

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

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

Plaintiffs,)

v.)

GOOGLE INC., a California corporation,)

Defendant.)

Civil Action No. 08-cv-694 (ARH)

**DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFFS' MOTION FOR RECONSIDERATION**

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Defendant Google Inc. (“Google”), by and through its attorneys, respectfully submits this Memorandum of Law in opposition to Plaintiffs’ motion seeking reconsideration of this Court’s February 17, 2009 Order (the “Order”). The Order granted Google’s motion to dismiss all of Plaintiffs’ claims set forth in their Amended Complaint without leave to amend.

PRELIMINARY STATEMENT

Plaintiffs’ motion sets forth no basis for reconsideration of the Court’s dismissal of their claims for trespass, unjust enrichment and punitive damages.¹ Having found no basis to challenge the Court’s dismissal of their privacy claims, the Plaintiffs now take the new position that their true grievance is trespass, albeit without any actual harm. Alleging a car momentarily drove on Plaintiffs’ driveway, they suggest that the Court’s denial of redress to them risks a return to slavery and the death of American liberty. Plaintiffs’ hyperbole only serves to demonstrate the weakness of their position. Plaintiffs’ motion should be denied because it fails to meet the strict standard applied to motions for reconsideration. Rather than presenting any controlling authority presented to and overlooked by the Court, Plaintiffs rely on new arguments and authorities they could have presented to the Court in opposition to Google’s motion to dismiss, but chose not to. They also rehash old arguments the Court considered and rejected.

¹ Plaintiffs do not challenge the Court’s Order with respect to the dismissal of their privacy and negligence claims and requests for injunctive relief and attorneys’ fees. Although they ask the Court to “vacate its decision on all counts,” Pls. Mot. at 5, Plaintiffs do not set forth *any* argument addressed to their privacy or negligence claims, or to their requests for injunctive relief and attorneys’ fees. Accordingly, they have necessarily failed to carry their burden of demonstrating a basis for reconsideration of these claims. *See, e.g., Peterson v. Brooks*, Civil Action No. 07-2442, 2008 WL 4072700, at *1 (E.D. Pa. Aug. 29, 2008) (movant bears burden of demonstrating that basis for reconsideration exists); *Porter v. Cancelmi*, Civil Action No. 04-1736, 2008 WL 1817267, at *1 (W.D. Pa. Apr. 22), *aff’d*, No. 08-2433, 2008 WL 4145432 (3d Cir. 2008) (same); *Shaw v. Lavan*, No. Civ. A. 04-1992, 2005 WL 1655893, at *3 (E.D. Pa. July 13, 2005) (same).

Simply put, Plaintiffs have not met their burden of showing grounds for reconsideration.

Moreover, the Order is correct as it stands. None of Plaintiffs' arguments sets forth any valid reason for reinstating any of Plaintiffs' claims.

ARGUMENT

I. PLAINTIFFS MISCONSTRUE BOTH THE COURT'S HOLDING AND THE NATURE OF STREET VIEW

Plaintiffs' motion is based on an erroneous reading of the Court's Memorandum Opinion dated February 17, 2009 (the "Opinion" or "Mem. Op."). The Opinion did not hold that Google can trespass with impunity. Rather, the Opinion held that the damages Plaintiffs alleged they suffered—mental distress and diminished property value—were not proximately caused by the alleged brief entry upon their driveway. Mem. Op. at 8. The Court further recognized that under Pennsylvania law, a trespass claim may proceed where no actual damages have been suffered under a nominal damages theory. However, the Court dismissed Plaintiffs' trespass claim in its entirety because, based on the specific allegations set forth in the Amended Complaint, there was no basis to proceed with a nominal damages claim. *Id.* at 9. Nothing in the Opinion eliminated any remedy under Pennsylvania law for trespass.

Plaintiffs also misstate the intended scope of Street View. As Plaintiffs themselves have conceded, the scope of Street View is limited to public roads. Am. Compl. ¶ 7. To create the Street View feature, drivers with panoramic digital cameras mounted to the roofs of their cars were instructed to drive around the public streets of various U.S. cities, thereby automatically capturing images of the view from these public streets. *Id.* ¶¶ 7, 8. While Plaintiffs' brief makes the wild accusation that Google "intentionally and systematically enters onto private property," there is nothing in the Amended Complaint to even remotely suggest that Google instructs its Street View drivers to drive on private roads and trespass onto private property. Nor could Plaintiffs make any such allegation in good faith. Moreover, as this Court observed in its Opinion, Google makes it simple to request the removal of any image available on Street View, whether it is entitled to privacy protection under the law or not. Mem. Op. at 2. Despite

Plaintiffs' overblown rhetoric, Google Street View simply is not the affront to private property rights that Plaintiffs profess it to be.

II. PLAINTIFFS' MOTION DOES NOT SATISFY THE STRICT STANDARD OF A MOTION FOR RECONSIDERATION

A. A Motion for Reconsideration Is Appropriate Only to Correct Manifest Errors or Present Newly Available Evidence

Reconsideration of judgments is an extraordinary remedy that District Courts grant only sparingly. *Porter v. Blake*, Civil Action No. 04-464, 2007 WL 966744, at *1 (W.D. Pa. March 28, 2007); *Shuey v. Schwab*, No. 3:08-cv-1190, 2008 WL 5111911, at *1 (M.D. Pa. Dec. 2, 2008); *Ehrheart v. Lifetime Brands, Inc.*, 498 F. Supp. 2d 753, 756 -57 (E.D. Pa. 2007); *see also* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2810.01, at 124 (2d ed. 1995). A proper Rule 59(e) motion for reconsideration "must be based on either an intervening change in controlling law, the availability of new or previously unavailable evidence, or the need to correct clear error or prevent manifest injustice." *Choi v. Kim*, 258 Fed. Appx. 413, 416 (3d Cir. 2007) (citing *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir.1995)); *see also Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). The party seeking reconsideration bears the burden of establishing the existence of one of the above-described narrow grounds for reconsiderations. *See, e.g., Peterson*, 2008 WL 4072700, at *1; *Porter*, 2008 WL 1817267, at *1; *Shaw*, 2005 WL 1655893, at *3.

Plaintiffs seek reconsideration based on alleged clear error. Pls. Mot. at 5. Clear error occurs only where the District Court fails to follow "binding authority." *See In re Nicola*, 65 Fed. Appx. 759, 764 (3d Cir. 2003). A motion for reconsideration asserting clear error must be based on arguments previously raised but overlooked by the Court; it may not rely upon arguments that the moving party could have but did not make previously. *See, e.g., Payne v. DeLuca*, No. 2:02-CV-1927, 2006 WL 3590014, at *2 (W.D. Pa. Dec. 11, 2006); *U.S. v. Jasin*,

292 F. Supp. 2d 670, 676-77 (E.D. Pa. 2003). Additionally, the movant must present matters overlooked “that might reasonably have resulted in a different conclusion.” *Payne*, 2006 WL 3590014, at *2. A motion for reconsideration will not be granted where “it would merely allow wasteful repetition of arguments already briefed, considered and decided.” *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1232 (3d Cir. 1995) (internal quotations omitted); *see also Porter*, 2007 WL 966744, at *1 (“A motion for reconsideration may not be used by a losing party to repeat old arguments previously considered and rejected by the Court.”); *Williams v. City of Pittsburgh*, 32 F. Supp. 2d 236, 238 (W.D. Pa. 1998) (“[A] motion for reconsideration is not properly grounded in a request for a district court to rethink a decision it has already made . . .”).

B. Plaintiffs Have Failed to Meet Their Burden of Showing That the Court Clearly Erred in Dismissing Their Trespass Claim

The Court should deny Plaintiffs’ motion with respect to the dismissal of their trespass claim because Plaintiffs have failed to identify any controlling authority that the Court overlooked in arriving at its decision. Plaintiffs’ primary argument is that Pennsylvania permits trespass claims seeking only nominal damages. Pls. Mot. at 5-8. In support of their argument, Plaintiffs rely upon numerous authorities that they never previously presented to the Court. *See id.* Indeed in their twenty-seven page opposition brief, Plaintiffs argued vigorously that their trespass claim should stand because they had pled the existence of actual damages. Their only reference to nominal damages was a comment that Plaintiffs “could seek nominal damages” in connection with their trespass claim, and “could” amend their complaint to plead such damages.² Plaintiffs did not take the position that they sought nominal damages. And nowhere did they

² Notably, the only authority Plaintiffs cite in connection with their mention of the availability of nominal damages is a New York case that Plaintiffs admit is not controlling. *See* Pls. Mot. at 6 n.9.

argue or present controlling authority in support of the position that if the Court concluded that the damages Plaintiffs sought were not recoverable on a trespass claim, they must be permitted to pursue a nominal damages claim even though any alleged trespass was momentary and resulted in no damages. Because Plaintiffs here rely upon an argument and cases not previously presented to the Court, they have presented no basis for a finding of clear error. *See, e.g., Pine Belt Automotive, Inc. v. Royal Indem. Co.*, No. 3:06-cv-05995-JAP-TJB, 2009 WL 424384, at *2 (D.N.J. Feb. 19, 2009) (applying same standard as W.D. Pa. and holding authority not previously presented to the court could not provide basis for reconsideration); *Payne*, 2006 WL 3590014, at *6 (motion for reconsideration “may not be used to raise new arguments”) (quoting same); *accord Banks v. U.S. Attorney*, Civil Action No. 1:08-cv-1394, 2008 WL 4533680, at *2 (M.D. Pa. Oct. 6, 2008) (quoting *Hill v. Tammac Corp.*, No. 05-1148, 2006 WL 529044, at *2 (M.D. Pa. Mar. 3, 2006)).

Moreover, far from overlooking the proposition on which Plaintiffs base their motion with respect to their trespass claim—that a trespass claim may be brought where there has been no actual damages—the Opinion specifically recognized that a trespass claim seeking nominal damages is available under Pennsylvania law. *See* Mem. Op. at 7-9. Thus, contrary to Plaintiffs’ position, the Court did not require damages as an element of a trespass claim. However, as set forth below, it is within a court’s discretion to dismiss a claim based upon an insubstantial and harmless trespass.

In any event, because Plaintiffs have not set forth any controlling authority that was overlooked by the Court, their motion for reconsideration of the Court’s dismissal of their trespass claim should be denied. *See, e.g., Fedimore v. Longstreet*, No. 1:08-cv-00046-MBC-SPB, 2008 WL 2316552, at *1 (W.D. Pa. May 27, 2008) (denying motion for reconsideration where movant failed to specify any error by the Court and instead expressed dissatisfaction with court’s ruling); *see also Fogarty v. USA Truck, Inc.*, No. 2:08-cv-00111-WLS, 2008 WL

2872275, at *5 (W.D. Pa. July 24, 2008) (denying motion for reconsideration where no clear error); *Shankle v. Bell*, No. 2:04-cv-01885-TFM, 2006 WL 3053478, at *1 (W.D. Pa. Oct. 24, 2006) (same).

C. Plaintiffs Have Failed to Meet Their Burden of Showing That the Court Clearly Erred in Dismissing Their Unjust Enrichment Claim

Plaintiffs' argument that the Court clearly erred in dismissing their unjust enrichment claim also fails to meet the strict standard of a motion for reconsideration. Rather than presenting any controlling authority overlooked by the Court, Plaintiffs ask the Court to change its mind based upon a proposed provision of the Restatement of Restitution and Unjust Enrichment, which they set forth in a footnote without elaboration. *See* Pls. Mot. at 4 n.6. This is not controlling authority and, in any event, the Court already considered and rejected Plaintiffs' arguments that (1) unjust enrichment may stand alone as an independent tort, and (2) under a theory of unjust enrichment, Plaintiffs could recover any profits earned by Google in connection with the publication of images of Plaintiffs' house on Street View. Mem. Op. at 9-11. Plaintiffs cannot use a motion for reconsideration to reargue these issues merely because they do not like how the Court ruled. *See, e.g., Bhatnagar*, 52 F.3d at 1232; *Porter*, 2007 WL 966744, at *1.

D. Plaintiffs Have Failed to Meet Their Burden of Showing That the Court Clearly Erred in Dismissing Their Request for Punitive Damages

Plaintiffs' argument that that the Court should have permitted their request for punitive damages is yet another improper re-argument of a question considered and decided by the Court. Specifically, the Court already considered whether the allegations in the Amended Complaint³ could support a finding of outrageous conduct as required for a punitive damages award under Pennsylvania law, and it held they could not. Mem. Op. at 7 n.3 ("The Plaintiffs have also failed

³ Although Plaintiffs argue in their *briefs* that Google intentionally enters private property as a business practice, the Amended Complaint contains no such allegation.

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.”).

In support of their position that the Court clearly erred in making this determination, Plaintiffs rely upon two cases, neither of which amounts to controlling authority that the Court overlooked and consideration of which requires a different result. First, Plaintiffs direct the Court to *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 521 Pa. 97 (Pa. 1989), a case that Plaintiffs did cite in their opposition brief. Pls. Opp. Br. at 26. However, as explained in Google’s reply brief (Def. Reply Br. at 9), *Kirkbride* is inapposite because it addresses a question not at issue in this case—whether an award of punitive damages must bear a reasonable relationship to the compensatory award. *Kirkbride*, 555 A.2d at 801, 521 Pa. 97 at 98. *Kirkbride* provides no guidance on the question of whether the conduct alleged in the Amended Complaint could support a finding of outrageous conduct. Because this decision is inapposite, it provides no basis for reconsideration. See, e.g., *MDL Capital Mgmt., Inc. v. Federal Ins. Co.*, No. 05 Civ. 1396, 2006 WL 3324899, at *1 (W.D. Pa. Nov. 15, 2006) (denying motion for reconsideration based on “inapposite” case law).

Second, Plaintiffs’ motion for reconsideration cites, for the first time, the Wisconsin Supreme Court’s decision in *Jacque v. Steenberg Homes*, 209 Wis. 2d 605, 563 N.W.2d 154 (Wis. 1997). This decision is obviously not binding and was not previously put before this Court. Therefore, *Jacque* is properly disregarded in connection with this motion for reconsideration. See, e.g., *In re Nicola*, 65 Fed. Appx. at 764.

Because Plaintiffs have failed to present any controlling authority that the Court overlooked on the issue of whether the conduct alleged in the Amended Complaint could support an award of punitive damages, Plaintiffs’ motion for reconsideration of the dismissal of their request for punitive damages should be denied.

III. THE ORDER IS CORRECT ON THE MERITS

Even if the Court were to reconsider its dismissal of Plaintiffs’ claims for trespass, unjust enrichment and Plaintiffs’ request for punitive damages, the outcome would be the same because

the Order is correct. None of Plaintiffs' arguments provides any compelling reason to change the Court's dismissal of this action with prejudice.

A. The Court Correctly Dismissed Plaintiffs' Trespass Claim With Prejudice

The Court's with-prejudice dismissal of Plaintiffs' trespass claim in its entirety was proper. First, there is ample support for the Court's determination that the damages Plaintiffs sought in the Amended Complaint (mental distress and diminished property value) were not recoverable on a trespass claim because they could not have been proximately caused by the alleged unauthorized entry upon Plaintiffs' driveway. *See, e.g., C&K Coal Co. v. United Mine Workers of Am.*, 537 F. Supp. 480, 511 (W.D. Pa. 1982) (plaintiff bears burden of proving that trespass was the legal cause of resulting harm or damage), *aff'd in part, rev'd in part on other grounds*, 704 F.2d 690 (3d Cir. 1983); *In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1483 (E.D. Pa.) (plaintiffs not entitled to recover economic losses on trespass claim when such losses not causally related to trespass), *rev'd on other grounds*, 12 F.3d 1270 (3d Cir. 1993); *Costlow v. Cusimano*, 34 A.D.2d 196, 201 (N.Y. App. Div. 4th Dep't 1970) (trespass claim arising out of photos taken of accident at plaintiff's home, which photos were subsequently published, should have been dismissed where alleged injury resulted from publication after trespass).

Second, dismissal of Plaintiffs' trespass claim in its entirety, rather than allowing a claim to proceed for nominal damages, was a proper exercise of the Court's discretion to dismiss a claim based on an alleged *de minimis* violation that has resulted in no actual damages. *See Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Labs.*, 617 F. Supp. 1190, 1206 (D.N.J. 1985) ("Application of [*the de minimis*] doctrine is committed to the sound discretion of the trial court.") (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 687 n. 29 (1979)); *see also Lynchburg Commc'ns Sys.*,

Inc. v. Ohio State Cellular Phone Co., No. Civ. A. 603CV00107, 2006 WL 148750, at *5 (W.D. Va. Jan. 18, 2006) (invoking discretion to dismiss remaining portion of claim that involved failure to pay contractually mandated 30% of rent where rent paid was \$1.00).

Specifically, under the legal principle of *de minimis non curat lex*, which is followed both by the Pennsylvania Supreme Court and Third Circuit, courts will “disregard trivial matters that serve merely to exhaust the court’s time.” *Bailey v. Zoning Bd. of Adjustment of the City of Philadelphia*, 801 A.2d 492, 504, 569 Pa. 147, 166 n.20 (Pa. 2002); see *Suppan v. DaDonna*, 203 F.3d 228, 235 (3d Cir. 2000). The purpose of the doctrine is to conserve judicial resources and protect defendants from vexatious suits. See, e.g., *Student Public Interest Research Group*, 617 F. Supp. at 1205-06. The doctrine has been applied where a complaint alleges a technical violation of the law that was inadvertent and which has not caused any actual harm. *Bates v. Provident Consumer Discount Co.*, 493 F. Supp. 605, 607 (E.D. Pa. 1979), *aff’d*, 631 F.2d 725 (3d Cir. 1980). And it has been applied in the context of trespass claims. See, e.g., *Northern Pa. R.R. Co. v. Rehman*, 49 Pa. 101, 1865 WL 4408, at *4 (Pa. 1865) (recognizing that under *de minimis* doctrine, and in order “to avoid vexatious suits,” no action lies for trespass based upon cattle roaming on unenclosed land); *Yeakel v. Driscoll*, 467 A.2d 1342, 1344, 321 Pa. Super. 238, 242-43 (Pa. Super. Ct. 1983) (invoking doctrine in refusing to grant injunction to require removal of wall that encroached two inches on plaintiff’s property); see also *Palmieri v. Lynch*, 392 F.3d 73, 75 (2d Cir. 2004) (action alleging brief, albeit trespassory, entry upon plaintiff’s property that caused no harm would have properly justified dismissal under maxim of *de minimis non curat lex*, but because entrants were state actors, court was constrained to undertake constitutional analysis).

Application of the doctrine of *de minimis non curat lex* supports the Court's dismissal here. Plaintiffs admit there was no damage to their grass or driveway because a Street View driver allegedly used it to turn around. Pls. Mot. at 2. And while Plaintiffs' bandy about the word "intentional," given that the scope of Street View is public roads, it is obvious that any momentary trespass was inadvertent.⁴ The Plaintiffs, by attempting to turn an action worth at most \$1.00 literally into a federal case by asserting unsupportable claims and seeking substantial yet non-recoverable damages (Plaintiffs' initial complaint sought in excess of \$75,000), have already wasted significant judicial resources and subjected Google to significant defense costs. There is no legitimate reason to exhaust any more of the Court's time on what is at heart a vexatious suit seeking headlines and an unjustified payout, rather than the redress of any real harm.

B. The Court Correctly Dismissed Plaintiffs' Unjust Enrichment Claim With Prejudice

The Court also correctly dismissed Plaintiffs' unjust enrichment claim with prejudice. Based on its canvas of Third Circuit precedent and other authority, the Court concluded that Plaintiffs had not (and could not) allege any relationship between the parties that could be construed as contractual. Mem. Op. at 9-10 (citing, *inter alia*, *Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris, Inc.*, 171 F.3d 912, 936 (3d Cir. 1999) (unjust enrichment typically invoked "when plaintiff seeks to recover from defendant for a benefit conferred under

⁴ Because the underlying motion was a 12(b)(6) motion to dismiss, Google assumed for the purposes of the motion that Plaintiffs could prove their allegation that the road on which they live was "clearly marked" with a private property/no trespassing sign at the time the Street View driver gathered the images at issue. However, Google vigorously disputes the accuracy of this allegation.

an unconsummated or void contract”); Restatement of Restitution § 3 cmt. a (1937) (“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 . . .”). Next, the Court determined that Plaintiffs’ theory of recovery under unjust enrichment—that they were entitled to recover all profits made by Google as a result of its decision not to implement certain internal policies—was without *any* support at law. Mem. Op. at 10 n.6. Finally, the Court agreed with authority concluding that unjust enrichment is not a stand alone tort. *Id.* at 10-11. Plaintiffs’ motion provides no compelling argument in support of a different result.

Indeed, Plaintiffs’ entire argument in support of reconsideration of the Court’s dismissal of their unjust enrichment claim consists of nothing more than a block quotation from Section 40 of a draft of the Restatement (Third) of Restitution and Unjust Enrichment (2005) (Tentative Draft No. 4), set forth in a footnote to Plaintiffs’ introduction. Pls. Mot. at 4 n.6. Our review of the cases indicates that no court within the Third Circuit and no Pennsylvania state court has even discussed (much less adopted) Section 40. Moreover, we found only two reported cases that discuss Section 40, neither of which adopted it. *See Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 755 (8th Cir. 2006) (affirming denial of leave to amend complaint to allege unjust enrichment claim based on packing plant’s alleged failure to install adequate pollution control equipment) (Section 40 cited by dissent); *Young v. Appalachian Power Co.*, Civil Action No. 2:07-479, 2008 WL 4571819, at *12 (S.D. W. Va. Oct. 10, 2008) (plaintiffs not entitled to disgorgement of defendant’s profits allegedly derived from defendant’s trespass). Plaintiffs present no reason why this Court should be the first to follow a draft revision to the Restatement. Moreover, the Amended Complaint alleges no facts to support a finding that Google has engaged

in conscious wrongdoing. At most, the original Complaint and the Amended Complaint allege nothing more than a momentary, unintentional entry onto private property by a single Street View driver. Therefore, even under the liberal restitution rules proposed by Section 40, the Court rightly concluded that Plaintiffs were not entitled to disgorgement of Google profits—the only restitution that they sought pursuant to their unjust enrichment claim.

C. The Court Correctly Struck Plaintiffs' Request for Punitive Damages

The Court correctly concluded that Plaintiffs failed to state a claim for punitive damages because they did not allege facts sufficient to support the contention that Google engaged in outrageous conduct. Mem. Op. at 7 n.3. Under Pennsylvania law, punitive damages are reserved to punish the most extreme and outrageous conduct. *Phillips v. Cricket Lighters*, 883 A.2d 439, 445, 584 Pa. 179, 188 (Pa. 2005). The Pennsylvania Supreme Court has adopted Restatement Second of Torts § 908(2) (1979), which defines outrageous conduct as that done with an “evil motive” or “reckless indifference to the rights of others.” *See Feld v. Merriam*, 485 A.2d 742, 747-748, 506 Pa. 383, 395-96 (Pa. 1984).

Plaintiffs urge the Court to reconsider its decision to strike their claim for punitive damages based on a case from the Wisconsin Supreme Court. *See* Pls. Mot. at 9 n.11 (citing *Jacque v. Steenberg Homes*, 209 Wis. 2d 605, 563 N.W.2d 154 (Wisc. 1997)). In *Jacque*, the Supreme Court of Wisconsin held that “when nominal damages are awarded for an intentional trespass to land, punitive damages may, in the discretion of the jury, be awarded.” 209 Wis. 2d at 610, 563 N.W.2d at 156. The *Jacque* court went on to affirm an award of \$100,000 for an intentional trespass that had caused no actual damage. 209 Wis. 2d at 632, 563 N.W.2d at 166. According to the *Jacque* court, this punitive damages award was warranted because the defendant’s intentional conduct—plowing a path through plaintiffs’ snow-covered field and conveying a mobile home across that path despite plaintiffs’ adamant and repeated refusals to

grant defendant access to their land—was “egregious,” “brazen,” and “shocking.” 209 Wis. 2d at 632, 563 N.W.2d at 165-66.

The Amended Complaint (which was filed after Google’s original motion to dismiss challenged the sufficiency of Plaintiffs’ punitive damages request, *see* Def. Original Opening Br. at 22-24) does not allege facts from which intentional conduct could be inferred, let alone conduct that could be characterized as egregious, brazen or shocking.⁵ Nor does the Amended Complaint allege facts evidencing evil motive or reckless indifference to the rights of others. Because Plaintiffs had notice of the defective nature of their punitive damages request and failed to cure it in the Amended Complaint, the District Court properly exercised its discretion to dismiss that claim with prejudice. *See Krantz v. Prudential Invs. Fund Mgmt. LLC*, 305 F.3d 140, 144 (3d Cir. 2002).

⁵ In their motion for reconsideration, Plaintiffs assert that “Google intentionally and systematically enters onto private property.” Pls. Mot. at 2. However, this allegation is not found anywhere in the Amended Complaint. Moreover, Plaintiffs have no good faith basis to make such an assertion.

CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court deny Plaintiffs' motion for reconsideration and grant such further and other relief as the Court deems just and proper.

Dated: March 20, 2009

s/Tonia Ouellette Klausner

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