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

BRIEF OF APPELLANTS
AARON AND CHRISTINE BORING

APPENDIX VOLUME I (A1-A20)

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

On April 2, 2008, this action was commenced in the Court of Common Pleas of Allegheny County, Pennsylvania captioned Boring v. Google, Inc., Case No. GD 08-694. Aaron and Christine Boring are residents of Allegheny County, Pennsylvania.

On May 21, 2008, Google filed a Notice of Removal with the U.S. District Court for the Western District of Pennsylvania, removing the action to the District Court pursuant to 28 U.S.C. §1441. The District Court had original jurisdiction of the civil action pursuant to 28 U.S.C. §1332.

On July 18, 2008 and August 14, 2008, respectively, Google and the Borings each filed a Consent to Jurisdiction by U.S. Magistrate.

On July 22, 2008, the Borings filed an Amended Complaint. On August 14, 2008, Google filed a Motion to Dismiss the Amended Complaint, demurring to each count pursuant to F.R.C.P. 12(b)(6).

On February 17, 2009, the Magistrate Judge granted Google's Motion to Dismiss, dismissing the Amended Complaint on all counts with prejudice. On February 27, 2009, the Borings filed a Motion for Reconsideration pursuant to Federal Rules of Civil Procedure 59(e). On April 6, 2009, the Magistrate Judge denied the Borings' Motion for Reconsideration.

On May 4, 2009, the Borings filed their Notice of Appeal. The Appeal was from a final Order that disposed of all claims. This Court has jurisdiction to review final Orders of the District Court pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES

Standard of Review. For each issue, the Magistrate Judge erred in formulating or applying a legal concept, for which the review of the Third Circuit is plenary, *de novo*.

1. Invasion of Privacy.

The Magistrate Judge erred in determining, as a matter of law on a 12(b)(6) demurrer, that a reasonable person would be not be highly offended or incur mental suffering, shame or humiliation, having discovered that someone recently entered onto secluded private property, took 360° pictures within and while close-up on the driveway close to the home and swimming pool (close to the home windows), while ostensibly trespassing, after also trespassing and driving far down a privately maintained graveled road and past "Private Road No Trespassing" signage, having published the pictures throughout the world via the trespasser's pervasive proprietary index system; and

FURTHER erred by failing to view plaintiffs' averments, and reasonable inferences drawn therefrom, in the light most favorable to the plaintiffs; erred in considering the tortfeasor's removal weblinks with failure to consider the cost and burden upon the injured party to be required to discover and to mitigate within the technological constraints imposed by the tortfeasor; erred in using permissible conduct of plaintiffs, during the course of this civil action, after the fact, as evidence of damage averments before the fact, including that this action was not filed under seal; and erred in using unspecified lack of "claims," in unspecified jurisdictions, with unspecified facts, to draw invalid conclusions that tortfeasor's "Street View" is viable as part of a prima facie pleading ruling; and erred in accepting extrinsic evidence from the Court's own unilateral "Googling" activities regarding plaintiffs' counsel.

2. Trespass.

The Magistrate Judge erred in prejudging that compensatory damages are not available as a matter of law; and

FURTHER erred in requiring pleading damages when, at the same time, opining that damages are not an element of a prima facie claim; and erred in holding that plaintiffs had a special duty to plead nominal damages in the complaint and that plaintiffs were required to forfeit any claim to compensatory damages at the pleading stage without the aid of discovery or the benefit of expert review.

3. Unjust Enrichment.

The Magistrate Judge erred in ruling as a matter of law that: i) the relationship between the parties must be construed as contractual; ii) that plaintiffs did not confer anything of value on Google; and iii) that there is no independent cause of action for unjust enrichment being subsumed by the other claims, particularly when the other claims were dismissed.

4. Punitive Damages.

The Magistrate Judge erred in holding punitive damages are not available as a matter of law even though pleaded and evidence is in the possession of defendant.

5. Injunctive Relief.

The Magistrate Judge erred in dismissing the claim for injunctive relief leaving the plaintiffs without even a destruction/non-use claim.

STATEMENT OF THE CASE

The Borings filed this action against Google, among other claims, for trespass and invasion of privacy. [Complaint; A29-35]

The claims arise from Google's “Street View” practices, whereby Google traverses the physical earth with one or more 360° cameras and then automatically publishes the results throughout the world via the Internet as part of its profit strategy. Google’s implementation of Street View is a social phenomenon.

For the first time, a commercial enterprise has the ability to use 21st Century roads, with 21st Century vehicles, with 21st Century 360° camera technology, with 21st Century recording, storage and digitization technology, with 21st Century indexing and search technology, with 21st Century Internet access technology, with 21st Century pervasive publishing technology.

Notwithstanding a "**Private Road No Trespassing**" road sign, Google drove from a paved public road onto the Borings’ crunching graveled and potholed privately owned road while taking 360° photographic imagery of the surroundings. Continuing on the privately owned road and past clearly marked “**Private Road No Trespassing**” signage, Google drove from the private road deeper back into and onto the Borings’ private residential driveway. Then, Google proceeded to take additional close-up pictures of the Borings’ secluded residence, swimming pool and surroundings, while actually trespassing on the Borings’ driveway at the front of their home.[1]

[1] “Crunching graveled and potholed” was not averred in the Complaint, nor was the length of more than 1000 feet (three football fields inclusive of a right of way); nor was the fact that the mailbox is at the beginning of the private road 1,000 feet from the home at the public road junction. Also, we also understand that drivers are paid by the mile photographed. These are detail inferences now and trial facts later.

Google commercially used the pictures by publishing them throughout the world as part of Google's profit strategy in its Street View program. The acts were without consent. *Id.*

Google demurred to all counts, by F.R.C.P. 12(b)(6), and the Magistrate Judge dismissed all counts, and thus the entire case, giving rise to this appeal. The Magistrate Judge dismissed even though Google's specific intent of the trespass was to accomplish the very goal that was, in fact, accomplished. Google's intent was to enter the land, and to acquire the pictures that were actually acquired and to publish them as they were actually published, in Google's commercial environment.[2]

In ruling on the privacy count, the Magistrate Judge concluded that it is "hard to believe" that the damage was "as severe" as averred, apparently because of post-filing publicity about this case. To reason thusly, the Magistrate Judge admitted "Googling."[3] Googling for data by the trial judge, as part of the 12(b)(6) demurrer review, is clearly improper, if not undermining confidence in the entire judicial process: that it occurred is no less concerning than why it occurred. And, even more egregiously, the conclusive inference drawn against the Borings is not sup-

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[2] *E.g.,* this was not a misdirected commercial ice cream truck, someone pushed onto the land, someone turning around, or a mail carrier. Google was on the private property, intentionally, for a profit purpose, to acquire pictures for publication, which it did acquire and publish, implementing Google's commercial profit strategy.

[3] Opinion, dated February 17, 2009 at 4-5; A7-8 [hereafter "Opinion"] ("'Googling' the name of the Borings' attorney demonstrates that publicity regarding this suit has perpetuated dissemination of the Borings' names and location, and resulted in frequent re-publication of the Street View images. Plaintiffs' failure to take readily available steps to protect their own privacy and mitigate their alleged pain suggests to the Court that the intrusion and the [sic] their suffering was less severe than they contend.")

ported by one reference and, therefore, cannot even be traced for its proper quality and authenticity apart from mere judicial speculation. The undersigned appeals to this Court that the proper admission of evidence to a neutral judge is difficult enough for zealous advocates, let alone trying to manage a situation where the trial judge is conducting searches regarding the legal activities of plaintiffs' attorneys using the defendant's own index services.

In addition to googling, the Magistrate Judge also performed unreferenced, uncategorized, independent research to draw a serious incorrect statistical inference against the Borings, to wit: that the lack of claims made against Google (apparently leaving it viable as a service) tends to prove that the Borings' privacy claim was not minimally pleaded pursuant to 12(b)(6).[4] The act was improper, and the reasoning was clearly invalid speculation.[5]

Even more revealing, the Magistrate Judge expressly concluded that "any attempted amendment would be futile." [Opinion, at 12, n. 8; A15] In saying so, the Magistrate Judge admitted the deeper belief and rationale, that nothing would allow this case to proceed to discovery on any count: to wit, that there are no facts that could be amended with the same counts, nor any count that could be amended with the same facts, nor any

[4] Opinion, at 5, A8 ("[I]t does not appear that the viability of Street Search [sic] has been compromised by requests that images be removed, nor does a search of relevant legal terms show that courts are inundated with - or even frequently consider - privacy claims based on virtual mapping.")

[5] "Inundated" is not defined as a standard, but the inference must be that an injured person needs a computer, must know how to use it, then be caused to investigate online. There is no foundation to draw any inference against the Borings that Google's database is not replete with undiscovered violations. In fact, the inference must be that a statistician would prove the presupposition as backwards: property owners are older, older people are less technologically capable, and the most secluded person, with the most egregious injury, would be least able to discover it.

combination of both, that would allow the facts to match the law and to permit the case to proceed on any basis (even with inferences).

Google is a success to be sure. But, because Google is a success does not mean that it follows that it has done no wrong. Such a legal presumption is reserved for kings. The Borings have their inference.

> **If a person claims an accident, and I find his penny in my pocket, I might believe it; but, if I find my penny in his pocket, I am not so sure.**

Google's success is no accident, and Google's actions to achieve that success are no accident. Google has far too many pennies in its pocket. Sweet words aside, Google gets exactly what it wants, and has the profit to show for it. But, there are no accidents. The Google people are very smart people, and they are equally clever. While we love Google for satisfying our addictions for "free" computer candy, Google acquires raw power in our new age: money, technology and information. We are sugar-blind where we should be vigilant: to see that Google enjoys profits by socializing its expenses onto the unwary. The inference now, and fact to be proved, after discovery at trial, is as follows:

> **Google's "Street View" program is a database that requires "critical mass" to be viable. Critical mass is the point where enough people have enough random search success that the site gains a positive reputation for reliable results. A search database needs data, in volume, fast. Google values its time and money, and needs to gain competitive advantage, so it intentionally disregards property rights – and the commitment of time and money to verify data before or after the fact – and publishes automatically.**
>
> **Google does exactly what it intends: it acquires data, publishes data, and then makes the sweet offer of an after-the-fact mitigation policy. This yields perfect cost efficiency and extremely high profitability, because there is no inefficiency or cost in verifying the content that would already be permissible; only errors actually discovered by people on their own time, at their own cost, bubble up to be removed by the automated technology, by special request opt-out. Google in-**

> **tentionally socializes its compliance costs by requiring that we use our own valuable resources to "cleanse" Google's database.**
>
> **Google is a probability expert. It disregards property rights and merely runs a probability risk analysis: 1) what is the probability that we will end up on someone's property in violation of their rights? 2) if we do, what is the probability that they will actually discover it? 3) if they do actually discover it, what is the probability that they will care? 4) if they do care, what is the probability that they will not be satisfied with our removal system? 5) if they are not satisfied, what is the probability that they will start to enforce their rights? 6) if they do start to enforce their rights, what is the probability that we will ultimately have to pay any money? 7) if we do have to pay any money, what is the probability that the amount will have a material negative impact on our $30B in net worth, in light of any injured party's average claim?**

Let us at least admit the game. The Google people are very smart people. There are no accidents. Google places burdens onto each of us — indeed, onto society generally — to fix the problem that it has chosen to create, at our cost, and for its own profit. Google argues that we have to take our own time to correct their mistake, and their mistake only occurred to save their own time. Google thinks only its time is money.

It may be just a little time from everyone, but it adds up. Indeed, it ends up in Google's pocket for their use and benefit — at least until we happen to discover it, stop the happiness we are otherwise trying to pursue, and use our training and valuable equipment to make the special request to opt out.

The infraction by Google is now less important that the error in dismissing the case, because the particular has become the policy:

> **It is one thing that even one drop of my blood is extracted for the profit of another; it is an entirely different thing if the law should permit it.**

If the Magistrate Judge is correct, then the law is that Google's acts are effectively legally permitted, at least in this jurisdiction. They are permitted, even if Google should do them as part of a business strategy, and with the flagrant impunity of a demurrer's "so what." The Magistrate Judge does not make Google obliged to answer for its actions, nor does the Magistrate Judge even allow the Borings equitably to *claim* that the pictures must be destroyed.

The ruling of the Magistrate Judge leaves private property owners helpless and creates an implied servitude on the land. Indeed, the acts are not only effectively permitted for Google, but, by equal protection of the law, are also permitted to countless other profiteers, driving up and onto the Borings' "private" property, seriatim. No matter what circuitous legal bait Google may offer this Court in this appeal; that is the legal effect.

Although the principles of private property and trespass are an inherent part of our American heritage, this is the first time that a private enterprise has the money, the technology, and the information — that is, the raw power in the new age of our existence — to contend so deeply against our guaranteed individual rights, as a social phenomenon.

Google is a young darling in the world of corporate enterprise. But, if we should be vigilant to see it, this baby behemoth has not even yet hit its stride, or is even toddling. Google already controls money, technology *and information*, throughout the world. And, it is just getting started. We applaud Google's success, with only the reasonable condition that Google's commercial and social omnipotence be checked and balanced where providence permits.

A jury of the People can weigh the relative social value of private property versus the intrusions of technology. Google simply needs to answer for its actions, defend its policies and testify to the quality of its database. Indeed, that it has been and is careful with our rights.

There is no one, and no law firm, that supports and applauds technology and entrepreneurial ventures more than the undersigned. To wit, it is our name. But, there is a point at which the Entrepreneurial Spirit must attorn to the American Dream it serves, and pay rent.

STATEMENT OF THE FACTS

The Borings live at 1567 Oak Ridge Lane; their home is on a private road, and it is not visible to the public eye, being surrounded by trees. The property is secluded, with a clearly marked "**Private Road No Trespassing**" sign. The Borings had an expectation of privacy. [Complaint, ¶¶1, 5-6, 9, 10, 11; A30-35]

Google has a "Street View" service, the scope of which is to gather pictures of paved non-private roads, using mounted cameras on vehicles. [Id., ¶¶7-8]

The Borings discovered that Google trespassed, and, while on the Borings' very driveway without authorization, Google took close-up pictures of their residence, including the recent additions and the swimming pool. [Id., ¶¶9, 17] Google drove on the private drive, past the clearly marked "**Private Road No Trespassing**" signage onto the Borings driveway, with its vehicle packed with cameras, in close proximity to the residence, garage and swimming pool, and recorded the secluded surroundings. [Id., ¶¶7, 8, 9, 11, 13, 15]

The invasion to seclusion was substantial; learning that Google had trespassed onto their private road (1,000 feet of crunching gravel and potholes), past "**Private Road No Trespassing**" signage, entered property unbeknownst to the Borings, driving close up to the residence and swimming pool, and taking photographs that were published worldwide, was highly offensive and a disregard of the Borings' privacy interests. [Id. ¶¶7, 8, 9, 11, 13]. The Borings purchased their home for a considerable sum of money, and privacy and seclusion of the home was a major component to purchase the property. [Id., at ¶5]

Publication of close-up photographs, including the Borings' swimming pool, was not authorized or desired, and exposes the Borings and their family to additional undesired life risks, including based upon new methods of data access and dissemination, contrary to their posted and desired seclusion; the imposition is not of their choosing. [Id., at ¶15].[6]

Google failed to take proper measures to prevent the conduct, and does not implement appropriate controls or filtering prior to publication. [Id., at ¶15, 24, 26, 28] Google profits by the conduct. [Id., at ¶27]

The Borings incurred mental suffering, diminishment of market value, consequential damages, punitive damages, compensatory damages, incidental damages, and all other damages deemed to be just after discovery and trial. [Id., at 14, 15, 24; each Count's Prayer for Relief]

STATEMENT OF RELATED CASES

There are no related cases and this case has not been previously reviewed.

[6] For example, many people have children and grandchildren. Certainly, the children and grandchildren exist in the world, and their physical likeness is public information. But, parents and grandparents decide whether or not to publish pictures of the children on Facebook and MySpace, for example. This is not an issue of legal theory, it is one of practicality in the new world of data accessibility and dissemination: one does not need to be forced to "show its gold to thieves" when it chooses to be relatively secluded from something. It is about free choice. For this reason, as a practical matter, even government agencies, such as Allegheny County, PA, have reduced the online accessibility of public data. Even though the data is public information, the ease of access and dissemination yields its own independent problems and legal interests in our new shrinking world, as a practical experiential matter. This may be why the Chief Judge of the United States District Court for the Western District of Pennsylvania requested removal of the public information names of approximately 100 judges from the Allegheny County website. The interest served does not relate to the public nature of the data, but is one of practical judgment guided by experience: ease of access and dissemination.

SUMMARY OF THE ARGUMENT

The fact scenario is so basic that there is no need to restate matters contained in the Summary of the Case and/or Statement of the Facts.

The Magistrate Judge concluded, "Plaintiffs have failed to state a claim under any count" and "any attempted amendment would be futile." [Opinion, at 1, A4; at 12, A15]

There are two general analytical categories for pleading: 1) the defendant's conduct; and 2) the damage. A combination of pleading one or both of these categories forms elements of the claim.

Conduct.

Google's conduct in this case is straight-forward. The Boring have nothing remaining to plead from a "short and plain" perspective, pursuant to F.R.C.P. 8(a). Certainly, Google is on fair notice to frame a defense that its vehicle was not on the property, that the driver did not take close-up 360° pictures, and that the pictures were never published.

By way of example, in a bodily trespass case, whether a person actually touched another may be a point of dispute; that is, whether or not the *conduct* occurred. But, here, the defense is not to the Borings' case in chief, but, if at all, by an affirmative defense claimed by Google for which Google has the burden of proof. For example: Google admitting it was on the property, took the pictures, and commercially published them; however, a claim that liability is excused because: there was no gate or guard dog, the entry was trivial, that Google is effectively a mail carrier or a person turning simply around in a driveway.

The irony is that, for the trespass count, for example, the Borings would expect almost to be assured summary judgment on liability with bifurcation of the trial for damages only. Requests for Admission on the

trespass count would almost assuredly prove liability, but for survival of any affirmative defenses. And, that brings us to damages.

Damages.

The Magistrate Judge's ruling is centered on damages. Certainly, from a *conduct* perspective, the Borings pleaded exactly the wrongful conduct that, if accepted as true, states the claim. However, the Magistrate Judge finally adjudicated all *damage* issues and denied all counts, with the googled information in mind, finding damages "hard to believe" on a convincing fact standard of pleading for damages (not conduct),[7] while, at the same time, ruling that amendment of the pleading would be futile. [Opinion, at 12; A15]

Regarding the trespass count, and as a result of the same presuppositions and improperly drawn inferences, the Magistrate Judge ruled that the Borings, at the pleading stage, had to waive any claim to compensatory damages as a matter of law in order to proceed, without even the benefit of discovery or expert assessment. [Opinion, 8-9; A11-12] This is so, even though the Magistrate Judge also ruled that damages are not part of a prima facie claim for trespass.[8]

Pleading damages is different than pleading conduct, and elements of claims are distinct in this regard: damage is not a prima facie element of all causes of action; in some cases, damages are presumed as unified and self-perfected within the conduct itself. For example, conduct in the na-

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[7] Opinion, at 4; A7 ("[I]t is hard to believe"; "Plaintiffs have not alleged facts to convince the Court otherwise.") The Magistrate Judge begs the ultimate jury determination and clearly fails to draw the proper inference. *See* F.R.C.P. 54(c) ("Every [non-default] final judgment should grant relief to which each party is entitled, even if the party has not demanded that relief in its pleading").

[8] Reconsideration Opinion, dated April 6, 2009 [hereafter "Reconsideration"] at 8; A11 ("[D]amages are not part of a prima facie claim for trespass.")

ture of a trespass to body or property is inherently legally unpermitted. But, for example, the conduct of an unsterilized doctor might or might not be legally unpermitted: the conduct and damage are not unified; the prima facie claim depends upon a conditional secondary event of damage, and the satisfaction of that condition must be pleaded to perfect the claim.

Moreover, wrongful conduct can be asserted and defended at the onset, but the pleading of damages, with assessments and categorizations, can be sophisticated and may require expert assessment after discovery and the adducement of evidence.[9] Also, at the inception of a case, a trial judge may be incompetent to pre-judge the merits of a damage claim, particularly when discovery has not occurred, and the trial judge must, whether personally agreeing or not — or finding difficult or "hard to believe" or not[10] — exercise the judicial discipline and restraint to allow a plaintiff a full and fair opportunity to make its case and claim without prejudgment.

To use the trespass to body example again, a person may be groped; but it is a point of discovery and expert damage assessment if the data taken from the groper's trespass is not for pleasure, but is the acquisition of data to be used in a commercial environment. For example, it might be that the groper supplies the clothing industry with data, and is paid for the individualized body statistic. If the groper required data for its commercial purpose, and used the data for its commercial endeavor and for its profit, there is no basis to prejudge that the groper "took"

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[9] *See, generally,* Black's Legal Dictionary 9th, "Damages" (two and one-half pages of damage categories); *see also* F.R.C.P. 54(c).

[10] *See*, Opinion, at 4, A7 ("hard to believe"); this is not a proper legal standard for the truth sought to be proved; to wit, many things that are true are hard to believe; *see* 2009 Federal Rules Handbook, 12(b)(6), 429 ("No claim will be dismissed merely because the trial judge disbelieves the allegations or feels that recovery is remote or unlikely.")

nothing, as the Court below opined; it is inferred, if not self-evident, that the data has value from the specific intent and conduct.[11]

Whether an expert can attribute compensatory damage related to the value of the data in a profit-environment is a point for the expert, after discovery, and pre-trial motion practice in due course.[12]

Certainly, the groper who needs the data should have negotiated for the data, but, of course, that might raise questions about the scope of use and particulars, and it would take time and cost money. So, the groper wrongly avoids the negotiation, and gropes for exactly the value desired, and by commercializing the wrongfully acquired data, makes its profit.[13]

For a judge to presuppose compensatory damages cannot be claimed or calculated, when the defendant is a commercial enterprise commercially using the fruits of the alleged tortuous conduct for which there was specific intent to acquire, is both clearly an improper inference and a pre-

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[11] Opinion, at 10 ("It cannot fairly be said that the Borings conferred anything of value upon Google. The entire thrust of the Borings' allegations is that Google *took* something from the Borings without their consent, and should be liable for having done so.") This is another telltale sign of the Magistrate Judge's presupposition and error. In 2009, it is not about taking trees, as it might have been in 1899.

[12] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Compensatory damages is a damage completely separate in purpose from punitive damages. If the groper promises not to do it again, improves controls and spends millions to create general social affinity by giving away free clothing, it may be that punitive damages are not awarded, but the groper still sits on profits for which payment has not been made to compensate the provider of the data. It may even be that the groper uses the profit acquired by the wrongful deeds to create that social affinity. The compensatory damage for pain and suffering may also be applicable if the person groped perceives it; but, the compensation for the value of the data is a different interest and a different measure. The Borings should not have to waive compensatory damages, as a matter of law, at the pleading stage, because the Magistrate Judge does not yet see or does not properly draw the inference of a compensatory value to be presented by an expert.

[13] Certainly, the groper may assert affirmative defenses, such as the grope is exactly the same conduct of a doctor, or that there was no protective gear, or that it was trivial, or that the groper was involuntarily pushed into the touch.

sumes the perfect pre-discovery professional competence of the judge to determine the legal and factual impossibility of the damage assertion. Indeed, the Restatement of Restitution 2d (Draft) sets forth:

> **§ 40. Trespass and Conversion, Comment b. Measure of Recovery. ...Restitution is justified in such cases because the advantage acquired by the defendant is one that should properly have been the subject of negotiation and payment...The more difficult issues of valuation are accordingly those in which the defendant has made a use of the claimant's property for which there is no ordinary market; or in which the defendant has bypassed any market by taking without asking, or by proceeding in the face of a refusal. Valuation in such cases resists any precise formula, and courts exercise a wide discretion in fixing a price for the benefit in question—in other words, a measure of liability—that will correspond to the unjust enrichment of the defendant. The one constant factor in such cases is that values will be more liberally estimated against a conscious wrongdoer...**

Id., §40.

According, the Magistrate Judge's drew improper inferences, using invalid information, and begged exactly the damage question that the Borings assert they are entitled to an inference to prove.

ARGUMENT

I. THE STANDARD OF REVIEW

1. The Standard of Review for Third Circuit.

This appeal arises from the Magistrate Judge's granting of Google's F.R.C.P. 12(b)(6) demurrer on all counts, dismissing the entire action with prejudice.

The standard of review for a dismissal under Fed.R.Civ.P. 12(b)(6) is *de novo*. *Phillips v. County of Allegheny, et. al.*, 515 F.3d 224; 2008 U.S. App. LEXIS 2513 (3rd Cir. 2008), *quoting, Omnipoint Communications Enters., L.P. v. Newtown Township*, 219 F.3d 240, 242 (3d Cir. 2000); *see In re Paoli R.R. Yard PCB Litigation*, 221 F.3d 449, 461 (3d Cir. 2000) ("de novo means [that] ... the court's inquiry is not limited to or constricted by the record ... nor is any deference due the ... conclusions [under review]").

2. The Standard of Review for F.R.C.P. 12(b)(6).

The standard of review for a dismissal under F.R.C.P. 12(b)(6) is to accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. *Phillip,* 515 F.3d at 231*, citing, Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, at 1969 n.8, 167 L. Ed. 2d 929 (2007); *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 653 (3d Cir. 2003). Moreover, in the event a complaint fails to state a claim, unless amendment would be futile, the District Court must give a plaintiff the opportunity to amend the complaint. *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Phillips*, 515 F.3d at 231. In considering a motion to dismiss, the issue is not whether the plaintiffs ultimately will prevail but whether they are entitled to offer evidence to support their claims. *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996) (emphasis added).

II. INCORPORATION BY REFERENCE.

Certain facts and argument were stated in the Statement of the Case, Statement of the Facts and Summary of Arguments. In all prudence and caution those sections are hereby incorporated into each of the following Sections III through VII, inclusive, as if again restated therein.

III. INVASION OF PRIVACY.

The Magistrate Judge erred in determining, as a matter of law on a 12(b)(6) demurrer, that a reasonable person would be not be highly offended or incur mental suffering, shame or humiliation, having discovered that someone recently entered onto secluded private property, took 360° pictures within and while close-up on the driveway close to the home and swimming pool (close to the home windows), while ostensibly trespassing, after also trespassing and driving far down a privately maintained graveled road and past "Private Road No Trespassing" signage, having published the pictures throughout the world via the trespasser's pervasive proprietary index system; and

FURTHER erred by failing to view plaintiffs' averments, and reasonable inferences drawn therefrom, in the light most favorable to the plaintiffs; erred in considering the tortfeasor's removal weblinks with failure to consider the cost and burden upon the injured party to be required to discover and to mitigate within the technological constraints imposed by the tortfeasor; erred in using permissible conduct of plaintiffs, during the course of this civil action, after the fact, as evidence of damage averments before the fact, including that this action was not filed under seal; and erred in using unspecified lack of "claims," in unspecified jurisdictions, with unspecified facts, to draw invalid conclusions that tortfeasor's "Street View" is viable as part of a prima facie pleading ruling; and erred in accepting extrinsic evidence from the Court's own unilateral "Googling" activities regarding plaintiffs' counsel.

The Borings' statement of facts, if accepted as true, satisfy a short and plain statement of facts to state a claim for relief, pursuant to F.R.C.P. 8(a).

To the Borings' averments, the Magistrate Judge stated that facts must be alleged that the intrusion "could be expected to cause mental suffering, shame or humiliation to a person of ordinary sensibilities." [Opinion, pg. 4, A7]. Yet, the Magistrate Judge finally adjudicated the entire claim against Plaintiffs at the pleading stage, stating:

> While it is easy to imagine that may whose property appears on Google's virtual maps resent the privacy implications, it is hard to believe that any – other than the most exquisitely sensitive – would suffer shame or humiliation. The Plaintiffs have not alleged facts to convince the Court otherwise.

[Id. (emphasis supplied)] Contrary to the Borings pleading of the conduct to state the claim, the Magistrate Judge required additional factual allegations of the damage on a "convince" standard. The Magistrate Judge, clearly by presupposition, gave little weight to the seclusion that the Borings intend to prove. Seclusion is not absolute, but relative: that is, seclusion from something. Because children's faces are public at some degree does not mean seclusion is waived to Google for all degrees. The Magistrate Judge draws from no precedent applicable to these facts, nor can that be accomplished without discovery and trial. Nevertheless, clearly the Magistrate Judge did not view the facts in a light most favorable to the Borings.

Even a more egregious error of law, the Magistrate Judge then further opined, without any legal basis whatsoever, and no factual references whatsoever:

> Although the Plaintiffs have alleged intrusion that was substantial and highly offensive to them and have asserted that others would have a similar reaction, they have failed to set out facts to sub-

> stantiate the claim. This is especially true given the attention that the Borings have drawn to themselves and the Street View images of their property. The Borings do not dispute that they have allowed the relevant images to remain on Google Street View, despite the availability of a procedure for having them removed from view. Furthermore, the have failed to bar others' access to the images by eliminating their address from the pleadings, or by filing this action under seal. **"Googling" the name of the Borings attorney demonstrates that publicity regarding this suit has perpetuated dissemination of the Borings' names and location, and resulted in frequent re-publication of the Street View images**. The Plaintiffs' failure to take readily available steps to protect their own privacy and mitigate their alleged pain suggests to the Court that the intrusion and the [sic] their suffering was less severe than they contend.

Id at 4-5. The Magistrate Judge opined that the Borings should have filed under seal, without any legal basis whatsoever for the proposition. As stated above, the Magistrate Judge conducted "googling" of the attorneys' activities in this case, on a 12(b)(6) demurrer.[14] Google is the defendant, and the Court admits using the defendants' indexing methods to make determinations on matters of law; there are no references whatsoever.

The Magistrate Judge does not cite to the record, nor articulates any fact underlying the finding, so the Borings are clearly prejudiced in not even being able to definitively tell this Court exactly what the Magistrate Judge reviewed to make its ruling; the ruling is completely unfastened by references and is, therefore, tantamount to improper speculation and reverse inference. The Magistrate Judge's "Googling" efforts undermines confidence in the entire legal process because a party plaintiff should not have to proceed in fear that a neutral judge is going to make determinations based upon research of activities off the record. That it happened is as concerning as why it happened.

Moreover, "[a]ny illegal entry would be sufficiently serious and offensive to state a claim for invasion of privacy." *Brunette v. Humane So-*

[14] The Magistrate Judge clearly set forth the standard of review under F.R.C.P. 12(b)(6).

ciety, 40 Fed.Appx. 594, 2002 U.S.App. LEXIS 13169 (9th Cir. 2002); *see also Dietemann v. Time, Inc.*, 449 F.2d 245, 247-249 (9th Cir. 1971) (finding invasion of privacy where reporter entered and photographed the plaintiff at home without authorization).

The Magistrate Judge stated that amendment of the pleading would be futile. [Opinion, pg. 12, n. 8, A15] And, yet, the Magistrate Judge requires additional facts to be pleaded.

IV. TRESPASS.

The Magistrate Judge erred in prejudging that compensatory damages are not available as a matter of law; and

FURTHER erred in requiring pleading damages when, at the same time, opining that damages are not an element of a prima facie claim; and erred in holding that plaintiffs had a special duty to plead nominal damages in the complaint and that plaintiffs were required to forfeit any claim to compensatory damages at the pleading stage without the aid of discovery or the benefit of expert review.

The Magistrate Judge ruled that:

> The Court considers this argument in order to eliminate any possibility that the language of its Memorandum Opinion addressing Defendant's Motion to Dismiss might be read to suggest that damages are part of a prima facie case for trespass. Clearly, they are not. The tort is complete once there has been an unprivileged intentional entry upon property in the possession of another. *See Graham Oil v. BP Oil Co.,* 885 F. Supp. 716, 725 (W.D.Pa. 1994).

[Reconsideration, at 2; A18] So far, so good; the Borings pleaded the *conduct* constitutes an intentional trespass [Complaint ¶17, A32]. But, then the court proceeded to state immediately thereafter:

> What the Court *did* hold was that the Borings, in their Amended Complaint, failed to allege facts sufficient to support a plausible claim that they suffered any damage as a result of trespass.

[Id.] Plaintiff met its prima facie pleading burden, only to have not met it in the next sentence based upon the Magistrate Judge's requirement of

additional pleading.[15] The authority cited is equally misguided. The Magistrate Judge cited the *1899* case of *Morris & Essex Mut. Coal Co., v. Delaware*, L. & W.R. Co., 42 A. 883, 884 (Pa. 1899) for the proposition that only nominal damages and not compensatory damages are available. However, that case expressly, on its own terms, is inapplicable to this case; to wit, "The whole proceeding was to recover damages based, not upon a wrongful invasion of the plaintiff's rights, but upon an act of assembly..." *Morris*, at 445.

The Magistrate Judge cited *Bastian v. Marienville Glass Co.,* 126 A. 798 (Pa. 1924) affirming the trial court's instruction for defendant because plaintiff failed to provide proof of actual damages, and although nominal damages may have been permitted, plaintiff failed to plead them. First, this case was in assumpsit, in Pennsylvania state court, subject to fact pleading rather than notice pleading requirements. Second, more importantly, the posture of the case was "[a]fter the pleadings had been closed and discovery completed." *Id.*, at 140. In that case, plaintiff was given a full and fair opportunity to adduce evidence of damage, and it was expressly stated as inapplicable where "a property right involved." *Id.*

Lastly, the Magistrate Judge's reliance on *Cohen v. Resolution Trust*, No. 03-2729, 107 Fed. Appx. 287, (3rd. Cir 2004), is equally inapplicable. In *Cohen*, this Third Circuit Court held that nominal damages were waived not having been requested through and including at trial, but this Court did so only after providing a full and fair opportunity for plaintiff to make a case to prove compensatory damages. *Id.*, at 288. It is noted that this was expressly not a property rights case, where damages

[15] See, generally, Summary of Argument (distinguishing conduct and damage); *See* Opinion, at 3; A6 (*citing Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007) "the [proscribed] conduct")

are presumed. Certainly, if the Borings cannot sustain a claim for compensatory damages after full and fair discovery, and if the Borings do not seek leave to amend for nominal damages, and if such a request would be necessary for this property rights case, the applicability of *Cohen* can be revisited as applicable in due course.

It is the substantive law of this Commonwealth that it is not necessary to allege any actual injury or damage as an element of the claim:

> **There is no need to allege harm in an action for trespass, because the harm is not to the physical well-being of the land, but to the landowner's right to peaceably enjoy full, exclusive use of the property.**

Jones v. Walker, 425 Pa.Super. 102, 109 (Pa.Super. 1993); *see, Houston v. Texaco, Inc.*, 371 Pa.Super. 399, 538 A.2d 502 (1988), alloc. den., 520 Pa. 575, 549 A.2d 136 (1988). Moreover, *see Restatement (Second) of Torts,* §158, 163. Section 158 states as follows:

> **One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so...**

Id. (emphasis added). And, in *Goodrich Amram, Summary of Pennsylvania Jurisprudence* 2d, § 23:1, it is further stated:

> Under this definition, one who intentionally and without consensual or other privilege enters land in possession of another or causes anything or a third person to do so is liable as a trespasser irrespective of whether harm is thereby cause to any legally protected interest.

Id. (emphasis added). *See also, Pennbaur v. City of Cincinnati*, 745 F.Supp. 446 affirmed 947 F.2d 945 (S.D.OH 1990) (every unauthorized entry upon land of another constitutes a trespass, and regardless of whether the owner suffered substantial injury, he at least sustains legal injury which entitles the owner to verdict for some damages); *accord Gavcus v. Potts*, 808 F.2d 596 (7th Cir. 1986); *Hoffman v. Vuilcan Materials Co.*, 91 F.Supp.

2d 881 (M.D.NC. 1999); *Wilson v. Amoco*, 33 F.Supp.2d 969 (D. Wyo. 1998); *Cook v. Rockwell Int'l.*, 273 F.Supp 2d 1175 (D.Colo. 2003); *Lugue v. Hercules*, 12 F.Supp. 2d 1351 (S.D.Ga. 1997).

The Magistrate Judge originally opined that the Plaintiffs "do not describe damage to or interference with their possessory rights." [Opinion, at 8; A11]. In clear error to *Walker*, the Magistrate Judge merely cited to a district court case for the ever-present standard proposition that liability is imposed for damages caused, to wit: "*See N.E. Women's Ctr., Inc. v. McMonagle*, 689 F.Supp. 465, 477 (E.D.Pa. 1988)." [Opinion, at 8; A11]. The indirect citation to *Kopka v. Bell Tel*, 91 A.2d 232, 235 (1952) stands for the same proposition.

The fact that the District Court of Philadelphia stated the positive proposition that, "a trespasser is responsible in damages for all injurious consequences which are the natural and proximate result of his conduct," does not make the negative inverse proposition true. That is, that without physical damage, there is no liability; or, that the damage must be pleaded or the case dismissed.[16] While a trespasser is responsible in damages for all injurious consequences which are the natural and proximate result of his conduct, this is not the same as opining that a plaintiff, in a trespass action, has to establish actual damages to maintain the action at the initial pleading.[17] In *N.E. Women*, the Court was merely not

[16] *E.g.*, "If you are hungry, then you eat" does not create the truth of the inverse negative proposition, "You cannot eat unless you are hungry." The question is not whether damages must be proximate at the post-trial point of award. The question is whether they must be pleaded as a an element and/or whether a plaintiff must waive a claim for compensatory damages to proceed in trespass.

[17] Post discovery, defendants in *N.E. Women* contended that the Court erred by permitting the jury to award plaintiff damages for injury to its business as well as injury to its property under the trespass claim. The defendants argued that they should only be required to pay for the actual

limiting plaintiff to actual damages to real property. Moreover, importantly, the Court still let the jury decide whether the damages flowed from the trespass.[18] The Restitution and Unjust Enrichment 2d (Draft) sets forth as follows:

> **§ 40. Trespass and Conversion: (1) A person who obtains a benefit by an act of trespass or conversion, is accountable to the victim of the wrong for the benefit so obtained. (2) The measure of recovery depends on the blameworthiness of the defendant's conduct. As a general rule: (a) a conscious wrongdoer, or one who acts despite a known risk that the conduct in question violates the rights of the claimant, will be required to disgorge all gains (including consequential) derived from the wrongful transaction.**
>
> **Comment b. Measure of Recovery. ...In consequence, a conscious wrongdoer may be liable to disgorge more than the value of what was taken or obtained in the first instance. ... Restitution is justified in such cases because the advantage acquired by the defendant is one that should properly have been the subject of negotiation and payment....The more difficult issues of valuation are accordingly those in which the defendant has made a use of the claimant's property for which there is no ordinary market; or in which the defendant has bypassed any market by taking without asking, or by proceeding in the face of a refusal. Valuation in such cases resists any precise formula, and courts exercise a wide discretion in fixing a price for the benefit in question—in other words, a measure of liability—that will correspond to the unjust enrichment of the defendant. The one constant factor in such cases is that values will be more liberally estimated against a conscious**

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damage to plaintiff's real property, not for any injury to plaintiff's business. The Court found that it "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." *N.E. Women*, at 477.

[18] In the dicta of footnote 4 of the Opinion [A11], this Magistrate Judge referenced the case of *Costlow v. Cusimano*, 34 A.D.2d 196; 311 N.Y.S.2d 92 (1970). That case is inapplicable as it is a citation to the New York state court, which is applying the rules of procedure and body of law for that state court forum, rather than this Federal court forum, using the substantive law of the State of New York. Most importantly, the State of New York uses a form of fact pleading, superseded by the Federal Rules.

> **wrongdoer.. . . A conscious wrongdoer ought not to be left on a parity with a person who, in pursuing the same objectives, respects legally protected rights of the property owner, since if liability in restitution were limited to the price that would have been paid in a voluntary exchange, the calculating wrongdoer would encounter no incentive to bargain. By this reasoning, a benefit taken by a conscious wrongdoer is properly valued at a price greater than the cost of the negotiated transaction that the defendant wrongly elected to bypass.**

Id.; see also, Jacque v. Steenberg Homes, 209 Wis. 2d 605; 563 N.W.2d 154, 159-162 (1997). Certainly, federal notice pleading, with a general prayer for relief, at the pleading stage, prior to discovery, and in light of the fact that nominal damages are the subsumed within other damage claims (being only $1), and in light of the presumption of damages in trespass, the Magistrate Judge erred to have dismissed the claim.

V. UNJUST ENRICHMENT.

> **The Magistrate Judge erred in ruling as a matter of law that i) the relationship between the parties must be construed as contractual, ii) that the Borings did not confer anything of value on Google and iii) that there is no independent cause of action for unjust enrichment being subsumed by the other claims, particularly when the other claims were dismissed.**

The Magistrate Judge ruled, "there was no relationship between the parties that could be construed as contractual. It cannot be fairly said that the Borings conferred anything of value upon Google." [Opinion, at 9-10] For the reasons stated upon, the Magistrate Judge presupposes against the Borings the very inference that the Borings require for their claim.

Although it may be that a surviving trespass count would subsume the substance of this claim, the trespass count must survive to do so; otherwise unjust enrichment is appropriate claim.

> **Valuation in such cases resists any precise formula, and courts exercise a wide discretion in fixing a price for the benefit in question—in other words, a measure of liability—that will correspond to the <u>unjust enrichment</u> of the defendant.**

Restatement of Restitution 2d (Draft). The Borings properly satisfy the standard, and the same have been pleaded: (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. *Lackner v. Glosser*, 892 A. 2d 21, 34 (Pa. Super 2006).

VI. PUNITIVE DAMAGES

The Magistrate Judge erred in holding punitive damages are not available as a matter of law even though pleaded and evidence is in the possession of defendant.

In addition to dismissing all counts, the Magistrate Judge also ruled that the "allegations in the Amended Complaint fail to establish a plausible claim of entitlement to punitive damages." [Reconsideration, at 4; A20] However, with regard to punitive damages, the Pennsylvania Supreme Court has delineated the clear purpose as a jury question:

> **In making its determination, <u>the jury has the function</u> of weighing the conduct of the tortfeasor against the amount of damages which would deter such future conduct.**

Kirkbride v. Lisbon Contractors, 521 Pa. 97, at 103-4, 555 A.2d 800 (1998). Determining punitive damages is a jury function to determine after discovery, and the Borings are entitled to all inferences.

The determination that punitive damages are not warranted because the Borings do not point to aggravating or outrageous conduct begs the question. The Borings averred entry onto property without permission (which is also crime), pursuant to a calculated scheme of approach, substantiating a claim for punitive damages. The Borings are entitled to discovery to prove that the acts are not mere "accidents" but are

reckless disregard of rights with a profit-motive as stated in the Summary of the Case. The question must be reserved the jury because discovery may yield information that bears on the question and the initial inference. For example, discovery may show that a doctor was intoxicated, or that Google's policy was to consciously disregard property rights.

Furthermore, the Pennsylvania Supreme Court has stated:

> **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. ... 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.**

Kirkbride v. Lisbon Contractors, 521 Pa. 97, at 103-4, 555 A.2d 800 (1998) (emphasis added). Moreover, the Supreme Court of Wisconsin also eloquently stated the socio-philosophical policy behind punitive damages in a trespass count:

> **[Plaintiffs] argue that both the individual and society have significant interests in deterring intentional trespass to land, regardless of the lack of measurable harm that results. We agree with the [plaintiffs]....**
>
> **[T]he United States Supreme Court has recognized that the private landowner's right to exclude others from his or her land is "one of the most essential sticks in the bundle of rights that are commonly**

characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 384, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994); (*quoting Kaiser Aetna v. United States*, 444 U.S. 164, 176, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979)). *Accord Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987) (*quoting Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). ...

[B]ecause a legal right is involved, the law recognizes that actual harm occurs in every trespass. The action for intentional trespass to land is directed at vindication of the legal right. W. Page Keeton, Prosser and Keeton on Torts, § 13 (5th ed. 1984). The law infers some damage from every direct entry upon the land of another. *Id.* The law recognizes actual harm in every trespass to land whether or not compensatory damages are awarded. Id. Thus, in the case of intentional trespass to land, the nominal damage award represents the recognition that, although immeasurable in mere dollars, actual harm has occurred. . . .

Society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner. Society has an interest in preserving the integrity of the legal system. Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished. When landowners have confidence in the legal system, they are less likely to resort to "self-help" remedies. In McWilliams, the court recognized the importance of "'preventing the practice of dueling, [by permitting] juries to punish insult by exemplary damages.'" McWilliams, 3 Wis. at 381. Although dueling is rarely a modern form of self-help, one can easily imagine a frustrated landowner taking the law into his or her own hands when faced with a brazen trespasser, like [defendant], who refuses to heed no trespass warnings....

If punitive damages are not allowed in a situation like this, what punishment will prohibit the intentional trespass to land? Moreover, what is to stop [defendant] from concluding, in the future, that [it] is not more profitable than obeying the law? . . . An appropriate punitive damage award probably will.

In sum, as the court of appeals noted, the Barnard rule sends the wrong message to [defendant] and any others who contemplate trespassing on the land of another. It implicitly tells them that they are free to go where they please, regardless of the landowner's wishes. As long as they cause no compensable harm, the only deterrent intentional trespassers face is the nominal damage award of $1, the modern equivalent of Merest's halfpenny, and the possibility of a Class B forfeiture under Wis. Stat. § 943.13. We conclude that both the private landowner and society have much more than a nominal interest in excluding others from private land. Intentional trespass to land causes actual harm to the individual, regardless of whether that harm can be measured in mere dollars. Consequently, . .

> **., we hold that nominal damages may support a punitive damage award in an action for intentional trespass to land.**

Jacque v. Steenberg Homes, 209 Wis. 2d 605; 563 N.W.2d 154, 159-162 (1997) (emphasis added).

VII. INJUNCTIVE RELIEF.

The Magistrate Judge erred in dismissing the claim for injunctive relief leaving the plaintiff without even a destruction/non-use claim.

Apart from the other claims, Google has possession of pictures of the secluded Boring home, acquired with specific intent, by trespassing. The Magistrate Judge dismissed the count on the basis that every other count was dismissed, each of which was dismissed based upon the pleading of damages. In effect, the Magistrate Judge ruling sends exactly the message that underlies the entire dismissal of the entire case, including that amendment would be futile: a prejudgment that what Google did is legally acceptable and not actionable for any reason, not even to substantiate a non-use and destruction order. Irrespective of each other count, Google is permitted by the Magistrate Judge to continue to use the pictures in the manner of its choosing, acquired while trespassing.

> **Although dueling is rarely a modern form of self-help, one can easily imagine a frustrated landowner taking the law into his or her own hands when faced with a brazen trespasser, like [the defendant], who refuses to heed no trespass warnings....**

Id.

CONCLUSION

As a free people, we have different opinions as to the meaning of the law, and how words should be interpreted and applied. To freely and to openly debate is our American heritage; even more, it is our duty. Rightly so, as the broad spirit of the law, and what it is meant to do, must be entrusted by the creator into a constrained choice of corporal words. Our law is merely a body of words, and we are merely a body of people. And, it is true that even our best body cannot perfectly encage the expansive broadness of our best spirit.

It is also true that the new birth of any law or body constitution, as used in the prospection of its life, cannot detail every future intention, cause and deed. In the end, and such as it may be for ourselves, it is not what the body of words say here that is important, but, rather, what they do here, in life, for us, the living. It is by the dedicated resolution of this Federal court from which the body of our law is animated, endures or perishes from the earth. Indeed, in the contention of differing opinions as to the meaning of words, and what they are meant to do, this Federal court determines the last full measure of each word used by the creator for any law or legal principle.

This case is about the meaning of private property. No less than the check and balance on our inalienable rights, as Americans, to “life, liberty [and] property,” and the “pursuit of happiness.” If “happiness” is spoken today with the superficial insipidness of a smiley-face sticker, it was not so for our American Forefathers: happiness was a gift of Divine Providence, and inalienably grounded in the right to be left alone. Indeed, freedom begins with the right to be left alone.

> **The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If "Thou shall not covet" and "Thou shall not steal" were not commandments of Heaven, they must be made inviolable precepts in every society before it can be civilized or made free.**

John Adams.[19]

Google claims that its liberty permits it to intrude onto my private property. I exclaim that my own liberty prevents it. I exclaim that my property is nothing more than the resultant embodiment and product of my time and labor.

If you take my property, you take my time. If you take my time against my will, you take my liberty. If you take my liberty, I am your prisoner. If you take my labor against my will without compensation, I am your slave.

This appeal is made because Google and I have different opinions as to the law and the meaning of the word "liberty," and that is the rub. But, contention in the meaning of "liberty" is not a new one for the American people:

> **The world has never had a good definition of the word "liberty," and the American people, just now, are much in want of one. We all declare for liberty; but in using the same word we do not all mean the same thing. With some the word "liberty" may mean for each man to do as he pleases with himself, and the product of his labor; while with others, the same word may mean for some men to do as they please with other men, and the product of other men's labor.**
>
> **Here are two, not only different, but incompatible things, called by the same name — liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names — liberty and tyranny.**

Abraham Lincoln.[20]

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[19] John Adams. A Defense of the American Constitution.
[20] Abraham Lincoln. Address in Baltimore, Maryland (April 18, 1864)

Can Americans find “happiness” with legally permitted intrusion on their own private property, even past posted warnings? Can Americans love their government for allowing profiteers the liberty to intrude on private property, take the benefit for their own private luxuries and then not pay compensation?

Is not the first act of any tyrant to destroy private property, or, to create acceptance for the premise, even if the destruction is in degrees of seconds or hours, or inches or yards? And so much more insidious, if we are not vigilant with oil in our lanterns to watch for it when it comes.

> **Without a broken fence to aver, or a direct monetary diminution, I am treaded upon, injured and without remedy.**
>
> **Whether my property is a slave to serve unlimited commercial profiteers or I am taxed as a slave to build a fence, it is of no matter: my property, my time and my money are committed to serve the interests of another against their will.**

It matters not if the lien is termed, “servitude,” “servient tenement” or “slave.” It is immaterial; it is what it is. Such as it was for our American heritage, when other intrusions were then at issue.

> **[D]ifferent men often see the same subject in different lights; and, therefore, I hope that it will not be thought disrespectful to those gentlemen, if, entertaining as I do opinions of a character very opposite to theirs, I shall speak forth my sentiments freely and without reserve.**
>
> **This is no time for ceremony...**
>
> **For my own part I consider it as nothing less than a question of freedom or slavery; and in proportion to the magnitude of the subject ought to be the freedom of the debate. It is only in this way that we can hope to arrive at truth, and fulfill the great responsibility which we hold to God and our country. Should I keep back my opinions at such a time, through fear of giving offense, I should consider myself as guilty of treason towards my country, and of an act of disloyalty towards the majesty of heaven, which I revere above all earthly kings.**

> **[I]t is natural to man to indulge in the illusions of hope. We are apt to shut our eyes against a painful truth, and listen to the song of that siren, till she transforms us into beasts. Is this the part of wise men, engaged in a great and arduous struggle for liberty? Are we disposed to be of the number of those who, having eyes, see not, and having ears, hear not, the things which so nearly concern their temporal salvation?**
>
> **... I have but one lamp by which my feet are guided; and that is the lamp of experience. I know of no way of judging of the future but by the past. ...**
>
> **They tell us, sir, that we are weak — unable to cope with so formidable an adversary. But when shall we be stronger? Will it be the next week, or the next year? Will it be when we are totally disarmed, and when a British guard shall be stationed in every house? ...**
>
> **Sir, we are not weak. ... The battle, sir, is not to the strong alone; it is to the vigilant, the active, the brave. ... There is no retreat but in submission and slavery! Our chains are forged! Their clanking may be heard on the plains of Boston! The war is inevitable — and let it come! I repeat it, sir, let it come! ...**
>
> **Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; but as for me, give me liberty, or give me death!**

Patrick Henry.[21]

The information revolution is here and it contends against our freedoms. And it matters not to me whether the intruder on my land or stationed in my house is King George or Google.

Never before has a commercial enterprise had the power to pervasively traverse the physical earth, the power to record and to index the acts of pervasion, and the power to pervasively publish the results. Do we not recognize Orwell's Big Brother, even as he sits in our driveway, 1,000 feet from the public road, packed with six cameras taking 360° photographs on our driveway, at our home window? Experience teaches to check and balance.

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[21] March 23, 1775. "Slavery" is used in the formative political-philosophical context as the antithesis to "freedom"; such as Empty/Full on a gauge: as one lessens the other gains.

If the Magistrate Judge is correct, this case will be remembered as the case that allows Google to tread upon me and my land. If the Magistrate Judge is correct, there is no difference, in the liberty to intrude, even if the Google's car was painted bloody red with a hammer and sickle, painted with a Nazi flag, or painted with the Iraqi flag of black and red horizontal stripes. There is no difference in point of law, if Google, with all of its technology and information, is acquired by an Iranian or Iraqi company, or an Arabian king. These merely expose the subtlety.

And, what is the natural and logical next step, if we should divine it. The rule of law, the new principles of imposition and creep of permissions to use my land have no logical end or definition. The ruling below is a foot preventing the closing of the door on my rights, and, mark these words, the permissions will creep. Google gets its bite, so does everyone else. Each is entitled to equal protection of the law. Lady Liberty is bled to death by the pinpricks of trespass.

> **For those who do not know how to count, they lose their money; for those who do not know their rights, they lose their liberties.**

Our Forefathers did not intend to replace the intrusions of a monarchy with the intrusions of a corporate oligarchy or corporate aristocracy. In an age of needed responsibility, Google must be held accountable for its choices. The Borings seek their day in court. Google is not above the law, but that begs the question.

The Borings seek reinstatement of the Amended Complaint, Counts I, II, III, IV and V, with a directive to Google to answer in due course.

Respectfully submitted,

Date: August 25, 2009

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ATTORNEY CERTIFICATE OF BAR MEMBERSHIP

I, Gregg Zegarelli, certify on the date specified below, that I am admitted as an attorney of the United States Court of Appeals for the Third Circuit and that I am a member of the bar in good standing.

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I, Dennis M. Moskal, certify on the date specified below, that I am admitted as an attorney of the United States Court of Appeals for the Third Circuit and that I am a member of the bar in good standing.

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CERTIFICATE OF COMPLIANCE

I, Gregg Zegarelli, certify that this Brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because it contains 10,224 words, excluding parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii). I further certify that this Brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because it has been prepared in a non-proportionally spaced type-face using Microsoft Word 2003 with 10.5 point Courier New typeface.

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CERTIFICATION OF IDENTICAL BRIEFS AND VIRUS SCAN

I, Gregg Zegarelli, certify that the text of the E-Brief and the ten (10) hard copies of the brief are identical and are submitted on this same date. I further certify that the .PDF file enclosed was scanned for viruses by Kasperski anti-virus document verification.

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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 I (A1-A20)

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APPENDIX I - TABLE OF CONTENTS

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 NUMBER: 08-694 (ARH)

NOTICE OF APPEAL

TO THE CLERK OF COURTS:

Notice is hereby given that Plaintiffs, Aaron and Christine Boring, in the above-named case, hereby appeal to the United States Court of Appeals for the Third Circuit from the Memorandum and Order entered by Magistrate Judge Amy Reynolds Hay in this action on February 17, 2009, granting Defendant's Motion to Dismiss Amended Complaint (Docket Nos. 41-42) and from the Memorandum and Order entered in this action on April 6, 2009, denying Plaintiffs' Motion for Reconsideration (Docket Nos. 49-50).

Dated: May 4, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

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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The undersigned hereby also certifies that a copy of this document has been served upon the trial judge by United States mail, postage prepaid, at the following address:

The Hon. Amy Reynolds Hay, Magistrate Judge
U.S. District Court for the Western District of Pennsylvania
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AARON C. BORING; CHRISTINE BORING, Plaintiffs,	)	
vs.	)	Civil Action No. 08-694
	)	Magistrate Judge Amy Reynolds Hay
GOOGLE, INC., Defendant.	)	

ORDER

AND NOW, this 17th day of February, 2009, for the reasons set forth in the accompanying Memorandum Opinion, IT IS HEREBY ORDERED that Defendant Google's Motion to Dismiss the Amended Complaint (Doc.22) is GRANTED and the above-entitled action is DISMISSED with prejudice.

IT IS FURTHER ORDERED that, pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, if the Plaintiffs desire to appeal from this Order they must do so within thirty (30) days of the date of this Order by filing a notice of appeal as provided in Rule 3, Fed.R.App.P.

/s/ Amy Reynolds Hay
United States Magistrate Judge

cc: Counsel of Record via CM-ECF

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

AARON C. BORING; CHRISTINE BORING, Plaintiffs,	)	
vs.	)	Civil Action No. 08-694
	)	Magistrate Judge Amy Reynolds Hay
GOOGLE, INC., Defendant.	)	

MEMORANDUM OPINION

HAY, Magistrate Judge

In April 2008, Pennsylvania residents, Aaron and Christine Boring ("the Plaintiffs" or "the Borings"), filed a five count Complaint against Google, Inc. ("the Defendant" or "Google"), a Delaware corporation, in the Court of Common Pleas of Allegheny County, Pennsylvania. The Borings alleged entitlement to compensatory and punitive damages based on four tort-based causes of action: (1) Count I - invasion of privacy; (2) Count II - trespass; (3) Count IV - negligence; and (5) Count V - conversion. In Count III, the Plaintiffs asserted a claim for temporary and permanent injunctive relief. Invoking this Court's diversity jurisdiction, the Defendant effected timely removal. The Borings then filed an Amended Complaint (Doc.18), substituting an unjust enrichment claim for the conversion claim at Count V. The Defendant's Motion to Dismiss the Amended Complaint (Doc. 22) pursuant to Fed. R. Civ. P. 12(b)(6) is pending. Because the Plaintiffs have failed to state a claim under any count, the Amended Complaint will be dismissed .

Background

Google describes itself as the operator of a "well-known internet search engine" that maintains the world's largest and most comprehensive index of web sites and other online content. (Doc. 11 at 4). One of the services offered by Google is comprehensive online map access. "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" made up of satellite or aerial images. Id. at 4-5. In May 2007, Google introduced "Street View" to its map options. Street View permits users to see and navigate within 360 degree street level images of a number of cities, including Pittsburgh. These images were generated by Google drivers who traversed the covered cities in passenger vehicles equipped with continuously filming digital panoramic cameras. Id. at 5. According to Google, "the scope of Street View was public roads." Id. Google included in the Street View program an option for those objecting to the content of an image to have it removed from view. (Doc. 11 at 5).

The Borings, who live on a private road north of Pittsburgh, discovered that "colored imagery" of their residence, outbuildings, and swimming pool, taken "from a vehicle in their residence driveway . . . without . . . waiver or authorization," had been included on Street View. (Doc. 18 at ¶ 9). The Plaintiffs allege that the road on which their home is located is unpaved and clearly marked with "Private Road" and "No Trespassing" signs. Id. at ¶ 11. They contend that Google, in taking the Street Search pictures from their driveway at a point past the signs, and in making those photographs available to the public, "significantly disregarded [their] privacy interests." Id. The Court addresses the sufficiency of the Borings' claims seriatim.

Standard of Review

In Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, (2007), the Supreme Court held that a complaint challenged pursuant to Fed. R. Civ. P. 12(b)(6) must be dismissed if it fails to allege "enough facts to state a claim to relief that is plausible on its face." Id. at 1974. Said another way, a plaintiff is required to plead facts sufficient to "raise a right to relief above the speculative level." Id. at 1965. The court is not obligated to accept inferences unsupported by facts set out in the complaint, see California Pub. Employees' Ret. Sys. v. The Chubb Corp., 394 F.3d 126, 143 (3d Cir. 2004) (citing Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997)), and is not required to accept legal conclusions framed as factual allegations. Bell Atlantic Corp., 127 S.Ct. at 1965. See also Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008) (explaining, citing Twombly, that "labels, conclusions, and a formulaic recitation of the elements of a cause of action" do not suffice; noting that the complaint "must allege facts suggestive of [the proscribed] conduct;" and requiring plaintiff to allege "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element[s] of his claim"). In evaluating the complaint, the Court views all facts and reasonable inferences drawn therefrom in the light most favorable to the Borings. Odd v. Malone, 538 F.3d 202, 205 (3d Cir. 2008).

Analysis

A. The Claims for Invasion of Privacy

The action for invasion of privacy embraces four analytically distinct torts:(1) intrusion upon seclusion; (2) publicity given to private life; (3) appropriation of name or likeness; and (4) publicity placing a person in a false light. Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 621 n.9 (3d Cir. 1992). The Borings do not identity the tort or torts underlying their invasion of privacy claim. Appropriation of name or likeness and false light publicity clearly do not apply.

Since the remaining torts have an arguable relationship to the facts alleged, the Court will discuss each.

1. Intrusion Upon Seclusion

This tort is established where a plaintiff is able to show: (1) physical intrusion into a place where he has secluded himself; (2) use of the defendant's senses to oversee or overhear the plaintiff's private affairs; or (3) some other form of investigation into or examination of the plaintiff's private concerns. Id. at 621. "Liability attaches only when the intrusion is substantial and would be highly offensive to 'the ordinary reasonable person.'" Id. (quoting Harris by Harris v. Easton Publ'g Co., 483 A.2d 1377, 1383 -84 (1984)). See also Restatement (Second) of Torts §652B (same). In order to show that an intrusion was highly offensive, the plaintiff must allege facts sufficient to establish that the intrusion could be expected to cause "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 (Pa. 2002) (quoting McGuire v. Shubert, 722 A.2d 1087 (Pa. Super. 1988)). This is a stringent standard. Wolfson v. Lewis, 924 F. Supp. 1413, 1420 (E.D. Pa. 1996). While it is easy to imagine that many whose property appears on Google's virtual maps resent the privacy implications, it is hard to believe that any - other than the most exquisitely sensitive - would suffer shame or humiliation. The Plaintiffs have not alleged facts to convince the Court otherwise.

Although the Plaintiffs have alleged intrusion that was substantial and highly offensive to them and have asserted that others would have a similar reaction, they have failed to set out facts to substantiate this claim. This is especially true given the attention that the Borings have drawn to themselves and the Street View images of their property. The Borings do not dispute that they

have allowed the relevant images to remain on Google Street View, despite the availability of a procedure for having them removed from view. Furthermore, they have failed to bar others' access to the images by eliminating their address from the pleadings, or by filing this action under seal. "Googling" the name of the Borings' attorney demonstrates that publicity regarding this suit has perpetuated dissemination of the Borings' names and location, and resulted in frequent re-publication of the Street View images. The Plaintiffs' failure to take readily available steps to protect their own privacy and mitigate their alleged pain suggests to the Court that the intrusion and the their suffering were less severe than they contend.

2. Publicity Given to Private Life

The Amended Complaint, insofar as is purports to state a claim for publicity given to the Borings' private life, is similarly flawed. Under Pennsylvania law, this claim comprises four elements:(1) publicity; given to (2) private facts; (3) which would be highly offensive to a reasonable person; and (4) are not of legitimate public concern. See Harris by Harris, 483 A.2d at 1384. Because the Plaintiffs have not alleged facts sufficient to establish the third element of this tort, the Court need not address the other requirements. As the Court has already discussed, the Amended Complaint is devoid of facts sufficient to indicate that the photographs of the Borings' property revealed private facts such that a reasonable person would be highly offended.. The Plaintiffs do not allege that their situation is unique or even unusual. Yet, it does not appear that the viability of Street Search has been compromised by requests that images be removed, nor does a search of relevant legal terms show that courts are inundated with - or even frequently consider - privacy claims based on virtual mapping. Furthermore, as was true with the intrusion upon seclusion claim, the Plaintiffs have done little to limit - and seem to have heightened

intentionally - public interest in and access to the allegedly private information.[1]

B. The Negligence Claims

In order to state a claim based on negligence, a plaintiff must allege facts sufficient to show: (1) a duty of care; (2) breach of the duty; (3) actual loss or damage; and (4) a causal connection between the breach of duty and the resulting injury. Farabaugh v. Pa. Turnpike Com'n, 911 A.2d 1264, 1272-73 (Pa. 2006) (citing R.W. v. Manzek, 888 A.2d 740, 746 (2005)). The Borings' negligence claims are set out in the Amended Complaint as follows:

> 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 date is [sic] captured, for the whole world to see without some advance method of filtering. Defendant breached its duty by its aforesaid actions. Plaintiffs have been injured, and such breach was the proximate cause of Plaintiffs' injuries.

(Doc.18 at ¶ 24). These allegations are insufficient to state a viable claim. Simply stating that there is or ought to be a duty is not enough; the duty alleged must be one recognized by the law. See Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270, 280 (Pa. 2005)

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[1] This claim is deficient in other respects. The facts do not establish that the views shown of the Plaintiffs' property constituted private information. What was disclosed was already available to the public by virtue of tax records and maps compiled by other internet search engines. (Doc.22 Ex. A-G). Aside from some additional detail, the Plaintiffs do not specify what in the Google images was not ascertainable from or was more outrageous than information included in public records or on other internet sites prior to the unveiling of Street Search.

Even if the information had been disclosed for the first time on Google, it does not comport with the definition of "private facts" contained in the Restatement of Torts. According to the Restatement, private facts have been disclosed "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. The limitations, in other words, are those of common decency. . . ." Restatement (Second) of Torts § 652D cmt. h. The Borings have not alleged facts to support the contention that Google transgressed standards of decency, or published information that was of no public concern.

(declaring it "well established that 'a cause of action in negligence requires allegations that establish the breach of a *legally recognized* duty or obligation that is causally connected to the damages suffered by the complainant.'") (citation omitted) (emphasis added). In certain circumstances, the Court may recognize a "new" duty on which a negligence claim may be based. See e.g., Althaus ex rel. Althaus v. Cohen, 756 A.2d 1169 (2000).[2] The Plaintiffs, however, do not mention the relevant factors. Moreover, it does not appear that these factors militate in favor of finding a duty.[3]

C. Trespass

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[2] "The determination of whether a duty exists in a particular case involves the weighing of several discrete factors: 1) the relationship between the parties; 2) the social utility of the actor's conduct; 3) the nature of the risk imposed and foreseeability of the harm incurred; 4) the consequences of imposing a duty upon the actor; and 5) the overall public interest in the proposed solution." Althaus, 756 A.2d at 1169.

[3] The Borings' negligence claim is also problematic in that it is grounded, in part, on damages attributable to "mental suffering." (Doc. 18 at ¶ 14). Recovery for emotional distress stemming from a defendant's negligence is available only where the claim includes physical injury to the plaintiff or, in limited circumstances, where the plaintiff witnesses injury to another. See Mest v. Cabot Corp., 449 F.3d 502, 519 (3d Cir. 2006) (collecting Pennsylvania cases). Neither of these conditions is met here.

The Plaintiffs have also failed to state a claim for punitive damages in that they do not allege facts sufficient to support the contention that Google engaged in outrageous conduct. Ordinary negligence cannot be the basis for an award of punitive damages. See Hutchison ex rel. Hutchison v. Luddy, 946 A.2d 744, 747 (Pa Super. 2008).

The Court disagrees with the Defendant's argument that diminution in the value of property is not recoverable in negligence. Pennsylvania's economic loss doctrine "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract." Duquesne Light Co. v. Westinghouse Elec. Corp,, 66 F.3d 604, 618 (3d Cir.1995). The Borings' negligence claim is not based on a contract. The Court's rejection of the Defendant's argument is irrelevant, however, in view of the fact that the Borings have not alleged a single fact supporting their contention that their property decreased in value, or that any decrease was due to action taken by Google. Tying any alleged damage to Google would be particularly difficult in light of the number of times the images have been published by entities other than Google.

Pennsylvania law defines trespass as "an unprivileged, intentional intrusion upon land in possession of another." Graham Oil Co. v. BP Oil Co., 885 F. Supp. 716, 725 (W.D. Pa.1994) (citing Kopka v. Bell Tel. Co., 91 A.2d 232, 235 (1952)). Trespass is an intentional tort, which means that in order for liability to attach, a defendant must have the "intention to enter upon the particular piece of land." Valley Forge Gardens, Inc. v. James D. Morrissey, Inc., 123 A.2d 888, 891 (Pa.1956) (quoting Restatement § 163, comment b). Under Pennsylvania law, as under the general rule, a trespasser is responsible in damages for all injurious consequences which are the natural and proximate result of his conduct. See N.E. Women's Ctr., Inc. v. McMonagle, 689 F. Supp. 465, 477 (E.D. Pa. 1988) (citing Kopka 91 A.2d at 232)). See also 75 Am. Jur.2d, Trespass, Section 52.

The Borings have not alleged facts sufficient to establish that they suffered any damages caused by the alleged trespass. They do not describe damage to or interference with their possessory rights. Instead, they claim, without factual support, that mental suffering and a diminution in property value were caused by Google's publication of a map containing images of their home. While, arguendo, trespass was the "but for"cause of their alleged harm, it was not the proximate cause required to establish indirect and consequential damages.[4]

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[4] T he Borings misapprehend the nature of the tort of trespass when they argue that imposing liability for trespass here is no different from doing the same when a person enters briefly upon another's land to steal a car. This example is flawed, however, because in the second case the transgressor would be held accountable, not for trespass, but for theft of the car. The tort of trespass protects interests in possession of property. Consequently, "damages for trespass are limited to consequences flowing from the interference with *possession* and not for separable acts more properly allocated under other categories of liability." Costlow v. Cusimano, 34 A.D.2d 196, 201 (N.Y. 1970) (publication of photographs of plaintiffs' deceased children not actionable as trespass since claim was really based on interference with rights of a personal nature rather than for interference with rights to exclusive possession of property) (emphasis added).

The Court need not consider whether the Borings have alleged facts sufficient to support a claim for nominal damages, because the Amended Complaint does not contain a nominal damages claim.

D. The Claim for Unjust Enrichment

In order to establish a claim for unjust enrichment, a plaintiff must allege facts showing that: (1) he conferred a benefit upon the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under circumstances making it inequitable for defendant to retain the benefit without compensating the plaintiff for its value. Lackner v. Glosser, 892 A. 2d 21, 34 (Pa. Super. 2006).

The doctrine of unjust enrichment is "typically invoked . . . when plaintiff seeks to recover from defendant for a benefit conferred under an unconsummated or void contract." Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris, Inc., 171 F.3d 912, 936 (3d Cir. 1999) (citing Zvonik v. Zvonik, 435 A.2d 1236, 1239- 40 (Pa. Super. 1981)). In this event, the law implies a quasi-contract, requiring that the defendant compensate the plaintiff for the value of the benefit conferred. In other words, the defendant makes restitution to the plaintiff in quantum meruit.[5] See Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 998 (3d Cir.1987); AmeriPro Search, Inc. v. Fleming Steel Co., 787 A.2d 988, 991 (Pa. Super. 2001) (citations omitted).

In this case, there was no relationship between the parties that could be construed as

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[5] "Quantum meruit" is defined as "as much as deserved." Black's Law Dictionary at 1243 (6th ed. 1990). It "measures recovery under implied contract to pay compensation as reasonable value of services rendered." Id. See also Mulholland v. Kerns, 822 F. Supp.1161,1169 (E.D. Pa. 1993) (quoting Black's Law Dictionary)).

contractual. It cannot fairly be said that the Borings conferred anything of value upon Google.[6] The entire thrust of the Borings' allegations is that Google *took* something from the Borings without their consent, and should be held liable for having done so. There is, therefore, no basis for applying a quasi-contractual remedy.

The Borings argue that unjust enrichment is not an exclusively quasi-contractual remedy, but may stand alone as an independent tort. The Court of Appeals for the Third Circuit addressed this issue in Steamfitters, writing: "In the tort setting, an unjust enrichment claim is essentially another way of stating a traditional tort claim (i.e., if defendant is permitted to keep the benefit of his tortious conduct, he will be unjustly enriched.)" Id. 171 F.3d at 936. The Court then quoted the Restatement of Restitution:

> The desirability of permitting restitution in [tort] cases is usually not so obvious as in the cases where there has been no tort since the tortfeasor is always subject to liability in an action for damages, and . . . the right to maintain an action for restitution in such cases is largely the product of imperfections in the tort remedies, some of which imperfections have been removed.

Restatement of Restitution § 3 cmt. a (1937). The District Court for the District of New Jersey relied on Steamfitters in "treat[ing] the Plaintiffs' unjust enrichment claim as subsumed by their other tort claims, and not as an independent cause of action." Blystra v. Fiber Tech Group, Inc., 407 F. Supp. 2d 636, 645 n.11 (D. N.J. 2005). See also Pourzal v. Marriott Intern., Inc., Civ. No.

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[6] Recovery for unjust enrichment would not, in any event, exceed the particular photographs' value to Google. In framing their demand for restitution, the Plaintiffs ignore the meaning of quantum meruit, arguing that they are entitled to recover all profits made by Google as a result of its decision "not to implement controls that would prevent inclusion of imagery of private property," and the amount of reduction in costs realized by Google "by failing to implement control measures." (Doc.18 at 22). The Borings do not cite - and the Court has not found - authority recognizing such broad-based recovery under the theory of unjust enrichment.

2001-140, 2006 WL 2471695, at *3 (D.V.I. Aug. 17. 2006) (dismissing unjust enrichment claim as "materially indistinct" from trespass claim). This approach is supported by the fact that the Restatement of Torts does not recognize unjust enrichment as an independent cause of action.[7] Dismissal of the Plaintiffs' tort claims favors dismissal of this claim as well.

E. The Request for Injunctive Relief

Injunction is an extraordinary remedy that should be issued with caution "only where the rights and equities of the plaintiff are clear and free from doubt, and where the harm to be remedied is great and irreparable." 15 Standard Pennsylvania Practice 2d, § 83:2 (2005). In order to establish the right to injunctive relief, a plaintiff must demonstrate, at a minimum: (1) a clear right to relief; (2) an urgent necessity to avoid an injury that cannot be compensated in damages; and (3) a finding that greater injury will result from refusing, rather than granting, the relief requested. Id. at § 83:19. See also John G. Bryant Co., Inc., 369 A.2d at 1167. Where, as here, the request is for a mandatory injunction, the standard is even more demanding than the one applied where the plaintiff seeks to impose a restraint. See Mazzie, 432 A.2d at 988.

The Plaintiffs have failed to plead - much less set out facts supporting - a plausible claim of entitlement to injunctive relief. Where not one of the other claims is sufficient to survive the Defendant's Motion to Dismiss, the assertion of a right to injunctive relief also fails.

Conclusion

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[7] In reaching this conclusion, the Court does not ignore the sentence included in a footnote in Flood v. Makowski, No. Civ. A. 3:CV-0301803, 2004 WL 1908221, at * 37 n.26 (M.D. Pa. Aug. 24, 2004), which reads: "An unjust enrichment claim can be an equitable stand-in a tort claim [sic]." This statement does not have any bearing on the outcome of this matter. In truth, the Court cannot say with certainty what this sentence was meant to convey, and, in any event, the case in which it appears is not precedential.

For the reasons set out above, the Defendant's Motion to Dismiss the Amended Complaint (Doc. 22) will be granted.[8]

An appropriate Order follows.

/s/ Amy Reynolds Hay
United States Magistrate Judge

Dated: 17 February, 2009

cc: Counsel of Record via CM-ECF_

[8] The Court concludes that any attempted amendment would be futile.

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

AARON C. BORING; CHRISTINE BORING, Plaintiffs,	)	
vs.	)	Civil Action No. 08-694
GOOGLE, INC., Defendant.	)	Magistrate Judge Amy Reynolds Hay

ORDER

AND NOW, this 6th day of April, 2009, for the reasons set forth in the accompanying Memorandum Opinion, IT IS HEREBY ORDERED that the Plaintiffs' Motion for Reconsideration (Doc. 45) of the Order (Doc. 43) dismissing this action with prejudice is DENIED.

The Clerk is directed to mark this case closed.

/s/ Amy Reynolds Hay
United States Magistrate Judge

cc: Counsel of Record via CM-ECF

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

AARON C. BORING; CHRISTINE BORING, Plaintiffs	)	
vs.	)	Civil Action No. 08-694
	)	Magistrate Judge Amy Reynolds Hay
GOOGLE INC., Defendant	)	

MEMORANDUM OPINION

Hay, Magistrate Judge

The Court addresses here the Plaintiffs' Motion for Reconsideration (Doc. 45) of the Court's Order (Doc. 43) granting Defendant's Motion to Dismiss the Amended Complaint (Doc. 22) with prejudice.[1] "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir.1985) (citation omitted). "Because of the interest in finality, at least at the district court level, motions for reconsideration should be granted sparingly; the parties are not free to relitigate issues the court has already decided." Williams v. City of Pittsburgh, 32 F. Supp.2d 236, 238 (W.D.Pa.1996).

The Plaintiffs argue that the Court committed an error of law when it dismissed their

[1]The Plaintiffs' Brief makes clear that they have abandoned their privacy and negligence claims, as well as their request for injunctive relief and attorneys fees: "In good faith and for judicial efficiency, Plaintiff [sic] request that the . . . Judge . . . reinstate the Counts II (Trespass) and V (Unjust Enrichment) with the claim for punitive damages. (Doc. 45 at 10).

trespass claim.[2] The Court considers this argument in order to eliminate any possibility that the language of its Memorandum Opinion addressing the Defendant's Motion to Dismiss might be read to suggest that damages are part of a prima facie claim for trespass. Clearly, under Pennsylvania law, they are not. The tort is complete once there has been an unprivileged intentional entry upon property in the possession of another. See Graham Oil v. BP Oil Co., 885 F. Supp. 716, 725 (W.D. Pa. 1994). What the Court *did* hold was that the Borings, in their Amended Complaint, failed to allege facts sufficient to support a plausible claim that they suffered any damage as a result of the trespass. Furthermore, although under Pennsylvania law, a Plaintiff who establishes that a trespass occurred is entitled to nominal damages, see Morris & Essex Mut. Coal Co. v. Delaware, L. & W. R. Co., 42 A. 883, 884 (Pa. 1899), the Court found that this entitlement was not sufficient to save the trespass claim from dismissal under Fed. R. 12(b)(6). This was because the Borings did not, as Pennsylvania law requires, request nominal damages in the Amended Complaint.

While a Plaintiff may be entitled to recover nominal damages, he must first establish that he seeks them. See Bastian v. Marienville Glass Co., 126 A. 798 (Pa. 1924) (affirming trial court's binding instruction for defendant because plaintiff failed to provide proof of actual

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[2]Their statement of error is not nearly as straightforward as the Court's discussion suggests. The substance and tenor of the Plaintiffs' argument is illustrated by this hyperbolic statement in their Brief:

> The Court tells Google that it is okay to enter onto a person's private property without permission. I would not teach that rule to my child.
>
> This Court's ruling makes our private property a Google Slave; our Property is no longer our own: it is forced to work for another, against its will, without compensation, for the profit of another. The Federal Court should free slavery, not create it.

(Doc. 45 at 3).

damages, and although nominal damages may have been permitted, plaintiff failed to request them). See also Thorsen v. Iron and Glass Bank, 476 A.2d 928 (Pa. Super. 1984) (affirming trial court's grant of summary judgment because plaintiff failed to request nominal damages and failed to show any harm from the alleged breach). In Cohen v. Resolution Trust, No. 03-2729, 107 Fed. Appx. 287, (3d Cir. 2004), the Court of Appeals wrote: "Here, plaintiffs requested only compensatory and punitive damages in their amended complaint, and nothing in the record suggests that they asked to amend their complaint to include nominal damages. Accordingly, the court did not err in refusing to award nominal damages." Id. at 289-290.

The Borings, too, failed to mention nominal damages in their Amended Complaint. They admitted as much in their Memorandum in Opposition to the Motion to Dismiss (Doc. 25):

> [A]side from any compensatory damages in relation to the trespass . . . 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.

Id. at 19 (emphasis added). Plaintiffs did not, however, file a second Amended Complaint, nor did they seek leave to do so. In this context, the Court's decision not to consider the issue of nominal damages was fully consistent with Pennsylvania law, and does not provide a basis for granting the pending Motion for Reconsideration.

The Plaintiffs also challenge the Court's conclusion that the allegations set out in the Amended Complaint do not approach the type of outrageous conduct that warrants a punitive damages award under Pennsylvania law. The Borings' account of Google's conduct has transmogrified during the course of this litigation. In their Amended Complaint (Doc. 18) - to

which the Court must confine its attention in evaluating a Motion to Dismiss - the Plaintiffs alleged that "the scope of Google Street View was all paved, non-private roads." Id. at ¶ 7. The allegations relating to the trespass as set out in the Amended Complaint differ dramatically from the account of Google's activity in the Plaintiffs' Brief in Support of the Motion for Reconsideration (Doc. 45), where they state:

> Google's argument that punitive damages are not warranted because Plaintiffs do not point to aggravating or outrageous conduct found in the complaint is factually conclusory in that the illegal entry upon property, pursuant to a calculated scheme of approach, is a crime and clearly warrants punitive damages.

Id. at 8-9. This unsupported alteration in the characterization of Google's conduct does not change the Court's conclusion that the allegations in the Amended Complaint fail to establish a plausible claim of entitlement to punitive damages.

Although the Plaintiffs ask that their claim for unjust enrichment be reinstated, they do not address or point to error in the Court's disposition of that claim. Consequently, the Court does not consider that issue here, adhering to the analysis in the Memorandum Opinion addressing Google's Motion to Dismiss.

Because it finds no ground upon which to do otherwise, the Court will deny the Plaintiffs' Motion for Reconsideration (Doc. 45) in its entirety. An appropriate Order follows.

/s/ Amy Reynolds Hay
United States Magistrate Judge

Dated : 6 April, 2009

cc: Counsel of Record via CM-ECF

Respectfully submitted,

Date: August 25, 2009

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