

**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)

FED. R. CIV. P. 26(f) REPORT OF THE PARTIES

- 1. Identification of counsel and unrepresented parties. Set forth the names, addresses, telephone and fax numbers and e-mail addresses of each unrepresented party and of each counsel and identify the parties whom such counsel represent:**

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- 2. Set forth the general nature of the case (patent, civil rights, anti-trust, class action, etc):**

A. Plaintiffs' Statement of the Case:

This facts of this case are well-known, with notice taken of the record on appeal. Google entered Plaintiffs' property, including, but not limited to, in violation of Plaintiffs' express

statement of “Private Road No Trespassing” and notwithstanding other indicia of private property to a reasonable person, and, more particularly, to a driver who is trained. Then, while trespassing and parked in front of Plaintiffs’ swimming pool at their doorstep and with nowhere to drive except into the home, the pool or the detached garage, and, with no street in view, continued taking more 360° moving digital pictures of Plaintiffs’ secluded property. In fact, Google took pictures the entire process of driving up to the home, turning around and back from the home, surely after knowing Google was on private property. Then, in reckless disregard, Google published the pictures worldwide. Google did exactly what it entered the property to do. The Third Circuit has upheld Plaintiffs’ position that Plaintiffs are entitled to claim compensatory damages arising from the trespass as determined by the jury in accordance with law.

B. Defendant’s Statement of the Case:

Defendant disputes Plaintiffs’ interpretation of the Third Circuit’s decision and asserts that following the District Court’s prior rulings and remand by the Circuit Court, this action has been reduced to nothing more than a simple trespass claim. The only remaining questions to be adjudicated are: (1) whether Defendant entered onto Plaintiffs’ property; (2) whether Defendant had an implied license for any such entry; and (3) whether any such entry caused any damage to Plaintiffs’ property. Defendant disputes that it has any liability to Plaintiffs because: (1) Defendant had an implied license to enter briefly onto Plaintiffs’ property, and (2) no damage was caused to Plaintiffs’ property by entry (if any) by Defendant’s driver. At most, Defendant is liable for \$1.00 in nominal damages.

3. Date Rule 26(f) Conference was held, the identification of those participating therein and the identification of any party who may not yet have been served or entered an appearance as of the date of said Conference:

Pursuant to Federal Rules 16(b), 26(f) and this Court's Order dated March 23, 2010, a telephone conference was held on March 26, 2010. The participants were Gregg R. Zegarelli, Esq. on behalf of the Plaintiffs and Tonia Ouellette Klausner, Esq. and Joshua A. Plaut, Esq. on behalf of the Defendant. There are no other parties to this action.

4. Date of Rule 16 Initial Scheduling Conference as scheduled by the Court:

The Rule 16 Initial Scheduling Conference has been scheduled by the Court for 9:30 am on March 30, 2010.

5. Identify any party who has filed or anticipates filing a dispositive motion pursuant to Fed. R. Civ. P. 12 and the date(s) by which any such anticipated motion may be filed:

In view of the prior proceedings in this case, no such additional Rule 12 motions are contemplated by the Defendant at this time. Plaintiffs reserve the right to address motion practice in light of Google's answer, not yet made of record. Plaintiffs request that the schedule provide fair opportunity for Plaintiffs to assess the answer of Google as filed and properly made of record and to move the Court accordingly.

Plaintiffs have placed Google and this Court hereby on notice that Plaintiffs intend to seek a Writ of Certiorari to the Supreme Court of the United States and will seek a stay of this action. Defendant has no objection to the stay at this time.

6. Designate the specific Alternative Dispute Resolution (ADR) process the parties have discussed and selected, if any, and specify the anticipated time frame for completion of the ADR process. Set forth any other information the parties wish to communicate to the court regarding the ADR designation:

The parties have participated in the Appellate Mediation Program of the United States Court of Appeals for the Third Circuit. This mediation record is sealed and did not result in resolution of any aspect of the action.

- 7. Set forth any change that any party proposes to be made in the timing, form or requirements of Fed. R. Civ. P. Rule 26(a) disclosures, whether such change is opposed by any other party, whether any party has filed a motion seeking such change and whether any such motion has been ruled on by the Court:**

The parties propose that their respective Rule 26(a) disclosures be made by April 26, 2010.

- 8. Subjects on which fact discovery may be needed. (By executing this report, no party shall be deemed to (1) have waived the right to conduct discovery on subjects not listed herein or (2) be required to first seek the permission of the Court to conduct discovery with regard to subjects not listed herein):**

A. Plaintiffs' Position:

Plaintiffs intend to seek discovery that may lead to relevant evidence regarding any disputed fact or regarding any affirmative defense as stated in Google's answer. Plaintiffs cannot fully assess or respond because Plaintiffs have not yet received Google's answer to Plaintiffs' claims by a proper record. Without waiver as provided above, Plaintiffs would expect to discover things that may lead to relevant evidence of liability and damage; including the circumstances under which Google came to enter Plaintiffs' property, applicable policies and procedures, the details of any denial or affirmative defense(s) it asserts, and the nature, amount and use of the surveillance, and damages.

B. Defendant's Position:

Defendant anticipates seeking discovery regarding whether any indication that Plaintiffs' street was a private road at the time the Street View footage was taken, and the basis for any damages claimed by Plaintiffs.

- 9. Set forth suggested dates for the following:**

- a. *Date(s) on which disclosures required by Fed. R. Civ. P. 26(a) have been or will be made:* April 26, 2010.
- b. *Date by which any additional parties shall be joined:* April 26, 2010.
- c. *Date by which the pleadings shall be amended:* May 1, 2010. Defendant reserves the right to object to the filing of any amended pleading by the Plaintiffs.
- d. *Date by which fact discovery should be completed:* October 26, 2010. Plaintiffs

caveat that the volume of Google's responses to discovery requests are unknown. Plaintiffs reserve the right to seek modification of the schedule for cause.

e. *If the parties agree that discovery should be conducted in phases or limited to or focused on particular issues, identify the proposed phases or issues and the dates by which discovery as to each phase or issue should be completed:* Not applicable, generally. Plaintiffs have not yet received a responsive pleading from Defendant and reserve the right to reassess after receiving fair notice of Defendant's answer to the claims.

- f. *Date by which plaintiff's expert reports should be filed:* See No. 12.
- g. *Date by which depositions of plaintiff's expert(s) should be completed:* See No. 12.
- h. *Date by which defendant's expert reports should be filed:* See No. 12.
- i. *Date by which depositions of defendant's expert(s) should be completed:* See No. 12.
- j. *Date by which third party expert's reports should be filed:* Not applicable.
- k. *Date by which depositions of third party's expert(s) should be completed:* Not applicable.

10. If the parties agree that changes should be made to the limitations on discovery imposed or Local by the Federal Rules of Civil Procedure Rule or that any other limitations should be imposed on discovery, set forth such changes or limitations: Not applicable.

11. Set forth whether the parties have considered the need for special deadlines, procedures or orders of court dealing with discovery of electronically-stored

information (electronic discovery), including the need for the preservation of discoverable information and the protection of the right to assert privilege(s) after the production of privileged information and if so, set forth the results of such consideration. In particular, answer the following questions:

Prefatory Note: Please see No. 5, *supra*, regarding motion practice.

- a. ESI. *Is either party seeking the discovery of ESI in this case?* Yes No
If disputed, identify the nature of the dispute.

A. *Plaintiffs' Position:*

Plaintiffs have placed Google on fair notice that discovery will be sought as permitted by the Rules, and that requests will be made for ESI and for documents and things in their native form. Plaintiffs have not had the opportunity to assess Google's answer and have not had the opportunity to conduct motion practice that may be applicable to that answer. As a public company, Google is presumably governed by the standards of Sarbanes-Oxley and would thereby fully contemplate the applicability of metadata within litigation requests and implemented corporate policies regarding ESI. Google's position on discoverability is premature and mischaracterized, as its answer is not yet filed and requests not yet made. From the Court's scheduling perspective, it appears that there will be early motion practice based upon some presumptive objections to discovery requests. Accordingly, the schedule should accommodate that motion practice.

B. *Defendant's Position:*

Plaintiff has indicated that it intends to seek significant discovery of Google, including extensive discovery of ESI. Other than the video containing the actual footage of the Street View images of Plaintiffs' street and property, Google believes there is absolutely no need for discovery of ESI in this case because all such ESI is patently irrelevant to the only three issues that remain in this case: (1) whether Defendant entered onto Plaintiffs' property; (2) whether

Defendant had an implied license for any such entry; and (3) whether any such entry caused any damage to Plaintiffs' property.

b. Metadata: Will any metadata be relevant in this case? Yes No

If yes, with respect to what ESI?

If disputed, identify the nature of the dispute.

A. *Plaintiffs' Position:*

Yes. There is not yet a proper record for Google's answer, but it does appear that there will be a dispute regarding proper discovery, as to scope and format. The Federal Rules now contemplate ESI and metadata. Plaintiffs expect, and hereby places Google on fair notice, that requests will be made for production of documents and things in native form with metadata. Google will have a full and fair right to conduct motion practice with Google's concrete objections in due course. Google is presumably governed by the standards of Sarbanes-Oxley and would thereby fully contemplate the applicability of metadata within litigation requests. Plaintiffs believe a pre-answer abstract denial of a category of evidence contemplated by applicable laws and rules would be prejudicial.

B. *Defendant's Position:*

Because the only ESI that is relevant to the remaining issues in the action is the Street View footage of Plaintiffs' street and property, Google submits that metadata is not relevant to the action. Even if the Court concludes that production of email or other internal Google documents is appropriate, Google fails to see how metadata regarding such ESI would be relevant to the remaining trespass claim.

c. Format. Have the parties agreed on the format(s) for production of ESI?
Yes No

If no, what disputes remain outstanding?

The parties propose to address format issues at the time of production, and if a dispute arises, the parties will meet and confer in good faith and attempt to resolve the matter.

- d. *Clawback Agreement.* Will the parties be using the Form Inadvertent Production Provision of LCvR 16.1.D? Yes No

If no, will an alternative provision be proposed? Yes (Please attach) No

- e. *Search terms.* Have the parties agreed on any protocol for review of electronic data? Yes No

If yes, please describe.

If no, please identify what issues remain outstanding.

The parties have agreed that if the Court does not prevent discovery of ESI in this action, then they will meet and confer concerning the use of search terms for review of electronic data.

- f. *Accessibility.* Have the parties agreed on what ESI is “reasonably accessible” as defined in R. 26(b)(2)(B)? Yes No

If no, please identify the nature of the dispute.

Subject to disputes regarding the discoverability of ESI, the parties have agreed, however, that if the Court does not limit discovery of ESI in this action, then they will meet and confer to determine what ESI is “reasonably accessible” as defined in Federal Rule 26(b)(2)(B).

- g. *Preservation.* Are there any unresolved issues pertaining to the preservation of ESI? If so, please describe.

There are known issues pertaining to preservation of ESI.

- h. *Other.* Identify all outstanding issues or disputes concerning ESI.

As set forth above, the parties disagree as to whether discovery of ESI is warranted in this action.

- 12. Set forth whether the parties have elected to schedule the Post-Discovery Status Conference following the completion of Fact Discovery or Expert Discovery; in either event the parties shall be prepared at the Post-Discovery Status Conference to discuss and/or schedule the following: (The parties are not required during their Rule 26(f) Conference to consider or propose dates for the items identified below. Those dates will be determined, if necessary, at the Post-Discovery Status Conference. Lead trial counsel for each party and each unrepresented party are required to attend the Post-Discovery Status Conference with their calendars in hand to discuss those items listed below that require scheduling. In addition, a representative with settlement authority of each party shall be required to attend; representatives with settlement authority of any insurance company providing any coverage shall be available throughout the Conference by telephone):**
- a. Settlement and/or transfer to an ADR procedure;**
 - b. Dates for the filing of expert reports and the completion of expert discovery as itemized in sub-paragraphs 9.f. through 9.k., above, if the parties elected to defer such discovery until after the Post-Discovery Status Conference;**
 - c. Dates by which dispositive motions pursuant to Fed. R. Civ. P. 56, replies thereto and responses to replies should be filed;**
 - d. Dates by which parties' pre-trial statements should be filed;**
 - e. Dates by which in limine and Daubert motions and responses thereto should be filed;**
 - f. Dates on which motions in limine and Daubert motions shall be heard;**
 - g. Dates proposed for final pre-trial conference;**
 - h. Presumptive and final trial dates.**

The parties agree that the Post-Discovery Status Conference should be held following the completion of Fact Discovery and prior to Expert Discovery. The parties will develop the Expert Discovery schedule at the post-Fact Discovery conference.

- 13. Set forth any other order(s) that the parties agree should be entered by the court pursuant to Fed. R. Civ. P. 16(b) or 26(c):**

Pursuant to Rule 16(b)(3)(vi), the parties request that the Court include in its scheduling order a provision setting April 15, 2010 as the due date for Google to file and serve its Answer to Plaintiffs' trespass claim. Plaintiffs have placed Google and this Court hereby on notice that

Plaintiffs intend to seek a Writ of Certiorari to the Supreme Court of the United States and will seek a stay of this action. At this time, Defendant has no objection to the stay.

- 14. Set forth whether the parties anticipate that the court may have to appoint a special master to deal with any matter and if so, specify the proposed role of any such master and any special qualifications that such master may require to perform such role:**

The parties do not anticipate that appointment of a special master will be necessary.

- 15. If the parties have failed to agree with regard to any subject for which a report is required as set forth above, except for proposed dates required in paragraph 9, above, briefly set forth the position of each party with regard to each matter on which agreement has not been reached:**

See above.

- 16. Set forth whether the parties have considered the possibility of settlement of the action and describe briefly the nature of that consideration:**

See No. 6, above.

Dated: March 29, 2010

s/ Gregg Zegarelli

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