IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

Ramp Realty of Florida, Inc.,

Appellant,

vs.

CASE NO. 1D13-1332
L.T.: 2012 CA 6966

Google, Inc.,

Appellee.
_____/

REPLY BRIEF OF APPELLANT RAMP REALTY OF FLORIDA, INC.

Appealed from The Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida Case No.: 2012-CA-6966, Division: CV-H, Judge Waddell Wallace presiding.

Submitted By:

JEB T. BRANHAM, P.A.
Jeb T. Branham
Fla. Bar No. 0296030
3500 Third Street South
Jacksonville Beach, Florida 32233
jeb@jebbranham.com
denise@jebbranham.com
Phone: (904) 339-0500
Fax: (904) 339-0501

REPLY BRIEF OF APPELLANT RAMP REALTY OF FLORIDA, INC.

TABLE OF CONTENTS

TABLE OF CITATIONS

o GOOGLE'S ARGUMENTS

Google makes six basic arguments for why Ramp Realty should not be able to use Florida's courts to get information about how and why the Google+ Local page for St. Johns Storage was changed to say Ramp Realty's business was permanently closed. The arguments are:

1. Google's forum selection clause governs where Ramp Realty must file its bill of discovery.
2. A pure bill of discovery is a "claim" under Google's Terms of Service.
3. Ramp Realty is on a "fishing expedition."
4. Ramp Realty is asking Google to reveal trade secrets.
5. Google does not have any information to give Ramp Realty.
6. Ramp Realty did not argue below that its computers were illegally hacked.

Each of Google's arguments is readily defeated:

1. Google's forum selection clause does not apply because the clause's plain language is too narrow.
2. Google's forum selection clause applies only to "claims." A pure bill of discovery is not a claim within the ordinary meaning of the word.
3. Ramp Realty's Complaint and requests for production show Ramp Realty is not on a "fishing expedition."
4. Whether Ramp Realty's discovery asks for trade secrets is irrelevant to whether its bill of discovery states a claim. Objections and protective orders are the proper way to protect trade secrets, not dismissals of actions.
5. What Google claims in affidavits and arguments about how much information Google has is irrelevant to whether Ramp Realty's bill of discovery states a claim.

6. Ramp Realty's beliefs about how the Google+ Local page for St. Johns Storage got changed are irrelevant to whether Ramp Realty's bill of discovery states a claim. The whole purpose of the bill is to find out how the page got changed in the first place.

Google devotes much of its Answer Brief to red herrings such as why Google does not think Ramp Realty is entitled to the information it seeks, claiming it does not have any useful information for Ramp Realty anyway, and arguing that Ramp Realty should get its information from somebody else. None of Google's six arguments relate to whether Ramp Realty's complaint alleges the elements of a pure bill of discovery, and only the first two relate to whether Google's forum selection clause gets Google out of Florida's court system. At times, it seems Google just does not like the fact that Florida recognizes a pure bill of discovery.

o THE FORUM SELECTION CLAUSE

Google is correct that Ramp Realty's Amended Initial Brief omitted the word "exclusively" from a quote of Google's forum selection clause. The omission was unintentional and regretted. It is also irrelevant. Ramp Realty's arguments about the plain language of the forum selection clause do not turn on exclusivity. Ramp Realty's arguments turn on 1) whether a bill of discovery is a "claim;" and 2) whether Ramp Realty's bill of discovery "aris[es] out of or relat[es] to [Google's] terms or [Google's] Services[.]" (R. at 33.) The parts of Google's

arguments that Ramp Realty disputes have nothing to do with the presence or absence of the word "exclusively" in Google's forum selection clause.

Google also spends considerable time discussing the “mandatory” nature of its forum selection clause, how courts usually enforce such clauses, and even suggests Ramp Realty misleadingly cited forum selection cases in its Initial Brief. (Answer Brief, p. 14-15.) Google's arguments miss the point. Ramp Realty is not making a policy argument that this Court should not enforce forum selection clauses in contracts of adhesion. Ramp Realty's argument – completely backed up by the cases it cites – is that the threshold question for any court is whether the plain language of a forum selection clause is broad enough to include the action at issue within its ambit. *See Food Marketing Consultants, Inc. v. Sesame Workshop*, 2010 WL 1571206, *12-13 (S.D. Fla. 2010) ("whether a *particular phrasing* of a forum-selection clause covers a given cause of action . . . depends on *the relationship of the claim in question to the contract* containing the forum-selection clause") (emphasis added). Indeed, if a policy argument is to be made at all in this case it is that courts must at the very least hold the party that drafted a contract of adhesion to the limitations in its own contractual language.

"The polestar guiding the court" in the analysis of Google's forum selection clause "is the intent of the parties[.]" *Bombardier Capital, Inc. v. Progressive Marketing Group, Inc.*, 801 So. 2d 131, 134 (Fla. 4th DCA 2001). "Where . . .the

language is clear and unambiguous the parties' intent must be garnered from that language." *Id*. No one has argued ambiguity exists. Thus, the question is would an objective person reading a contract that says "[a]ll *claims arising out of or relating to these terms or the Services* will be litigated exclusively in the federal or state courts of Santa Clara County, California" intend to give up his right to merely seek information through the courts of his home state about things Google did of its own accord *15 months* before Google started providing Services to that person under the contract?[1] To answer the question "yes," Google must clear two of three hurdles: 1) a bill of discovery must be a "claim;" and 2) Ramp Realty's bill of discovery must arise out of or relate to Google's Terms of Service; or 3) the bill must arise out of or relate to Google's Services.

- *Hurdle no. 1 – The Ordinary Meaning of "Claim"*

A bill of discovery must first be a "claim" before Google's forum selection clause can apply. Google relies on legalistic arguments for its position that a pure bill of discovery is a "claim." (Initial Brief, pp. 12-13.) Google cites Black's Law Dictionary and the fact that a pure bill of discovery is a cause of action. (*Id*.) Legalistic meaning, however, does not control. A word's ordinary meaning

[1] Ramp Realty originally thought Google admitted that it changed St. Johns Storage's Places listing three months before Ramp Realty agreed to Google's Terms of Service. In preparing its Reply Brief, Ramp Realty realized it misread the Affidavit of Audrey Kim. Google actually admits it changed the Places listing *15* months before Ramp Realty agreed to Google's Terms of Service.

controls. *Beans v. Chohonis*, 740 So. 2d. 65, 67 (Fla. 3rd DCA 1999) ("the words used by the parties must be given their plain and ordinary meaning"); *see also* THE AMERICAN HERITAGE DESK DICTIONARY (1981), p. 191 ("Claim -- [a] demand or request for something as one's rightful due: *file a claim for losses*") (emphasis supplied).

An ordinary person would think "claim" as used in the forum selection clause means a cause of action filed against Google seeking affirmative relief from Google over something Google did wrong with the specific services Google provided under the contract. An ordinary person would not intend "claim" to be so broad as to cover the person's efforts to get information from Google about things Google did on its own 15 months before the person even agreed to be bound by Goggle's forum selection clause.

- *Hurdle no. 2 – Arises out of or Relates to "terms"*

No one has argued that Ramp Realty's bill of discovery arises out of or relates to Google's terms. (Answer Brief, pp. 13-14; Amended Initial Brief, pp. 11-12.) Thus, this Court can readily determine Google cannot clear hurdle no. 2.

- *Hurdle no. 3 – Arises Out of or Relates to "Services"*

Google cannot clear hurdle no. 3 because Ramp Realty's bill of discovery does not arise out of or relate to Google's Services. Surprisingly, Google says little about this most critical issue. All Google really says is:

> 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.

(Initial Brief, p. 15.) This argument only works if Google is allowed to erroneously conflate its mere publication of various websites own its own accord with the specific contractual relationship Google and Ramp Realty entered into in 2012. Google is really arguing that the mere fact that Google publishes information about people and businesses on various websites automatically makes these people subject to Google's Terms of Service, regardless of their actual use of the websites. Not even Google really believes this argument. If it did, Google would have told Ramp Realty process had to issue out of a Santa Clara County court when Ramp Realty asked Google in April 2012 how to get information. (*See* R. at 47-50.)

In this case, however, we are dealing with the terms of a specific contract between two parties entered into at a specific time and for a specific purpose. (R. at 25-33.) Before May 9, 2012, Google published the Google+ Local page for St.

Johns Storage of Google's own accord, without any input from Ramp Realty. Paragraph 7 of Audrey Kim's Affidavit details the formation and purpose of the contractual relationship between Google and Ramp Realty. (R. at 25.) Kim says that on May 9, 2012, Ramp Realty created a Local Business Center account for St. Johns Storage so Ramp Realty could edit the Google+ Local page for St. Johns Storage. (R. at 25.) As part of the creation of the account, Ramp Realty had to agree to Google's Terms of Service. (R. at 25.) Thus, Ramp Realty did not start using Google's Services until May 9, 2012.

Indeed, the fact that St. Johns Storage's Google+ Local page said the business was permanently closed from at least February 2011 to May 2012 shows that Ramp Realty was definitely *not* using Google's Services prior to May 9, 2012. (R. at 24-25.) No matter how much Google would like it to, Google's mere publication on its own of a Google+ Local page for St. Johns Storage does not automatically make Ramp Realty a user of Google's Services.

The information Ramp Realty's bill of discovery seeks concerns things that took place *15 months before* Google started providing Services to Ramp Realty. There is no way to say the changes Google made to St. Johns Storage's Google+ Local page in February 2011 arise out of or relate to Services Google did not even start providing until May 9, 2012. Likewise, there is no way to say the vehicle being used to get the information – Ramp Realty's bill of discovery –arises out of

or relates to Google's Services. The bottom line is the change made to St. Johns Storage's Google+ Local page that said the business was permanently closed did not happen because of Ramp Realty's use of Google's Services. According to Audrey Kim's Affidavit, the reason the changes happened had nothing to do with Ramp Realty at all. (R. at 24-25.) There is no way something can arise out of or relate to Services when those Services were not even being used.

o FISHING EXPEDITIONS

Google argues that Ramp Realty's bill of discovery fails to state a claim because Ramp Realty is on a "fishing expedition." In Ramp Realty's experience, "fishing expedition" is an overused, virtually meaningless term thrown out by litigants trying to avoid discovery.

Google readily acknowledges a pure bill of discovery "'may be used to identify potential defendants and theories of liability . . . .'" (Answer Brief, p. 21) (citing *Mendez v. Cochran,* 700 So. 2d 46, 47 (Fla. 4th DCA 1997)). This is exactly what Ramp Realty is trying to do here. Ramp Realty's Complaint specifically alleges "Plaintiff believes the false statement [on the Google+ Local page about St. Johns Storage being permanently closed] was made at the behest of a third party acting with malice toward [Ramp Realty,]" "[t]he third party has liability to [Ramp Realty] for the lost profits [Ramp Realty] suffered as a result of the false statements[,]" and "[Ramp Realty] needs to know from [Google] how and

why the false statements were made and at whose bequest the false statements were put on the websites." (R. at 2.)

While Ramp Realty has suspicions about who is behind the false statements on Google's website, it is not responsible or ethical for Ramp Realty to sue or even publicly accuse an individual of such misconduct based on mere suspicions. Doing so could even be actionable. Fortunately, Florida law provides a legal means by which to convert suspicions into a good faith basis for a lawsuit – the pure bill of discovery.

All Ramp Realty has asked Google to do at this point is respond to the following requests for production:

> 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 Maps result, as shown by way of example on 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 Maps or other search results, as shown by way of example on the attached screen print.
> 3. **Request:** All documents that discuss or concern the individual(s) involved with putting a statement that St. Johns Storage was permanently closed on Google Maps or other search results, as shown by way of example on the attached screen print.
> 4. **Request:** All documents that discuss or concern St. Johns Storage.
> 5. **Request:** All internal and external communications concerning the placement of a statement that St. Johns Storage was permanently closed on Google Maps or

> other search results, as shown by way of example on the attached screen print.

(R. at 36-37.) These requests are narrowly tailored to get the precise information Ramp Realty said it needed in its Complaint. Depending on Google's responses, Ramp Realty might follow up with limited interrogatories or perhaps a deposition. Ramp Realty has no desire to spend thousands of dollars in a vain effort to identify a defendant for a lawsuit. However, Ramp Realty did lose a large amount of money during the 15 months the Google+ Local pages said St. Johns Storage was permanently closed. Google is the best place to look for information to develop the necessary good faith basis for Ramp Realty's lawsuit against the individual it suspects of causing those losses. This is exactly what a pure bill of discovery is for. This is not a fishing expedition.

o TRADE SECRETS

Trade secrets are another red herring raised by Google. Google claims its "internal processes relating to the Google+ Local pages service . . . are trade secrets . . . ." (Answer Brief, p. 27.) Ramp Realty does not doubt that Google has trade secrets. However, a careful look at ¶ 9 of Audrey Kim's Affidavit shows that Google has not said any of Ramp Realty's requests actually call for the production of trade secret information. (R. at 24-25.)

Even if Ramp Realty's requests do call for the production of some trade secret information, the Florida Rules of Civil Procedure say how to deal with that. Rule 1.280(b)(6) says:

> When a party withholds information otherwise discoverable . . . by claiming that it is privileged . . ., the party shall make the claim expressly and shall describe the nature of the documents . . . not produced . . . in a manner that . . . will enable other parties to assess the applicability of the privilege . . . .

FLA. R. CIV. P. 1.280(b)(6). Ramp Realty has never seen another party argue that it should not have to make any response whatsoever to discovery because some of the discovery *might* call for the production of some privileged information. If Ramp Realty's requests actually do call for the production of trade secret information, then Google should say so in response to the requests. If Ramp Realty still needs the protected information, the parties can meet and confer at that time about how to preserve Google's trade secrets and involve the trial court if necessary. The possibility of having to later assert trade secret objections provide no legal basis whatsoever for the dismissal of a bill of discovery.

- GOOGLE'S CLAIM THAT IT DOES NOT HAVE ANY INFORMATION FOR RAMP REALTY

Google's argument that Ramp Realty's bill of discovery should be dismissed because Google says it does not have any information that will help Ramp Realty is another red herring. There is more than a little irony with a party clamoring for protection of its trade secrets turning around and saying it does not have any

information to produce anyway. The only things in the record other than argument of Google's counsel about what information Google has are these statements in the Affidavit of Audrey Kim:

> On or about February 15, 2011, Google 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 storage or what specifically triggered the commencement of the process.
>
> Google attempted unsuccessfully to contact someone at St. John Storage, and when the attempt failed, Google updated the Listing to reflect that St. John Storage was closed.

(R. at 24-25.) While it might be true that "Google has no records or information *specifying* why this process was started[,]" (R. at 24) (emphasis added), Kim's affidavit shows that Google has records germane to these events. We know this because Audrey Kim works in Google's legal department and acts as a records custodian. (R. at 24.) Kim certainly would not have been the actual person who "started the process" or "attempted unsuccessfully to contact someone at St. Johns storage" yet Kim somehow knows these things happened. Obviously, Kim knows the events happened because she either reviewed records herself, talked to someone who reviewed records, or both. This, of course, completely undermines Kim's statement that she made her affidavit based on personal knowledge. (*See id*.)

More importantly, however, an affidavit of questionable validity from a party saying it does not have much information (and argument of counsel that says the same thing) does not tell this Court anything about whether Ramp Realty's bill of discovery states a claim. The elements of a claim for a pure bill of discover are:

> (1) the nature and contents of documents or other matters in the defendant's possession or control, as to which discovery is prayed, (2) the matter or controversy to which the requested discovery relates, (3) the interest of each party in the subject of the inquiry, (4) the complainant's right to have the requested relief, (5) the complainant's title and interest, as well the complainant's relationship to the discovery claimed, and (6) that the requested discovery is material and necessary to maintain the complainant's claims in the prospective litigation.

Payne v. Beverly, 958 So. 2d 1112, 1114 (Fla. 5th DCA 2007) (reversing the trial court's dismissal of a pure bill of discovery and noting that any dismissal should have been without prejudice). Ramp Realty pled element 1 at ¶¶ 18-19 of its Complaint; element 2 at ¶¶ 7-9; element 3 at ¶¶ 9-13; element 4 at ¶¶ 14-17; element 5 at ¶¶ 7-14; and element 6 at ¶¶ 15-16 and 21. If Google does not have information responsive to Ramp Realty's discovery requests, it should say so in discovery responses signed by its attorney, in sworn interrogatory answers, etc. The idea that a party can avoid discovery altogether with an evasive, conclusory affidavit has no legal support whatsoever. The issue is whether Ramp Realty alleged ultimate facts for the elements of its claim, not how much information the opposing party says it might or might not have.

o COMPUTER HACKING

This is yet another red herring. Ramp Realty alleged in its Complaint that it "believes the false statements [made on the Google+ Local page for St. Johns Storage were] made at the behest of a third-party acting with malice toward [Ramp Realty]." (R. at 54.) In its Amended Initial Brief, Ramp Realty said it "believes someone 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 the storage business." (Amended Initial Brief, p. 1.) For some reason, Google has taken this statement and built an argument around it that Ramp Realty had to somehow argue hacking below. (Answer Brief, p. 32.) Obviously, Ramp Realty does not know how or why the Google+ Local page got changed to say St. Johns Storage was permanently closed. Indeed, finding out how and why is the reason Ramp Realty filed a bill of discovery. Ramp Realty's statement in its Amended Initial Brief represents the three most likely reasons why the change was made, and ¶ 14 of Ramp Realty's Complaint subsumes these reasons. Ultimately, however, it does not matter what Ramp Realty thinks about the specifics of how or why the Places listing got changed. The specifics are Google's purview. All that matters is Ramp Realty adequately alleged a third party acting with malice took action to cause the listing to be changed, and Google has information about the specifics.

o CONCLUSION

Google's forum selection clause does not apply to Ramp Realty's bill of discovery because the bill is not a claim. Even if the bill is a claim, the clause still does not apply because the bill does not arise out of or relate to Services Google provided to Ramp Realty. The bill of discovery concerns changes Google made to the Google+ Local page for St. Johns Storage without any involvement from Ramp Realty. Google made these changes 15 months before Google and Ramp Realty entered into a contractual relationship. Something that happened without one party's input 15 months before a contractual relationship was formed does not arise out of or relate to any aspect of the later formed contract. The trial court's dismissal of Ramp Realty's bill of discovery should be reversed.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been served this 14th day of August, 2013 via electronic and regular mail to Samuel A. Lewis, Esq. at slewis@FeldmanGale.com.

CERTIFICATE OF COMPLIANCE

I certify that the brief above complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

JEB T. BRANHAM, P.A.

Jeb T. Branham, Esquire
Fla. Bar No. 0296030
3500 Third Street South
Jacksonville Beach, Florida 32250
Phone: (904) 339-0500
Fax: (904) 339-0501
Primary: jeb@jebbranham.com
Secondary: denise@jebranham.com