

**COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT**

SUFFOLK, ss

)	MISCELLANEOUS CASE
)	NO. 20 MISC 000321 (RBF)
PHILIP A. RACCUIA, Trustee)	
NICHOLAS REALTY TRUST)	
)	
Plaintiff,)	
)	
v.)	
)	
CYNTHIA MEI CHEN and)	
JUN RONG CHEN)	
)	
)	
Defendants.)	
)	

MEMORANDUM AND ORDER DENYING PLAINTIFF’S MOTION *IN LIMINE*

Introduction

The trial for this case is scheduled to begin on April 10, 2023. Plaintiff Philip A. Raccuia, Trustee of the Nicholas Realty Trust (Raccuia) submitted a Motion *In Limine* to Exclude from Evidence at Trial All Google-Originated Photographs (Motion *In Limine*) on March 27, 2023, and Defendants Cynthia Mei Chen and Jun Rong Chen (the Chens or Chen) filed Defendants’ Opposition to the Motion *In Limine* (Chen Opp.) on March 30, 2023. The court heard the Motion *In Limine* on March 31, 2023, and denied it without prejudice to renewing objections at trial. This memorandum and order follows.

Discussion

Raccuia argues in his motion that the Chens cannot properly authenticate photographs originating from Google Earth or Google Maps absent extrinsic evidence proffered by the Chens

regarding Google's photographing system. In response, the Chens argue that having lived at the property during the years depicted by the Google Earth images, they will be capable of authenticating the Google-derived photographs using the authentication procedure explicitly authorized by Massachusetts Guide to Evidence.

Under § 1119 of the Massachusetts Guide to Evidence, the "same principles of evidence that apply to documentary evidence apply to digital evidence in courtroom and virtual proceedings." Mass. G. Evid. § 1119(b) (2022). Digital evidence must be authenticated to be admissible. Authentication requires the offering party to produce evidence of "confirming circumstances that would allow a reasonable fact finder to conclude that this evidence is what is proponent claims it to be." *Id.* at § 901(b)(11); see *id.* at § 1119, Note at 529-530 (judge to find that "the party offering digital evidence has produced sufficient evidence so that a reasonable person could find that the digital evidence is more likely than not what the offering party claims it is." Possible methods to establish the authenticity of digital evidence are: (1) testimony of a witness with personal knowledge about what appears in a photograph (even if the witness did not take the photograph); (2) testimony of a witness providing "confirming circumstances" that the digital evidence was created by a particular person; or (3) testimony of an expert or a person familiar with the system that created the digital evidence. *Id.* at § 1119, Note at 530.

There are many ways a witness can provide "confirming circumstances." See *Commonwealth v. Purdy*, 459 Mass. 442 (2011) (the "confirming circumstances" adequate to meet the authentication threshold included confirmation that the emails originated from an account bearing the defendant's name and acknowledged to be used by the defendant; confirmation that the defendant owned the hard drive on which the emails were found; and the presence of a photograph of the defendant attached to one of the emails); *Commonwealth v.*

Anderson, 404 Mass. 767, 770 (1989) (telephone call was sufficiently authenticated where a witness placed a telephone call to a “land-line” telephone number located in an apartment in which the defendant was the only male resident, where the male answering the telephone had the same voice as the male who had answered previous telephone calls to that number, and where the male provided information during the telephone call that confirmed his identity as the defendant). The judge does not decide whether the proponent has actually proved that the digital evidence is authentic – he only decides if there is enough evidence that would, if believed, permit the trier of fact to conclude that the digital evidence is authentic. *Commonwealth v. Meola*, 95 Mass. App. Ct. 303, 308-309 (2019). While the mere possibility that digital evidence may have been altered affects the weight of the evidence, it is not, without more, a reason to exclude it. *Purdy*, 459 Mass. at 450.

The admissibility of Google Earth photographs and Google Maps (Google photographs or Google photos) and the process by which they can be authenticated is a question on which there is little guidance in Massachusetts caselaw. Judge Roberts noted in *Kane v. Harrington* that the moving party did not cite “to Massachusetts authority for the proposition that Google Earth photographs [were] admissible without further authentication.” *Kane v. Harrington*, 30 LCR 579, 580 n.3 (2022) (Roberts, J.). The standard rule for photographs is that they “usually are authenticated directly through competent testimony that the scene they show is a fair and accurate representation of something the witness actually saw.” *Commonwealth v. Figueroa*, 56 Mass. App. Ct. 641, 646 (2002). But there is little further Massachusetts case law on issues surrounding the authentication of Google photographs or aerial photographs. The court therefore looks to case law in other states and jurisdictions for guidance on this issue.

Generally, in other states, when the purpose of the Google photo is to identify a property's general characteristics or its general location, the authentication requirements are the same as for a regular photograph. See *City of Miami v. Kho*, 290 So. 3d 942, 944-945 (Fla. Dist. Ct. App. 2019) (to authenticate photographic evidence, one can use the "pictorial testimony" method, which requires a witness with personal knowledge to testify that the image fairly and accurately depicts a scene; or, one can use the "silent witness" method, where a photograph can be admitted upon proof of the reliability of the process which produced the tape or photo. Such proof could include evidence establishing the time and date of the photographic evidence); *Hensel v. Childress*, 145 N.E.3d 1159, 1162 (Ohio Ct. App. 2019) ("Authentication of photographs simply requires that a witness, based on his familiarity with the subject matter of the photographs, establish that the photographs depict what the proponent claims they represent."). As discussed, in Massachusetts this would be evidence that that the scene the photograph shows is a fair and accurate representation of something the witness actually saw. *Figueroa*, 56 Mass. App. Ct. at 646; Mass. G. Evid. § 1119(b).

If the purpose of the Google photo is more specific than confirming the general location or characteristics of a property – if, for example, the photograph is being used to identify a specific characteristic of land at a single point in time, or to measure the distance between the land and some other landmark – additional authentication may be required. See *Jones v. Mattress Firm Holding Corp.*, 558 S.W. 3d 732, 738 (Tex. App. 2018) (the presence of computer-generated dates on Google Earth photos, absent additional evidence confirming these dates, was not enough to authenticate such dates, rendering the photos inadmissible); *United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1110 (9th Cir. 2015) ("when faced with an authentication objection, the proponent of Google-Earth-generated evidence would have to establish Google

Earth's reliability and accuracy," a burden which could be met "with testimony from a Google Earth programmer or a witness who frequently works with and relies on the program."); *Diaz v. County of Ventura*, C.D. Cal., No. CV194695DMGAGR (Nov. 22, 2021) (district court excluded images from Google Earth when the proponent "provide[d] no explanation of the methodology he used to place these figures and calculate the measurements, or whether this [was] a well-accepted methodology within the field of reconstruction.").

Regarding aerial photographs generally, many courts have equated them to regular photographs that require the same authentication methods. See *Corsi v. Town of Bedford*, 58 A.D. 3d 225, 261 (N.Y. App. Div. 2008) ("A photograph is generally admissible as a depiction of a fact in issue upon proof of its accuracy by the photographer or upon testimony of one with personal knowledge that the photograph accurately represents that which it purports to depict . . . Aerial photographs are admissible on the same basis."); *State v. Brownlee*, 501 S.W. 3d 556 (Mo. Ct. App. 2016) (Aerial photo was deemed to be authenticated when an officer with the Perry County Sheriff's Department, who had 15 years of experience with the Department and was personally familiar with the streets, buildings, and area identified by the photograph, confirmed that the photograph accurately depicted the streets, buildings, and area at issue.); *Henry v. McKinney*, 342 So. 3d 985, 993 n.4 (La. Ct. App. 2022) (Appeals Court held, in relevant part, that the trial court erred in finding that the plaintiff's testimony confirming the aerial photograph depicted his property was insufficient to authenticate aerial photographs.); *Hubert v. City of Marietta*, 224 Ga. 706, 709 (1968) ("We see no reason why a different rule should be applied to aerial photographs than is applied to other photographs offered in evidence.").

If a party is unable to authenticate a Google photo in the above-mentioned ways, it could alternatively offer proof that the Google photo is computer-generated and required no human participation in its creation. In *Commonwealth v. Davis*, 487 Mass. 448 (2021), the court – while not adjudicating on authentication – held that computer-generated maps (maps created solely by the mechanical operation of a computer that do not require human participation) are not hearsay. *Davis*, 487 Mass. at. 465. If a party can prove that a Google photo is computer-generated, this proof will not be hearsay and can therefore be used as an alternative form of authentication. If, for example, a party can prove that a timestamp on a Google photo was computer-generated, this will constitute authentication that the timestamp reflects the exact time at which the Google photo was taken.

The Chens assert in their opposition that they intend to use aerial Google Earth images from 12 different dates over the course of 16 years to confirm the existence and appearance of a particular fence situated on the Chens’ parcel and a dirt mound in the area. Chen Opp. at 5. Sufficient authentication of these photographs will largely depend on what the photographs are used for. If, for example, the Chens use the photographs to prove that the fence has been on the parcel consistently throughout the 16-year period, it is likely that the most basic form of authentication– testimony of a witness with personal knowledge about what is represented in the photograph – will be sufficient. *Figueroa*, 56 Mass. App. Ct. at 646; Mass. G. Evid. §1119(b). However, if the Chens do not have a witness who can so testify or if they seek to use the photographs to prove something beyond what they show, additional evidence beyond testimony of a witness with personal knowledge is required.

Such additional evidence will largely depend on what the Chens seek to prove. As discussed, other courts often require testimony of an expert or a person familiar with the system

that created the digital evidence when trying to prove that a photograph was taken on an exact date. However, if the Chens can prove that the Google photo was computer-generated without human participation, this evidence will be sufficient to authenticate the photo. Alternatively, confirming circumstances such as independent photographs taken by the residents from that time period or witness testimony about the general appearance of the parcel during that time period may be sufficient to authenticate the photograph.

While the way the Chens will need to authenticate any Google photos they seek to admit into evidence cannot be known until the purpose of the photographs and maps is disclosed, Google Earth photographs, Google Maps, and aerial photographs generally can all be effectively authenticated. Raccuia's claim that the Chens will not be able to authenticate Google photos absent testimony from an agent of Google or its affiliates is erroneous.

For the foregoing reasons, the Motion in Limine is **DENIED** without prejudice to renewing objections at the time of trial.

SO ORDERED.

By the Court. /s/ Robert B. Foster, J.

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson
Recorder

Dated: April 4, 2023