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 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS AMENDED COMPLAINT

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Defendant Google Inc. ("Google") respectfully submits this Reply to Plaintiffs' Memorandum in Opposition to Motion to Dismiss Amended Complaint ("Pl. Br."), and in further support of its Motion to Dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

In response to Google's motion to dismiss the Amended Complaint for failure to state a claim, Plaintiffs have filed a diatribe against Google based on its financial success and criticisms of Google found in newspaper articles and privacy advocate discourse. Plaintiffs argue that their claims should proceed because Google is a wealthy "giant." They argue that Google should be punished because other people have opined that Google does not do enough to protect privacy. They ask this Court to allow this case to proceed because, although Plaintiffs could have easily removed the images of the exterior of their property from Street View without a lawsuit, others might not be able to. In essence, Plaintiffs seek to turn this motion into a referendum on Google Street View as a whole.

However, as this Court is no doubt aware, a motion to dismiss for failure to state a claim must be addressed to the allegations of the complaint, and not the rhetoric of counsel. As set forth in Google's Memorandum of Law in Support of its Motion to Dismiss Amended Complaint ("Opening Brief"), the allegations of Plaintiffs' Amended Complaint do not state any legal claim against Google. It is well-established that there is no reasonable expectation of privacy in the view of a home's exterior that can be seen by third-parties as part of the ordinary incidents of community life. Plaintiffs do not cite any authority to the contrary. They also do not dispute that a fact cannot be "private" for purposes of an invasion of privacy claim if it has already been disclosed, or that there already are numerous photos of Plaintiffs' property on multiple websites.

And while Plaintiffs maintain that the discovery of photos of their property on a Street View map caused them shame and humiliation and would have done the same to any reasonable person of ordinary sensibilities, the conduct at issue is a far cry from anything any court has every found "highly offensive." Thus, while Google takes privacy concerns seriously, this action does not implicate the legal interests protected by an invasion of privacy claim under Pennsylvania law.

Plaintiffs' other claims fair no better. Google has assumed for purposes of this motion that its driver mistakenly drove on a private road and turned around in Plaintiffs' driveway. Yet Plaintiffs devote the bulk of their argument as to why they have stated a claim for trespass to a privilege argument that Google did not make. Plaintiffs' trespass claim fails because they have not alleged any harm proximately caused by an entry upon their property. Plaintiffs' negligence claim fails because they have not alleged any cognizable negligence damages. Plaintiffs concede they cannot recover for emotional damages on their negligence claim, and their argument that the economic loss doctrine does not apply to their claim is refuted by substantial authority. Finally, Plaintiffs fail to refute Google's arguments as to why they have not stated a claim for unjust enrichment. Plaintiffs rely upon inapposite cases, and they ignore other authority precluding their claim as a matter of law. In short, when Plaintiffs' colloquy is set aside there is nothing left to save Plaintiffs' claims.

ARGUMENT

I. PLAINTIFFS' EXTRANEOUS MATERIALS SHOULD BE DISREGARDED

It is well-settled that a motion to dismiss is addressed to the face of the complaint and documents relied upon therein, and that a plaintiff may not amend his or her complaint through materials submitted in opposition to a motion to dismiss. *See, e.g., Glover v. DeLuca*, No. 03-CV-0288, 2006 WL 2850448, at *4, n.10 (W.D. Pa. Sept. 29, 2006). A significant portion of Plaintiffs' brief relies upon assertions and unauthenticated exhibits that are referenced nowhere

in the Amended Complaint. *See, e.g.*, Pl.'s Exs. 1, 4-9; Pl.'s Br. at 2 n.7, 14, 25. Thus, the Court must disregard these materials as improperly submitted. *Glover*, 2006 WL 2850448, at *4 n. 10. Moreover, the vast majority of Plaintiffs' exhibits (i.e., Exs. 1, 4, 6-9) have been submitted as purported support for Plaintiffs' assertions that Google has a general propensity for bad acts. This propensity-based argument and the materials submitted to support it are impermissible at any stage of this litigation. Fed. R. Evid. 404.[1]

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

A. The Conduct Alleged Does Not Amount to Intrusion upon Seclusion

The view from Plaintiffs' driveway is not private for purposes of a Pennsylvania intrusion upon seclusion claim. As discussed in Google's Opening Br. at 8-12, the law simply does not protect that which regularly can be seen by third parties as part of the ordinary incidents of community life. Google cited to numerous authorities in support of this position. Plaintiffs' response falls flat.

Plaintiffs miss the point that not all alleged intrusions onto privately-owned property can support a claim for intrusion upon seclusion. It is for this reason that Google cited cases where intrusion upon seclusion claims had been stated with respect to public property and others where they had been stated with respect to private property. The particular facts of the public property cases were of no import, and therefore Plaintiffs' discussion of these cases is inapposite.

[1] Plaintiffs also improperly rely upon an outdated pleading standard. Pl. Br. at 5. The appropriate standard is set forth in Google's Opening Brief at 6.

Plaintiffs next try to distinguish two of Google's private-property cases with distinctions that do not make a difference.[2] Ignoring the central inquiry in these cases (whether the intruded area was generally visible to members of the community), Plaintiffs argue that the particular attributes of the plaintiff determine whether a reasonable expectation of privacy exists. *See* Pl. Br. at 9-10. However, the cases do not hinge on such factors. *See Mulligan v. United Parcel Service, Inc.*, Civ. A. No. 95-1922, 1995 WL 695097, at *2 (E.D. Pa. Nov. 16, 1995) (no reasonable expectation of privacy where plaintiff "is not in a private place or in seclusion"); *Streisand v. Adelman*, No. SC 077-257, at 32 (Super. Ct. Los Angeles Co. Dec. 31, 2003) (no reasonable expectation of privacy where occasional overflights are among ordinary incidents of community life and plaintiff took no steps to preclude persons passing in airplanes from seeing backyard).[3] Indeed, for purposes of an invasion of privacy claim, a plaintiff's expectation of privacy must be "***objectively*** reasonable." *Jarmuth v. Waters*, No. 1:04CV63, 2005 WL 5715172, at *6 (N.D. W. Va. Mar. 31, 2005) (emphasis added) (applying Pennsylvania law), *aff'd*, 200 Fed. Appx. 228 (4th Cir. 2007). Thus, Plaintiffs' subjective expectations, *see* Pl. Br. at 7-9, cannot save their claim.

Finally, Plaintiffs ask the Court to disregard the voluminous authority holding in the context of the Fourth Amendment that there is no reasonable expectation of privacy in what can be seen from a private driveway, or from a low-flying aircraft, Opening Br. at 8-9, based on the solitary statement that under *Erie* principles a federal court may not apply federal law to a state

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[2] Plaintiffs' statement that Google does not cite to any cases involving a private road is simply false. *See* Opening Br. at 9.

[3] Notably, Plaintiffs do not even attempt to distinguish the most analogous case, *Schiller v. Mitchell*, 828 N.E.2d 323 (Ill. App. Ct. 2005), addressed at length by Google.

law claim, Pl. Br. at 10-11. This argument ignores the fact that Pennsylvania courts, in addressing common-law privacy claims, look to what is a reasonable expectation of privacy for purposes of the Fourth Amendment. *See* Opening Br. 8-9. Thus, by following the Fourth Amendment cases, this Court would be following Pennsylvania law.

Plaintiffs' intrusion into seclusion claim must be dismissed for the independent reason that Google's alleged conduct is not highly offensive to a reasonable person. Google cited numerous legal authorities in support of this position. Opening Br. at 12-13. Plaintiffs do not address a single one. Rather, Plaintiffs' argument rests on statements by privacy advocates.[4] The opinions of privacy advocates are inadequate to overcome the numerous legal authorities set forth by Google.

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

Plaintiffs improperly conflate their claims for intrusion into seclusion and publicity given to private life, which, although similar, have distinct elements. *See Pacitti v. Durr,* No. Civ. A. 05-317, 2008 WL 793875, at *25 (W.D. Pa. Mar. 24, 2008). In doing so, they ignore virtually all of Google's arguments as to why the facts at issue are insufficient to support a claim for publicity to private life: (1) various photographs of the exterior of Plaintiffs' home (and not just the one on the Allegheny County website, which Plaintiffs do address) are already available on various websites, Def. Br. at 14; (2) the facts revealed in the images at issue (i.e., that Plaintiffs have a pool and two garages) are already known to many people, *id.*; (3) there is no "morbid sense of prying" in photographs of the exterior of a home that are published as part of a map; (4)

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[4] Google has been unable to locate the text Plaintiffs attribute to *Galella v. Onassis,* 487 F.2d 986 (2d Cir. 1973). Moreover, the case was decided under New York's statutory prohibition on harassment, and the Court acknowledged that New York had not recognized a common law right of privacy. *Id.* 994-95 & n. 12.

information regarding what Plaintiffs' street and property look like as part of a virtual map is of legitimate public concern, *id.* at 14; (5) the view from Plaintiffs' driveway is not an "intimate detail" of their life, *id.* at 15-16. By failing to contest these arguments, Plaintiffs have conceded them. *See, e.g., Landis v. U.S. Airways, Inc.*, Civil A. No. 07-1216, 2008 WL 728369, at *5 (W.D. Pa. Mar. 18, 2008). Absent publication of a truly private fact that is not of legitimate concern to the public, Plaintiffs' claim for publicity to private life fails as a matter of law. *See, e.g., Morgan v. Celender,* 780 F. Supp. 307, 310 (W.D.Pa. 1992).

III. PLAINTIFFS FAIL TO STATE A CLAIM FOR TRESPASS

Plaintiffs devote four and a half pages of their trespass argument to a point that ***Google did not make*** in support of dismissal of the Amended Complaint. Pl. Br. at 13-17. Given that for purposes of this motion Google and the Court must accept Plaintiffs' allegations that Google entered Plaintiffs' property in the face of a clearly marked "no trespassing" sign, Google is not asserting privilege as a defense that can be applied as a matter of law. Thus, the Court need not address Plaintiffs' discourse on the question of privilege.

Rather, Plaintiffs' trespass claim should be dismissed because Plaintiffs do not allege any damages proximately caused by the alleged brief entry onto their driveway. Opening Br. at 16-17. Unable to distinguish *Costlow v. Cusimano*, 34 A.D.2d 196, 201 (N.Y. App. Div. 4th Dep't 1970), Plaintiffs rely upon two other cases that they argue support the viability of their trespass claim. However, both cases addressed injuries flowing from conduct of the trespasser while on the private property. *See Kopka v. Bell Tel. Co.*, 91 A.2d 232, 235-36, 371 Pa. 444, 451 (Pa. 1952) (injury from hole dug by trespasser while on property); *Northeast Women's Center v. McMonagle*, 689 F. Supp. 465, 476-77 (E.D. Pa. 1988) (injury to business caused by activists' presence on property). Neither case can be read even remotely to suggest that a plaintiff can

recover in trespass for harms resulting from acts performed after the defendant had left the plaintiffs' property.[5]

IV. PLAINTIFFS FAIL TO STATE A CLAIM FOR NEGLIGENCE

Plaintiffs do not dispute that emotional distress damages are not recoverable in connection with their negligence claim. Pl. Br. at 20. The only other damages claimed—diminished property value—are similarly barred by Pennsylvania's economic loss doctrine. Opening Br. at 18. Plaintiffs respond that the economic loss doctrine does not apply where the action sounds only in tort and is not otherwise contract based. They are wrong. None of the cases Plaintiffs cite draw such a distinction, and numerous decisions have applied the doctrine to bar tort claims asserted without accompanying contract claims. *See, e.g., Aikens v. Baltimore & Ohio R.R. Co.*, 501 A.2d 277, 279, 348 Pa. Super. 17, 21-22 (Pa. Super. Ct. 1985) ("no cause of action exists for negligence that causes only economic loss"); *Duquesne Light Co. v. Pennyslvania Am. Water Co.*, 850 A.2d 701, 706, 2004 PA Super 160 (Pa. Super. Ct. 2004).

V. PLAINTIFFS FAIL TO STATE A CLAIM FOR UNJUST ENRICHMENT

Google set forth numerous reasons why Plaintiffs have failed to state a claim for unjust enrichment. Opening Br. at 19-22. In response, Plaintiffs take issue with Google's position that the doctrine of unjust enrichment is inapplicable to the facts alleged, which do not support imposition of a quasi-contract. Pl. Br. at 21. However, none of the cases they cite support their position. *See Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 999 (3d Cir. 1987) (unjust enrichment theory rejected where relationship governed by contract); *Schott v. Westinghouse Elec. Corp.*, 259 A.2d 443, 449, 436 Pa. 279, 292 (Pa. 1969) (under circumstances

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[5] Plaintiffs do not dispute that they have not sought nominal damages in connection with their trespass claim. Pl. Br. at 19.

alleged, plaintiff might have expected payment for value of benefit conferred); *Birchwood Lakes Community Assoc., Inc. v. Comis,* 442 A.2d 304, 309, 296 Pa. Super. 77, 86 (Pa. Super. Ct. 1982) (declining to allow plaintiff to proceed on unjust enrichment theory). Here, there simply are no allegations of an unenforceable contract or otherwise to support a finding that Plaintiffs expected payment for the value of any benefit conferred on Google.

More importantly, Plaintiffs fail to identify any benefit they conferred on Google. They argue that they benefited Google because Google saved the expense of implementing adequate procedures. *See, e.g.,* Pl. Br. at 22-23. However, as previously set forth by Google, Plaintiffs' theory of "benefit" based on cost savings has been considered and rejected. *See Commerce Bank/Pennsylvania v. First Union Nat'l Bank*, 911 A.2d 133, 144, 2006 PA Super 305 (Pa. Super. Ct. 2006); *Doe v. Texaco, Inc.*, No. C 06-02820 WHA, 2006 WL 2053504, at *2 (N.D. Cal. July 21, 2006). Plaintiffs cite no contrary authority.

Finally, Plaintiffs argue that they should be permitted to proceed with an unjust enrichment claim in the alternative to their tort claims. Pl. Br. at 22. While Plaintiffs cite cases where a claim for unjust enrichment has proceeded in the alternative to a tort claim based upon identical conduct, *see* Pl. Br. at 22, none addressed a challenge to the propriety of proceeding on both claims. The cases cited by Google addressed the issue and dismissed unjust enrichment claims that were duplicative of alternate tort claims. Opening Br. at 20-21. This Court should do the same.

VI. THE REQUEST FOR PUNITIVE DAMAGES SHOULD BE STRICKEN[6]

Even if any of Plaintiffs' claims survive this motion, the prayers for punitive damages should be stricken because the Amended Complaint contains no allegations that Google engaged in any aggravated conduct warranting such an extreme remedy, which Pennsylvania courts reserve for only the most exceptional and outrageous conduct. Def. Br. at 23-24. Plaintiffs do not take issue with Google's recitation of the requirements to seek punitive damages under Pennsylvania law, including the requirement that the defendant's conduct as alleged must have been more serious than the underlying tort. *See id.* Instead, Plaintiffs set forth cases from other states, and quote from a Pennsylvania opinion that addressed whether an award of punitive damages must bear a reasonable relationship to the compensatory award, and not whether the conduct alleged in the complaint was sufficiently egregious to sustain a punitive damages award if proven. *See Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 801, 521 Pa. 97, 98 (Pa. 1989). Plaintiffs also rely upon numerous assertions regarding Google's profits, purported decisions regarding controls, and unrelated assertions of privacy violations found nowhere in the Amended Complaint, *see* Pl. Br. at 24-25, and which this Court must disregard in deciding this motion, *see supra* Section I; *see also Vance v. 26 and 2, Inc.*, 920 A.2d 202, 206, 2007 Pa. Super. 71 (Pa. Super. Ct. 2007) (inappropriate to consider wealth of defendant in determining whether punitive damages may be imposed). However, Plaintiffs do not point to a single allegation of aggravating or outrageous conduct found in the Amended Complaint. Absent any such

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[6] Plaintiffs do not dispute that there is no basis for injunctive relief absent a properly-stated claim, or that attorney fees are not available in connection with any of their claims, thus Google does not address these arguments further herein.

Respectfully submitted,

Date: August 25, 2009

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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.

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