IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNCIL ON AMERICAN-ISLAMIC RELATIONS ACTION NETWORK, INC., *et al*.,

Plaintiffs,

-v.-

DAVID GAUBATZ, *et al*.,

Defendants.

CIVIL NO: 1:09-cv-02030-CKK-JMF

MEMORANDUM OF POINTS & AUTHORITIES

IN SUPPORT OF

DEFENDANTS' MOTION FOR RECONSIDERATION

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INTRODUCTION

The history of this litigation is long and somewhat convoluted. It began on October 29, 2009, with the filing of the original complaint ("Complaint" [Doc. No. 1]). That complaint was followed by a first amended complaint ("FAC" [Doc. No. 75]), which was followed by a second amended complaint ("SAC" [Doc. No. 76]), which in turn was followed by the extant third amended complaint ("TAC" [Doc. No. 126]). The TAC was filed a year into discovery on September 17, 2012. Formal discovery in this case was lengthy, beginning in September 2011 and continuing until January 18, 2013. (Scheduling and Procedures Order [Doc. No. 99]).

This court has done a remarkable job working its way through the often complicated issues, having rendered two prior opinions on multiple motions directed at the pleadings[1] and now on the parties' respective motions for summary judgment. (Mem. & Op. [Doc. No. 172]).[2]

However, despite the court's best efforts, Defendants contend that the court made several fundamental errors in its ruling on Defendants' motion for summary judgment, warranting the filing of this motion for reconsideration.[3]

[1] *Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311 (D.D.C. 2011) ("*CAIR II*") (ruling on the Gaubatz Defendants' motion to dismiss); *Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz*, 891 F. Supp. 2d 13 (D.D.C. 2012) ("*CAIR III*") (ruling on the CSP Defendants' motion to dismiss).

[2] The court's ruling on the parties' motions for summary judgments can be found at *Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz*, Civil Action No. 09-02030 (CKK), 2014 U.S. Dist. LEXIS 40581 (D.D.C. Mar. 27, 2014) ("*CAIR IV*"). However, throughout this memorandum, Defendants cite to the court's "Memorandum and Opinion" (Doc. No. 172) filed in the case. (Mem. & Op.).

[3] The moving Defendants herein are Center for Security Policy ("CSP"), Christine Brim ("Brim"), Society of Americans for National Existence ("SANE"), David Yerushalmi ("Yerushalmi"), David Gaubatz, and Chris Gaubatz.

STANDARDS OF REVIEW

A. Motion for Reconsideration.

This court has "broad discretion" to hear and decide Defendants' motion for reconsideration, which is brought under Rule 54(b) of the Federal Rules of Civil Procedure. *See Isse v. Am. Univ.*, 544 F. Supp. 2d 25 (D.D.C. 2008) (J. Kollar-Kotelly) ("The Court has broad discretion to hear a motion for reconsideration brought under Rule 54(b). . . ."); Fed. R. Civ. P. 54(b) ("[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."). More specifically, as this court stated in *Isse v. American University*:

> The standard for determining whether or not to grant a motion to reconsider brought under Rule 54(b) is the "as justice requires" standard espoused in *Cobell v. Norton*, 355 F. Supp. 2d 531, 539 (D.D.C. 2005), which requires "determining, within the Court's discretion, whether reconsideration is necessary under the relevant circumstances." *Id. See also Singh v. George Washington University*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005). Considerations a court may take into account under the "as justice requires" standard include whether the court "patently" misunderstood the parties, made a decision beyond the adversarial issues presented, made an error in failing to consider controlling decisions or data, or whether a controlling or significant change in the law has occurred. *See Singh*, 383 F. Supp. 2d at 101. The party seeking reconsideration bears the burden of proving that some harm would accompany a denial of the motion to reconsider; "[i]n order for justice to require reconsideration, logically, it must be the case that, some sort of 'injustice' will result if reconsideration is refused. That is, the movant must demonstrate that some harm, legal or at least tangible, would flow from a denial of reconsideration." *Cobell*, 355 F. Supp. 2d at 540.
>
> *Cobell* also suggests that even if justice does not "require" reconsideration of an interlocutory ruling, a decision to reconsider is nonetheless within the court's discretion: "[E]ven if the appropriate legal standard does not indicate that reconsideration is warranted, the Court may nevertheless elect to grant a motion for reconsideration if there are other good reasons for doing so." *Id.* However, the efficient administration of justice requires that a court at the very least have good reason to reconsider an issue which has already been litigated by the parties. "The district court's discretion to reconsider a non-final ruling is [ ] limited by the

> law of the case doctrine and 'subject to the caveat that where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.'" *Singh*, 383 F. Supp. 2d at 101 (quoting *In re Ski Train Fire in Kaprun, Austria, on November 11, 2004*, 224 F.R.D. 543, 546 (S.D.N.Y. 2004)). Thus, if the court chooses to reconsider a motion even if justice does not so require, there must be a "good reason" underlying the parties' re-addressing an already decided issue.

Isse v. Am. Univ., 544 F. Supp. at 29-30. As set forth below, reconsideration is necessary under the circumstances. Indeed, not only does this court have "good reason" to reconsider the issues presented below, but justice so requires.

B. Motion for Summary Judgment.

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and [that he] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Indeed, the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotations omitted).

Consequently, to defeat a motion for summary judgment, the non-movant must cite to specific facts in the record. *See* Fed. R. Civ. P. 56(c). Conclusory assertions are insufficient to create a *genuine dispute* sufficient to survive summary judgment. *Ass'n of Flight Attendants-CWA, AFLC-CIO v. U.S. Dep't of Transp.*, 564 F.3d 462, 465-66 (D.C. Cir. 2009); *Poullard v. Smithkline Beecham Corp*., No. 02-1590, 2005 U.S. Dist. LEXIS 35182, at *45-*46 (D.D.C. Nov. 30, 2005) (Kollar-Kotelly, J.) (holding that conclusory, self-serving affidavits do not create a material fact dispute on a matter for which the party has the burden of proof). Indeed, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986).

ARGUMENT

I. The Court's Ruling on *Respondeat Superior* Liability Was Error.

The court's ruling on the issue of *respondeat superior* was wrong for at least three reasons. First, in *CAIR III* the court foreclosed primary liability as against the CSP Defendants based upon a principle's vicarious liability for the wrongs of its agent without even suggesting that it was limiting its ruling to a principle-agent relationship as opposed to a new theory of subagency involving a principle appointing an agent, who in turn becomes a principal/appointing agent of yet another agent. Second, even if we were to read *CAIR III* in the way this court suggests in its Memorandum and Opinion—*i.e*., that *CAIR III* somehow left the door open to this new theory—subagency is not even inferentially alleged in the TAC nor are the facts alleged to provide this court with a foothold to craft such a theory on behalf of Plaintiffs. As such, even if the court somehow understands Plaintiffs' opposition to Defendants' motion for summary judgment to "appear to be alleging a different theory of *respondeat superior*,"[4] this effort to amend the pleadings through a vague argument raised only by implication and only in Plaintiffs' opposition papers to a motion for summary judgment is unavailing. Third, even if we were to assume such a theory were possible given the extant allegations of the TAC, the court has ignored the substantive doctrine of subagency that extends the liability to the employer-principal and not to supervisory co-employees or co-agents in the employer's hierarchy. We treat each of these in turn.

A. *CAIR III* Foreclosed *Respondeat Superior* Liability.

In order to extend vicarious liability under the Federal and D.C. Wiretap Acts[5] and the

[4] (Mem. & Op. at 48).

[5] Federal Wiretap Act (Title I of the ECPA), 18 U.S.C. §§ 2510-2522, and the D.C. Wiretap Act, D.C. Code §§ 23-541-23-556.

SCA[6] to the moving Defendants,[7] the court held in its Memorandum and Opinion that its previous ruling foreclosing primary liability against the CSP Defendants[8] somehow kept the door open to a subagency theory because the court only confronted an argument Plaintiffs made about Chris Gaubatz's agency with CSP. (Mem. & Op. at 48, 56). But given the facts alleged in the SAC, the TAC, and the actual language used by the court in *CAIR III*, it is hard to square *CAIR III* with the court's current willingness to allow this argument at this stage and to do so by virtue of an effort by the court to effectively craft a legal argument for Plaintiffs that they themselves have not made.

We note initially that the very question of agency and *respondeat superior* liability was raised by Plaintiffs in *CAIR III* as an effort to extend vicariously primary liability under the SCA to CSP (but not to Brim or the other CSP Defendants), only after Defendants had established that there was no vicarious liability under the SCA (or the Federal and D.C. Wiretap Acts). In the court's own words:

> First, Plaintiffs confine their argument to CSP. Plaintiffs do not contend that they have adequately pled a claim for primary liability against the remaining CSP Defendants: Christine Brim, Adam Savit, and Sarah Pavlis. **Accordingly, Plaintiffs have conceded that they cannot pursue claims against these three defendants under a theory of primary liability**.
>
> Second, as to CSP, Plaintiffs' primary liability theory is a recent invention, raised for the very first time in opposition to the CSP Defendants' Motion to Dismiss. . . . Significantly, when they set forth the scope of their claim in the Second Amended Complaint, **Plaintiffs asserted only that CSP "conspired with" and "aided and abetted" Chris Gaubatz in violating the statute. (Second Am. Compl. ¶¶ 82-83.) Nowhere in their description of Count Two did Plaintiffs even intimate that CSP could be held liable under a theory of primary liability and/or as Chris Gaubatz's alleged principal. (*See id*. ¶¶ 79-85.)** "It is

[6] Stored Communications Act (Title II of the ECPA), 18 U.S.C. §§ 2701-2712.

[7] SANE, while a moving Defendant, is not, per the Memorandum and Opinion, subject to *respondeat superior* liability. Chris Gaubatz, while a moving Defendant, is presumably not subject to *respondeat superior* liability per the TAC.

[8] The court referred to CSP, Brim, Adam Savit, and Sarah Pavlis as "CSP Defendants." (Mem. & Op. at 10).

> axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Arbitraje Casa de Cambio, S.A. de C.V. v. U.S. Postal Serv*., 297 F. Supp. 2d 165, 170 (D.D.C. 2003) (quotation marks omitted). ***For this reason alone*, Plaintiffs' newly minted primary liability claim against CSP must fail.**

CAIR III at 28 (emphasis added). Thus, the court did not rule out "agency" liability simply because the claim was that Chris Gaubatz was CSP's agent as opposed to an agent of David Gaubatz, who in turn was an agent of CSP. Rather, the court quite explicitly and unmistakably examined the pleadings and found that there simply were no allegations of vicarious primary liability, but rather only allegations of conspiracy and aiding and abetting between Chris Gaubatz and CSP. That is, the court recognized quite correctly that allegations of conspiratorial agreements or efforts to aid and abet do not include the requisite factual allegations to establish an agency, wherein issues such as control, are paramount.

This quite explicit ruling by the court in *CAIR III* places in high relief the court's professed rationale for finding that subagency was not "foreclosed":

> The Court notes that *CAIR III* did not specifically foreclose this avenue. *See* 891 F. Supp. 2d at 28 (stating that in the Third Amended Complaint, "Plaintiffs specifically identify several agreements that they claim provide the structure to the alleged conspiracy between the Defendants, all of which were entered into by David Gaubatz, not Chris Gaubatz.").

(Mem. & Op. at 48; *see also id*. at 56). But how do references to allegedly conspiratorial agreements provide anyone with any notice of *respondeat superior* liability and beyond that notice of a subagency theory? The court's central rationale in *CAIR III* denying primary liability was the fact that there were only allegations of conspiratorial agreements and aiding and abetting. How do these same fatal defects turn themselves inside out and become subagency saviors?

Further, it was only after its unequivocal ruling that Plaintiffs had failed to make out any claim of primary liability against CSP (and failed to even mention Brim) that the court added the

dicta cited to above about the conspiratorial agreements entered into by David Gaubatz, as opposed to Chris Gaubatz, in an effort to examine the specific allegations regarding the lack of a direct relationship between Chris Gaubatz and CSP. (*Id*. at 28-29). While we will return to this *dicta* to compare the failure of the SAC allegations to the failure of the TAC allegations to support *respondeat superior* liability below, the fact remains that it was just that—*dicta*. Moreover, when the court rendered its bottom line order on primary liability as an extant claim, the court held *without any qualifications*, or, for that matter, without even a hint of some special exception to a primary liability based on subagency, that "Count Two of the Second Amended Complaint (Stored Communications Act) shall be DISMISSED (1) against the CSP Defendants (and any other Defendant) insofar as Plaintiffs rely on a theory of secondary liability and (2) against the CSP Defendants ***insofar as Plaintiffs rely on a theory of primary liability***." (*Id*. at 29 [emphasis added]). And as the court noted, this ruling would also apply to any claim of "agency" liability under the Federal and D.C. Wiretap Acts. (*Id*. at 25, n.4). Allowing a subagency claim of primary liability at this stage is in effect to blindside Defendants only after the court informed them to put this claim behind them and move on to other defenses.

Finally, we also note that when, in *CAIR III*, the court ruled on the motion for leave to allow the TAC, the court expressly ruled that any parts of the court's analysis dismissing or foreclosing liability of the SAC would apply to render such claims under the TAC futile. (*Id.* at 34 ["However, to the extent Defendants' arguments mirror those arguments concerning Counts One and Two of the Second Amended Complaint first raised in the CSP Defendants' Motion to Dismiss, the Court concurs that amendment is futile for the reasons set forth in detail previously. (*See supra* Part III.A.)."])

Given the court's expressed rulings in *CAIR III*, the court is simply wrong that *respondeat superior* liability survives, and the court should reverse its ruling in the

Memorandum and Opinion and grant summary judgment in favor of the moving Defendants on the issue of *respondeat superior* liability.

B. The TAC Fails to Allege Primary Liability against CSP, Brim, SANE, or Yerushalmi.

Even if we were to assume *arguendo* that *CAIR III* did not foreclose primary liability based upon a theory of subagency, there is simply no basis to craft this argument out of the TAC, and this is especially true given the court's analysis of this issue in *CAIR III* relative to the SAC. We begin by noting that it is obvious that the TAC nowhere expressly sets out a claim of *respondeat superior* liability against any of the Defendants, much less one based upon subagency. Indeed, the only time the TAC even mentions the word agent in this context is at paragraph 22, wherein it alleges that the Mapping Sharia project related "SANE-Gaubatz Agreement," attached as Exhibit A to the TAC, somehow created an agency between SANE and Yerushalmi on the one hand as principals, and David Gaubatz as agent on the other. (TAC at ¶ 22; *see also* Ex. A to TAC). But beyond the factually erroneous[9] reference to a contractual agency, there is absolutely no other allegation in the TAC that even remotely creates an agency relationship between the parties. A careful review of the TAC demonstrates this point beyond question:

- In its introductory allegations, the TAC speaks of Defendants as a collective operating together, not as principal and agent. (TAC at ¶¶ 1-5).
- Even after erroneously describing the Mapping Sharia related agreement to be an agency creator in paragraphs 22-25, when describing why Chris sought an internship at Plaintiffs, the TAC describes the impetus as pursuant to a conspiracy, and there is no hint that Chris

[9] The parties and the court all recognize as an undisputed fact that the Mapping Sharia Project had nothing to do with the CAIR Documentary Film Project and the agreement referenced did not and could not have created an agency relationship relative to the CAIR Documentary Film Project. (Mem. & Op. at 5 [describing the "unrelated project entitled 'Mapping Sharia'"]).

Gaubatz was an agent or subagent of anyone. (TAC at ¶26).

- At paragraph 29 of the TAC wherein Plaintiffs seek to implicate Yerushalmi, Plaintiffs might have alleged some agency-like relationship, but instead alleged that Yerushalmi provided "advice and assistance" as the attorney for the CAIR Documentary Film Project. (TAC at ¶ 29).
- At paragraph 40, the TAC again simply refers to a conspiracy as the relationship between Defendants. (TAC at ¶ 40).
- At paragraph 41, the TAC only describes Chris Gaubatz as the "chief field investigator" for David Gaubatz but nowhere provides any ***facts*** about what that relationship was. (TAC at ¶ 41). Thus, we do not know whether that was a contractual arm's length relationship with no control or an employer-employee relationship.
- Immediately thereafter, the TAC makes reference to agreements entered into between Chris Gaubatz and David Gaubatz with CSP. (TAC at ¶¶ 42-45). Again, there is no hint in these allegations that these agreements are anything but the predicate to the conspiracy theory proffered by the TAC. Moreover, Chris Gaubatz is not positioned as a "sub" player in these agreements subject to control and direction, but positioned equal to David Gaubatz, which befits a conspiracy and not a subagency theory.
- At paragraphs 48 and 50, the TAC simply notes that Chris Gaubatz delivered items to David Gaubatz, but again without a hint that he was acting as an agent or subagent or under anyone's control, but rather as a co-conspirator. (TAC at ¶¶ 48, 50).
- At paragraph 54, the TAC makes the point that David Gaubatz delivered materials to CSP not out of an agency relationship, but as a result of a settlement agreement with SANE, which is attached as Exhibit C to the TAC. (TAC at ¶ 54). Moreover, there is no dispute that this settlement agreement related to the Mapping Sharia Project and not the

CAIR Documentary Film Project. (Defs.' Facts in Supp. of Summ. J. [Doc. No. 154] at ¶ 51; *see also* Pls.' Opp'n Facts [Doc. No. 164-1] at ¶ 51 [not disputing any fact alleged]).

- At paragraphs 54-57, the TAC expressly describes Brim's involvement as a co-conspirator and not as a principal or appointing agent as would be the case in a subagency context. (TAC at ¶¶ 55-57).
- Tellingly, in the wrap up to the general allegations of the TAC, as was the case in the introductory paragraphs, Plaintiffs only mention Defendants acting equally and collectively, fitting quite appropriately within the framework of a conspiracy theory but contrasting quite discordantly with an agency relationship of control—either an agency between David Gaubatz and the moving Defendants or between David Gaubatz and Chris Gaubatz. (TAC at ¶¶ 75-78).
- In the allegations specific to the Federal and D.C. Wiretap Act violations, Plaintiffs allege only procurement, conspiracy, and aiding and abetting. (TAC at ¶¶ 85-87). Nowhere in the complaint to this point, either in the general allegations or the specific wiretap allegations, do Plaintiffs even hint that David Gaubatz was an agent for CSP or Brim. Nowhere do they allege control or any other fact that might suggest as much. Indeed, there is nothing more here than existed in the SAC, which the court rejected in its *dicta*.

Thus, the court's *dicta,* going beyond its legal ruling into the "counterfactual" realm, explained:

> Moreover, even assuming, counterfactually, that Plaintiffs had asserted a primary liability claim against CSP in the Second Amended Complaint, that claim would still fail. According to Plaintiffs, "[s]everal facts support a finding that CSP and Chris Gaubatz consented to a principal-agent relationship, including [1] Gaubatz's delivery of stolen documents to CSP pursuant to a prior agreement, [2] Gaubatz and CSP being a party to an agreement for Gaubatz to pursue an internship with Plaintiffs under an assumed identity and steal confidential documents and record oral conversations, [3] Chris Gaubatz and CSP being party to at least two written agreements for Gaubatz to give CSP documents stolen from Plaintiffs[,] . . . . [4] Gaubatz informing CSP of the confidentiality agreement he signed with Plaintiffs, and [5] Gaubatz and his father giving documents and at least 51 discs of

> recordings and oral communications to CSP." (*Id*. at 11 (citing Second Am. Compl. ¶¶ 4, 19, 31, 35, 44) (citations omitted).)
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> * * *
>
> But a more pressing problem is that the five allegations that Plaintiffs rely upon, whether they are considered together or independently, do not plausibly suggest that an agency relationship existed between CSP and Chris Gaubatz. Most notably, these allegations do not suggest that CSP had "the right to control and direct [Chris Gaubatz] in the performance of his work and the manner in which the work [was] to be done"—the *sine qua non* of an agency relationship. *Judah v. Reiner*, 744 A.2d 1037, 1040 (D.C. 2000) (quotation marks omitted). Nor do these five allegations indicate that CSP selected and engaged Chris Gaubatz, paid Chris Gaubatz wages, had the power to discharge Chris Gaubatz, or that Chris Gaubatz's duties were part of CSP's regular business. *See id*. At best, Plaintiffs' allegations suggest that CSP and Chris Gaubatz had an ordinary, arms-length contractual relationship. Plaintiffs' allegations simply do not plausibly suggest that an agency relationship existed between CSP and Chris Gaubatz. Accordingly, Plaintiffs may not pursue a claim for primary liability against CSP.

CAIR III at 28-29. This analysis by the court in *CAIR III* of Chris Gaubatz's relationship applies equally to an agency theory or subagency theory that requires David Gaubatz to be an agent of CSP, Brim, SANE, or Yerushalmi. There are no factual allegations that even suggest that David Gaubatz was an agent of CSP, and this applies with greater force in the case of Brim, with whom the Gaubatz Defendants had no contractual relationship at all. And other than the entirely conclusory and patently false allegations that the Mapping Sharia related agreement created some kind of agency, and without any facts providing any of the elements of agency actually alleged, there are no extant factual allegations to create an agency relationship between SANE and Yerushalmi on the one hand and David Gaubatz on the other.

- In the allegations specific to the SCA violations, again Plaintiffs only allege conspiracy and aiding and abetting. There is no hint of *respondeat superior* liability applying to any Defendant. (TAC at ¶¶ 92-93).
- Indeed, even if we look beyond the general and specific allegations of the TAC relevant to the wiretap and SCA allegations and cast out a net to the common law counts, there is no bait there either. (TAC at ¶¶ 97-100 [conversion: treating all Defendants on equal

terms]; TAC at ¶¶ 106-07 [breach of fiduciary duty: only alleging conspiracy and aiding and abetting]; TAC at ¶¶ 115-18 [breach of contract: only alleging inducement, conspiracy, and aiding and abetting]; TAC at ¶ 124 [interference with contract: only alleging "inducing, assisting, participating in"]; TAC at ¶¶ 131-33 [trespass: only alleging inducement, conspiracy, and aiding and abetting]; and TAC at ¶¶ 161-63 [trade secrets: only alleging inducement, conspiracy, and aiding and abetting]).

- In the fraud count of the TAC, Plaintiffs uniquely return to allegations about underlying agreements. Specifically, at ¶ 150 of the TAC, Plaintiffs simply re-allege, and again falsely, that the Mapping Sharia related agreement between SANE and David Gaubatz made David Gaubatz an agent. But this single, bare-boned conclusory allegation could not possibly give rise to a "subagency" theory of *respondeat superior* liability as now proposed. First, this agreement had nothing to do with the CAIR Documentary Film Project. Second, it provides zero factual allegations—beyond the mere existence of an arm's length agreement—that the agreement provided SANE or Yerushalmi with any control over the Gaubatz Defendants relative to the CAIR Documentary Film Project. That is to say, it uses the word "agent" in a wholly conclusory fashion without alleging any facts. *See, e.g., CAIR III* at 21 (stating that "a plaintiff must furnish 'more than labels and conclusions' or 'a formulaic recitation of the elements of a cause of action") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). And third, and most important, the allegation itself does not put Chris Gaubatz in some chain of agency but rather suggests some kind of conspiracy centered around an agreement wherein David Gaubatz is an agent. To require Defendants to have divined a critical and critically important subagency theory from this single allegation citing to an agreement that does not even apply to the CAIR Documentary Film Project would be to violate the "fair notice"

requirement that exists under Rule 8(a) of the Federal Rules of Civil Procedure. *See, e.g.*, *CAIR III* at 21 (describing the requirement "to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests'") (quoting *Twombly*, 550 U.S. at 555). The same problems exist with the allegations of the CSP agreement. (TAC at ¶ 151). But beyond all of these problems, which mirror the problems raised by the court's rationale in *CAIR III* for rejecting primary liability against CSP, these allegations relating to fraud do not even begin to touch the purported allegations relating to a subagency under the Federal and D.C. Wiretap Acts and the SCA.

Quite simply, and Defendants believe quite evidently, to the extent that the conspiratorial agreements in *CAIR III* did not suffice to provide notice of *respondeat superior* liability against CSP and all such claims were thus dismissed, this must also be the case relative to a theory of subagency where there must be separate allegations of an agency relationship between each defendant and David Gaubatz and between David Gaubatz and Chris Gaubatz as part of a single chain that runs from Chris Gaubatz to David Gaubatz to the principal. Those allegations do not exist.

Given the failure of the TAC allegations to put Defendants on notice of a subagency theory, an analysis the court did not even undertake, the court seems to go to some lengths to fathom a subagency from Plaintiffs' opposition brief. (Mem. & Op. at 48 ["However, at the summary judgment stage, Plaintiffs ***appear to be alleging*** a different theory of *respondeat superior* liability than the one rejected by the court in *CAIR III*. Plaintiffs now argue that David Gaubatz was an agent of the remaining Defendants." (emphasis added)]). But just because "Plaintiffs now argue that David Gaubatz was an agent" does not provide a basis in the pleadings to make this argument. Indeed, as we've demonstrated above, the TAC is no less flawed than the SAC was shown to be by the court in *CAIR III*.

And to the extent that Plaintiffs' motion for summary judgment papers have somehow sought to amend the allegations of the TAC to allege this theory (and to amend the pleadings regarding the Mapping Sharia related agreement, which could not have provided an agency relationship for the CAIR Documentary Film Project as a matter of undisputed fact), this effort could—and should—be informed by the court's ruling on the breach of contract and tortious interference with contractual relations claims. In its discussion of the contract claims, the court stated the following:

> Plaintiffs' Complaint clearly alleges breach of a contractual relationship with one Plaintiff, CAIR-AN. Now, Plaintiffs are attempting to prove breach of a contractual relationship with another Plaintiff, CAIR-F. Having learned that the contractual relationships were different from what Plaintiffs assumed when drafting the Third Amended Complaint, they could have easily sought leave to amend their Complaint again to correct these allegations in light of discovery. Indeed, such leave likely would have been granted, in light of the absence of prejudice to Defendants from simply having the Complaint conform to the record as viewed by Plaintiffs. But Plaintiffs did not choose this option. ***Instead, now, at the summary judgment stage, they seek to broaden their claim, distorting the allegations made in the Complaint***. ***Yet "[i]t is well established that a party may not amend its complaint or broaden its claims through summary judgment briefing."*** *District of Columbia v. Barrie*, 741 F. Supp. 2d 250, 263 (D.D.C. 2010). *See also DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 84 (D.D.C. 2007) (rejecting plaintiff's attempt to broaden claims and thereby amend its complaint in opposition to defendant's motion for summary judgment.); *Quinn v. District of Columbia*, 740 F. Supp. 2d 112, 130-31 (D.D.C. 2010). Rather, the proper course for Plaintiffs, once they realized the actual contractual relationship, was to amend their Complaint. *See Sharp v. Rosa Mexicano*, 496 F. Supp. 2d 93, 97 n. 3 (D.D.C. 2007) ("[P]laintiff may not, through summary judgment briefs, raise the new claims . . . because plaintiff did not raise them in his complaint, and did not file an amended complaint."); *Sloan v. Urban Title Servs., Inc.*, 652 F. Supp. 2d 51, 62 (D.D.C. 2009) ("Plaintiff cannot amend her complaint by . . . filing a motion for summary judgment; she must amend her complaint in accordance with Fed. R. Civ. P. 15(a)."). Accordingly, because Plaintiffs no longer purport to prove the allegations made in their Complaint, Plaintiffs' breach of contract claim is dismissed.
>
> For the same reasons, Plaintiffs' claim for tortious interference with contractual relations is also dismissed. The underlying contract alleged by Plaintiffs in their Complaint was between Chris Gaubatz and CAIR-AN. In the absence of the contract Plaintiffs pled, there is no cause of action for tortious interference with contractual relations. *See Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1305

> (D.C. Cir. 2002) (noting that the "existence of a contract" is an element of "tortious interference with contract" under D.C. law).

(Mem. & Op. at 57-58 [emphasis added]).

This analysis relating to the contract allegations applies with even greater force to the newly discovered subagency doctrine. As we have demonstrated, nowhere in their pleadings do Plaintiffs proffer a subagency doctrine for liability. Indeed, nowhere do they claim that Dave Gaubatz was an agent of CSP, and certainly never of Brim. And the only conclusory allegation of agency is a factually incorrect allegation about a Mapping Sharia agreement unrelated to any agency relevant to this case.[10] Indeed, subagency is not even argued by Plaintiffs in their opposition brief, as the court recognizes when it first raised this novel theory: "Accordingly, Plaintiffs ***appear to be arguing*** that a subagent relationship existed between Chris Gaubatz and the remaining Defendants through David Gaubatz." (Mem. & Op. at 48 [emphasis added]). But how does it *appear* to be so? Nowhere does Plaintiffs' brief speak of a tiered relationship of principal to agent, with the agent in turn serving as principal-appointing agent to a downstream agent. Indeed, when you read the portion of the brief cited by this court, Plaintiffs are once again treating Defendants David Gaubatz and Chris Gaubatz as a kind of conspiratorial unit and not as separate agents in a chain.

For example, "The record establishes that Defendants CSP, SANE, and Yerushalmi had the right to control and exercised control over the Gaubatz Defendants' infiltration and

[10] The fact that Plaintiffs did not seek leave to amend their TAC to correct the allegations of the Mapping Sharia related agreement as the factual basis for the SANE and Yerushalmi liability exposure is all the more telling, even more so than the confidentiality agreement confusion addressed by the court in the Memorandum and Opinion. Notably, Defendants raised this issue in March 2012 when they unsuccessfully opposed Plaintiffs' motion for leave to amend the SAC and file the TAC. *CAIR III* at 34 (discussing unavailing futility arguments by Defendants). (*See* Defs.' Opp'n to Mot. for Leave to Amend [Doc. No. 113] at 22-25). That is, this was no last minute discovery but one for which Plaintiffs were on notice even before the court granted leave to file the erroneous TAC.

clandestine recording of the CAIR offices." (Pls.' Opp'n Br. [Doc. No. 164] at 29). This is not a veiled subagency proposition articulating some two-step liability theory that runs from the principles to David Gaubatz as an intermediary appointing agent-principal and then to Chris Gaubatz as the final agent. Rather, this is a claim of agency that runs from the principals to the Gaubatz Defendants indistinguishably. And this is all the more important because nowhere in the pleadings and nowhere in Plaintiffs' various summary judgment filings do they even make the argument that Chris was an agent of David Gaubatz in the subagency chain-of-command.[11]

Moreover, it should be lost on no one that while the court cites to the Restatement (Third) of Agency as legal support for the subagency doctrine, nowhere do Plaintiffs cite to this authority or any other for such a doctrine.

So, we are left with a theory first articulated by this court in its Memorandum and Opinion, which was indisputably not raised expressly by Plaintiffs in their opposition to Defendants' motion for summary judgment and was most certainly not raised expressly or otherwise in Plaintiff CAIR-F's motion for summary judgment. But even assuming *arguendo*

[11] The court recognizes this problem and rather than find the answer within Plaintiffs' domain chooses to quote a footnote authored by Defendants in opposition to CAIR-F's motion for summary judgment explaining why Defendants do not make an expressed argument against secondary liability on behalf of David Gaubatz. The court appears to draft this footnote into involuntary servitude as some kind of legal admission that Chris Gaubatz was an agent for David Gaubatz within the context of the sub-agency doctrine. (Mem. & Op. at 48); (*see* Defs.' Opp'n to Pl.'s Mot. for Summ. J. [Doc. No. 163] at 25, n.4). This is wrong on several counts. First, Plaintiffs never cite to this footnote or to its substance. Second, the footnote is in context of Defendants' opposition to Plaintiff CAIR-Foundation Inc.'s ("CAIR-F") motion for summary judgment where *respondeat superior* liability ***was not even raised***, and thus, not an issue where Defendants' observation about *respondeat superior* liability would even be relevant, much less operate as a legal admission. The footnote was intended, as it says expressly, only to explain why David Gaubatz did not make a separate defense against secondary liability in opposition to CAIR-F's motion. It was not intended nor may it fairly be usurped and used as a legal admission against Defendants to a claim of subagency for which Defendants were not even on notice. To use this footnote, un-cited and unreferenced by Plaintiffs, to fill-in a critically missing portion of Plaintiffs' purported subagency argument as if Plaintiffs simply assumed it to be the case is to credit Plaintiffs with prescience and to impose unfairly and without notice on Defendants a legal and factual admission where one was never intended or conceived.

that the court remains satisfied that Plaintiffs have somehow given sufficient voice in their opposition brief to the subagency doctrine, or at least some aspects of the doctrine without actually mentioning the doctrine and without actually citing legal authority for the doctrine, that does not excuse Plaintiffs from the clear prohibition of amending the pleadings through a motion for summary judgment. Indeed, it does not, and Plaintiffs have never sought to amend the TAC to include such a theory. "Instead, now, at the summary judgment stage, they seek to broaden their claim, distorting the allegations made in the Complaint. Yet '[i]t is well established that a party may not amend its complaint or broaden its claims through summary judgment briefing.' *District of Columbia v. Barrie*, 741 F. Supp. 2d 250, 263 (D.D.C. 2010)." (Mem. & Op. at 57-58).

C. Subagency Does Not Apply to Supervisory or Managerial Employees.

One of the problems created when a court crafts a theory of liability not raised in any expressed way by a plaintiff, and certainly one not briefed and argued with legal citations and careful attention to the record, is that the defendant as an adversary had no notice or opportunity to brief the legal nuances of the theory to test its applicability to the pleadings and factual record. Not surprisingly, this lack of aggressive briefing by the parties may result in the court's reliance on a legal theory that just does not apply. This is the problem we have here.

A fundamental tenant of subagency is that it does not apply to co-agents or two employees who serve a single employer. Restatement (Third) of Agency, § 7.03, Comment d(1) ("A relationship of subagency does not result when an agent appoints a coagent. Coagents share a common principal, although they may occupy dominant and subordinate positions in an organizational hierarchy. *See* § 3.15, Comment b. An agent who has authority to hire a coagent is not subject to vicarious liability for the coagent's tortious conduct."). The rationale for this limitation to subagency is clear: if subagency were to extend to coagents, even as between

supervisory or managerial co-agents with the power to control their subordinates, a tort by a low-level employee in the course of her employment would create a string of vicarious liability up the supervisory and managerial chain of employees, wreaking havoc on the very notion of *respondeat* ***superior*** liability. *See, e.g., Ware v. Timmons*, 954 So. 2d 545, 555 (Ala. 2006) (explaining the limitation in the context of consent).

In this case, there is a dispute between the parties whether David Gaubatz served as his own master who had entered into an arm's length contract with CSP or whether he was a mere servant of CSP. While Defendants strongly object to the court's ruling that the factual record did not demonstrate overwhelmingly that Dave Gaubatz was his own master, we set this objection aside at this level of the argument. Rather, the question raised by the subagency theory at this level is how does the court extend subagency to Yerushalmi and Brim with no evidence in the record whatsoever that they acted in any way other than as co-agents to the principal CSP? According to the court, the explanation is that based upon some statements by David Gaubatz during deposition, Yerushalmi might have served as his supervisor and Brim might have been the applied "control" person over David Gaubatz on behalf of CSP. (Mem. & Op. at 50). And again, while Defendants object to the court's taking of isolated and legally vague statements by David Gaubatz as sufficient to create a fact dispute on an otherwise uncontroverted record that David Gaubatz was his own master, the fact that Yerushalmi served as a legal advisor or even allegedly a "supervisor" to the participants of the CAIR Documentary Film Project on behalf of CSP and the fact that Brim served as a corporate liaison employee of CSP do not demonstrate subagency, but rather co-agency. The specific factual question whether Yerushalmi and Brim were principals over David Gaubatz or merely co-agents, albeit per the court's ruling with "supervisory" control, is simply nowhere at issue in the record. No one argues, and not even Plaintiffs, that Yerushalmi or Brim entered into a separate relationship with David Gaubatz or

that they hired or authorized David Gaubatz to do anything outside of their respective relationships to CSP, or that they paid his contractual fees. Even assuming there is a valid fact dispute about whether Yerushalmi and Brim had elements of "control" by virtue of their alleged "supervisory" roles, everyone recognizes, and more importantly the record demonstrates, that Yerushalmi's presence during the CAIR Documentary Film Project was only due to the fact that he served as general counsel to CSP and in that capacity provided legal advice and that Brim's presence was solely as an employee of CSP. As such, at best they were co-agents with David Gaubatz within the CSP hierarchy, and any alleged control they exercised over David Gaubatz was managerial. Not surprisingly, the court's analysis that examined whether there was a fact dispute over "agency" and "control" relative to Yerushalmi and Brim neglected to even account for the fact that there were no facts to suggest that David Gaubatz had ever consented to act as Yerushalmi's and Brim's agent as opposed to CSP's. Nor did the court's analysis even ask the question whether there was any evidence that the "control" factor exerted by Yerushalmi and Brim stemmed from their positions in the CSP hierarchy as co-agents working for the same master or through some independent agent-principal relationship. (Mem. & Op. at 50). The failure to assess co-agency was manifest error.

In short, even assuming *arguendo* a subagency theory has been legitimately raised in the pleadings and properly argued in the respective summary judgment filings (which it has not), there is no legal or factual basis to entertain a subagency theory of *respondeat superior* liability against Yerushalmi or Brim, who at best were co-agents of David Gaubatz.

II. The Court Erred Interpreting "Willfully" under the D.C. Wiretap Act as Not Requiring Knowledge or Reckless Disregard of a Violation of the Statute.

A. General Discussion of the Law.

In applying the use, disclosure, and procurement prohibitions under the D.C. Wiretap

Act, the court recognized that the willful requirement was at least literally different from the Federal Wiretap Act's intentionality requirement of knowledge "of a violation of this subsection." (Mem. & Op. at 34-35 [discussing knowledge requirement of Federal Wiretap Act], at 40, n.10 & accompanying text [discussing willful requirement of D.C. Wiretap Act]). But the court's analysis from that point on is flawed. In the court's footnote 10, apparently recognizing that "willfully" typically has a different meaning in the criminal context than in a purely civil or administrative context, the court borrows from the non-criminal context when in fact the use of the word "willfully" in the statute is in a criminal context (D.C. Code § 23-542(a)(1)), which is only extended to the civil arena by the civil remedy provision (D.C. Code § 23-554) that does not mention "willfully" except by referencing "a violation of this subchapter." *See id*.

The only explanation the court provides for this odd choice is to tell us that "the bare use of the word 'willfully' likely does not signal that the statute implies a requirement that the defendant act with knowledge that his conduct was prohibited by law." (Mem. & Op. at 40, n.10). This is not the case. The court's error is that it apparently had not recalled the relationship between the D.C. Wiretap Act, enacted in 1970, and the Federal Wiretap Act extant at that time, but later amended in 1986.[12] At the time, the D.C. Wiretap Act was modeled in all pertinent respects after the Federal Wiretap Act. *Napper v. United States*, 22 A.3d 758 (D.C. 2011) ("Because the District of Columbia wiretapping statute is 'virtually identical' to the federal wiretapping statute, which was intended to codify the Fourth Amendment test established by the Supreme Court in *Katz*, the same analysis is required to determine whether an act of electronic surveillance runs afoul of it."). Indeed, like the pre-1986 Federal Wiretap Act, the D.C. Wiretap Act forbade procurement, vitiated the one-party consent rule for "any injurious

[12] Defendants discussed this at some length in their motion to dismiss. (Defs.' Mot. to Dismiss [Doc. No. 97] at 24-28).

act," and, importantly here, included only a willful requirement and not an intentional/knowledge requirement. In 1986, Congress amended the Federal Wiretap Act and eliminated the procurement violation (*see Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 168-69 (5th Cir. 2000)), the injurious act exception to the one-party consent rule (*see Boddie v. Am. Broad. Cos.*, 881 F.2d 267 (6th Cir. 1989)), and replaced "willfully" with "intentionally" (*see Malouche v. JH Management Co.*, 839 F.2d 1024, 1025, n.1 (4th Cir. 1988)).

Indeed, in 1988, retired Associate Justice Powell, sitting by designation, authored the panel's opinion in *Malouche* addressing precisely the question addressed by the court in its footnote 10. Powell noted that the Second Circuit had already taken up this question and ruled that "willfully" under the pre-1986 Federal Wiretap Act should have its standard meaning in the criminal context "to denote at least a voluntary, intentional violation of, and perhaps also a reckless disregard of, a known legal duty." *Id.* at 1025 (citing *Citron v. Citron*, 722 F.2d 14, 16 (2d Cir. 1983)). After examining the legislative history, Powell concluded:

> Thus, we agree with the Second Circuit and hold that the word "willfully," as used in section 2511, was intended to be given its traditional meaning when used in a criminal statute. In this case, as civil liability under section 2520 depends on a violation of the willfulness standard of section 2511, we also hold that appellant was required to establish an intentional or reckless disregard of its legal obligations by appellee. Neither the language of the statute nor its legislative history suggest that Congress intended different standards of willfulness to apply in the civil and criminal context.

Malouche, 839 F.2d at 1029.

Given the D.C. Court of Appeals' expressed recognition that the pre-1986 Federal Wiretap Act and the D.C. Wiretap Act were "virtually identical," and the agreement between the Second and Fourth Circuits, there is no coherent rationale to contend that the D.C. Wiretap Act

does not require knowledge (or a reckless disregard) of a violation of the statute.[13] This legal error by the court alters meaningfully the court's application of the factual record to the allegations of use, disclosure, and procurement violations under the D.C. Wiretap Act and indeed demands the court reverse itself and grant summary judgment on these counts in favor of the moving Defendants.

We will next address the factual analysis required under the proper definition of "willfully."

B. Defendants CSP, Brim, SANE, Yerushalmi, and David Gaubatz Are Entitled to Summary Judgment on Count I Under the Federal and D.C. Wiretap Acts.

Having argued above that the court erroneously extended *respondeat superior* liability to Defendants CSP, Brim, Yerushalmi, and David Gaubatz, the only remaining claims for these Defendants under the Federal and D.C. Wiretap Acts are procurement liability under the D.C. statute and use and disclosure liability under both statutes against CSP, Brim, and David Gaubatz. In this section, we apply the correct "willful" requirement under the D.C. Wiretap Act to the factual record to demonstrate that there can be no liability under the Federal and D.C. Wiretap Acts at all for any of the Defendants.

1. Procurement Liability under the D.C. Wiretap Act.

The court's analysis of the factual record for procurement liability improperly assumed that Defendants only needed to know that they were procuring an interception of an oral communication, without regard to whether the purposes and methods of that intercept were legal

[13] It is worth noting here that this "willful" standard is even more exacting than the intentional/knowledge standard under the Federal Wiretap Act. Under the Federal Wiretap Act, one must have actual knowledge of a violation of the statute or presumptive knowledge—that is, the availability of sufficient facts, together with a presumed knowledge of the law, to know that a violation occurred. (Mem. & Op. at 35-36). Under the D.C. Wiretap Act, presumptive knowledge does not cross the "willfully" Rubicon until the person who has these facts available recklessly disregards them.

under the one-party consent rule or not. (Mem. & Op. at 41-46). As we have shown, this standard was improper. The proper analysis, as discussed above, is whether the procuring party knew that the intercept would violate the one-party consent rule, or, acted in reckless disregard of that reality. *See, e.g*., *Citron*, 722 F.2d at 16; *Malouche*, 839 F.2d at 1029. We will treat each Defendant in turn.

a. SANE and Yerushalmi.

The court found there to be a fact dispute whether SANE and Yerushalmi had done enough to trigger procurement liability. And while Defendants strenuously object to the court's treatment of the facts to arrive at this conclusion, now that we are armed with the correct *scienter* requirement to assess procurement liability, it is patent that the court must grant Yerushalmi and SANE summary judgment on this issue. First, SANE did not and could not have had any knowledge of wrongdoing because its involvement, as the court has recognized, was limited to making an initial recommendation to CSP to use David Gaubatz and only later as a contractual intermediary. (Mem. & Op. at 44-45). Neither SANE nor Yerushalmi ever had possession of or access to the audio-video clips during the CAIR Documentary Film Project, and Yerushalmi had been reassured by David Gaubatz on several occasions that everything was being conducted legally. (Defs.' Facts in Supp. of Summ. J. [Doc. No. 154] at Nos. 198, 254). Plaintiffs provide no contrary evidence. As such, neither SANE nor Yerushalmi, during any time, but much less during any time related to a procurement violation, could possibly have had the knowledge to know of a violation of the statute or have available some set of facts to have recklessly disregarded them.

b. Brim.

The court has accepted as a disputed fact the timing of Brim's involvement in the CAIR Documentary Film Project. (Mem. & Op. at 45). And while Defendants strenuously object to

the court's treatment of the factual record in this regard, even assuming Brim provided David Gaubatz with the authority to hire researchers, Brim had no actual knowledge at this time nor any facts available to her (there were no audio tapes prior to the hiring of researchers to access Plaintiffs' offices) to know of a violation of the statute. And there is no evidence in the record to suggest, nor has the court pointed to any in its Memorandum and Opinion, that the CSP Defendants had intended from the outset to violate the D.C. Wiretap Act.

c. CSP and David Gaubatz.

While not addressed by the court in its Memorandum and Opinion, we treat a procurement violation analysis for CSP and David Gaubatz together because given the fact that CSP provided the ongoing contractual fees to David Gaubatz and David Gaubatz in turn provided Chris Gaubatz's salary, a procurement violation might not have taken place at a discreet moment at the beginning of the CAIR Documentary Film Project, but rather as ongoing conduct. As a result, there is no single point in time that one might measure the knowledge of these two defendants other than the knowledge that they had at any time during the researchers work at Plaintiffs' offices. (Mem. & Op. at 44). This distinguishes these two Defendants from the other Defendants treated above.

But what this also means is that the analysis for a procurement violation under the D.C. Wiretap Act with respect to these Defendants' willfulness will mirror the analysis under use and disclosure liability under the D.C. statute. As a result, we leave off here to move onto the proper analysis for use and disclosure liability under the D.C. Wiretap Act for those three Defendants who remain exposed to such liability: Brim, CSP, and David Gaubatz.

2. Use and Disclosure Liability.

a. Turning to the Court's Analysis under the Federal Statute.

The court's analysis of use and disclosure liability under the D.C. Wiretap Act suffers

from the same flaw as its analysis for procurement liability. The court assumed that the only knowledge requirement was that the Defendants (*i.e.*, CSP, Brim, and David Gaubatz) simply knew that the audio-video clips were interceptions of oral communications when they used or disclosed them without regard to whether these Defendants knew that Chris Gaubatz had violated the statute—either by not observing the one-party consent rule or by vitiating it through tortious conduct. (Mem. & Op. at 41). Consequently, the court's analysis here is not helpful.

If instead, by way of assistance, we borrow from the court's analysis of use and disclosure liability under the Federal Wiretap Act, where the court applied the federal requirement, we uncover, as demonstrated below, what operates as a built-in legal error based upon a misapplication of the standard for presumptive knowledge under the federal statute and the legal standard for determining a fact dispute under Rule 56. Since we must avoid the same kind of error in applying the "willful" requirement under the D.C. statute, we pay special note here of the court's error in the Memorandum and Opinion when it examined the knowledge requirement for a use and disclosure violation under the Federal Wiretap Act.

Before proceeding, we again stress that the standards for presumptive knowledge under the Federal Wiretap Act and the D.C. Wiretap Act are different. The former requires the availability of facts, together with a presumed knowledge of the law, that would lead to knowledge of a violation of the statute. (Mem. & Op. at 35-36). The latter requires more. Under the D.C. statute, a person must recklessly disregard those available facts before they are presumed "available" to her to possess the presumptive knowledge. *Citron*, 722 F.2d at 16; *Malouche*, 839 F.2d at 1029. Thus, under the Federal Wiretap Act, if the facts are available and the person carelessly or negligently ignores them, they remain presumptively known and available to the person to assess legality. That same person, acting merely carelessly, is not liable under the D.C. Wiretap Act. We turn now to the court's misapplications of the

presumptive knowledge requirement under the Federal Wiretap Act and the standard for measuring a fact dispute under Rule 56 to uncover the court's bias when treating the facts so as to avoid that problem going forward.

b. Understanding and Avoiding the Court's Error.

To understand the court's error in applying the presumptive knowledge requirement of the Federal Wiretap Act, we begin with a careful look at the presumptive knowledge requirement as articulated by the court in its Memorandum and Opinion. (Mem. & Op. at 35-36). There, citing to the identical cases relied upon by Defendants in their motion for summary judgment (Defs.' Mot. for Summ. J. at 23-24 [Doc No. 154-64]), the court clearly articulated the correct standard: "It is not enough to know that the conversation was intercepted; the defendant must also be able to tell that none of the statutory exceptions apply." (Mem. & Op. at 36 [quoting *McCann*, 622 F.3d at 753 (citing *Williams v. Poulos*, 11 F.3d 271, 284 (1st Cir. 1993) & *Thompson v. Delaney*, 970 F.2d 744, 749 (10th Cir. 1992))]). Further, "in order to establish liability under § 2511(1)(c) and (d), the use or disclosure must . . . be intentional and [t]he defendant must know 1) the information used or disclosed came from an intercepted communication, and 2) sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, ***determine that the interception was prohibited in light of Title III***." (Mem. & Op. at 36 [quoting *Thompson*, 970 F.2d at 749] [emphasis added]).

In other words, before a defendant may be liable for a use and disclosure violation under the federal statute, the defendant must have enough facts at her disposal to ***determine*** that a violation occurred not that a violation may or may not have occurred. This is key because it gets at what is "presumptively" known. If the facts are available to a defendant that establish a violation had occurred but the defendant willfully or carelessly ignores those facts, the law

presumes she knew them, even if she was not actually consciously aware of the facts. But if the facts available to the defendant at best suggest that there may or may not have been a crime, and yet more facts are required to "***determine*** that the interception was prohibited," then there is insufficient presumptive knowledge to create liability. That is, there can be no presumption or even "reasonable foreseeability" about what *additional facts* might exist from facts that do exist to arrive at presumptive knowledge to *suggest* a violation existed. The presumption is only that the facts available to the defendant were known to the defendant and from these facts, and these facts alone, the defendant could *determine* that a violation occurred. *See, e.g.*, *Weeks v. Union Camp Corp*., No. 98-2814/98-2815, 2000 U.S. App. LEXIS 12549, at *12 (4th Cir. June 7, 2000) ("A plaintiff cannot overcome summary judgment merely by showing that it was reasonably foreseeable that the interception occurred illegally.") (citing *Nix v. O'Malley*, 160 F.3d 343, 349 (6th Cir. 1998)) (internal quotation marks omitted); *see also United States v. Wuliger*, 981 F.2d 1497, 1503-1505 (6th Cir. 1992) (rejecting the use of reasonable foreseeability to add presumptive knowledge of unknown facts on top of presumptive knowledge of available facts).

Indeed, in *McCann*, the Seventh Circuit upheld summary judgment for a defendant by rejecting an argument that an email sent by the defendant to his board of trustees attempting to retrieve the transcript of an intercepted dictation after he had provided it to them along with a letter to this defendant from one of the plaintiff's lawyers explaining the dictation was obtained illegally were not sufficient to create a "reason to know" because they were not facts available to the defendant that provided knowledge for him "to determine" a violation occurred. He may very well have suspected a violation or even worried about one, but that does not satisfy the test. *McCann*, 622 F.3d at 753-54.

From here we may examine the court's analysis of use and disclosure liability under the Federal Wiretap Act and understand how it misapplied the presumption to find a fact dispute and

thus deny Defendants summary judgment. Indeed, if we carefully examine the court's shifting language setting out the standard from one paragraph to the next, we can actually expose this erroneous misapplication of the presumption clearly. So it is that after citing the case law, the court quite accurately sets out the test for presumptive knowledge:

> Consequently, in order to be liable here for use or disclosure under the Federal Wiretap Act, Plaintiffs must show that the Defendants besides Chris Gaubatz (1) intentionally used or disclosed the contents of an intercepted communication, (2) knew or had reason to know that the information used or disclosed came from an intercepted communication, and (3) knew or had reason to know that the intercepted communication was made in violation of 18 U.S.C. § 2511. Here, Defendants argue that these claims should be dismissed because Plaintiffs have failed to satisfy these elements. Defs.' MSJ at 23-26. The primary issue here is whether Defendants knew or had reason to know sufficient facts concerning the circumstances of Chris Gaubatz's interception of Plaintiffs' ***communications such that they could determine that the interception was prohibited*** in light of the Wiretap Act and that that none of the statutory exceptions – including the one-party consent rule – applied.

(Mem. & Op. at 36 [emphasis added]). The court here is quite right. The question is whether Defendants had enough facts available to them (*i.e.*, in the audio-video tapes) to ***determine*** that an interception was prohibited. But in the very next paragraph, in the set up to the analysis of the facts available to each Defendant, the court changes this standard and effectively destroys it by turning it into presumptive knowledge about a ***possible*** violation. In the quote, note the court's one-word shift that changes everything:

> As discussed, *supra*, there are genuine issues of material fact as to whether the one-party consent rule applies to all of the conversations intercepted by Chris Gaubatz. For at least one conversation, it is not clear whether Chris Gaubatz's presence was apparent to the person he was recording, or whether he was functioning as an "unseen auditor" unprotected by the one-party consent rule. For the remaining conversations, there is a genuine issue of material fact as to whether Chris Gaubatz understood himself as bound by a fiduciary duty of non-disclosure, such that he operated with the tortious purpose of breaching this duty in making the recordings and thus was not protected by the one-party consent rule. ***If Defendants were on notice of facts suggesting that these conversations were not protected by the one-party consent rule***, then they may be liable for use and disclosure of these communications. The Court addresses potential use and disclosure liability for each Defendant other than Chris Gaubatz below.

(*Id*. at 36-37). Quite simply, that is not the test articulated by the case law or even by the court one paragraph earlier. What the court has done by replacing the verb "to determine" in the "reason to know" test with the participle "suggesting" is to force upon Defendants by presumption not only the knowledge of the facts available to Defendants of which they might not have actual knowledge (*i.e*., notice to investigate), but also unavailable facts that are ***suggested*** by the facts only known presumptively. This is error, and it is not unlike impermissibly applying a "reasonable foreseeability" extension on top of presumptive knowledge. Either the facts are available and thus presumptively known or not. Whatever facts are available and presumptively known ***must*** on their own be enough for Defendants to ***determine*** that a violation occurred not that a violation ***might have occurred***.

Because the court's remaining analysis of whether each of the Defendants had sufficient knowledge to be liable under the use and disclosure liability provisions expressly relies upon this "suggesting" standard, the court erred in denying summary judgment for Defendants. Specifically, in analyzing David Gaubatz's knowledge, the court takes the reasonable position that because he had possession of all of the recordings and his job was to manage the research of the CAIR Documentary Film Project, he had presumptive knowledge of their content. From there, however, the court leaps to the conclusion that David Gaubatz had knowledge of a violation. (Mem. & Op. at 37-38). But how could that be? At best, the court refers to recordings that ***might have*** violated the one-party consent rule or that ***might have*** indicated Chris Gaubatz violated some non-disclosure agreement or duty that ***might have*** existed. (*Id*.). From there the court assumed that because that would be sufficient grounds to create a fact dispute as to Chris Gaubatz's liability, this must be a fact dispute as to David Gaubatz's knowledge. (*Id*. ["Accordingly, to the extent that there is a factual dispute as to whether the actions of CAIR-F

placed Chris Gaubatz on notice of a duty of non-disclosure, because David Gaubatz had access to almost all of this information as well, the same factual dispute carries over to David Gaubatz."]).

This is wrong because what the court is in effect doing is taking all of the "might have" facts and concluding that this should have ***suggested*** to David Gaubatz that an offense ***might have*** occurred. But as we have shown, the test is not what the presumptive knowledge might have, could have, or should have suggested, but rather whether David Gaubatz could have ***determined*** that a violation in fact occurred from the presumptive knowledge of available facts.

In this case, the answer has to be "no" because even the court could not make this determination after carefully reviewing the evidence, thus concluding that the evidence was not sufficient "to determine" whether a violation occurred. To put this slightly differently and more in the vernacular, even if we assume that David Gaubatz was on notice to investigate and carefully watch and listen to each and every one of the recordings, and that he had in fact done so, what he would have learned is that out of hundreds of hours of recordings, there is no question Chris Gaubatz was a "party" (*i.e.*, not an "unseen auditor") to the conversations. In one blurry, and effectively inaudible seconds-long portion of one clip on August 7, Chris may or may not have been seen by someone who may or may not have actually been speaking and who may or may not have been an intern or employee of Plaintiffs. But that comports entirely with the "knowledge" available to David Gaubatz and thus does not give rise to a violation of the statute, especially in light of Chris Gaubatz's insistence on carrying out his role in the CAIR Documentary Film Project legally and according to David Gaubatz's instructions.

The factual question that might lead to a dispute about a given defendant's "reason to know" is what facts were reasonably available to him to investigate had he chosen to do so, not whether those facts are sufficient to determine whether a violation of the statute occurred. At the

summary judgment stage, the latter is a classic legal question: having assumed along with the court that the recordings were available for investigation and thus the contents of which were presumptively known, given the available facts X, Y, Z as presented by the recordings, and given a presumed knowledge of the law, can it be *determined* that a violation occurred? If yes, the defendant is liable. If no (as in this case), the defendant is entitled to summary judgment. Fed. R. Civ. P. 56(c) (providing that only fact disputes give rise to jury question not whether the known facts establish a violation); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986).

Similarly, in analyzing Brim's liability, the court begins by recognizing that there is a fact dispute whether Brim did or did not take a more active role in the CAIR Documentary Film Project such that she would have reasonably reviewed the recordings for content. (Mem. & Op. at 38). Indeed, for purposes of this motion, Defendants accept this as a fact dispute, but point out that it is an irrelevant fact dispute in this instance. It is irrelevant because even if we accept as fact that Brim carefully perused all of the recordings for content, the legal question remains: having presumed knowledge of the content of the recordings, do the facts available on the recordings provide Brim with sufficient knowledge to ***determine*** a violation had occurred? The court actually answers that question in the negative by concluding that Brim would have known that Chris Gaubatz "may have" violated the one-party rule and "may have" breached a non-disclosure duty, but because the court was applying the improper "suggesting" standard, it found the situation unclear and called it a fact dispute. *Id*. But if a defendant has ***presumptive*** knowledge only of an event that ***may*** **or** ***may not*** have occurred, that simply does not give rise to the requisite knowledge to ***determine*** the existence of a violation. It is only "suggestive" of a violation, which is insufficient to impose liability.

In this case, while certain Defendants, such as Brim and CSP, might dispute whether it is factually reasonable to presume that all of the content of the recordings was "available" to them such that the law presumes their knowledge of it or their duty to investigate further (and this is indeed a legitimate fact question),[14] for purposes of this motion, we accept the court's determination that all of the recordings were available and thus the content of those recordings was presumptively known to David Gaubatz and Brim, and this knowledge was then imputed to CSP. But that content simply does not allow any of the Defendants to have made a ***determination*** that a violation of either the federal or D.C. statute occurred. Indeed, this court's Memorandum and Opinion is the best evidence of that.

Take for example the August 7 recording from Plaintiffs' Exhibit 1, which the court cites throughout its Memorandum and Opinion as key evidence for at least the possibility to establish an "unseen auditor" and a violation of both the federal and D.C. statutes, precluding the one-party consent rule. (Mem. & Op. at 25). Had David Gaubatz or Brim reviewed that recording with all of the care and concern the court applied during its deliberations before rendering its ruling on the motions for summary judgment, what might they have ***determined***? In the court's own words: "This speaker has his back turned to Chris Gaubatz and ***it is not clear*** from the video or from any other facts in the record whether Chris Gaubatz's presence would have been apparent to this speaker, or if Chris Gaubatz was instead acting as an 'unseen auditor' to whom the one-party consent rule would not apply." (*Id*. [emphasis added]). Given the court's treatment of this recording as admissible evidence over Defendants' strenuous objections,[15] there

[14] Part of this fact question is how reasonable it is to assume presumptively that any of the Defendants scoured all of the recordings to locate one recording on August 7, where the person allegedly on the telephone appears for only a few seconds, amidst hundreds of hours of recordings.

[15] Defendants raise here in this footnote an ongoing objection to the court's use of the recordings to provide admissible evidence beyond the fact that Chris Gaubatz was recording at Plaintiffs'

is at least an argument as to why Chris Gaubatz's liability is a fact dispute: there is no way to determine if the recording somehow discredits Chris Gaubatz's constant refrain that he was always a party to conversations recorded (*i.e.*, present and known to the others on the

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offices and other observations that require no foundation. What is troubling to Defendants is that these objections were carefully raised and argued with legal citations, and the court simply ignored them without passing on their merits. (*See, e.g.*, Defs.' Facts in Opp'n to Pl.'s Mot. for Summ. J. at Nos. 73, 77-78, 81 [dealing directly with the one-party consent rule], 105; *see also* No. 37 [discussing case law for admissibility for summary judgment]; *see als*o Defs.' Reply Br. in Supp. of Mot. for Summ. J. [Doc. No. 167] at 11-13 [briefing admissibility of evidence and Plaintiffs' failure to provide foundation to recordings]). What is especially troubling is the court's use as admissible evidence the August 7 recording from Plaintiffs' Exhibit 1. The court seeks to use the content of this recording to make the case that there is a fact dispute that at least on one occasion Chris Gaubatz might not have been present and seen by the individual recorded. But this raises enormously problematic evidentiary issues that the court has simply ignored. It is axiomatic, as Defendants have briefed, that a document, or for that matter a recording, does not simply speak for itself. *Akers v. Liberty Mut. Group*, 744 F. Supp. 2d 92, 95-97 (D.D.C. 2010) ("At the summary judgment stage, supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . [U]nsworn, unauthenticated documents cannot be considered on a motion for summary judgment."). But to use this recording for that purpose, the court must accept a litany of facts based upon what the recording appears possibly to show and to do so without any sworn statement by a fact witness with personal knowledge. Thus, the court must accept without any testimony that the person who appears on the telephone is actually an intern or employee of Plaintiff CAIR-F. If the person was not, Plaintiffs have no standing to claim injury. Even assuming this person was employed by CAIR-F, one has to assume that he is the one speaking, but that is not at all clear from the recording. Indeed, it is very possible that the voice, which is effectively inaudible in all events and thus not likely an "interception" of an "oral communication," s*ee generally* 18 U.S.C. § 2511(1); *United States v. Koyomejian*, 970 F.2d 536, 538-39 (9th Cir. 1992) (holding that Title I of the ECPA is only concerned with "aural acquisition," not video); *see also* D.C. Code § 23-542(a)(1) (referring only to the interception of wire and oral communications), emanates from a speaker sitting behind Chris Gaubatz and that the person who appears on the telephone is just listening. Further, Chris Gaubatz has testified, as the court notes, that he was present and visible to all of the individuals he recorded. We have no idea, precisely because there is no sworn statement from this person who appears to be on the telephone, that he was <u>not</u> aware of Chris Gaubatz's presence. In fact, from the recording, Chris enters what appears to be a small room and spends some time there before we even see this person who appears to be on the telephone. Thus, we have no idea whether he saw Chris Gaubatz enter the room or not, and we have no testimony to establish anything contrary to Defendants' facts. Notwithstanding all of these evidentiary blind spots and potholes, the court ignored entirely Defendants' objections to this and other recordings being used in this way and treated the evidence as admitted without objection. This was error, and the court should reverse itself and rule the recordings inadmissible for any matter not plainly observable and not requiring foundation.

recordings). (Mem. & Op. at 15 [setting out factual positions of the parties relative to the one-party consent rule]). (Although, this argument, which is based on the slimmest of "evidence," stretches the "reasonable inference" presumption to its breaking point in light of the overwhelming and indisputable evidence to the contrary.)

But this fact dispute relates to the fact of Chris Gaubatz's primary liability: did he or did he not violate the wiretap statutes. At this procedural stage, the question for the other Defendants, however, is not whether Chris Gaubatz did or did not violate the wiretap acts; the question is whether the recordings, which themselves are only presumptive knowledge, provide *determinative* evidence of a violation. And the court has made clear that none of the evidence put before the court provides that kind of factual predicate.

At best, as the court notes, a few isolated recordings among hundreds of hours of recordings only suggest the possibility of a violation. But facts "*possibly suggesting*" are not sufficient to *determine* a violation and thus do not provide *sufficient knowledge* for liability under the Federal Wiretap Act, and most certainly not under the heightened "reckless disregard" standard of the D.C. Wiretap Act. As such, the court's ruling denying summary judgment on the use and disclosure liability under the Federal Wiretap Act is error, and all the more so for the reasons set forth above, are the court's rulings denying summary judgment for the use and disclosure and procurement violations under the D.C. Wiretap Act.

C. The Court's Ruling on "Willfully" Renders the D.C. Wiretap Act Unconstitutional.

Under this court's rendering of the D.C. Wiretap Act, even though it is *entirely* legal in the District of Columbia to intercept an oral communication under the one-party consent rule, if a third person uses or discloses the content of that communication, *reasonably believing that the interception was entirely lawful and not knowing that it was not*, that third person is now civilly

(and criminally) liable under the D.C. Wiretap Act. That is a troubling reading of the statute that violates the First Amendment and fundamental notions of due process.

As the U.S. Supreme Court stated in *Grayned v. City of Rockford*, 408 U.S. 104 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'

Id. at 108-09 (internal footnote citations omitted).

In this case, the court's reading of the D.C. Wiretap Act as set forth in its Memorandum and Opinion renders the law void for vagueness. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands and forbids."); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) ("That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law."). By removing *any* requirement that the person engaged in the prohibited conduct has knowledge of its unlawfulness (indeed, the person may possess indisputable facts that lead him or her to reasonably believe that *it was lawful*), the law "trap[s] the innocent by not providing fair warning" of the illegality of the person's conduct. In fact, through the one-party consent

provision of the statute, the law *instructs* the person that his or her conduct is legal. *See* D.C. Code § 23-542(b)(3) ("It shall not be unlawful under this section for – (3) a person not acting under color of law to intercept a wire or oral communication, where such person is a party to the communication . . . ."). Moreover, in this case, as the record demonstrates, the purpose of the recordings was to create a documentary—an activity that is unquestionably protected by the First Amendment. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 393 (2010) (holding that a "documentary film" is protected speech under the First Amendment); (*see also* Mem. & Op. at 4 ["The parties agree that the purpose of the documentary was in part to portray CSP's beliefs about CAIR and the Muslim Brotherhood in America."]). Consequently, the court's view of the D.C. Wiretap Act will "inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked,'" making such documentaries—a staple of investigatory journalism—an untenable speech activity in the District of Columbia. *See Grayned*, 408 U.S. 109 (noting the dangers associated with a vague statute that "abuts upon" First Amendment activity).

Smith v. California, 361 U.S. 147 (1959), is instructive here. In *Smith*, a bookstore owner challenged a conviction for possessing an obscene book in violation of a local ordinance on the basis that the ordinance imposed strict criminal liability by not containing a scienter element. The Supreme Court reversed the conviction, holding that while obscene speech and writings were <u>not</u> protected by the First Amendment, that did not authorize any state power to restrict the sale or dissemination of books which were not obscene. The Court reasoned that the strict liability feature of the ordinance *had that effect* because it penalized booksellers even though "they had not the slightest notice of the character of the books they sold." *Id.* at 152. Additionally, by dispensing with any requirement of knowledge of the contents of the book on the part of the bookstore owner, the ordinance imposed a severe limitation on the public's access

to constitutionally protected matter because the ordinance would act as a deterrent on the bookstore owner because the owner would tend to sell only those books he had inspected. *See id*. at 154 (noting that "[t]he bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public"). In sum, the Court held that "stricter standards of permissible statutory vagueness may be applied to a statute having a *potentially inhibiting effect* on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Id*. at 151 (emphasis added); *see also Wieman v. Updegraff*, 344 U.S. 183 (1952) (striking down a law that lacked a *scienter* element). The same is true here, except that the D.C. Wiretap Act as rendered by this court is even more Draconian than the statute at issue in *Smith* because the person who used or disclosed the recorded conversation could not avoid liability by simply inspecting the content of the recording. That inspection, as in this case, would not reveal whether the recording was obtained in violation of the D.C. Wiretap Act, thereby compelling further self-censorship and thus inhibiting the "free dissemination of ideas" in violation of the Constitution.

Indeed, the court's view of procurement liability suffers from the same constitutional defects. Similar to the court's reading of the statute's "willfully" requirement as applied to the use and disclosure prohibitions, the court begins its reading of the statute with regard to procurement liability by concluding "that the underlying interception or attempted interception allegedly procured by a defendant must violate the statute. By this, the Court means that the underlying interception or attempted interception must not be permissible under another provision of the statute, such as the one-party consent rule of D.C. Code § 23-542(b)(3). . . . Under the opposite result, a party could be liable for willfully procuring an otherwise lawful interception of another's communication, which would seem to represent a nonsensical reading of the statute." (Mem. & Op. at 43). However, the court proceeded to find that the statute does

not require "that the procuring defendant know or have reason to know that the underlying interception was made in violation of the D.C. Wiretap Act." (Mem. & Op. at 43). This reading is problematic.

Consider, for example, the following hypothetical (which is not really a hypothetical because it resembles the undisputed facts in this case) in light of this court's view of the statute. An organization (CSP) wants to conduct a documentary (*i.e.*, engage in First Amendment activity) in the District of Columbia that involves the use of hidden cameras (*i.e.*, video and audio recordings). The organization understands that under federal and D.C. law, which follow the one-party consent rule, such activity is lawful under certain circumstances. Consequently, the organization seeks to hire someone—preferably someone with experience, including law enforcement experience—who understands the parameters of these circumstances. Such a person was known (David Gaubatz) and thus recommended by a third party (David Yerushalmi and SANE) because he performed admirably in a separate and unrelated project involving undercover work (Mapping Sharia project). Consequently, the organization hires the person as an independent contractor pursuant to a contract that explicitly requires the person to perform all of his tasks, including the use of video cameras to obtain footage for the documentary, pursuant to the law. According to this court's rendering of the statute, if the independent contractor ultimately breaches the terms of the contract, then the organization (CSP) and the person who recommended that the organization hire the contractor (David Yerushalmi and SANE) are civilly (and criminally) liable for a procurement violation. But this can only be described as a nonsensical and unconstitutional rendering of the statute. Indeed, as detailed above, this rendering of the statute will have an inhibiting effect on free speech activity in violation of the First Amendment and, in this case, the due process protections of the Fifth Amendment, *Grayned*, 408 U.S. 109; *Smith*, 361 U.S. at 151, since it involves the federal government.

III. All Defendants, including Chris Gaubatz, Are Entitled to Summary Judgment on Count I under the Federal and D.C. Wiretap Acts.

Defendants understand that in light of the relevant case law in this district, which has "deliberately left the definition of a 'fiduciary relationship' open-ended, allowing the concept to fit a wide array of factual circumstances," *CAIR II*, 793 F. Supp. 2d at 341 (citation omitted), "that there is a genuine issue of material fact as to whether Chris Gaubatz understood himself to be bound to a fiduciary duty of non-disclosure to Plaintiff CAIR-F." (Mem. & Op. at 27). But even assuming, *arguendo*, that Chris Gaubatz was "bound by a fiduciary of non-disclosure," the undisputed record evidence demonstrates that none of the *recorded conversations* breached that duty. Indeed, Plaintiffs have not presented this court with even one *recorded conversation*, the content of which is confidential, such that disclosure would breach this duty—nor has the court cited to such a recording.[16] In its ruling, the court cites to "CAIR-F's contacts lists at mosques, outreach strategy, and legislative advocacy plans" as apparent examples of confidential information. (Mem. & Op. at 33-34). However, this citation refers to ***documents*** that were disclosed, not the content of any recorded conversations—which is what matters for both the Federal and D.C. Wiretap Acts. S*ee generally* 18 U.S.C. § 2511(1); *United States v. Koyomejian*, 970 F.2d 536, 538-39 (9th Cir. 1992) (holding that Title I of the ECPA is only concerned with "aural acquisition," not video); *see also* D.C. Code § 23-542(a)(1) (referring only to the interception of wire and oral communications). Even if we extend this mystical and seemingly infinitely elastic duty of non-disclosure to any disclosure that might hurt Plaintiffs,

[16] Once again, this is where Defendants reemphasize in the strongest possible terms their previous evidentiary objections, as referenced in note 15, *supra*, to the use of the recordings to provide evidence beyond what is plainly visible and not in need of foundation. Factual assertions, as made by Plaintiffs in their briefs, that the recordings provide evidence of information subject to some duty of non-disclosure would require testimony based upon personal knowledge that the speaker being recorded was an intern or employee of Plaintiffs and that the recorded communication was in fact subject to this duty, as opposed to speaking about pizza, for example, or other trivial matters.

Plaintiffs have yet to provide an example of harm, as this court itself notes. (Mem. & Op. at 59-60). Consequently, there is not even a "metaphysical doubt" as to this material fact: none of the conversations recorded by Chris Gaubatz breached a fiduciary duty of non-disclosure. In effect, the court's decision to push this matter onto a jury when Plaintiffs have provided no admissible evidence to establish a recording of confidential or proprietary information is a patent violation of Rule 56 and the evidentiary burden placed upon a non-moving party.

In the final analysis, as this court's ruling makes clear, Chris Gaubatz's interception of *non-confidential* conversations in which *his presence was apparent to the speaker* does not violate either the Federal or D.C. Wiretap Acts. Consequently, in light of the undisputed factual record and controlling law, summary judgment was appropriate in Defendants' favor on Count I.

IV. All Defendants Are Entitled to Summary Judgment on Count II Under the SCA.

It was error for the court to treat Corey Saylor's deposition testimony as sworn factual testimony contradicting the written and oral sworn statements by Chris Gaubatz that he <u>never</u> removed documents from Plaintiffs' network or share drive. (Mem. & Op. at 54). This error is best observed through the court's own characterization of Saylor's testimony: "In response [to Chris Gaubatz's unequivocal sworn testimony], Plaintiffs provide their own sworn testimony that Chris Gaubatz did remove documents from the shared drive." *Id*. But, in fact, that is <u>not</u> Saylor's testimony. Saylor was testifying as Plaintiffs' Rule 30(b)(6) deponent. He was not testifying as an expert. All Saylor testifies to is an opinion about what he thinks the source of the documents was. Indeed, when the court sought to extract the very best example of this testimony to make its point, the two statements the court quoted are manifestly opinions and <u>not</u> factual statements: [1] "[t]he documents that were returned to us were reviewed by our attorneys, and a number of them did not appear to be available to Mr. Gaubatz in either print form or on his desktop, leaving the server as the other option" and [2] "in review of the documents once they

were returned to us, there were those that were determined, there were no other places that Mr. Gaubatz could have obtained them from other than the server." (Mem. & Op. at 54).

To begin, statement [1] is not even remotely factual testimony but testimony about some ***belief*** or ***opinion*** by some attorneys that concluded the server was the source because the attorneys did not believe the documents ***appeared*** to have been printed or saved to a desktop. As the court well knows, when Saylor is asked about the factual basis for this opinion, he refuses to provide any. (Defs.' Ex. A at Ex. 3 [Saylor Dep.] at 144:1-1:53-15).[17] Thus, we have no idea how Plaintiffs arrived at the opinion that the documents were not printed insofar as there is no evidence anywhere in the record of digital documents produced by Plaintiffs. Moreover, we have no idea how Plaintiffs arrived at the opinion that the documents were not saved to a desktop by someone else and only retrieved by Chris Gaubatz at that point. Statement [2] is no different in that it is nothing but an opinion that implicitly contains some kind of factual assessment that would eliminate all sources but the server. But when Saylor is asked to provide Plaintiffs' factual basis for this opinion so that Defendants can tests its logic and coherence, he once again refuses to provide any basis. As the court well knows by reviewing Saylor's testimony, he flatly refused to provide the factual basis for the opinion testimony. (Saylor Dep. at 144:1-1:53-15).

There were some facts, however, about which Plaintiffs' Rule 30(b)(6) deponent did testify. One, interns could *freely* use different desktop computers to access the shared drive, and they would often do so. Two, Plaintiffs had "no idea" if other interns working on the shared drive had saved documents from the shared drive to the desktop computers. (Saylor Dep. at 153:3-15). That is, the actual *factual* testimony by Plaintiffs' deponent contradicts the *opinions* about which he testified earlier.

[17] We note that the court erroneously cited to the Saylor deposition as being Plaintiffs' exhibit when in fact it was Defendants' exhibit.

The court's error is compounded by its effort to treat Defendants' objection to this opinion testimony as a kind of straw man as follows: "Defendants criticize Plaintiffs for failing to provide more specific examples of documents that could only be from the shared drive, rather than generalized statements. Defs.' Reply at 4. To be sure, such evidence would prove powerful, but it is not necessary to survive summary judgment as to this claim." (Mem. & Op. at 54). But that is not the criticism Defendants make in their reply brief at page 4. The court is simply wrong. Defendants are not seeking more "specific examples of documents that could only be from the shared drive," but rather objecting to the fact that this testimony was rank opinion and speculation and not factual testimony. (Pls.' Reply Br. in Supp. of Mot. for Summ. J. at 4).

The court's concluding remark is no less troubling: "Here, Plaintiffs' 30(b)(6) witness, speaking on behalf of Plaintiffs, who presumably possess the greatest familiarity with the location and storage of their own digital files, has stated that these documents could have only been obtained from Plaintiffs' server." (Mem. & Op. at 54-55). But that of course is not what Saylor's testimony was in any meaningful sense. Saylor testified that some unknown "review"[18] was undertaken by someone (*i.e.*, Plaintiffs' attorneys, who are presumably the same attorneys who are litigating this case and thus making themselves fact witnesses), that this "review" resulted in the conclusion that the documents could not have been printed or saved to a desktop, and that according to the undisclosed opiner(s), that would leave only the server as a possible source. But at the same time, Saylor conceded that interns could have printed out or saved to a desktop any number of documents from the server. Indeed, according to Saylor's testimony, this feat would have been quite easy for several reasons: [1] there were no passwords to the desktop,

[18] As noted and discussed further in the text, Saylor refused to provide ***any*** details regarding the nature of this review, how it was conducted, the principles and methods employed, *etc*. so as to permit Defendants to test its reliability.

only to the server (Saylor Dep. at 144:12-15); [2] interns could freely work at one desktop and move to another (Saylor Dep. at 144:23-24); and [3] Saylor knew of no written rules or procedures to tell the interns not to do this (Saylor Dep. at 116:20-24).

From just this analysis, it is clear that Saylor's testimony does not contradict Chris Gaubatz's testimony at all—at least not factually. What it does is claim that some unknown analysis was undertaken of some unknown documents which resulted in the opinion that these documents "appeared" not to have been printed or saved to a desktop. But this is patent "expert opinion testimony" in violation of Rule 702 and the discovery requirements incumbent upon any party proffering such testimony. *See, e.g.*, Fed. R. Evid. 702 (requiring the proffered testimony to be "the product of reliable principles and methods"); Fed. R. Civ. P. 26(a)(2) (setting forth requirements for the disclosure of expert testimony). Indeed, this ploy runs afoul of Rules 701 and 702 of the Federal Rules of Evidence and any number of judicial precedents that reject efforts to evade the reliability requirements of the evidentiary rules by attempting to present what amounts to an expert opinion by a lay witness:

> Federal Rule of Evidence 702 governs expert testimony. Expert witnesses may testify to matters of "scientific, technical, or other specialized knowledge." FED. R. EVID. 702. Lay testimony, by contrast, is governed by Rule 701. Unlike experts, lay witnesses must base their testimony on their experiential "perception" and not on "scientific, technical, or other specialized knowledge within the scope of Rule 702." FED. R. EVID. 701(a), (c). This requirement ensures that lay testimony is "the product of reasoning processes familiar to the average person in everyday life." *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005). Moreover, ***it avoids the "risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing."*** FED. R. EVID. 701 advisory committee's notes, 2000 amends.

United States v. Wilson, 605 F.3d 985, 1025-26 (D.C. Cir. 2010) (emphasis added). This instruction has been underscored by even more recent decisions of the D.C. Circuit:

> When there has been a proper objection [to a proffered lay opinion], the district court of course must determine whether the lay witness's opinion testimony

> satisfies Rule 701's requirements. . . .
>
> Jurors too must independently assess the basis of the opinion and scrutinize the witness's reasoning. But ***"[w]hen a witness has not identified the objective bases for his opinion, the proffered opinion obviously fails completely to meet the requirements of Rule 701***, first because there is no way for the court to assess whether it is rationally based on the witness's perceptions, and second because the opinion does not help the jury but only tells it in conclusory fashion what it should find." *United States v. Rea*, 958 F.2d 1206, 1216 (2d Cir. 1992). Enforcement of Rule 701's criteria thus ensures that the jury has the information it needs to conduct an independent assessment of lay opinion testimony.

United States v. Hampton, 718 F.3d 978, 981-82 (D.C. Cir. 2013) (internal citations omitted) (emphasis added).

In other words, a party may not proffer an expert opinion disguised as lay witness testimony and thus circumvent Rule 702 and expert discovery. But that is exactly what this court's treatment of Saylor's opinion testimony has permitted. Instead of retaining an expert and making the required disclosures to Defendants within the discovery deadlines, Plaintiffs refused to answer Defendants' interrogatories[19] which sought information regarding how Plaintiffs knew which documents originated from a server and which did not, and then positioned their Rule 30(b)(6) deponent to provide an expert opinion about which he could not testify (and for which he refused to provide any objective bases) because it was not even his opinion but the opinion of some unknown group of "our attorneys." This is egregious conduct, and the court's sanctioning of this conduct by calling it a fact dispute is wrong. The court should reverse itself and grant summary judgment to all Defendants on Count II of the TAC.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the court grant their motion for summary judgment on all counts.

[19] (*See* Defs.' Mot. for Leave to File Partial Summ. J. [Doc. No. 120] at 22-25 [setting forth the history of Plaintiffs' refusal to answer Defendants' interrogatories about the sourcing of the so-called computer documents]).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

LAW OFFICES OF DAVID YERUSHALMI, P.C.

/s/ David Yerushalmi
David Yerushalmi, Esq.