

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-2350

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

v.

**GOOGLE INC.,
Appellee.**

MOTION FOR LEAVE TO FILE SUPPLEMENTAL APPENDIX

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Attorneys For Appellee Google Inc.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL APPENDIX

NOW COMES Appellee Google Inc. (“Google”), through its undersigned counsel, and files the within Motion for Leave to File Supplemental Appendix, stating as follows:

1. On or about April 2, 2008, Plaintiffs Aaron C. Boring and Christine Boring (the “Borings”) commenced this action by filing a Complaint in the Court of Common Pleas of Allegheny at G.D. No. 08-6615 (the “Action”).
2. On May 21, 2008, Google effected a removal of the Action to the United States District Court for the Western District of Pennsylvania (the “District Court”) by Notice of Removal, and on May 28, 2008 filed a Motion to Dismiss Complaint.
3. The Borings filed an Amended Complaint on July 22, 2008, in which they alleged claims against Google for damages they allegedly suffered as a result of photographic images of their home appearing on Google’s Street View website feature.
4. Street View is a feature that Google offers in connection with the Google Maps service on its website. 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 views while driving on streets.
5. According to the Borings, a Google driver went down a private road, turned around in their driveway, captured photographs of the exterior of their home and then made those images available through Street View.
6. The Borings alleged that such actions gave rise to their claims against Google for invasion of privacy, trespass, negligence, unjust enrichment, and injunction.

7. Google filed its Motion to Dismiss the Amended Complaint on August 14, 2008, and submitted in connection therewith the Declaration of Tonia Ouellette Klausner in Support of Google's Motion to Dismiss Amended Complaint (the "Klausner Declaration"). The Klausner Declaration attaches as Exhibits Street View photographs of the Borings' property as well as matters of public record concerning that property and Google Street View.

8. Google submitted the Klausner Declaration with attached Exhibits to support its contention that its actions in taking and posting the photographs of the Borings' property on Street View failed to give rise to any of the claims alleged by the Borings in their Amended Complaint.

9. On February 17, 2009, the District Court entered a Memorandum and Opinion, and Order (collectively, the "February 17, 2009 Order"), dismissing the Amended Complaint with prejudice.

10. Subsequent to the District Court's denial of the Borings' Motion for Reconsideration of the February 17, 2009 Order, the Borings filed a Notice of Appeal on May 4, 2009.

11. On August 25, 2009, the Borings filed their Appellants' Brief, as well as an Appendix containing certain documents from the record in the District Court.

12. The Appendix does not include the Klausner Declaration with attached Exhibits, which Google respectfully submits are essential for a thorough review of the proceedings below and the District Court's February 17, 2009 Order.

13. The Klausner Declaration and the Exhibits thereto were presented to the District Court and were therefore part of the record considered by that Court in reaching its decision to dismiss the Amended Complaint with prejudice.

14. Although the Klausner Declaration and the Exhibits thereto are automatically part of the record on appeal, Google respectfully submits that these documents should be included in a Supplemental Appendix because they refer to and include photographic images that will be easier for the Court to view in hard-copy form.

15. The Klausner Declaration and the exhibits attached thereto are, inter alia, based upon the allegations of the Amended Complaint, the images 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). Further, the Court may take judicial notice that the websites referenced in the Klausner Declaration and attached exhibits include aerial images of property associated with the Borings' address, which fact can be readily determined by examination of the websites themselves. Fed. R. Evid. 201 (2009); *see, e.g., Gordon v. Lewistown Hosp.*, 272 F. Supp. 2d 393, 429 (M.D. Pa. 2003) *aff'd*, 423 F.3d 184 (3rd Cir. 2005); *McLaughlin v. Volkswagen of Am. Inc.*, No. CIV. A. 00-3295, 2000 WL 1793071, at *3 n.3 (E.D. Pa. Dec. 6, 2000).

16. These materials are essential for the Court's review of the case below, are extensively referenced throughout Google's Brief, and including them as part of the Appendix in this matter will provide the Court ready access to them without having to resort to the record below. As such, the Klausner Declaration and attached exhibits are properly included as part of the Appendix. *See* Fed. R. App. P. Rule 30(a)(1)(D); and 3d Cir. L.A.R. 30.3(a).

17. Google therefore respectfully requests that it be permitted to supplement the Appendix to include the Klausner Declaration and Exhibits thereto, in the form submitted herewith as the "Supplemental Appendix."

18. Granting such leave will permit the Court to fully address the issues and to assist the Court in the ultimate resolution of this matter on appeal.

19. Google's request is reasonable, will not unduly delay this action or prejudice the parties.

WHEREFORE, Appellee Google Inc. respectfully requests that the Court enter the proposed Order submitted herewith granting it leave to supplement the Appendix, and directing the Clerk of Courts to accept the Supplemental Appendix being filed concurrently with this Motion, containing from the record below the Declaration of Tonia Ouellette Klausner in Support of Google Inc.'s Motion to dismiss Amended Complaint, including Exhibits A through H attached thereto.

Dated: September 24, 2009

Respectfully submitted,

s/ Tonia Ouellette Klausner
Tonia Ouellette Klausner

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FOR THE THIRD CIRCUIT

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

Appellants,

C. A. No. 09-2350

v.

GOOGLE INC.,

Appellee.

ORDER

AND NOW, this _____ day of _____, 2009, upon consideration of Appellee Google Inc.'s Motion for Leave to Supplement Appendix, IT IS HEREBY ORDERED that the Motion is GRANTED. The Clerk of Courts is directed to accept for filing the Supplemental Appendix containing the Declaration of Tonia Ouellette Klausner in Support of Google Inc.'s Motion to Dismiss Amended Complaint and Exhibits A through H attached thereto.

_____, J.

CERTIFICATE OF SERVICE & CM/ECF FILING

09-2350

I hereby certify that I caused the foregoing Motion to File A Supplemental Appendix to be served on counsel for Plaintiffs-Appellants via the Notice of Docket Activity generated by the Court's electronic filing system (i.e., CM/ECF) and via electronic mail pursuant to Local Appellate Rules 31.1(d) and 113.4(a):

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Aaron C. Boring and Christine Boring

I certify that an electronic copy was uploaded to the Court's electronic filing system. Four hard copies of the foregoing Motion to File A Supplemental Appendix were sent to the Clerk's Office via Federal Express Next Business Day Delivery to:

Clerk of Court
United States Court of Appeals, Third Circuit
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106
(215) 597-2995

on this 24th day of September 2009.

/s/ Jacqueline Gordon
Jacqueline Gordon

ANTI-VIRUS CERTIFICATION

Case Name: Boring v. Google

Docket Number: 09-2350

I, Jacqueline Gordon, hereby certify that the Motion submitted in PDF form as an e-mail attachment to Notice of Docket Activity generated by the Court's electronic filing system (i.e., CM/ECF) in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 9/24/2009) and found to be VIRUS FREE. The electronic version of this Motion is identical to the text version in the paper copies filed with the court.

/s/ Jacqueline Gordon

Jacqueline Gordon
Record Press, Inc.

Dated: September 24, 2009