IN THE DISTRICT COURT OF APPEAL OF FLORIDA – FIRST DISTRICT

CASE NO.: 1D13-1332

RAMP REALTY OF FLORIDA, INC.,

Appellant,

v.

GOOGLE INC.,

Appellee.

FROM THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA
LT CASE NO.: 2012 CA 6966 CV-H

APPELLEE'S ANSWER BRIEF

Samuel A. Lewis / Fla. Bar No. 55360
David M. Stahl / Fla. Bar No. 84713
FELDMAN GALE, P.A.
Counsel for Appellee Google Inc.
One Biscayne Tower, 30th Floor
2 South Biscayne Blvd.
Miami, Florida 33131
Telephone: (305) 358-5001
Facsimile: (305) 358-3309

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STATEMENT OF THE CASE AND OF THE FACTS[1]

Fully cognizant that it would be seeking information from the Appellee, Google Inc. ("Google"), the Appellant, Ramp Realty of Florida, Inc. ("Ramp Realty") entered into an agreement with Google containing, *inter alia*, a mandatory forum selection clause. (R. 26, 50-51). Under such circumstances, the Trial Court properly enforced the mandatory forum selection clause and dismissed Ramp Realty's Complaint for Pure Bill of Discovery.

In its Amended Initial Brief, Ramp Realty presented a Statement of the Case that omits various critical facts and incorrectly sets forth certain other facts. Accordingly, Google, is constrained to address the following record facts omitted by Ramp Realty, and to correct certain facts relevant to the instant appeal.

The Google Terms of Service and the Correct Forum Selection Clause

Ramp Realty purports to quote the applicable forum selection clause in the Amended Initial Brief. *See, e.g.,* Init. Br. at 4, 8-9. Contrary to how the clause has been reproduced in the Amended Initial Brief, the clause at issue actually provides:

> The laws of California, U.S.A., excluding California's conflict of laws rules, will apply to any disputes arising out of or relating to these terms or the Services. All claims arising out of or relating to these terms or the Services will be litigated

[1] References to the Record on Appeal shall appear as "R. ___"; references to Google's Appendix shall appear as "App. #___"; references to the Amended Initial Brief shall appear as "Init. Br. at __."

> *exclusively* in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts.

(R. 33)(emphasis supplied).

Ramp Realty Already Has More Information Identifying Its Potential Defendant Than Google

Ramp Realty filed a Complaint For Pure Bill Of Discovery ostensibly seeking "to identify the parties responsible for making" false statements regarding the status of St. Johns Storage, and for stating that the "business was permanently closed." (R. 3, at ¶21). Ramp Realty further alleged that this information was necessary so that it could "bring appropriate claims for relief against the responsible parties." *Id.* Indeed, Ramp Realty alleges that it "believes the false statement was made at the behest of a third-party acting with malice toward [Ramp Realty]." (R. 2, at ¶14).

In support of its Motion to Dismiss, Google presented the Affidavit of Audrey Kim. (R. 24). In Ms. Kim's Affidavit, she confirmed that "Google has no records of information specifying why [a verification process] was started for St. Johns Storage or what specifically triggered the commencement of the process." *Id.,* ¶4. Thus, Google does not have any information that would identify the third party that Ramp Realty has in mind.

Certainly, Ramp Realty has a fairly good idea as to the identity of the third party it believes caused it harm. At the hearing on Google's Motion to Dismiss, Ramp Realty's counsel repeated the belief that "a third party rather than Google instigated the addition of the false information" on the Google+ Local pages[2] listing for St. Johns Storage. (App., #1 at 19-20). Counsel for Ramp Realty went further, admitting to the Court that

> I could – I don't think I have to, but I could tell the Court who we think [the third party acting with malice] is. I'd rather not at this point in time, but we have a specific individual in mind.

(App., #1 at 28). If, as Ramp Realty contends, it requires information from Google to identify the alleged third party acting with malice, it appears that Ramp Realty has far more of an idea as to the identity of the individual than Google, which has no such records.

Information Regarding Google's Internal Processes Are Trade Secrets

Despite the scant allegations in Ramp Realty's Complaint, it is apparent from the Request for Production of Documents served with the Complaint that Ramp Realty seeks far more information than the identity of some third party it

[2] In the Amended Initial Brief, Ramp Realty's reference to the "Google Maps Places" service appears to be a mistaken reference to what was previously named the Google Places service, where a listing for St. Johns Storage existed. For the sake of consistency, Google shall refer to those services by their current name, "Google+ Local pages."

believes was acting with malice.[3] Rather, the Request for Production of Documents lays bare Ramp Realty's intention to invade Google's trade secrets, notwithstanding that Ramp Realty has no legitimate basis for invading an established evidentiary privilege in a Complaint for Pure Bill of Discovery.

For example, Ramp Realty seeks the following:

> 1. Request: All documents that discuss or concern the means by which a business receives a statement that it is permanently closed on a [Google+ Local pages] result, as shown by way of the attached screen print.
>
> 2. Request: All documents that discuss or concern the means by which a statement that St. Johns Storage was permanently closed was placed on [Google+ Local pages] or other search results, as shown by way of example on the attached screen print.

(R. 36-37). Ramp Realty's counsel has also expressed a desire to serve interrogatories and conduct a deposition. (App. #1, at 26)("Depending upon what documents are produced, I can see following it up with interrogatories and possibly a deposition . . . ."). These requests seek information regarding Google's internal

[3] It is perhaps noteworthy that Ramp Realty's Complaint does not request permission from the Court to serve a Request for Production of Documents, and the prayer for relief only seeks the discovery identified in the Complaint, namely, the identity of the third party responsible for causing the Google+ Local pages page for St. John's Storage to suggest that the business was closed, and how and why that information came to be on the Google+ Local pages.

processes, which are highly guarded trade secrets. (R. 25-26, at ¶9). Ms. Kim's Affidavit confirms that

> [t]he details of Google's internal processes relating to the Google Places and Google Maps services, including without limitation the manner in which Google collects information, determines which listings need to be updated, etc., are trade secrets. These processes derive economic value from not being generally known and not being readily ascertainable by proper means. These processes are also the subject of efforts to maintain their secrecy, including without limitation, requiring that all [Google] employees having access to such information execute agreements to prevent the improper disclosure of such information. In addition, Google limits the employees who have access to these processes to only those who have a reason to know them. Google does not publicly disclose these internal processes, including without limitation, how Google determines that certain listings should be verified.

(R. 25-26, at ¶9).

Ramp Realty Presents "Facts" Not Supported By The Record

In its Statement of the Case, Ramp Realty states that it believes that "someone other than Google illegally either hacked Ramp Realty's computers, Google's computers, or supplied Google with false information for the purpose of manipulating Google's Places listing for St. Johns Storage." (Init. Br. at 3). While Ramp Realty asserted before the trial court that it believed a third party provided Google with false information, *see, e.g.,* R. 2, at ¶14; App. #1 at 19-20 ("At this time we believe that a third party rather than Google instigated the addition of the false information."), the record is otherwise devoid of any allegation that any

illegal hacking activity was involved.[4] Other than the assertion by Ramp Realty's counsel in the Initial Brief (and Amended Initial Brief), there simply is no support in the record for any "facts" relating to illegal hacking activity.

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED GOOGLE'S MOTION TO DISMISS FOR IMPROPER VENUE.

The trial court correctly granted Google's Motion to Dismiss on improper venue grounds. It is undisputed that the agreement between Ramp Realty and Google contains a forum selection clause which requires that "[a]ll claims . . . relating to . . . [Google's] Services will be litigated *exclusively* in the federal or state courts of Santa Clara County, California." Based on the clear and unambiguous language of this mandatory forum selection clause, Ramp Realty's Complaint for Pure Bill of Discovery, which names Google as a defendant and includes a prayer for equitable relief, is a "claim" relating to Google's Services. Moreover, the accrual of any claims that Ramp Realty may have against the

[4] Assuming *arguendo* that Ramp Realty is sincere in its belief that its computers were hacked, it stands to reason that it would have subjected its own computers to forensic examination to determine whether such hacking activity occurred. However, the record is also devoid of any suggestion that Ramp Realty subjected its own computer systems to forensic examination. Likewise, such hacking is, as Ramp Realty points out, illegal. *See, e.g.,* the Florida Computer Crimes Act, Chapter 815, Fla. Stat. (2012). Yet, the record is devoid of any mention that Ramp Realty filed a police report, or lodged a complaint with the State Attorney's office.

unidentified third party are not a cognizable basis for avoiding the forum selection clause. Accordingly, venue was and is improper in any Florida court and the Trial Court correctly dismissed the action.

II. EVEN IF THIS COURT WERE TO CONCLUDE THAT VENUE WAS PROPER IN FLORIDA, THIS COURT SHOULD STILL AFFIRM THE DISMISSAL BECAUSE RAMP REALTY'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION.

Even if this Court were to conclude that venue was proper in Florida, this Court should still affirm the dismissal because Ramp Realty's Complaint fails to state a cause of action. As is evident from the face of the Complaint, Ramp Realty seeks to misuse the bill of discovery in order to conduct a fishing expedition. Not only does Ramp Realty fail to set forth sufficient allegations to show that it is engaging in anything other than a fishing expedition, those allegations present highlight that the Complaint in the instant case is long on speculation and short on any concrete facts or allegations identifying the claim or claims that Ramp Realty intends to pursue against the unidentified third party. The speculative nature of Ramp Realty's allegations do no more than raise a possibility that some as yet unidentified cause of action might exist against some unknown third party.

Additionally, the discovery that Ramp Realty now seeks to obtain from Google implicates Google's trade secrets. In light of Ramp Realty's failure to identify even a single cause of action that it intends to pursue, combined with the

highly speculative factual allegations, Ramp Realty's Complaint is insufficient to permit a court to properly evaluate whether Ramp Realty is justified in seeking to invade the trade secret privilege. As such, Ramp Realty has failed to plead the facts necessary to demonstrate that it is entitled to the relief it seeks, and its Complaint should be dismissed for failure to state a cause of action.

Finally, dismissal of Ramp Realty's Complaint is justified on mootness grounds. The purpose for which Ramp Realty filed a Complaint For Pure Bill Of Discovery is moot because Ramp Realty has either received the information sought in its Complaint or has learned that no such information exist. To the extent that the Trial Court were to order Google to produce the information responsive to the issues raised in Ramp Realty's Complaint, Google would not be able to produce any more information than has been produced because it simply does not have any other responsive information.

III. BY FAILING TO RAISE CERTAIN ISSUES BEFORE THE TRIAL COURT BELOW, RAMP REALTY FAILED TO PROPERLY PRESERVE THE ISSUES FOR CONSIDERATION ON APPEAL.

Ramp Realty did not raise any arguments regarding alleged illegal hacking activity before, or how that activity justifies Ramp Realty's efforts to avoid the trade secret privilege and invade Google's trade secrets, before the Trial Court. Having failed to raise these issues before the Trial Court, Ramp Realty failed to properly preserve the issues for consideration on appeal.

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED GOOGLE'S MOTION TO DISMISS FOR IMPROPER VENUE.

A. Standard Of Review.

"Florida courts have held that a decision interpreting a contract presents an issue of law that is reviewable by the de novo standard of review." *Management Computer Controls, Inc. v. Charles Perry Constr., Inc.,* 743 So. 2d 627, 630 (Fla. 1st DCA 1999).

B. The agreement between Ramp Realty and Google contains a mandatory forum selection clause requiring that all claims relating to the terms of the agreement or Google's Services be litigated *exclusively* in California.

Ramp Realty concedes that it entered into an agreement with Google, and that the agreement contains a forum selection clause. (Init. Br. at 3-4). Since the forum selection clause is mandatory, and since Ramp Realty failed to make any showing that the clause is unreasonable or unjust, the Trial Court correctly honored the parties' agreement, enforced the forum selection clause and dismissed the action.

1. The forum selection clause is mandatory.

The question of whether a venue clause is permissive (and non-binding) or mandatory (and binding) turns on whether the provision at issue reflects the parties' expression of "their intent to limit venue to one particular location."

Management Computer Controls, 743 So. 2d 627, 631 (Fla. 1st DCA 1999). Use of the term "exclusively" in the forum selection clause is sufficient to express the requisite intent to render the clause mandatory. *See, e.g., East Coast Karate Studios, Inc. v. Lifestyle Martial Arts, LLC,* 65 So. 3d 1127, 1129 (Fla. 4th DCA 2011) (held that a forum selection clause containing term "exclusive" is mandatory); *Travel Express Investment Inc. v. AT&T Corp.*, 14 So. 3d 1224, 1227 (Fla. 5th DCA 2009) (held that where parties consent to "the exclusive jurisdiction" of a state's courts, forum selection clause is mandatory).

The forum selection clause at issue requires that "[a]ll claims arising out of or relating to [Google's] terms or the Services will be litigated *exclusively* in the federal or state courts of Santa Clara County, California, USA." (R. 33)(emphasis supplied). Since the clause contains the term "exclusively," the clause is mandatory.

2. Mandatory forum selection clauses must be enforced unless shown to be unreasonable or unjust.

Since Ramp Realty failed to make any showing as required under binding precedent to avoid application of a forum selection clause, the Trial Court correctly enforced the clause and dismissed the action.

"As a general principle, the trial court must honor a mandatory forum selection clause in a contract in the absence of a showing that the clause is

unreasonable or unjust." *Management Computer Controls,* 743 So. 2d at 631; *Land O'Sun Management Corp. v. Commerce and Industry Ins. Co.*, 961 So. 2d 1078, 1080 (Fla. 1st DCA 2007) (forum selection clause "must be enforced unless it is shown to be unreasonable or unjust"); *see also Manrique v. Fabbri,* 493 So. 2d 437, 440 (Fla. 1986) ("We hold that forum selection clauses should be enforced in the absence of a showing that enforcement would be unreasonable or unjust.").

This Court applies a three-pronged test to determine whether a party seeking to avoid a forum selection ought to be permitted to do so. *Land O'Sun Management Corp.,* 961 So. 2d at 1080. The record is devoid of any showing by Ramp Realty that any of those factors are implicated, much less satisfied. As such, the Trial Court correctly enforced the parties' agreement and dismissed the action.

C. Ramp Realty's Complaint for Pure Bill of Discovery, which names Google as a defendant and seeks relief from the court, is a *claim* which relates to Google's Services.

As noted above, the mandatory forum selection clause at issue requires that "[a]ll claims arising out of or relating to [Google's] terms or the Services" be litigated in the federal or state courts of Santa Clara County, California. (R. 33). Having failed to present any reason why the mandatory forum selection clause should not be enforced, Ramp Realty resorts to semantics in an effort to suggest that the claim stated in its Complaint is not a "claim" arising out of or relating to Google's terms or Google's Services. The reality is that Ramp Realty's Complaint

for Pure Bill of Discovery clearly constitutes a "claim" that arises out of or is related to Google's Services.

Black's Law Dictionary 281–82 (9th ed. 2009) defines the term "claim" as "[t]he assertion of an existing right; any right to payment *or to an equitable remedy*, even if contingent or provisional" (emphasis added).[5] Under Florida law, a bill of discovery is an equitable remedy. *See JM Family Enterprises, Inc. v. Freeman*, 758 So. 2d 1175, 1176 (Fla. 4th DCA 2000); *Trak Microwave Corp. v. Culley*, 728 So. 2d 1177, 1178 (Fla. 2d DCA 1998). As such, in its Complaint, Ramp Realty undeniably asserts a right to equitable relief and therefore constitutes a "claim."

Furthermore, Ramp Realty initiated the action below by filing a Complaint which names Google as a defendant, includes jurisdictional allegations, general factual allegations, and seeks relief from the court in the form of an equitable remedy. *See* R. 1-3; Fla. R. Civ. P. 1.110(b); *Surface v. Town of Bay Harbor*

[5] The forum selection clause is clear and unambiguous. "In the absence of an ambiguity on the face of a contract, it is well settled that the actual language used in the contract is the best evidence of the intent of the parties, and the plain meaning of that language controls." *Taylor v. Taylor*, 1 So. 3d 348, 351 (Fla. 1st DCA 2009) (citation omitted). To discern the plain meaning of words which are not defined in a contract, courts may "consult references that are commonly relied upon to supply the accepted meaning of the words." *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010) (alterations omitted) (quoting *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007).

Islands, 625 So. 2d 109, 109 (Fla. 3d DCA 1993) ("The mere fact that a complaint is called a Pure Bill of Discovery does not mean that it cannot be amended to allege a statutory cause of action."); *Perez v. Citibank, N.A.*, 328 F. Supp. 2d 1374, 1377 (S.D. Fla. 2004) (concluding that a bill of discovery constituted a cause of action under Florida law because "[t]he Florida Rules of Civil Procedure provide that 'there shall be one form of action to be known as "civil action,"' Fla. R. Civ. P. 1.040, and Florida courts have held that a bill of discovery is a civil action in equity." (citing *Surface*, 625 So. 2d at 109)).

Undoubtedly realizing that its Complaint constitutes a "claim," Ramp Realty resorts to a disingenuous argument that its Complaint is not a "claim" because "[i]t does not seek damages or injunctive relief from Google." *See* Init. Br. at 10. However, the forum selection clause at issue does not contain any language which would limit the term "claims" only to claims for damages or injunctive relief.[6]

Next, Ramp Realty contends that the relief it seeks does not "arise out of or relate to Google's terms of service." Ramp Realty, however, is again misquoting

[6] As the forum selection clause is clear and unambiguous—and Ramp Realty did not assert, either before the Trial Court or in its Amended Initial Brief, that the clause at issue is in any way ambiguous—this Court should not add words which the parties did not include. *See Discover Prop. & Cas. Ins. Co. v. Beach Cars of West Palm, Inc.*, 929 So. 2d 729, 732 (Fla. 4th DCA 2006) ("We cannot, under the guise of contract construction, supply language which the [parties] did not include."). Moreover, California law controls interpretation of the forum selection clause at issue, including whether the clause is ambiguous.

the plain and unambiguous language of the forum selection clause. The clause provides that the forum selection provision is applicable to "[a]ll claims arising out of or relating to these terms ***or*** the Services" (emphasis supplied).[7] Thus, the forum selection clause is not limited only to claims arising out of relating to the

[7] In an effort to argue that the Complaint in the instant action does not arise out of or relate to Google's services, Ramp Realty relies upon *Food Marketing Consultants, Inc. v. Sesame Workshop,* 2010 WL 1571206 (S.D. Fla.). *See* Init. Br. at 13. Ramp Realty's reliance is misplaced. Even overlooking that the quote appearing in the Amended Initial Brief was taken out of context, it is the language that Ramp Realty omits entirely that highlights why its reliance upon *Food Marketing Consultants* is misplaced.

Ramp Realty conveniently omits the first of the lessons that the *Food Marketing* Court drew from a review of cases involving forum selection clauses, namely that "forum-selection clauses are to be construed broadly." *Food Marketing Consultants, Inc.,* 2010 WL 1751206 at *13. Ramp Realty also omits the lesson that "courts should subject claims pled as so-called 'non-contractual' causes of action to vigorous scrutiny to ensure that the intent of the parties in entering into the forum-selection clause is upheld." *Id.*

The *Food Marketing* Court ultimately concluded that the forum selection clause at issue in that case was "enforceable, mandatory, and applicable to the causes of action in the Complaint and to the parties," and therefore concluded "it must enforce the forum-selection clause." *Id.* at 14.

Similarly, Ramp Realty relies upon *Stewart Organization, Inc. v. v. Ricoh Corp.,* 810 F.2d 1066 (11th Cir. 1987) to support the proposition that the broad language in a forum selection clause "only captured 'causes of action arising directly or indirectly from the business relationship evidenced by the contract.'" *See* Init. Br. at 13. Once again, its reliance is misplaced, for Ramp Realty conveniently omits the Eleventh Circuit's observation that "[c]ommercial contractual issues are commonly intertwined with claims in tort or criminal or antitrust law." *Stewart Organization,* 810 F.2d at 1070.

terms of service. The clause also applies to claims arising out of or relating to the services themselves.

Ramp Realty's claim arises out of or relates to the Google Places service. Ramp Realty asserts in its complaint that it suffered losses as a result of "false information" on Google's Places service indicating that St. Johns Storage was closed. Ramp Realty then alleges that it is seeking information from Google to identify the parties responsible for making false statements regarding the status of St. Johns Storage. In light of these allegations, it strains credibility to suggest that the discovery which Ramp Realty seeks does not relate to Google's Services. Additionally, along with its Complaint, Ramp Realty served Google with a Request for Production of Documents. In four of the five requests, Ramp Realty seeks documents which relate directly to Google Maps, one of Google's Services governed by the terms of service to which Ramp Realty agreed.

Accordingly, based on the plain and unambiguous language of the forum selection clause, it is clear that Ramp Realty's civil action constitutes a claim arising out or relating to the Google Services.

D. The accrual of Ramp Realty's claims against the unidentified third party are not a cognizable basis for avoiding the forum selection clause.

Curiously, Ramp Realty concedes that it does not seek to "challenge the application of [Google's terms of service] to the business relationship between

Ramp Realty and Google that started on May 9, 2012." (Init. Br. at 11). Nonetheless, Ramp Realty seeks to avoid the forum selection clause at issue, ostensibly because its claim against the unidentified third party accrued prior the effective date of the agreement between Ramp Realty and Google. (Init. Br. at 13). The accrual of Ramp Realty's claims against a third party do not justify Ramp Realty avoiding the forum selection clause; if anything, the fact that such claims accrued prior to when Ramp Realty agreed to Google's terms of service further justifies enforcement of the forum selection clause at issue.

The only relevant dates for purposes of analyzing whether the forum selection clause applies are the date that Ramp Realty agreed to Google's terms of service, and the date when Ramp Realty filed its Complaint against Google. Since Ramp Realty is not pursuing a claim against Google predicated upon the unidentified third party's allegedly wrongful actions, the date those actions occurred is entirely irrelevant to the issue of whether the forum selection clause is enforceable.

The fact that Ramp Realty was aware of the unidentified third party's allegedly wrongful actions prior to entering into Google's terms of service actually weighs in favor of enforcing the forum selection clause. Ramp Realty admits that prior to agreeing to Google's terms of service, it was aware that it might need to resort to issuing a "subpoena or other appropriate legal process" in order to obtain

information from Google.[8] (Init. Br. at 3; R. 47-59). Nonetheless, Ramp Realty entered into Google's terms of service, and agreed to *inter alia* the forum selection clause at issue. Under such circumstances, enforcement of the forum selection clause is entirely equitable, and Ramp Realty cannot credibly complain that it must honor its bargain.

The Second District's opinion in *TECO Barge Line, Inc. v. Hagan,* 15 So. 3d 863 (Fla. 2d DCA 2009), is perhaps instructive, as it involves the enforcement of a mandatory forum selection in a "post-injury agreement." *Id.* at 864. In *TECO Barge,* the plaintiff was allegedly injured while working for TECO Barge. *Id.* at 864. A short time after the injury occurred, the plaintiff entered into an agreement with TECO Barge containing a forum selection clause. *Id.* Thereafter, the plaintiff commenced an action in Hillsborough County, Florida, and TECO Barge and its successor in interest sought dismissal based upon *inter alia* "a forum selection clause in a post-injury agreement" signed by the plaintiff. *Id.* The trial court denied the motion to dismiss. *Id.* On appeal, the Second District affirmed the general principle that "forum selection clauses are presumptively valid and 'should

[8] Nothing in the communications between Ramp Realty and Google prior to the commencement of Ramp Realty's action against Google suggests *where* Ramp Realty should pursue the "subpoena or other appropriate legal process." Ramp Realty's implied suggestion that Google instructed Ramp Realty to file a Complaint in Florida is not supported by the record.

be enforced in the absence of a showing that enforcement would be unreasonable or unjust.'" *Id.* Confronted with a mandatory forum selection clause, and no justification for avoiding same, the Second District reversed, holding that the forum selection clause required the plaintiff "to bring [his] lawsuit in one of two forums, neither of which is located in Florida." *Id.* at 865-66. The fact that the plaintiff was injured prior to entering into the agreement containing a forum selection clause did not justify refusing to enforce the clause.[9]

It stands to reason that if a mandatory forum selection clause in a post-injury agreement is enforceable as in *TECO Barge,* then Google's mandatory forum selection clause must be enforced. As in *TECO Barge,* Ramp Realty knew that it would be seeking relief from Google, even if that relief was only in the nature of equitable relief.

[9] Likewise, in *Tradecomet.com LLC .v Google, Inc.,* 435 Fed.Appx. 31 (2d Cir. 2011), a similar Google forum selection clause was challenged, *inter alia*, on the ground that the clause was impermissibly given retroactive effect. In that case, the forum selection clause applied to claims "arising out of or relating to this agreement *or the Google Program(s).*" *Id.* at 35. The U.S. Second Circuit Court of Appeals reasoned that such language was "not limited to claims arising from or related to the" agreement, but rather, "broadly includes any claim arising under or related to the 'Google Programs,' irrespective of whether it arose prior to or subsequent to the acceptance of the" agreement by the plaintiff. *Id.* As such, the U.S. Second Circuit held that the trial court "did not impermissibly give 'retroactive' effect" to the forum selection clause, and affirmed the trial court's dismissal of the action. *Id.* at 36, 37.

Ramp Realty's reliance upon *Armco, Inc. v. North Atl. Ins. Co. Ltd.,* 68 F. Supp. 2d 330 (S.D.N.Y. 1999), is misplaced. *Armco* involved *inter alia* claims that the defendants engaged in "a series of fraudulent activities that included the negotiation and execution of" the contract containing the forum selection clause, including fraudulent inducement, which occurred between the parties prior to the execution of the agreement. *Id.* at 335, 338. The *Armco* Court also refused to enforce the forum selection clause where "the inclusion of that clause in the contract was the product of fraud . . . ." *Id.* at 340. There has been no suggestion that Google engaged in fraudulent activities prior to or in connection with Ramp Realty's agreeing to Google's Terms of Service. Thus, the factual paradigm that confronted the *Armco* Court simply does not exist in the instant case.[10]

There is nothing inequitable about requiring that Ramp Realty honor the agreement and the forum selection clause it contains. Ramp Realty was certainly

[10] Moreover, Florida courts have taken a somewhat more narrow view than the *Armco* Court when voiding forum selection clauses. In *Holder v. Burger King Corp.,* 576 So. 2d 973 (Fla. 2d DCA 1991), the plaintiff sought to avoid a forum selection clause by arguing that "'the agreements themselves were entered into as a result of fraud and misrepresentation,' and therefore, 'each and every clause in the agreements is necessarily procured by fraud.'" *Id.* at 974. The Second District rejected the argument, holding that "[w]hen a party seeks to void a forum selection clause on the basis of fraud, it must be demonstrated that the clause itself is the product of fraud." *Id.* As the Second District explained, "[a]bsent proof that the forum selection clause is the product of fraud the parties should litigate all claims, including fraud claims, in the agreed on forum." *Id.*

aware *prior* to agreeing to Google's terms of service that it would need to pursue legal process of some form in order to obtain information from Google. Armed with that knowledge, Ramp Realty nonetheless agreed to the terms of service and accepted the benefits of Google's services. If Ramp Realty did not like the idea of pursuing legal process in California, it should have refrained from agreeing to Google's terms of service.

II. EVEN IF THIS COURT WERE TO CONCLUDE THAT VENUE WAS PROPER IN FLORIDA, THIS COURT SHOULD STILL AFFIRM THE DISMISSAL BECAUSE RAMP REALTY'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION.

Even if this Court were to conclude that venue was proper in Florida, this court should still affirm the dismissal because Ramp Realty's complaint fails to state a cause of action. *See D.R. Horton, Inc.-Jacksonville v. Peyton*, 959 So. 2d 390, 397–98 (Fla. 1st DCA 2007) (holding that if based on the appellate record there is any theory or principle of law that would support the trial court's judgment, this Court is obliged to affirm that judgment) (citing *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999); *Applegate v. Barnett Bank*, 377 So. 2d 1150, 1152 (Fla. 1979); *Cohen v. Mohawk, Inc.*, 137 So. 2d 222, 225 (Fla. 1962)).

A. Ramp Realty is attempting to use the Pure Bill of Discovery to engage in a fishing expedition.

As is evident from the face of the Complaint, Ramp Realty seeks to misuse the equitable bill of discovery as part of a fishing expedition to see if a cause of action exists. As such, Ramp Realty's complaint fails to state a cause of action and therefore was properly dismissed. *See, e.g.*, *Vorkbek v. Betancourt*, 107 So. 3d 1142, 1145–46 (Fla. 3d DCA 2012); *Kaplan v. Allen*, 837 So. 2d 1174, 1176 (Fla. 4th DCA 2003); *Trak Microwave Corp. v. Culley*, 728 So. 2d 1177, 1178 (Fla. 2d DCA 1998).

"A pure bill of discovery 'lies to obtain the disclosure of facts within the defendant's knowledge, or deeds or writings or other things in his custody, in aid of the prosecution or defense of an action pending or about to be commenced in some other court.'" *Publix Supermarkets, Inc. v. Frazier,* 696 So. 2d 1369, 1370-71 (Fla. 4th DCA 1997), *citing First Nat'l Bank of Miami v. Dade-Broward Co.*, 125 Fla. 594, 171 So. 510, 510-11 (1936); *see also Mendez v. Cochran,* 700 So. 2d 46, 47 (Fla. 4th DCA 1997) (the pure bill of discovery "may be used to identify potential defendants and theories of liability and to obtain information necessary for meeting a condition precedent to filing suit.").

It is well settled, however, that a bill of discovery may *not* be used as a fishing expedition to see if causes of action exist; to substantiate one's suspected

causes of action; or to acquire "a preview of discovery" for a prospective lawsuit. *Vorbek*, 107 So. 3d at 1146; *see also Kirlin v. Green*, 955 So. 2d 28, 29 (Fla. 3d DCA 2007); *Mendez v. Cochran,* 700 So. 2d 46, 47 (Fla. 4th DCA 1997); *Publix,* 696 So. 2d at 1372 (Stevenson, J., concurring) ("There must of course be some basis for targeting a particular defendant, and where a plaintiff is truly on nothing more than a 'fishing expedition,' the court, in equity, will not supply the rod and reel.").

Because a bill of discovery cannot be used to see if a cause of action exists, a pleading seeking such equitable relief must allege facts showing that the underlying claims for which the discovery is sought are more than speculative. That is, the facts alleged must do more than suggest a possibility that some cause of action might exist, the alleged facts must be sufficient to justify a good faith filing of an action. *See Kaplan*, 837 So. 2d at 1176 ("Here, the record contains allegations suggesting only a possibility that some cause of action might exist against Dr. Allen. This is insufficient to justify the invocation of the 'relatively rare' equitable pure bill of discovery."). Otherwise, the bill of discovery is merely being used as an investigative tool to see if causes of action exist.

For example, in *Kaplan*, the personal representative of an estate filed a complaint for a pure bill of discovery seeking medical records from the decedent's psychiatrist and also seeking to depose the psychiatrist. *Id.* at 1175. The decedent

had died in a car accident coming home from an appointment with his psychiatrist. The personal representative believed that the decedent had committed suicide as a result of professional malpractice on the part of the psychiatrist. The Court explained that "[i]n order to be entitled to a pure bill of discovery, Kaplan must allege some circumstantial evidence of negligence adequate to justify the good faith filing of a negligence action." *Id.* at 1176. The Court then held that the record contained "allegations suggesting only a possibility that some cause of action might exist" and that such allegations "were insufficient to justify the invocation of the 'relatively rare' equitable pure bill of discovery." *Id.* The Court affirmed the trial court's dismissal of the complaint for pure bill of discovery "[b]ecause of the speculative nature of [the] claims." *Id.*

Just like the complaint in *Kaplan*, the Complaint in the instant case is long on speculation and short on any concrete facts or allegations identifying the claim or claims that Ramp Realty intends to pursue against the unidentified third party. Indeed, the only non-speculative facts that Ramp Realty alleges in the Complaint are: (1) that Ramp Realty operates a self-storage business ("St. Johns Storage"); (2) "for reasons unknown" to Ramp Realty, the business sales began steadily and significantly declining (R. 1, ¶¶ 7-8); and (3) while investigating its declining sales it discovered that Google Places listed St. Johns Storage as closed. (R. 2, ¶ 9). Ramp Realty then *speculates* that: "a third-party acting with malice toward" it

informed Google that St. Johns Storage was closed[11&12] (R. 2, ¶ 14); and "estimates that it has lost in excess of $300,000" due to the third party's false statement. (R. 2, ¶ 13). Ramp Realty's claim is also too speculative in that it fails to allege any facts from which one could infer that there is a causal connection between Ramp Realty's declining sales and the change of status in the Google Places listing. Such speculation is insufficient to justify the extraordinary remedy that Ramp Realty seeks. More importantly, the speculative nature of Ramp Realty's assertions do no more than raise a *possibility* that some as yet unidentified cause of action might exist against some unknown third party.

[11] The same sort of baseless speculation that appears in the Complaint continues in Ramp Realty's Amended Initial Brief. Apparently not satisfied with the allegations in the Complaint, Ramp Realty—for the first time in these proceedings—makes the astounding allegation that "someone illegally either hacked Ramp Realty's computers [or] Google's computers . . . ." (Init. Br., at 1, 3).

[12] Ramp Realty has not alleged any fact from which a reasonable inference can be drawn to support Ramp Realty's belief that a third party acting with malice contacted Google to have the St. Johns Storage's listing changed. Unfortunately for Ramp Realty, Google has no information that would support Ramp Realty's third party with malice theory. In support of its motion to dismiss, Google submitted the Affidavit of Audrey Kim. (R. 24-26). Ms. Kim attested that on or about February 15, 2011, Google started the process to verify if the St. Johns Storage listing should be updated to reflect the business was closed. (R. 24). Once the process began, Google attempted to contact someone at the storage business, and when the attempt failed, Google updated the listing to reflect the business was closed. (R. 25). Ms. Kim also attested that Google has no records or information specifying why the verification process was started. (R. 24).

Finally, Ramp Realty has failed to identify any cause or causes of action that it intends to pursue against the third party.[13]

Ramp Realty's Amended Initial Brief further demonstrates the speculative nature of Ramp Realty's claims. In its Amended Initial Brief, Ramp Realty alleges that "someone other than Google illegally either hacked Ramp Realty's computers, Google's computers, or supplied Google with false information for the purpose of manipulating Google's Places listing for St. Johns Storage." (Init. Br. at 3). Although not raised before the Trial Court, this new "hacking" theory nonetheless highlights the extent to which Ramp Realty is speculating. Certainly, Ramp Realty has always been in a position to have a forensic expert examine its own computers to determine whether they were "hacked"; that Ramp Realty failed to do so does not justify Ramp Realty's boundless speculation.

Ultimately, the extent to which Ramp Realty speculates suggests that it is merely fishing in an effort to find facts, and perhaps even a cause of action, that might permit it to pursue a claim against some defendant. Under such

[13] Without even hinting at the cause of action it intends to assert against the third party, there is no way to begin to evaluate whether Google's trade secret processes are even remotely relevant to those claims. If a third party acting with malice is responsible for hacking the Google+ Local pages listing at issue, then Google's trade secret processes relating to the services, including the manner in which Google collects information and determines which listings need to be updated, are not remotely relevant to Ramp Realty's claims.

circumstances, Ramp Realty cannot justify the fishing expedition it seeks to undertake with the Court's imprimatur. This Court should not reward boundless speculation by giving Ramp Realty a rod and reel for a fishing expedition into Google's records.[14]

B. Ramp Realty's Complaint fails to allege sufficient facts that would justify invading Google's trade secret privilege.

In addition to failing to allege sufficient facts to justify anything other than a prohibited fishing expedition, Ramp Realty's Complaint also fails to allege sufficient facts that would justify invading Google's trade secret privilege. In the absence of such factual allegations, Ramp Realty's Complaint should be dismissed.

Florida law explicitly recognizes a trade secret privilege. Section 90.506, Florida Statutes provides:

> A person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by that person if the allowance of the privilege will not conceal fraud or otherwise work injustice. When the court directs disclosure, it shall take the protective measures that the interests of the

[14] During the hearing on Google's Motion to Dismiss, Ramp Realty's counsel stated that Ramp Realty had "a specific individual in mind" that it believed provided false information to Google. (App. #1, p. 28). If Ramp Realty truly has a specific individual in mind, then Ramp Realty should simply file a claim against that individual. Ramp Realty, however, cannot seek relief in the form of a bill of discovery just to substantiate its suspected causes of action. *See Vorbeck*, 107 So. 3d at 1147 ("We reiterate our holding in *Kirlin* that '[a] pure bill of discovery ... is not to be used to determine whether evidence exists to support an allegation.'" (quoting *Kirlin*, 955 So. 2d at 29)).

> holder of the privilege, the interests of the parties, and the furtherance of justice require.

§90.506, Fla. Stat. (2012). A "trade secret" is defined in section 688.002(4), Florida Statutes, as:

> information, including a formula, pattern, compilation, program, device, method, technique or process that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

§688.002(4), Fla. Stat. (2012).

Google's internal processes relating to the Google+ Local pages service, including the manner in which it collects information, determines which listings need to be updated, etc., are trade secrets under Florida law.[15] The affidavit of Audrey Kim, filed with the Trial Court in support of Google's Motion to Dismiss confirms that Google's internal "processes derive economic value from not being

[15] It is clear from the face of Ramp Realty's Complaint that Ramp Realty is seeking information regarding Google's internal processes and not just the name of a person who Ramp Realty speculates made false statements to Google. (R. 3, at ¶20). Additionally, along with its Complaint, Ramp Realty served Google with a "Request for Production" in which Ramp Realty sought "[a]ll documents that discuss or concern the means by which a business receives a statement that it is permanently closed on a [Google+ Local pages] result." (R. 36). Furthermore, despite the fact that Google provided Ramp Realty with an affidavit attesting that Google had no internal records or information specifying why the process of verifying the St. Johns Storage listing was started (R. 24), Ramp Realty still continues to pursue its Complaint for Bill of Discovery.

generally known and not being readily ascertainable by proper means," and that Google takes reasonable steps to ensure the secrecy of this information, including without limitation, restricting access to the information to only those employees those who have a reason to known the information. (R. 26).

Since Google established that its internal processes are trade secrets, the burden shifts to Ramp Realty, and Ramp Realty must be able to show a reasonable necessity for the discovery.[16] *See KPMG LLP v. State, Dep't of Ins.*, 833 So. 2d 285, 286 (Fla. 1st DCA 2002); *Goodyear Tire and Rubber Co. v. Cooey*, 359 So. 2d 1200, 1202 (Fla. 1st DCA 1978). In order to show a reasonable necessity for this discovery, Ramp Realty would have to show that this disclosure is indispensable to its being able to assert its underlying claim. *See Cooey*, 359 So. 2d at 1202. Since Ramp Realty fails to allege in its Complaint any underlying claim

[16] Google is cognizant that Trial Court would ordinarily determine whether a requested production constitutes a trade secret. Nonetheless, in light of the relief that Ramp Realty seeks in its Amended Initial Brief—not merely reversing and remanding the action, but remanding the matter with instructions to deny Google's Motion to Dismiss—Google is constrained to address the issue so that the Court is in a position to assess whether Google's Motion to Dismiss should be granted on grounds other than that which was included in the Trial Court's Order. Ramp Realty should not be able to side-step the obligation of pleading sufficient factual allegations to permit the Trial Court to determine whether disclosure of trade secrets is reasonably necessary simply by requesting relief from this Court.

that it might have against the unidentified third party, there is no way that Ramp Realty can establish that disclosure is reasonably necessary.[17]

This is something Ramp Realty simply will not be able to do given that Ramp Realty's Complaint fails to state any underlying claim that it might have against a third party.

Accordingly, this Court should conclude that Ramp Realty's Complaint does not contain sufficient factual allegations to justify invading Google's trade secret privilege. As such, Ramp Realty is not entitled to the requested relief and its claim should be dismissed. *See* Fla. R. Civ. P. 1.110(b) (requiring a complaint to contain "a short and plain statement of the ultimate facts showing that the pleader is *entitled to relief*" (emphasis added)).

C. Ramp Realty's Complaint For Pure Bill of Discovery is moot as Google does not have any information identifying any alleged third party.

The purpose for which Ramp Realty filed a Complaint For Pure Bill Of Discovery is moot because Google does not have the information that Ramp Realty primarily seeks—namely, the identity of the person "at whose bequest the false statements were put on the websites," *see* R. 2, at ¶16—and because the other

[17] Similarly, there is no way that Ramp Realty can justify any further invasion—whether in the form of interrogatories or depositions—into Google's trade secret processes.

information it sought—"how and why the false statements werer (sic) made," *see* R. 2, ¶16—has already been provided. Thus, dismissal of Ramp Realty's Complaint is justified on mootness grounds.

"A case is 'moot' when it presents no actual controversy or when the issues have ceased to exist." *Godwin v. State,* 593 So. 2d 211, 212 (Fla. 1992). "Generally, a case that has been rendered moot will be dismissed."[18] *Mazer v. Orange County,* 811 So. 2d 857, 859 (Fla. 5th DCA 2002).

Here, Ramp Realty seeks specific information that it believes[19] is within Google's possession. With regard to the identity of the alleged third party referenced in the Complaint, the record establishes that Google does not have any such information. *See* R. 24 at ¶4 ("On or about February 15, 2011, Google's (sic) started the process to determine whether the Google Places page for St. Johns Storage should be updated to reflect that the business was closed. Google has no records or information specifying why this process was started for St. Johns

[18] While Florida courts have recognized three instances where a moot case will not be dismissed, *see, e.g., Godwin,* 593 So. 2d at 212; *Mazer*, 811 So. 2d at 859, none of those exceptions are applicable here. The issues in this case are not of great public importance, are not likely to recur, and there are no collateral legal consequences flowing from the issues to be resolved that may affect the rights of a party.

[19] While Ramp Realty alleges that "[Google] has records that will show when the false statements were made and at whose bequest they were made," *see* R. 2, at ¶18, such an allegation is entirely speculative.

Storage or what specifically triggered the commencement of the process."). With regard to the question of why the Google Places page for St. Johns Storage was updated, the record contains an explanation of the process. *See* R. 24 at ¶5. Thus, Ramp Realty has either received the information sought in its Complaint, or has learned that no such information exist. Either way, the fact remains that the equitable relief Ramp Realty seeks in its Complaint has now been rendered moot because Ramp Realty has received the information that exists. To the extent that the Trial Court were to order Google to produce the information responsive to the issues raised in Ramp Realty's Complaint, Google would not be able to produce any more information than has been produced because it simply does not have any other responsive information. *See Montgomery v. Dep't of Health & Rehabilitative Servs.,* 468 So. 2d 1014, 1016 (Fla. 1st DCA 1985) ("A case becomes moot, for purposes of appeal, where, by a change of circumstances prior to the appellate decision, an intervening event makes it impossible for the court to grant a party any effectual relief.").

Thus, the issues have been rendered moot because Ramp Realty has already received the very information that it sought in its Complaint. As such, dismissal of this action is also justified on mootness grounds.

III. BY FAILING TO RAISE CERTAIN ARGUMENTS BEFORE THE TRIAL COURT BELOW, RAMP REALTY FAILED TO PROPERLY PRESERVE THE ISSUE FOR CONSIDERATION ON APPEAL.

It is well established that a party must raise an issue with the lower court in order to preserve the issue for consideration on appeal. *Sunset Harbor Condominium Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) ("As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal.") (citing *Dade County Sch. Bd. v. Radio Station WQBA,* 731 So. 2d 638 (Fla. 1999) (a claim not raised in the trial court will not be considered on appeal); *Dober v. Worrell,* 401 So. 2d 1322 (Fla. 1981) (appellate court will not consider issues not presented to the trial judge on appeal from final judgment on the merits)).

Ramp Realty failed to raise before the Trial Court any issue regarding the alleged illegal hacking of computers, or that this activity somehow justified Ramp Realty's efforts to avoid the trade secret privilege and invade Google's trade secret information. By failing to present such issues to the Trial Court, Ramp Realty failed to preserve the issues for consideration on appeal. Accordingly, Ramp Realty may not now raise these issues for the first time on appeal.

CONCLUSION

Based upon the foregoing, Google respectfully requests that this Court affirm the Trial Court's February 13, 2013 Order dismissing the action.

Respectfully submitted,

By:_____

Samuel A. Lewis / Fla. Bar No. 55360
David M. Stahl / Fla. Bar No. 84713
FELDMAN GALE, P.A.
Counsel for Appellee Google Inc.
One Biscayne Tower, 30th Floor
2 South Biscayne Boulevard
Miami, Florida 33131
Telephone: 305-358-5001
Facsimile: 305-358-3309

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Jeb T. Branham (jeb@jebbranham.com), Jeb T. Branham, P.A., Counsel for Ramp Realty, 3500 Third Street South, Jacksonville Beach, Florida 33250 by e-mail on July 26, 2013.

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Fla. R. App. P. 9.210(a)(2) that the font used herein is Times New Roman, 14 point, and that this Answer Brief complies with the rule.

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