on public roads. *See* Am. Compl. ¶ 7.

Further, any expenses saved by the alleged failure to implement adequate policies to prevent driving on private roads is not a benefit conferred by Plaintiffs, and therefore it cannot support a claim for unjust enrichment. *See, e.g., Commerce Bank/Pennsylvania v. First Union Nat'l Bank*, 911 A.2d at 144 (district court properly dismissed unjust enrichment claim based on alleged amounts saved by failing to take adequate actions); *Doe v. Texaco, Inc.*, No. C 06-02820 WHA, 2006 WL 2053504, at *2 (N.D. Cal. July 21, 2006) (dismissing unjust enrichment claim where any benefits to defendants from failing to implement protective measures "were not conferred upon them by plaintiffs"). Thus, because the Amended Complaint lacks any factual allegations from which it could be found that Google received a financial benefit conferred by Plaintiffs, the unjust enrichment claim fails as a matter of law.

V. THERE IS NO BASIS FOR INJUNCTIVE RELIEF

Because the Complaint fails to state any claim, there is no basis for an award of injunctive relief. *See Wolk v. U.S.*, No. Civ. A. 00-CV-6394, 2001 WL 1735258, *8 (E.D. Pa. Oct. 25, 2001), *aff'd sub nom., Wolk v. National Transp. Safety Bd.*, 45 Fed. Appx. 188 (3d Cir.

2002) (dismissing claim for injunction where the plaintiff failed to successfully allege any other claims against the defendant).

VI. THE REQUESTS FOR PUNITIVE DAMAGES AND ATTORNEYS' FEES SHOULD BE STRICKEN UNDER FEDERAL RULE 12(f)(2)

Even if any of Plaintiffs' claims were to survive this motion to dismiss, there would be no basis for punitive damages, and the prayers for such relief should be stricken pursuant to Rule 12(f)(2) of the Federal Rules of Civil Procedure. Punitive damages are reserved to punish the most extreme and outrageous conduct. *Phillips v. Cricket Lighters*, 883 A.2d 439, 445, 584 Pa. 179, 188 (Pa. 2005) ("[P]unitive damages are an extreme remedy available in only the most exceptional matters."; showing of negligence or even gross negligence insufficient) (internal quotation omitted); *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1096, 508 Pa. 154, 169 (Pa. 1985) ("[p]unitive damages are appropriate to punish and deter only extreme behavior. . ."). The Pennsylvania Supreme Court has adopted the Restatement (Second) of Torts § 908(2) (1979), which defines outrageous conduct as that done with an "evil motive" or "reckless indifference to the rights of others." *See Feld v. Merriam,* 485 A.2d 742, 747-748, 506 Pa. 383, 395-96 (Pa. 1984). Because punitive damages seek to punish and deter only the most egregious behavior, these damages should not be awarded unless the defendant's conduct was more serious than the underlying tort. *See Franklin Music Co. v. American Broad. Cos.,* 616 F.2d 528, 542 (3d Cir. 1979) (upholding the trial court's judgment notwithstanding the verdict on punitive damages because there was no evidence of aggravated conduct); *Chambers v. Montgomery,* 192 A.2d 355, 358, 411 Pa. 339, 344-45 (Pa. 1963) (striking an award of punitive damages for assault and battery because the assault could not be characterized as "malicious, wanton, reckless, willful or oppressive") (internal quotations omitted).

Here, none of the conduct alleged is extreme, outrageous, or in any way exceptional. At most Plaintiffs have alleged an unintentional trespass in the course of taking photos for use in an Internet map. There are no allegations from which it could be found that Google acted with an "evil motive" or intended for its driver to drive on private property. Although the Amended Complaint avers in conclusory fashion that the conduct at issue was "grossly reckless", there are no factual allegations that would support a finding that Google recklessly disregarded the Plaintiffs' rights. Because the conduct alleged is no more serious than commission of the underlying torts, the Court should strike the request for punitive damages. *See, e.g., McCann v. Wal-Mart Stores, Inc.*, 210 F.3d 51, 55-56 (1st Cir. 2000) (affirming pre-trial dismissal of claim for punitive damages where conduct alleged not sufficiently outrageous to permit award of punitive damages); *Smith v. Brown,* 423 A.2d 743, 745-46, 283 Pa. Super. 116, 120-22 (Pa. Super. Ct. 1980) (affirming order striking request for punitive damages where plaintiff failed to plead any facts indicating the defendant's conduct was outrageous); *McDaniel v. Merck, Sharp & Dohme*, 533 A.2d 436, 447-48, 367 Pa. Super. 600, 622-23 (Pa. Super. Ct. 1987) (affirming dismissal of punitive damages as to certain defendants where no allegations beyond what would satisfy elements of claim, and noting unavailability of punitive damages for conduct amounting to "inadvertence, mistake and errors of judgment").

Finally, Plaintiffs have sought attorneys' fees in the separate prayers for relief contained in their invasion of privacy, trespass, negligence, and unjust enrichment claims. Attorneys' fees are not available in connection with these claims. "[Pennsylvania] has consistently followed the general, American rule that there can be no recovery of attorneys' fees from an adverse party, absent an express statutory authorization, a clear agreement by the parties or some other established exception." *Merlino v. Delaware County*, 728 A.2d 949, 951, 556 Pa. 422, 425 (Pa.

1999). Plaintiffs do not base their claims upon any such statute, contractual agreement or established exception. Thus, to the extent any of their claims survive this motion to dismiss, the request for attorneys' fees should be stricken. *See, e.g., Rueda v. Amerifirst Bank*, Civ. A. No. 90-3986, 1991 WL 25565, at *4 (E.D. Pa. Feb. 25, 1991) (striking complaint's claim for attorneys' fees pursuant to Rule 12(f) where plaintiff failed to identify any statutory or contractual entitlement to same).

CONCLUSION

For the forgoing reasons, Defendant Google Inc. respectfully requests that the Court DISMISS the Amended Complaint with prejudice and grant such further and other relief as the Court deems just and appropriate.

Respectfully submitted,

Dated: August 14, 2008

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CERTIFICATE OF SERVICE

I, Brian P. Fagan, hereby certify that the foregoing **DEFENDANT GOOGLE INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS AMENDED COMPLAINT** was filed electronically with the Court on the 14th day of August, 2008. Parties may access this filing through the Court's ECF system. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system, including the following counsel of record for Plaintiffs:

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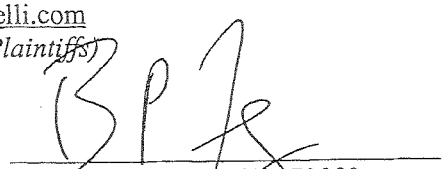

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

AARON C. BORING AND CHRISTINE BORING, husband and wife respectively,	CIVIL DIVISION
Plaintiffs,	CASE NO. 08-694 (ARH)
v.	
GOOGLE, Inc., a California corporation,	
Defendant.	

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS AMENDED COMPLAINT

Plaintiff, Aaron C. Boring and Christine Boring, by and through their legal counsel, Dennis M. Moskal, Esq., and the law firm of Technology & Entrepreneurial Ventures Law Group, P.C., and files the instant Memorandum in Opposition to Motion to Dismiss Amended Complaint, averring as follows:

I. Preliminary Statement

Google, the Leader

Google was started in 1998, and in a decade, it states that it is a global technology leader with one of the most recognized brand names in the world.[1] In the year 2007, Google listed cash and cash equivalents on its balance sheet of $6,081,593,000. For the same year ending 2007, it listed net income of $4,203,720,000.[2] Google is available virtually everywhere. This includes availability in 160 different local country domains and 117 languages.[3]

Google states the following regarding its mission:

"Our mission is to organize the world's information and make it universally accessible and useful. We believe that the

[1] Google's 2007 Annual Report is available at: http://investor.google.com/order.html
[2] *Id.* at 65-66.
[3] *Id.* at vi.

most effective, and ultimately the most profitable, way to accomplish our mission is to *put the needs of our users first.*"[4]

(Emphasis added)

Google's product development philosophy, in part, is "rapid and continuous innovation, with frequent releases of early state products that we seek to *improve with every iteration.*" (Emphasis added).[5] "We operate in a market that is characterized by rapid change and converging, as well as *new and disruptive, technologies* and we face formidable competition in every aspect of our business, particularly from companies that seek to connect people with information on the web and provide them with relevant advertising."[6] (Emphasis added)

Google Street View

In stark contrast to the representations in its annual report, Google's rollout of the Google Street View Project is a clear example of Google putting the needs of its users second. In fact, when Google references 'new and disruptive technologies,' it should be referencing its own Google's Street View Technology. The simple facts should not be lost in the midst of all the legal arguments thrown out by the defense; this is not a private individual driving down the street who is lost and happens to turn around in someone's driveway. This is a corporate giant. This giant is raking in billions of dollars, and in part, because the giant consciously decides not to implement proper controls to protect the landowner, the little person. The giant consciously is deciding that it can trespass on the Borings property and everyone's property. The giant decides it will only implement after-the-fact measures to remedy the situation. [7]

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[4] Google's 2007 Annual Report at 1.

[5] *Id.* at 2.

[6] *Id.* at 12-13.

[7] This is clearly a precarious and risky way for Google to do business in that some individuals, who do not have internet access or do not access the internet regularly, may never discover their imagery on Google Street View. Similarly, third party websites may discover inappropriate imagery prior to the victim in question and publish it on their websites such as www.thesmokinggun.com and other websites. See Plaintiffs' Exhibit 1. These are websites in which Google has no authorization to request removal. So, for the company to claim innocence is disingenuous. It's obvious there are victims.

In other words, the giant is saying the landowner has the burden to discover problems Google has created, not them, and to remedy the situation.

Google has made it clear that it is complacent with violating two independent obligations or duties owed to the public by trespassing on private property as a matter of course and publishing data over Street View, irrespective of how the data is captured, for the whole world to see without any advance method of filtering.

Beware: Google's Watching

Google is available virtually everywhere. This includes availability in 160 different local country domains and 117 languages.[8] If you are a property owner, this omnipresent entity should concern you. Property owners are not secure on their land anymore and must beware.

- The fact that the public record establishes they live on a private road is not enough.
- The fact that the entrance to their private road is a narrow, gravel road is not enough notice.
- The fact that they have a sign on the gravel road saying "Private Road No Trespassing" is not enough.
- The fact that they have a residence surrounded by trees and foliage is not enough.
- The fact that they never authorized or consented to having imagery of their private property on their private road is not enough.
- The fact that they never authorized or consented to said imagery being published for worldwide distribution and archiving is not enough.

But, if, and only if, they fortify their property boundaries, the landowner may stand a chance.[9]

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[8] Google's 2007 Annual Report at vi.

[9] See Defendant's **Gate-and-Guard-Dog Defense**, Defendant's Memorandum In Support of Motion to Dismiss Complaint pp. 8, 17.

Google's Gate-and-Guard-Dog Defense

Despite massive profits of $4 billion and cash available of $6 billion,[10] Google's management, acting in concert with one another, have individually and jointly consciously chosen to save millions by refusing to implement controls to prevent trespassing on private roads as well as the privacy issues, i.e. inappropriate and/or improper imagery of faces. If Google made automobiles, there would be injury for saving money, for profit.

They have thereby acquiesced to the trespassing on private property and invading of privacy that they know is occurring and will continue to occur. Rather than putting the needs of its users first, the company wants to put the burden of improving early releases on you, the user, after-the-fact. In other words, Google wants to be free to go on anyone's property at any time UNLESS - if one accepts their **Gate-and-Guard-Dog Defense** - the landowner fortifies their property. The restrictions of legal *authority* are not enough, landowners must use *power*. And, no one has enough power to stop Google, so the law must enforce the remedy. Landowners are not allowed to consent to anyone transgressing on your property for any reason lest they implicitly give up any privacy interest. That's the logic of their **Gate-and-Guard-Dog** defense.

This is apparently a case of first impression: big corporate interests plunging forward with new technology facing off against individual property interests. The task before this Court is to examine the concept of property interests in this high tech era. If the Court allows this intrusion, the precedential value of such a holding would be a slippery slope eroding basic private property common law.

Surely, Google admits the trespass, admits it is for a commercial purpose, admits that it is done systematically and has

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[10] *Id.* at 65-66.

huge profits. Google merely had set forth that it had an affirmative defense, that it as the absolute right to do so.

It is setting a dangerous precedent whereby other giants, whether Microsoft or Yahoo, could follow in Google's tracks, one after the other, in line, seriatim. Homeowners and citizens alike will have to live in fear that the privacy interests that are fundamental to our Civil Liberties will be slowly eradicated, bit by bit. That is, a homeowner on his or her private property, with signs posted on the road, "Private Road, No Trespassing" would watch Google, then Microsoft, then Yahoo, then everyone else continue to each take their "free bite" until the private property rights are eaten away. The giants gobble it all up, the property rights are left with nothing on the bone.

II. Standard of Review

To sustain a dismissal of a complaint under Fed.R.Civ.P. 12(b)(6), "we must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff," and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief. *Helstoski v. Goldstein,* 552 F.2d 564, 565 (3d Cir. 1977)(per curiam). As the Supreme Court stated, a federal court reviewing the sufficiency of a complaint has a limited task. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974).

III. Plaintiffs' Invasion of Privacy Claim does not Fail as a Matter of Law

A. The conduct is an intrusion upon seclusion.

Our Third Circuit has set forth the elements of an intrusion upon seclusion as a "(1) physical intrusion into a place where the plaintiff has secluded himself or herself; (2) use of the defendant's senses to oversee or overhear the

plaintiff's private affairs; or (3) some other form of investigation or examination into plaintiff's private concerns." *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611 (3d Cir. 1992).

The Restatement (Second) of Torts §652B sets forth as follows:

"One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

Another form of invading privacy interests is when a Defendant gives publicity to private facts concerning the life of the Plaintiff and the matter publicized is of a kind that "(a) would be highly offensive to a reasonable person, and (b) is not a legitimate concern to the public." *Harris by Harris*, 483 A.2d at 1384, 335 Pa.Super. at 154 (quoting Restatement (Second) of Torts §652D).

For the sake of brevity, both forms of invasion of privacy which have similar elements will be discussed in the same section as follows.

1. Plaintiffs' property is private, and Plaintiffs had a reasonable expectation of privacy.

Plaintiffs' Property is Private

Despite the fact that Plaintiffs live on a private road at the end of a narrow gravel road with an unmistakable sign stating "Private Road No Trespassing" and with their house encircled on all sides by trees as shown on Plaintiffs' Exhibits 2-3 and Google's Exhibits C, D and E, Google disingenuously claims that Plaintiffs' property is not private and further, that Plaintiffs have no reasonable expectation of privacy.[11] To the contrary, the facts surrounding the intrusion unequivocally establish that the property is private and the Plaintiffs have a reasonable expectation of privacy.

[11] To the extent that these facts are not in the instant record, Plaintiffs would seek leave to amend their complaint.

Google claims that not all privately owned property is "private" for purposes of an intrusion upon seclusion claim.[12] Google cites to the *Fogel* decision, for the proposition that a "place that is 'open to the public eye' is not private for purposes of intrusion of seclusion claim. *Fogel v. Forbes,* 500 F.Supp. 1081, 1087 (E.D.Pa. 1980). The *Fogel* decision involved an individual having their picture taken in an international airport; thus, it is easily distinguishable from the instant case whereby Plaintiff's premises are not open to the public eye. To the extent that Plaintiffs have not pled this fact, it is easily remedied by filing an amended complaint. Google also cites to another case, which involves surveillance cameras monitoring work areas and hallways. *Kline v. Security Guards, Inc.*, 386 F.3d 246, 260 (3d Cir. 2004). Of course, there is no comparison between photographs in the workplace and trespassing vehicles taking 360-degree panoramic colored imagery without authorization for reproduction worldwide.

Reasonable Expectation of Privacy

Google does not cite to any case involving a private road for its conclusion that it is not determinative that it's a private road. Rather, Defendant asserts that the determining factor is whether Plaintiff had a reasonable expectation of privacy. Reviewing the pleadings in the light most favorable to the Plaintiffs, the allegations asserted in the Complaint set forth that Plaintiffs' had a reasonable expectation of privacy.

Plaintiffs have properly pled that they purchased a home on October 10, 2006 on Oakridge Lane for a considerable sum of money. A major component of their purchase decision was a desire for privacy. The property includes the residence, two garages and swimming pool. There is also a fifty foot right of way to their home. See Amended Complaint, ¶ 5. They have also properly pled that the beginning of Oakdridge Lane is marked with a Private Road No Trespassing sign.[13] *Id.* ¶6. Upon entering

[12] See Google's Memorandum at pp. 7.
[13] The sign actually says "Private Road No Trespassing" and the Complaint can be amended as such.

Oakridge Lane from Reis Run Rcad, a two-lane paved road, the road changes to a narrow gravel road. See Google's Exhibits C-E; see also Plaintiffs' Exhibits 2-3. It is undisputed that the scope of Google Street View is paved roads. Plaintiffs have pled that Google's driver entered the property without authorization or consent and took imagery of the residence, garages and swimming pool without consent. *Id.* ¶9. Furthermore, Google took this imagery and published it worldwide on the internet. *Id.* ¶7. With the entire world as a potential viewer of the imagery, it was open to whatever uses or misuses viewers from all over the world may utilize such information, including archiving it.

The facts of the complaint, which are to be taken as true for the purposes of this motion, as well as Plaintiffs' Exhibits 2-3 and Google's aerial Exhibits C-E, together establish trees and foliage encircling and hiding the property from public view, support a "reasonable expectation of privacy." Testimony will likewise support the expectation of privacy, such as the reasons for Plaintiffs selling their house and moving to Oakridge.

Gate-and-Guard Dog Defense

Google next introduces a novel theory, it's "gate-and-guard-dog" defense claiming that Plaintiffs' claim for invasion of privacy should be dismissed because they do not have a gate or some other impediment to keep anyone "who is lawfully" on Oakridge Lane from driving up their driveway.[14] This presupposes that the 'anyone' referenced is "lawfully" on the property.

If we accept Google's ill-conceived logic, the fact that the public record establishes you live on a private road is not enough to protect your privacy interests from Google's standpoint. The fact that the entrance to your private road is a narrow, gravel road is not enough notice. The fact that you have a sign saying "Private Road, No Trespassing" is not enough. The fact that you have a residence surrounded by trees and foliage is not enough. The fact that you never authorized or consented to having imagery of your private property on your private road is

[14] See Google's Memorandum at pp. 8.

not enough. The fact that you never authorized or consented to said imagery being published for worldwide distribution and archiving is not enough. But if you fortify your property or have a canon at the entrance of your property, you stand a chance with Google.

Incredulously, Google tries to allege that delivery persons, meter readers, telephone wire repair persons, guests and people turning around are similarly situated people to the Google driver, and provide justification for the unauthorized driver without any prior notice to intrude on clearly marked private property on behalf of a commercial entity seeking commercial gain and take unauthorized imagery for worldwide distribution.

Google's argument might have some appeal at first blush; however, a closer look clearly refutes such a position. If we accept Google's position, by the same logic, no medical record should be private because there are doctors that have seen it. If you follow such logic to its furthest degree, you could never have an expectation of privacy as to matters that occurred in the bedroom if you had previously invited guests to your bedroom. Nothing is further from the truth. Just because a person consents to individuals being on the property, it does not follow that you cannot have an expectancy of privacy. Whether it is the privacy interest in matters occurring in your bedroom or in not having Google without any prior notice or authorization trespass onto your property despite a private road, no trespassing sign and take various imagery of your property for mass distribution worldwide, you are free to invite or consent to people entering your property or other zone of privacy without destroying your privacy interest.

Google next claims that "[u]nder *similar* circumstances, numerous courts have found no intrusion into seclusion." (emphasis added) However, at closer glance, the cases are clearly not similar at all and quite distinguishable. For instance, the *Mulligan* decision involves an employee who alleged wrongful discharge in retaliation for filing a worker's

compensation claim. *Mulligan v. United Parcel Service, Inc.*, 1995 WL 695097 (E.D.Pa. Nov. 16, 1995). The complaint further alleges that an investigation team used a surveillance camera to take photographs of claimant repairing a walkway in front of his house. Plaintiff claimed this was an invasion of privacy. *Mulligan*, at *2. The *Mulligan* case has no similarity to the instant case relating to a private road and so, is not applicable. The surveillance films shot for the very limited purpose of refuting a worker's claim of work-related injury in the workers' compensation realm are *de minimis* compared to the mass distribution of Google. Additionally, the claimant who was receiving workers compensation benefits had put his health at issue when he filed a claim.

Google also references and attaches a copy of *Streisand v. Adelman* for the proposition that an aerial photo taken of Ms. Streisand's house by a non-trespassing photographer posted to the Internet that showed the rear deck and swimming pool was held "not truly private place." *Streisand v. Adelman*, No. SC 077-257, at 32 (Super Ct. Los Angeles Co. Dec. 31, 2003). However, Google's reliance on the *Streisand* case is similarly misguided. The *Streisand* case involves an individual who had voluntarily thrust herself into the public spotlight rather than private individuals. It is without doubt that Ms. Streisand, an actress known throughout the globe, would have a much different reasonable expectation of privacy then private individuals on a private road. Additionally, while the photographs of Streisand's home were related to a non-profit effort regarding a conservation effort involving the California Coastline, there is no legitimate public interest in Plaintiffs' private property.

Google's next foray is into cases involving Fourth Amendment illegal searches and seizures, which are clearly distinguishable. They draw the conclusion that "[u]nder these authorities" namely, the two cases of *DeBlasio v. Pignoli* and *Konopka*, Plaintiffs could not have a reasonable expectation of privacy in the view of their property. However, this argument

clearly fails in the face of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 82 L.Ed. 1188, 58 S.Ct. 817 (1938) because a district court cannot, *a fortiori*, apply a federal standard of law to a cause of action grounded in the common law of the state in which it sits.

Allegheny County Website

Google attempts to further confuse the privacy issue by claiming that an old picture taken and posted by government officials on the Real Estate Assessment website somehow transforms their panoramic, 360-degree, view of the property as public facts. However, if you view the single photograph that appears on page 6 of Google's Exhibit C, an antiquated two dimensional single photograph taken on behalf of an Allegheny County Taxing agency, and compare it with the unauthorized 360 degree panoramic colored imagery on Google Street View, as shown by Plaintiffs' Exhibit 2, which includes the entire length of the private road and Plaintiffs' driveway, swimming pool and home surroundings, Google's argument is de minimis. The single snapshot from the Real Estate Assessment Office establishes absolutely nothing with regard to surroundings. On the other hand, Google's lively imagery allows the world to take a walk from Reis Run Road onto a narrow private gravel road through all the turns, trees and foliage, pass the "Private Road, No Trespassing" sign and wind through Plaintiffs' driveway to their hidden home. The imagery allows you to turn 360 degrees so that nothing is left to the imagination including the extent of the seclusion of the property.

2. The conduct alleged is a substantial intrusion into privacy that would be highly offensive to a reasonable person in Plaintiff's circumstances.

When determining whether an event is a substantial intrusion and highly offensive, as a first step the Court must look at what constitutes the essence of the privacy interest.

In *Galella v. Jacqueline Onassis*, the United States Court of Appeals for the Second Circuit defined the essence of the privacy interest as follows:

"[A] general 'right to be left alone,' and to define one's circle of intimacy; to shield intimate and personal characteristics and activities from public gaze; to have moments of freedom from the unremitted assault of the world and unfettered will of others in order to achieve some measure of tranquility for contemplation or other purposes, without which life loses its sweetness. The rationale extends to protect against unreasonably intrusive behavior which attempts or succeeds in gathering information, Note 83 Harv. L. Rev. 1923 (1970), and includes, but is not limited to, such disparate abuses of privacy as the unreasonable seeking, gathering, storing, sharing and disseminating of information by humans and machines." *Galella v. Onassis,* 487 F.2d 986, 1973 U.S.App. Lexis 7901 (2d Cir. 1973).

Google argues that no person of ordinary sensibilities would be shamed, humiliated, or otherwise suffer mentally from the conduct of Google. Contrary to its assertions, Plaintiffs are private individuals who purchased a very secluded home surrounded by trees and foliage on all sides for privacy reasons. The private road leading to their property is a narrow gravel road with a clearly marked "Private Road No Trespassing" sign whereby one would not expect visitors day by day, let alone an unannounced stranger in a vehicle with a camera mounted atop of it, driving along the private gravel road, disregarding clearly marked signage, and continuing right up the secluded and windy right of way to the house and swimming pool buried behind trees unannounced and unauthorized taking imagery with no one around for publication over the worldwide web. As stated by Pam Dixon, Director of a Privacy Advocate Group in San Diego, "Computers have very long memories."[15] Plaintiffs know it was merely fortuitous that no one was in the swimming pool. It is clear that a reasonable person living on a private road with the reasonable expectation of privacy would mentally suffer upon facing these circumstances. The stress of knowing that someone is watching or could be watching and the powerlessness and vulnerability to the intrusion.

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[15] *Is Google Map Street View an Invasion of Privacy?* , Internet Business Law, August 13, 2007; see also Footnote 7.

Although discussing how our rights exist in public spaces rather than private property as in the instant case, Robert Ellis Smith, leading advocate of privacy rights and publisher of Privacy Journal, stated that "[i]t is true that each of us, whenever we leave home and enter public spaces, run the risk that another person will observe our movements, remember them, and tell others about them. That does not mean that we consent to a permanent video record being made of our comings and goings, a video record that may now be stored digitally, searched by date or by location or by the geometrical relationships of the head of a person (biometics). It is this new permanent digital and search capacity that makes video monitoring a far greater threat than the possibility that any stranger will witness our activities in public." *Privacy Journal*, July 2008, Vol. 34, Number 9.

IV. Plaintiffs' Trespass Claim does not Fail as a Matter of Law

In its review of the pleadings, it is clearly recognizable that Defendant's response to the trespass claim does not even deny the unauthorized trespass on the property; rather, the arguments in Defendant's original motion to dismiss the trespass claim were nothing more than affirmative defenses, such as their original claim of unqualified privilege to trespass, for which Defendant, not the Plaintiffs, had the burden to prove. Now, all of a sudden, Defendants attempt to argue that Plaintiffs are trying to plead around Google's argument. However, Defendant's impugning of the character of Plaintiffs' amendment and its motivations is merely a clever smokescreen over their own transgressions. They attempt to argue that Defendant is now dropping its four page privilege claim due to the fact that Plaintiffs' amended their complaint to add that the sign said "Private Road - No Trespassing" rather than "Private Road" - as if their original argument of privilege had merit. Rather, Plaintiffs' amendment was clarifying the fact of what the sign

states, a fact to which the whole street in question can attest and which is easily seen with the Defendant's own Street View imagery. See Exhibit 2, the color photos of which have been delivered in conjunction with the first brief to the Court. There is nothing mistaken about Defendant's trespass; Defendant corporate giant has made an intentional business decision to refrain from costly internal controls to prevent trespasses. See Exhibit 7, Google Claims Right to Post Photos from Private Land.

In summary, Google believes and they will resurrect this belief that the Borings and every other owner of private property, must presuppose and concede Google and every other third-party's affirmative defense of an unqualified and absolute privilege to trespass. That is, Google's position is that the law permits Google to consciously decide, as a profit-making and expense avoiding business strategy, to trespass onto private roads, designated as "private road - no trespassing," drive onto every person's landscape, or even walk up to the door with a three-dimensional camera to photograph imagery to be published world-wide. And, logically, of course, this would also mean that Amazon, AOL, Yahoo and unlimited others could based on a similar claim of unqualified and absolute privilege could do the same, in line, seriatim throughout any given day.

Google further states that Plaintiffs' damages were not proximately caused by their entry on the property. In other words, they admit they entered onto Plaintiffs' private property.

A. Google had no actual or implied consent.

On pages 15-18 of Defendant's original brief in support of its motion to dismiss, as stated above, Defendant originally cited a whole four pages of case law to support this alleged privilege. The ONLY reason for Google's amendment of their brief to leave out the four pages is that there was never a basis in law or fact for the arguments which they now summarily drop.

A review of the cases Defendant originally listed, roughly one-fifth of their whole argument, shows the candor of the Defendant toward the tribunal is suspect and casts a discrediting

shadow over their whole argument. As originally argued, Defendant had cited the Third Circuit decision of *Lal v. CBS, Inc.*, 726 F.2d 97, 100 (3d Cir. 1984) for the proposition that the privilege of consent is an absolute defense to a trespass action. The *Lal* decision involved a tenant in possession of property giving permission to the news media to enter the leased premises and take pictures. The news media then published the pictures on TV, implying the landlord was a slumlord. Since the tenant gave consent, the trespass count was dismissed. Plaintiffs do not disagree that actual consent would defeat a trespass claim. Under the instant facts herein, the *Lal* supports Plaintiff's claim. If Plaintiff had given consent to the entrance of Google onto the private road and his private driveway to take photographs for dissemination world wide, Plaintiff would not have filed suit. *Id.*

Defendant had next argued that a case regarding title to mollusks and shells at the bottom of a stream supports their theory that they had consent "implied" by custom. *McKee v. Gratz*, 260 U.S. 127, 136 (1922). Not only does this decision, which is nearing one-hundred years old, not support Defendant's position, but it is incredulous to set forth that custom and habits of the country implied a right for Google to enter onto private roads and take photographs for world-wide dissemination. The *McKee* decision relates to a different and time remote set of facts altogether clearly distinguishable from the instant facts. Its main focus was the ownership of mussel shells at the bottom of a stream. The decision related to long-standing custom of fishing in large expanses of unenclosed and uncultivated land, a set of circumstances that existed in the 1920's. In fact, the *McKee* opinion states that "there was evidence that the practice had *prevailed* in this region." *Id.* There is no evidence of prevailing conduct herein. Also, as the syllabus clearly sets forth in paragraph 5, the existence of such custom and license was held for the jury. It certainly cannot be set forth as a matter of law in a motion.

Defendant then referenced *Fanning v. Apawanna Golf Club* for the proposition that consent can be implied by custom. *Fanning*, 82 A.2d 584, 169 Pa.Super. 180 (Pa.Super. 1951). However, the facts of the case clearly establish that reliance upon this case is misguided. Specifically, the case sets forth that a member of the gulf club asked Stanley Wykowski, director of the club, if the boys, including the injured one, could work as caddies; hence, the case is about express consent. *Id.* at 182.

Finally, the *McKee* decision relies upon *Marsh v. Colby*, where it was opined: "it has *always* been customary, however, to permit the public to take fish in all the small lakes and ponds of the State, and in the absence of any notification to the contrary, we think any one may *understand* that he is licensed to do so. No such notification appears in this case, and we therefore hold that the defendant was not a trespasser in passing upon plaintiff's land with the intent to take fish, having no *knowledge* that objection existed to his doing so." (emphasis added) *Marsh*, 627.

From the *Marsh* and *McKee* cases together, it can be gleaned that they stood for the proposition of a long-standing, prevailing custom where the alleged trespasser reasonably "understood" he was licensed to enter to do the act in question and/or that the person had no knowledge that an objection existed to him doing the act in question. There is no prevailing custom herein and nothing of record that suggests that the drivers in the instant case understood they were licensed to enter upon the land to take pictures for worldwide dissemination and/or that they had no knowledge of an objection. In fact, Google's policy was not to go on private roads or unpaved roads. Furthermore, it was a private road with a "private road, no trespassing" sign; thus, the driver could not have understood he was licensed to do so or that there would be no objection. The facts establish fair notice not to do what Google's drivers did.

B. Defendants Gate-and-Guard-Dog Defense is shere folly and that's why it was dropped.

Defendants then introduced their "gate-and-guard-dog" defense which would wreck havoc on the notion of trespass laws. They dropped this argument with full knowledge that it undermined their whole position. Specifically, Defendant had stated that it is "*well-established* that due to the implied consent given by general custom, absent a locked gate or other express notice to enter, the public may drive up the driveway or otherwise approach the front door of a private home without liability for trespass." (emphasis added). *See Defendants' Original Brief*, pg. 15. Even though they had set forth it is well-established, the only case they reference is *Singleton v. Jackson*, 935 P.2d 644, 647 (Wash.Ct. 1997), a case that is not even from the instant jurisdiction, has only been referenced nine times in fifteen years, and has never been cited in a case outside the Washington Courts until now. Furthermore, the case involves premises liability and the duty owed to someone that enters on the land and is injured. In the instant case, the entrant is not harmed, but rather, does the harming act. Finally, the *Singleton* case opines that "the *decisive factor* is the interpretation which a reasonable [person] would put upon the possessor's acts." *Singleton*, at 840 citing comment e of the *Restatement (Second) of Torts*, §330. Under the facts set forth in the instant case, there is nothing of record to establish that the driver, who was on private property without any intention to conduct a solicitation of any sort and/or without any license under §154-2 of the Borough of Franklin Park General Code to do so[16], reasonably believed that he was welcome to come upon the property and take pictures for mass-distribution, especially considering it was a private road with a private road sign. Rather, the facts will show that the driver knew that he was not permitted on private property or unpaved roads as it was beyond the scope of the Street View project.

C. Plaintiffs have set forth a causal connection.

[16] It is noteworthy that Google references a portion of the Franklin Park Borough Code. If they had contacted the Borough for a list of private roads, the instant case could have been averted.

Defendant's next argument is that there is no causal nexus between the trespass and any such damages. As the Defendant notes, a trespasser is liable not only for personal injuries resulting directly and proximately from the trespass but also for those which are indirect and consequential. *In re One Meridian Plaza Fire Litigation*, 820 F.Supp. 1460, 1483 (E.D.Pa. 1993) citing *Kopka v. Bell Tel. Co.*, 371 Pa. 444, 451, 91 A.2d 232 (1952). Defendants would be misguided to rely upon *In re One Meridian Plaza Fire Litigation* because the facts involve a class action brought by numerous Plaintiffs based on negligent conduct causing a fire. The fire is the entrant. Thus, the case would have no applicability to an intentional tort such as trespass where there is an actual entry by an individual.

Defendants assert that Plaintiffs do not allege any damages resulting from the Street View driver's alleged brief entry upon their driveway itself. Contrary to Defendant's assertions, the harm is directly related to the brief entry. The harm experienced in the unauthorized taking of images and posting them over the internet for worldwide distribution is no different than a brief entry on property to steal a vehicle. If Defendant had entered the property and stolen a motorcycle, clearly it would be a damage flowing from the trespass. Just because they entered the property to steal imagery rather than a motorcycle does not remove the claim from the scope of trespass. It's a new high tech era; the Court should not be so constrained in its view of damages.

Defendants argue *Costlow v. Cuismano*, 34 A.D.2d 196, 311 N.Y.S.2d 92 (NY 1970), precludes Plaintiffs from seeking damages due to the events in question. Applying Pennsylvania law, the Pennsylvania Supreme Court stated: The authorities are clear to the effect that where the complaint is for trespass to land the trespasser becomes liable not only for personal injuries resulting directly and proximately from the trespass but also for those which are indirect and consequential. See *Kopka v. Bell Tel. Co.*, 371 Pa. 444, 451, 91 A.2d 232, 235-6 (Pa. 1952).

In *Northeast Women's Center v. McMonagle,* trespassers on an abortion clinic argued that under a trespass claim, they should only have to pay for the actual damage to plaintiff's real property, not for any injury to plaintiff's business. *Northeast Women's Center,* 689 F.Supp. 465, 477 (E.D.Pa. 1988).

The Court opined as follows:

The Pennsylvania Supreme Court pronouncement follows the general rule in regards to tortfeasors in general; that the trespasser is responsible in damages for all injurious consequences flowing from his trespass which are the natural and proximate result of his conduct. *See* 75 Am. Jur. 2d, Trespass, Section 52. This court sees no valid reason why a trespasser could not be held liable for injuries to his or her business which are properly found by a jury to be the proximate cause of the trespass. If plaintiff's alleged injuries to business were not the consequence of defendants actions, the jury would have found that they were not the proximate cause of defendants' actions. Plaintiff's injuries as alleged and proven were not unduly indirect or remote from defendants' trespass. Therefore, defendants' motion on this ground is denied. *Northeast Women's Center,* supra at 477.

Under the same rationale as the Court in *Northeast Women's Center,* there is no reason why Defendant should not be liable for their profits gained in being able to use the imagery without authorization and failing to implement proper controls to prevent trespassing. Furthermore, as the Court stated, the damages are a decision for the jury.

As a further note, aside from any compensatory damages, *Costlow* clearly states that Plaintiffs could seek nominal damages and punitive damages in relation to a trespass action. Plaintiffs have already sought punitive damages in relation to the trespass, and to the extent Defendant asserts that nominal damages have not been properly pled, Plaintiffs could amend the complaint.

V. **Plaintiffs have sufficiently pled a claim for negligence.**

Although the facts support that the actions of Google support intentional conduct, Plaintiffs, in the alternative without waiver, have pled negligence based on two separate independent duties that Google owes to the Plaintiffs and others. Google owes a duty to utilize proper internal controls to avoid trespassing on private property. Additionally, Google has a duty to utilize proper methods and controls to avoid publishing data over Street View, irrespective of how the data is captured, for the whole world to see without some advance method of filtering.

Google's next argument is that mental suffering and diminished value of property are not recoverable in negligence. Diminished property value is property damage no different by analogy then a vehicle damaged in an automobile accident.

Google further claims that the economic loss doctrine bars negligence claims seeking recovery for 'economic damages' or 'losses' unless there has been physical injury either to a person or property." *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 395 F.Supp.2d 183, 204-5 (M.D.Pa. 2005). Contrary to Google's representations, the economic loss doctrine has no bearing in the instant case where the gist of the action sounds in tort rather than contract. The *Sovereign Bank* case as well as the other cases cited by Google are applicable when there's both contract and tort claims pled. The economic loss doctrine is applicable in situations where there is a product purchased, and in such cases, contract law is better equipped to handle disputes between parties to commercial transactions. *East River Steamship v. Transamerica Delaval*, 476 U.S. 858 (1986)

VI. **Plaintiffs' have set forth a cause of action for unjust enrichment.**

Defendant argues that unjust enrichment (alias "implied-in-law" contract) is inapplicable to the facts set forth in the amended complaint. Defendants argue in the very first sentence that "unjust enrichment is a quasi-contractual remedy that

typically is invoked 'when Plaintiff seeks to recover from Defendant for a benefit conferred under an unconsummated or void contract." (emphasis added) Thus, at best, Defendants words discuss a typical situation not the exhaustive universe of unjust enrichment claims. On page 21, Defendants chose their words cautiously again, stating that "under *appropriate* circumstances a plaintiff may seek restitution for unjust enrichment in connection with a valid tort claim..."

Quasi contract "implies a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement when one party receives an unjust enrichment at the expense of another." *Birchwood Lakes Community Ass'n v. Comis,* 296 Pa.Super. 77, 442 A.2d 304, 309 (1982); *Schott v. Westinghouse Elect. Corp.*, 436 Pa. 279, 259 A.2d 443 (1969). To sustain a claim of unjust enrichment, the evidence must show that a person wrongly secured or passively received a benefit which it would be unconscionable for that party to retain. *Hershey Food Corp. v. Ralph Chapek,* 828 F.2d 989, 999 (3d Cir. 1987), citing *Torchia on Behalf of Torchia,* 346 Pa.Super. 229, 499 A.2d 581, 582 (1985).

Under the instant facts, Defendant entered onto Plaintiffs' property without authorization to take pictures for commercial exploitation. These facts fit clearly within the doctrine of unjust enrichment. There is no question that the entrance onto the property was without consent and wrongful. If Defendant wanted to enter onto the property to take imagery, it could have sought permission. Rather, Defendant took it upon itself to conduct the Street View project with no prior notice to the community and to enter onto such private properties without consent. The benefit realized was not just the pictures per se, but also a realization of a much greater benefit in the form of a reduction in expenses by Defendant's willingness not to implement any measures to prevent trespasses or invasions of privacy before they occur. See Prosser and Keaton on Torts, 5th Ed. §9.4 (The measure of recovery is determined on the equitable basis of the

unjust enrichment of the Defendant rather than the loss of the Plaintiff). Implementation of procedures to prevent trespasses and invasions of privacy would force Defendant to incur significant expense; nonetheless, that does not give Defendant the right to disregard such measures. Finally, the benefit conveyed is clearly by the Plaintiffs as the Defendants were trespassing on Plaintiffs' property taking pictures for commercial exploitation and did so, because they did not implement controls to prevent this from happening.

Although Defendant argues that unjust enrichment is merely a repackaging of their tort claims and that you cannot argue both in a tort setting and/or that they are duplicative, counts are routinely pled in the alternative. See FRCP 8(d), which allows for pleading in the alternative. To the extent that Plaintiffs have not pled it in the alternative, that is easily remedied by amendment, not dismissal.

In conformity with the Pennsylvania Rules regarding pleading, the Pennsylvania Courts have opined that tort damages and restitution damages for unjust enrichment damages are alternatives. See *Pa.Gear Corp. v. ACSA Steel Forgings, S.P.A.*, 2002 U.S. Dist. LEXIS 23491 (E.D.Pa. 2002). See also *Lindsley v. First Nat'l Bank of Philadelphia*, 325 Pa. 393, 190 A. 876, 878 (Pa. 1937)(a plaintiff whose check was converted could recover for restitution damages instead of tort damages); *Rodgers v. Studebaker Sales Co.*, 102 Pa.Super. 402, 157 A. 6 (Pa.Super.Ct. 1931)(allowing Plantiff to recover for restitution damages instead of tort damages when the Defendant converted and sold Plaintiff's automobile); See also *Buford v. Wilmington Trust Co.*, 841 F.2d 51, 56 (3d Cir. 1988)(citing with approval *Wessel v. Montgomery, Scott & Co.*, 106 Pa. Super. 341, 351, 163 A. 347 (Pa.Super.Ct. 1932); 1A C.J.S. *Actions* §§ 110, 123; Dan R. Dobbs, *Law of Remedies* § 5.18(1)-(2), at 923-24, 928-29 (2d ed. 1993).

Defendants next argue that Plaintiffs must show that Google made a profit by including the images in question; to the contrary, Defendants have confused the issues. The real question

is whether Google made a profit from deciding not to implement controls that would prevent inclusion of imagery of private property. Benefit is no limited to funds coming in. The reduction of costs by failing to implement control measures is a huge financial benefit by limiting the funds going out. It's no different than the legendary Ford Pinto case where a corporation makes a cost-benefit analysis whether to implement a control, and incur the expense, at its own risk.

VII. Plaintiffs' have set forth a basis for injunctive relief.

Plaintiffs made a reasonable request for equitable relief, whereby Google would immediately revise and/or implement adequate procedures to ensure the privacy of those living along private roads, including Plaintiffs. See Amended Complaint, ¶21. Plaintiffs' made a reasonable request that Google destroy any and all films, videotapes, pictures, negatives, or other medium containing Plaintiffs' residence and/or Oakridge Lane. *Id.* ¶22.

Google's only response is that the Complaint failed to state any claim in which to base an injunction upon. As the Complaint does contain meritorious claims, the injunction count should not be dismissed.

VIII. Punitive Damages are particularly suitable to the facts and circumstances herein.

The Restatement (Second) of Torts (1979), states: Punitive damages may be awarded for conduct that is outrageous, because of defendant's evil motive *or his reckless indifference to the rights of others*." §908(2)(emphasis added); see also *Id.*, Comment *b*. Most cases under state common law, although varying in their precise terminology, have adopted more or less the same rule, recognizing that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence. *Loch Ridge Construction Corp. v. Barra*, 291 Ala. 312, 280 So.2d 745 (1973);

Sturm, Roger & Co. v. Day, 594 P.2d 38 (Alaska 1979), modified on other grounds, 615 P.2d 621 (1980), and 627 P.2d 204 (1981); *Huggins v. Deinhard*, 127 Ariz. 358, 621 P.2d 45 (App. 1980); *White v. Brock*, 41 Colo. App. 156, 584 P.2d 1224 (1978); *Collens v. New Canaan Water Co.*, 155 Conn. 477, 234 A.2d 825 (1967); *Focht v. Rabada*, 217 Pa.Super. 35, 268 A.2d 157 (1970). Punitive damages are awarded to punish or deter the Defendant and others like the Defendant from similar conduct in the future. See *Restatement (Second) of Torts* (1979), §908(1). Punitive damages are appropriate even in the absence of any proof of harm. Specifically, Comment C of the *Restatement (Second) of Torts* §908 provides that "[p]unitive damages are today awarded when there is substantial harm and when there is none." See also, *Id.*, Comment *b*. "An award of nominal damages is enough to support a further award of punitive damages, when a tort, such as trespass to land, is committed for an outrageous purpose, but no significant harm has resulted." See *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A.2d 800 (1989).

Aggravating Conduct

Defendants allege that none of the conduct alleged is extreme or dangerous. They further allege there is nothing to establish that the driver acted with evil motive. Obviously, this is misleading in that the focus of the punitive damages is Google, not its driver.

- **Resources to Prevent.** As stated earlier, it is a public fact that Google rakes in massive profits of $4 billion a year. The giant has cash and cash equivalents available of $6 billion. They've hired some of the greatest minds of technology.
- **Google's choice not to implement preventive measures.** Despite hiring some of the greatest technology minds and having the resources at its disposal to implement internal controls, Google's management, acting in concert, has consciously chosen to save millions of dollars by refusing to implement controls to prevent

trespassing on private roads as well as other privacy issues, i.e. improper or inappropriate imagery of faces, including children.[17]

- **Google's choice to implement inadequate reactive measures.** Google's reliance on after-the-fact/reactive measures is an inappropriate way for Google to do business in that some victims for whom their privacy has been compromised, may not have internet access or do not access the internet regularly. Thus, they may never discover inappropriate imagery on Google Street View. Similarly, third party websites may discover inappropriate imagery prior to the victim in question and publish it on websites, including www.thesmokinggun.com and other websites. See Plaintiffs' Exhibit 1. These are websites in which Google has no authorization to request removal. So, for the company to claim innocence is disingenuous. It's obvious there are real victims.
- **Not Isolated Incident.** As Plaintiffs' Exhibits 4, 5, 7 and 9 show, Google's privacy invasions with Street View is not an isolated incident.
- **Google's Track History.** Google has a past and current history of indiscretions in the privacy arena. See Plaintiffs' Exhibit 6, A Race to the Bottom: Privacy Ranking of Internet Service Companies with attached Consulting Report listing Google as having "a track history of ignoring privacy concerns." See also Exhibit 8 (Google's retention of potentially sensitive information regarding 650 million people).

In summary, Google management has acquiesced to the invasion of privacy rights that they know is occurring and will continue to occur. Rather than putting the needs of its users first as claimed in its annual report, the company wants to put

[17] While some of this is public record from Google's annual report, other information gained from witness interviews can support Plaintiff's argument in an amended complaint.

the onus of improving early releases of Street View on you, the user, after-the-fact. Thus, it's simply incredulous that Google does not find systematic trespasses on private property and mass distribution of unauthorized imagery on its Street View projects as aggravating and/or warranting punitive damages. After all, there's a reason, Google did not give Pittsburgh or other cities advance warning they were coming. After systematically trampling on individual privacy rights, they attempt to stifle objection by claiming they have a procedure to remove the photographs. In other words, after-the-fact, they are saying that you, the consumer, should police our Street View.

Discovery can further support the egregiousness and extent of Google's trangressions.

A Closing Note on Punitive Damages

As one parting thought concerning punitive damages, the Pennsylvania Supreme Court summarize the seriousness of the situation:

> If the purpose of punitive damages is to punish a tortfeasor for outrageous conduct and to deter him or others from similar conduct, then a requirement of proportionality defeats that purpose. It is for this reason that the wealth of the tortfeasor is relevant. In making its determination, the jury has the function of weighing the conduct of the tortfeasor against the amount of damages which would deter such future conduct. In performing this duty, the jury must weigh the intended harm against the tortfeasor's wealth. If we were to adopt the Appellee's theory, outrageous conduct, which only by luck results in nominal damages, would not be deterred and the sole purpose of a punitive damage award would be frustrated. *If the resulting punishment is relatively small when compared to the potential reward of his actions, it might then be feasible for a tortfeasor to attempt the same outrageous conduct a second time.* If the amount of punitive damages must bear a reasonable relationship to the injury suffered, then those damages probably would not serve as a deterrent. It becomes clear that requiring punitive damages to be reasonably related to compensatory damages would not only usurp the jury's function of weighing the factors set forth in Section 908 of the *Restatement (Second) of Torts*, but would also prohibit victims of malicious conduct, who fortuitously were not harmed, from deterring future attacks. (emphasis added) *Kirkbride v. Lisbon Contractors*, 521 Pa. 97, at 103-4, 555 A.2d 800 (1998).

WHEREFORE, Plaintiffs' respectfully requests that this Honorable Court deny Defendant's motion to dismiss.

Dated: September 15, 2008

s/Dennis M. Moskal/
Dennis M. Moskal, Esq.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies service of process of a true and correct copy of this Motion as follows:

The following person or persons are believed to have been served electronically in accordance with the procedures and policies for Electronic Case Filing (ECF) on this date:

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

AARON C. BORING AND CHRISTINE BORING, husband and wife respectively,

Plaintiffs,

v.

GOOGLE, Inc., a California corporation,

Defendant.

CIVIL DIVISION

CASE NO: 08-cv-694 (ARH)

ORDER OF COURT

AND NOW, this ___ day of _____, 2008, in consideration of Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss and accompanying exhibits, it is hereby Ordered that Defendant's motion is denied.

BY THE COURT:

_____ J.

CERTIFICATE OF SERVICE

The undersigned certify that four (4) paper copies of this volume of the Appendix were served upon the Clerk of the United States Court of Appeals for the Third Circuit by Federal Express courier, and for counsel for Appellee by U.S. Mail, postage prepaid.

Date: August 25, 2009

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