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

AARON C. BORING AND CHRISTINE BORING, husband and wife respectively,	CIVIL DIVISION
Plaintiffs,	CASE NO. 08-cv-694 (ARH)
v.	
GOOGLE, Inc., a California corporation,	
Defendant.	

PLAINTIFFS' BRIEF IN OPPOSITION TO GOOGLE'S MOTION FOR PROTECTIVE ORDER

1. At Answer ¶29, Google pleads "license (either express or implied)." Yet, Google now clearly admits that the defense is "implied consent..."[1] That Google's defense is or could be "express" is false. If Google does not concede that its own motion clearly admits that its affirmative defense is not based upon an "express" license, then it demonstrates the necessity of discovery to isolate the fact(s) of expression.

2. The point further supports that this case is not typical. There has been extensive motion practice prior to discovery, both in this Court and through an appeal. Google stated in the record many facts (signs and required *exacting* placement thereof, gates, guard dogs, fences, outer-space satellites) that are mixed with law as support for their defense.[2] The statements were admitted by Google to be relevant when made. Google, a public $34B company, has not demonstrated substantive hardship to complete its assignment of responding to Plaintiffs' requests, and, since the requests are within the permissible scope for discovery, Google must make inquiries either way.[3]

3. Replacing the same questions made by admissions into depositions is *highly* prejudicial, particularly in light of the parties' relative power. Much of what Plaintiffs have learned about Google's defense

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[1] Docket 81, Google Brief, p. 4; *see* p. 2, *infra.*

[2] *See* Docket 11, page 2, Exhibit A; *see, generally,* Rule 36(a)(1)(A).

[3] Clearly, the undersigned tried to draft the questions in discrete factual points. In cases, once a factual determination is made for one, others are easily answered, or one question is the particular with a matched question for the general, such as "this manager harassed this employee; how are all managers trained." *Taylor v Great Lakes* is inapposite; discovery propounded upon an individual with 300 interrogatories and prematurely. Google did not make objections for ambiguity or vagueness.

comes from Google's briefs of record asserting facts, the application of law to fact, and opinions about both.[4] Fact witnesses are not competent to testify to opinions or application of law. Requests for admission are *uniquely* suited for this context; Rule 36(a)(1)(B) develops the record of "facts, the application of law to fact, or opinions about either."

4. Google's argument that an affirmative defense does not change the body of evidence is so flawed as to be in bad faith, or at least an insult. Whether Google was on Plaintiffs' land is a fact, pure and simple. However, Google claiming license by "implied consent given by general custom"[5] is an entirely different case. Damages aside, Google refuses to admit it is wrong. Google cannot play it both ways. Rule 26(b)(1) permits discovery of defenses.

5. Google, now seeing that answering the requests will clarify their case to the point of a Rule 11 dismissal of their license claim, now seeks to change the rules *ex post facto* on an arbitrary basis, contrary to its own stipulation, delaying time and sandbagging Plaintiffs. It is too late. Plaintiffs relied upon the stipulation of the parties and this Court's Scheduling Order. More motions and arguments by Google attorneys does not substitute for answers of record by appropriate Google officers.

6. A "license" involves application of law to fact; it is a *legal right* "to do certain acts."[6] Google nets Plaintiffs into some nebulous worldwide-royalty-free easement of "general" (not particular) "custom" within some "general" scope (the World, America, Pennsylvania?), to wit:

> **The defense is based on the implied consent given by general custom, that absent a locked gate or other express notice not to enter, the public may drive up the driveway or otherwise approach a private home without liability for trespass.** [7]

1) If true *as a matter of law,* Plaintiffs would not have won the compensatory damage appeal. 2) Plaintiffs have "express notice" by signage.[8] 3) Contrary to *Yocca and common sense,* Google does not want this Court to consider the "certain acts" of: "surveilling, permanently recording, worldwide publishing, for a self-profit" related to the *consent to enter*.

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[4] *See* Exhibit A. Rule 36(a)(1)(A); *infra,* p. 4.
[5] Google Brief, p. 4. It is axiomatic that, if Google is successful in its relevancy objection, Google will not be permitted to introduce any evidence for implied custom.
[6] *Yocca, infra,* p. 5. Whether Google *did stick* a pin in me is not the same as whether it has a *legal right* to walk around doing so, or to do so.
[7] Google Brief, Page 4; *infra.,* p. 2.
[8] See, Exhibit A at bottom (a sign, but Google asserts too early).

4) What does "general" mean; the "custom" of other (non-existent) "Googles" or the custom for a milkman, the custom in the New York projects or the custom of an Iowa farmer; "drive up" by pizza person or with 18-wheel trucks and camera crews, 24/7; is the "public" the two eyes of a pizza person or the million eyes of a TV audience; is it royalty-free in the context of a commercial license; does the license constructively continue when permanently recorded and published, "approach" up to the pool with cameras recording for publication where swimming children are customarily partially naked? Google sets forth a defense without parameters and then claims foul when Plaintiffs try to discover the boundaries. Plaintiffs are entitled to discover evidence used to contradict the claimed license, and used to understand the "provisions thereof"[9] from the claim.

7. Plaintiffs want Google to *investigate* and *formulate* its answer or an objection, on the record.[10] Google's premise for a protective order is ungrounded. Rule 26 provides discovery for defenses. Rule 36 provides discovery for opinions (a manner of speculation) and the "application of law to fact."[11] Objections to duplication are incomprehensible, since the questions referenced are different. Objections to reducing legal issues are clearly overruled by Rule 36 and law reducing issues for trial.

8. Google filed *under Rule 26*. Google did all of the work to assess each request, yet refuses to place their objections *under Rule 36*. Google does not want to answer the questions for the reason *on the merits* that Plaintiffs want Google to answer: respectfully stated, it will prove the absurdity of Google's defense; then, with that foundation, Google's defense will be dismissed under Rule 11. If Google re-submits the same responses to Plaintiffs *under Rule 36,* Plaintiffs then have a *proper record* to assess the itemized responses, perform a Rule 26(c)(1) conference based upon a *proper record,*[12] and bring a Rule 36/37 motion as appropri-

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[9] Compare, Doc. 11, p. 2 *with Yocca, infra,* p. 4 (to do certain acts; rights depend on the provisions of the license). The Law: the purpose and acts are relevant. Google: the purpose and acts are irrelevant. No barking dog, no barrier of entry, Google has *carte blanche* worldwide easement.
[10] Google is a world-wide public $34B company. This is relevant to the discovery device because Google must research its companies, departments and affiliates, agents, etc., and coordinate a definitive bottom-line response. This will eliminate volumes of alternate discovery, who's-who depositions, voluminous, evasive or unclear testimony in motion practice.
[11] *Clubcom v. Captive Med.,* 2009 U.S. Dist. Lex. 14218*9-11 (WD.Pa. 2009).
[12] Google's last-minute challenge to volume is disingenuous. The requests were served April 2, 2010; as late as April 28, 2010, Google represented

ate, with each question cleanly assessed for this Court with minimum involvement. Google purposefully prevents Rule 36 from doing its job.

9. By side-stepping Rule 36 with "examples," Google deprives Plaintiffs of their right to itemized Rule 36 record: but, generally: 5, 27, the senses by which notice is perceived; 117, standards of responsibility and evidence retention; 191, 192, determine the source, possibly mooted; 242-253 swimming pool with customary nakedness bears on claimed consent; 3-4, 7-12 distinguish reading and comprehension; 57 distinguishes legal claims; 106 distinguishes scope of "custom"; 125, 132, 133, 136, 141, what is considered the "implied" "custom" and limits issues; 275-284 license provisions; 82, existing positive evidence; 178, 201-204, 238, 239, 240-241, 260, 261-263 are opinions of expectation for Google drivers.

10. Google told the undersigned it would admit only simple facts, such as, "the road is graveled." This is self-evident from the "objections." Google is generally obdurate: *e.g.,* Google claims it is irrelevant in No. 186 whether Google has instituted steps necessary to obtain the consent of third parties prior to entering said third parties' private property. Or, in Nos. 194-196, that it is irrelevant whether it was on the property for a commercial purpose. Google does not object under Rule 36, or provide the required itemized objections, because its defense will be dismissed if it does. It improperly burdens this Court for the greater probability anything will stick by Rule 26 motion, without any downside. Google would not make the same untenable objections under Rule 36.

11. The law clearly demonstrates Google's groundless assertion:

> **a. Availability of Requests for Admission.**
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> **The purpose of requests for admission ... is to reduce costs of litigation by eliminating necessity of proving facts that are not in substantial dispute, [and] to narrow scope of disputed issues, and to facili-**

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that responses would be served. *See* Exhibit B; Docket No. 74. If volume of requests were a genuine issue, it would have been immediately cognizable and stated forthrightly. As of mid-day April 30th, Plaintiffs expected to receive responses per Google's representation; then, that afternoon, Google sends its significant objections (including the preposterous claim that requests for admissions are limited to confirming known and undisputed facts, and pressing discovery to other more expensive devices). Indeed, in the April 30th letter, Google was already bearing down with fee claim threats **in the very first letter** before any conversation, but asking nicely (now for the third time) for extra two weeks to talk about it. Of course, delays would make no difference as hindsight demonstrates. Had Plaintiffs received proper itemized responses from Google, Plaintiffs could have properly reviewed Google's position, conducted a normalized conference, and filed to compel with itemization. Rule 36 can do its job.

tate presentation of cases to trier of fact; requests for admission are intended to save litigants time and money that would otherwise have to be spent unnecessarily...through complex and costly discovery procedures, such as interrogatories, depositions, or document requests.

Concerned Cit. v. Belle Haven Club 223 FRD 39 (D.C. Conn. 2004); *U.S. v. Nicolet,* 1989 W.L. 51734 (E.D. Pa. 1989); *United Coal Cos. v. Powell Construction,* 839 F.2d 958, 967 (3d Cir. 1988) (emphasis added). Further:

[Rule 36] provides that a request may be made to admit...statements or opinions of fact or of the application of law to fact...."opinion" and..."mixed law and fact" [are] proper[.]

Rule 36, Official Comments. Google clearly fails to meet its burden.

[T]he mere statement by a party that the discovery sought is overly broad, burdensome, oppressive, vague or irrelevant is "not adequate to voice a successful objection." *Josephs v. Harris Corp.,* 677 F.2d 985, 992 (3d Cir. 1982). A showing of how each interrogatory or request for admission or request for production is not relevant or how each question is overly broad, burdensome, vague or oppressive is required....

Katrina North. v. City of Phil., 2000 U.S. Dist. LEXIS 4278 (ED Pa. 2000).

b. Scope of Discoverability.

[L]icenses have long been defined by Pennsylvania law to be "an authority to do a particular act...upon another's land..." [citations omitted]...."[A] license based on a valuable consideration is a contract, and the rights and obligations of the parties under such a license agreement depend on the provisions thereof." *Sparrow v. Airport Parking Co.,* 221 Pa. Super. 32, 289 A.2d 87, 91 (Pa. Super. 1972) (defining license as the "purely personal privilege...to do certain acts... ")

Yocca v. Pitt. Steelers Sp., 806 A.2d 936 (Pa.Cmwlth 2002) (emph. added); *Katrina North. v. Cty of Phila.,* 2000 U.S. Dist. LEXIS 4278 (ED Pa. 2000) (proper if any possibility may be relevant to general subject of action).

12. The undersigned stepped up to this Court's request for efficient discovery, only for Google to try to cut Plaintiffs down for doing so. Google cites to no violation of any order; all circumstances point to Plaintiffs receiving costs and fees.[13] Google delays time and presses for costs at every chance to harass. Objectively viewed, it is obvious.

Quite simply, an order of this Court directing Google to respond under Rule 36 will force Google to take risk for its untenable position.

Dated: May 20, 2010

s/Gregg R. Zegarelli/
s/Dennis M. Moskal, Esq./
Counsel for Plaintiffs

[13] Surely, it is not about the money for Google. Google tries again for fees and costs to bear down on Plaintiffs, such as is now becoming habitual. Google seeks fees in a first round of discovery. Plaintiffs soldier forward.

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:

Brian P. Fagan, Esq.
Keevican Weiss Bauerle & Hirsch LLC
1001 Liberty Avenue
11th Floor, Federated Investors Tower
Pittsburgh, PA 15222, USA

Tonia Ouellette Klausner, Esq.
Wilson Sonsini Goodrich & Rosati, PC
1301 Avenue of the Americas
New York, NY 10019

Joshua A. Plaut, Esq.
Wilson Sonsini Goodrich & Rosati, PC
1301 Avenue of the Americas
New York, NY 10019

Jason P. Gordon, Esq.
Wilson Sonsini Goodrich & Rosati, PC
1301 Avenue of the Americas
New York, NY 10019

Elise M. Miller, Esq.
Wilson Sonsini Goodrich & Rosati, PC
1301 Avenue of the Americas
New York, NY 10019

Gerard M. Stegmaier, Esq.
Wilson Sonsini Goodrich & Rosati, PC
1301 Avenue of the Americas
New York, NY 10019

s/Gregg R. Zegarelli/
Gregg R. Zegarelli, Esq.
PA I.D. #52717
mailroom.grz@zegarelli.com
412.765.0401

Counsel for Plaintiffs

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.
Allegheny Building, 12th Floor
Pittsburgh, PA 15219-1616