**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiffs,

-v.-

DAVE GAUBATZ, *et al.*,

Defendants.

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

ORAL ARGUMENT REQUESTED

MEMORANDUM OF POINTS & AUTHORITIES

IN SUPPORT OF

DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

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PREFATORY STATEMENT & FORMAL OBJECTION

Defendants would be remiss if they did not, at the outset, take this opportunity to formally object to that part of the Court's order of March 27, 2014 (Doc. No. 171) ("Order"), wherein the Court denied Defendants' earlier motion for summary judgment (Doc. No. 154) on Counts III (conversion), IV (breach of fiduciary duty), VII (trespass), VIII (unjust enrichment), IX (fraud), and X (trade secret misappropriation). (Order at 3; *see also* Mem. Op. at 59-61 [Doc. No. 172][1]). Defendants' objection is based on the Court's own explanation in its Opinion, wherein the Court pointed out in no uncertain terms that Plaintiffs had failed to set out the requisite elements for liability, especially as to damages:

> The Court finds that Plaintiffs have thus far been frustratingly unclear as to the injuries at issue for each of the claims. In addition, Plaintiffs have not specified which injury, if any, corresponds to which of the Plaintiffs, and have made little effort to explain the proximate cause linking the alleged tortious conduct to the injuries at issue. Instead, Plaintiffs speak in broad generalizations, asserting injuries and damages and proximate cause across multiple counts and multiple Plaintiffs.

(Mem. Op. at 59). Indeed, the Court's Opinion goes on over the course of one and one-half pages to detail what Defendants ***must set out*** with specificity in order to survive a motion for summary judgment. (Mem. Op. at 60-61).

But this begs the question: bound as this Court is by the Supreme Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), why did the Court not grant summary judgment for Defendants? *Celotex* involved a plaintiff who had not demonstrated proximate causation for the death of her husband in a wrongful death action. Celotex moved for summary judgment, arguing that the plaintiff's various responses to the defendant's discovery demands demonstrated

[1] The formal citation to the Court's Memorandum Opinion ("Opinion") is *Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz*, No. 09-02030-CKK, 2014 U.S. Dist. LEXIS 40581 (D.D.C. Mar. 27, 2014). We shall refer and cite herein to this opinion as the "Opinion" and "Mem. Op.," respectively.

that the plaintiff had simply failed to carry her burden. While the District Court granted the defendant's motion, the Court of Appeals for the District of Columbia reversed, holding that the defendant's motion was "fatally defective" because it had not provided affirmative evidence to establish that the defendant should prevail. *Celotex Corp.*, 477 U.S. at 320-21 (quoting *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184 (D.C. Cir. 1985)). According to the Court of Appeals, the defendant had "offered no affidavits, declarations or evidence of any sort whatever in support of its summary judgment motion. To the contrary, Celotex's motion was based solely on the plaintiff's purported failure to produce credible evidence to support her claim." *Catrett,* 756 F.2d at 184.

The Supreme Court reversed the Circuit Court and held that the moving party's only obligation is to point to the factual record that exists, even if that record is solely the product of plaintiff's efforts or lack thereof, and to show that just one requisite element of the cause of action at issue is absent:

> We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure. Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex, 477 U.S. at 322-23.

Thus, since *Celotex* is binding law, we are forced to ask again: how did this Court not

grant Defendants' motion? The Court's Opinion makes clear that Plaintiffs have not established, at the very least, the fact of damages (a requisite element of proof). Further, there was no showing by Plaintiffs how each specific Defendant's conduct proximately caused any damage. Moreover, the Court required, for purposes of the trade secret misappropriation count and any other counts relying on confidentiality or proprietary information, that Defendants "explain specifically which documents they refer to, why these documents are confidential or proprietary, and how this disclosure harmed them." (Mem. Op. at 60-61). If this information was missing from Plaintiffs' opposition papers, the Court was duty-bound to grant Defendants' motion.

This point can be made from a slightly differently angle, following the expressed logic of *Celotex*. That is, ***even if we were to ignore Defendants' summary judgment briefs***, opaque or not, given the opportunities Plaintiffs have had to bring their own motion for summary judgment and to oppose Defendants' motion (and all of this after 16 months of discovery!), this Court could have and should have granted summary judgment *sua sponte*. *Celotex*, 477 U.S. at 326 ("Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence. It would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it."); *see* Fed. R. Civ. P. 56(f) (making explicit, via the 2010 amendments, that a court has the authority to grant summary judgment *sua sponte*—the very same practice noted by the Court in *Celotex*).

We might even make this point from yet another angle by asking a rhetorical question. Had Plaintiffs failed to file the Notice as required by the Court and Defendants renewed their earlier motion for summary judgment *verbatim*, would the Court have granted summary

judgment in Defendants' favor? While Defendants cannot know for certain the answer to this question, we respectfully suggest that the Court would have likely granted the motion. Even more to the point, Defendants believe the Court would have had no alternative under *Celotex* but to do so given the Court's criticism of Plaintiffs' damages claims. Necessarily, given Plaintiffs' inability to articulate with actual facts their damage claims, the Court had an obligation under *Celotex* to grant Defendants' motion in the first instance. *Garay v. Liriano*, 943 F. Supp. 2d 1, 20 (D.D.C. 2013) (stating that "summary judgment is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events") (quoting *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir.2008) (quotation marks omitted)).

The Court apparently recognized this *Celotex* problem at some level and, as a result, appears to extend part of the blame—or, shall we say, burden—to Defendants by asserting that "the Court has received only opaque and largely unhelpful briefing ***from both parties*** on the issues of injury, proximate cause, and damages." (Mem. Op. at 59) (emphasis added). Indeed, the Court goes on to say: "For their part, Defendants appear to be guessing at what injuries and which damages theories Plaintiffs are asserting for each of these claims, which provides no further assistance to the Court." (Mem. Op. at 59-60). With all due respect, the Court is wrong. Defendants did not provide "opaque" or "largely unhelpful briefing," nor were they "guessing" at Plaintiffs' injuries. Indeed, it is not Defendants' burden in the first instance to make Plaintiffs' case. Rather, Defendants were in the exact same boat as the Court in that *Plaintiffs* had failed to make *their own* case. Defendants need not guess. Their ***only obligation*** was to direct the Court to Plaintiffs' failure. Once that burden was met—that is, once the Court recognized that *Plaintiffs* had not provided to the Court the requisite showing of damages (which is Plaintiffs' burden alone), the only avenue available to the Court, per *Celotex*, was to grant summary

judgment in Defendants' favor. *Celotex Corp.*, 477 U.S. at 327 ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole . . . .")

To the extent Plaintiffs respond to all of this by coming to the Court pleading that their original failure, which prompted this somewhat unusual "notice" procedure, was not so much a failure of the evidence, but rather Plaintiffs' failure to articulate and to cite to that evidence, Defendants would make two points in response. ***First***, there is absolutely no fact in the record—that is to say, there is no evidence—that Plaintiffs have suffered any damages. Defendants' original motion demonstrated this absence of factual support not just in its careful briefing, but also through Defendants' detailed presentation of the facts, including the citation therein to Plaintiffs' discovery responses and deposition testimony. These citations amply demonstrate Plaintiffs' failure to justify their claims as to the fact of damages, and, not surprisingly, their inability to provide more than a speculative methodology to quantify their phantom damages. (Defs.' Facts at ¶¶ 238-45 [Doc. No. 154]).

For example, Defendants' statement of facts in support of their original motion, which has been incorporated for the same duty here, demonstrates Plaintiffs' failure to explain the rationale behind their calculation of damages by citing to a careful cross-examination of Plaintiffs' Rule 30(b)(6) witness, Corey Saylor, who quite simply could not explain the rationale behind the methodology. (Defs.' Facts at ¶¶ 243-45). Further, Defendants provided a detailed analysis in their motion papers of Plaintiffs' failure to coherently explain their damage theories with specific reference to this cross-examination. (Defs.' MSJ Mem. at 39-43 [Doc. No. 154-64]). There was nothing "opaque" about Defendants' legal and factual analysis establishing that Plaintiffs had no rational theory of damages, no evidence of damages, and no coherent methodology to calculate their asserted damages. As to the "largely unhelpful" or "imprecise

briefing" referenced by the Court (Mem. Op. at 59, 60), Defendants do not carry the burden to articulate a "helpful" theory on behalf of Plaintiffs and certainly have no burden to be "precise" about damages that simply do not exist. Under *Celotex*, Defendants met *their* burden, and this Court's inability to understand Plaintiffs' damage issues demonstrates that point better than anything Defendants might say now.

Second, if there were facts in the record and legitimate legal theories Plaintiffs might have employed during the first go-round such that Plaintiffs' second attempt might provide some cure that would lead to the "clearer understanding" sought by the Court (Mem. Op. at 61), Plaintiffs' newly filed Notice demonstrates the futility of this whole exercise. (Pls.' Notice [Doc. No. 176]). While Plaintiffs' Notice occupies a lot of digital space at 42 pages, much of it is premised on the notion that Plaintiffs need not actually show compensatory damages, but rather just sit back, scream "foul," and wait for punitive damages. Moreover, a not insignificant portion of the Notice is a regurgitation of case law already fully briefed by the parties in the earlier motion or actually cited to by the Court in its Opinion. And where Plaintiffs actually need to rely on judicial precedent, Plaintiffs either believe that case law is like modern art and it means whatever you say it means, or, quite simply, they failed to read the cases with any level of care. Finally, the lion's share of this remedial Notice effort consists of wildly absurd factual claims about the conduct of specific Defendants under each cause of action with no factual support whatsoever—all placed in the service of the exact same damage theories the Court rejected the first time around.

Quite simply, Plaintiffs' Notice is nothing less than insulting to the Court and to the judicial process. This is patent from just a cursory read of the document, but a few of the more salient examples should suffice. First, we see that Plaintiffs' Notice continues to assert that Plaintiff Council on American-Islamic Relations Action Network, Inc. ("CAIR-AN") has valid

claims (beyond merely trespass as the owner of the premises) for conversion of documents, fraud, breach of fiduciary duty, unjust enrichment, and misappropriation of trade secrets even though Plaintiffs have conceded, and this Court has ruled, that CAIR-AN owned none of the documents at issue in this litigation and had no employees to speak to Chris Gaubatz such that he could have entered into a fiduciary duty or misrepresented some truth about himself. Second, Plaintiffs continue to assert that Defendants Savit and Pavlis are liable as active participants in the CAIR Documentary Film Project, notwithstanding the factual record and the Court's clear rulings that this is not the case. Third, Plaintiffs continue to seek reputational damages disguised as punitive damages notwithstanding their stipulation not to seek such damages and this Court's memorialization of that stipulation in its Opinion. (One poignant example of this ploy is this particular claim: "[B]ecause plaintiffs suffered reputational and other harm proximately caused by defendants' acts, and because defendants engaged in a series of overt acts over a substantial period of time pursuant to and in furtherance of their outrageous common scheme, defendants are all liable as co-conspirators and as aiders and abettors for punitive damages." [Pls.' Notice at 11]). Fourth, Plaintiffs make claims about the state of the law (*e.g.,* that the District of Columbia allows punitive damages without a showing of actual damages for their fraud and breach of fiduciary duty claims) that suggest a complete disregard of the actual law as if no one will notice or care how reckless Plaintiffs are in their written submissions. And fifth, Plaintiffs make statements about "facts" that are so patently improper it is hard to know where to begin. One particularly comical example is Plaintiffs' claim that Defendant Yerushalmi should be required to relinquish all of his allegedly ill-gotten gains from the harms Plaintiffs allegedly suffered. Of course, the actual factual record evidences that Yerushalmi received no compensation for any of his legal services during the CAIR Documentary Film Project and received no benefit from any party. So how do Plaintiffs claim Yerushalmi received a benefit that he must relinquish under

their unjust enrichment claim? They just make it up as they go along: "Most recently, Yerushalmi entered his appearance on behalf of five private anti-Muslim parties in *MIA v. Pittsfield Charter Township, et al.*, Civil Action No. 12-10803 (E.D. Mich), a zoning case. Since 2008, Yerushalmi's professional income has significantly been bolstered as a direct result of his work with CSP and the Gaubatzes in infiltrating CAIR-F's office." (Pls.' Notice at 36 n.25). Needless to say, the factual record says nothing about Yerushalmi's income, professional or otherwise, either as it existed before 2008 or after, and it is hard to understand how an appearance in a federal case is remotely relevant to the point Plaintiffs are attempting to improperly assert. It is all the more interesting how Plaintiffs have come to assert (falsely, of course) that the five [sic] parties [sic] to the referenced litigation in Michigan are "anti-Muslim."[2] But, alas, for Plaintiffs, facts and the factual record are theirs to craft on the fly for they appear quite confident that there is no judicial consequence for their reckless disregard of the Rules of Civil Procedure.

To make these points and more, Defendants will now grudgingly proceed to reargue a motion for summary judgment that Defendants respectfully suggest should have been granted in the first instance.

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[2] To further illustrate Plaintiffs' disregard of the facts, in the Michigan zoning case cited by Plaintiffs (a case in which Plaintiffs' counsel, CAIR, is representing the MIA plaintiff), the American Freedom Law Center, of which attorneys Yerushalmi and Robert Muise are counsel, is representing ***seven*** township residents *pro bono*. These private citizens are not "***parties***" to any litigation, but rather non-parties who were served with harassing subpoenas by CAIR attorneys because they expressed their opposition at public hearings and in a petition submitted to township officials (activities protected by the First Amendment) to the MIA's application to rezone property in their neighborhood to build an Islamic center. The citizens expressly opposed the proposed construction because it would cause traffic congestion in their neighborhood. To describe these citizens as "anti-Muslim" is false, reckless, and offensive—and classic CAIR.

ARGUMENT[3]

I. Defendants Have Failed to Establish the Requisite Elements for Conversion.[4]

Plaintiffs' claims of conversion as against all Defendants fail on several levels. (Pls.' Notice at 23-26). We begin with one of the examples illustrating how Plaintiffs have turned this remedial opportunity, so generously (if not objectionably) granted by the Court, into nothing short of an insult.

A. CAIR-AN's Conversion Claims Must Fail.

Plaintiffs begin their conversion discussion with a footnote 13 wherein they argue for the first time that CAIR-AN owned some 68 pages of newly discovered documents beyond the 455 pages of documents they have previously alleged to have been converted (all of which Plaintiffs claim belonged to CAIR Foundation, Inc. ["CAIR-F"]).[5] (Pls.' Notice at 13 n.13). But this means that Plaintiffs did not bother to read the Court's Opinion very carefully. For if they had, they would have realized that the Court ruled that "none of the documents at issue in this litigation belonged to CAIR-AN." (Mem. Op. at 52-53) (citing to Plaintiffs' Rule 30(b)(6) deponent's testimony). Indeed, footnote 13 flatly contradicts Plaintiffs' sworn testimony in Plaintiffs' Exhibit 52, which consists of Plaintiffs' sworn answers to Defendant Center for Security Policy's ("CSP") First Set of Interrogatories. (*See, e.g.*, Pls.' Ex. 52, Interrog. Ans. No. 6 [claiming every document taken by Chris Gaubatz was a breach of fiduciary duty—and that the

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[3] As noted in the Notice of Motion, we hereby incorporate by reference Defendants' original motion for summary judgment and statement of facts (Doc. Nos. 154) and all supporting documents, including declarations and exhibits (Doc. Nos. 154-1-154-63; 167-1-167-2), a memorandum of points and authorities in support of the motion (Doc. No. 154-64), and a reply brief (Doc. No. 167).

[4] For whatever reason, Plaintiffs have briefed the causes of action not in the order in which they appear in the Third Amended Complaint or as listed by the Court's Order. For clarity purposes, Defendants will track the Court's Order.

[5] Defendants derive the 455 pages of documents belonging to CAIR-AN from Plaintiffs' Exhibit 52, and specifically from the table of documents referenced at Interrogatory Answer No. 5, wherein Plaintiffs include a page count. (Pls.' Ex. 52 [Doc. No. 164-8]).

table referencing documents in Interrogatory Answer No. 5 represents "the documents at issue in this case"; that all of these documents belonged to CAIR-F; and making no reference to a single document owned by CAIR-AN]; No. 7 [same]; No. 8 [claiming all documents taken in violation of 18 U.S.C. 2701(a) belonged to CAIR-F]; No. 10 [claiming all documents tortiously converted are referenced in the table at Interrogatory Answer No. 5 and that these documents represent "the documents at issue in this case."])

But if we assume the burden of interpreting the unspoken claims of Plaintiffs, as it seems the Court requires of us in this litigation,[6] we might infer that Plaintiffs are citing to newly discovered evidence to make their point and asking the Court to reconsider its earlier ruling about CAIR-AN's viable claims. But alas, footnote 13 simply cites to a new exhibit filed with their Notice (Pls.' Ex. 81 [Doc. No. 176-8]) containing some document titled "Appendix," some documents that appear to be emails, with the remaining bulk of the exhibit's pages appearing to be public records relating to real estate. No affidavit, no authentication, no foundation laid. Should we leap yet further down the supposition hole we have already entered, it appears that Plaintiffs are suggesting that their Exhibit 81 contains documents they claim were stolen by Chris Gaubatz. Nowhere, however, do Plaintiffs provide any sworn statement that these documents were documents removed by Chris Gaubatz or, for that matter, actually belonged to CAIR-AN. Beyond this technical evidentiary defect and almost comically, the claim of footnote 13 appears to be—although we concede that as to this point the footnote is all but incoherent—that these documents relate to property that CAIR-AN owns and therefore CAIR-AN must have a possessory interest in the documents relating to that property. Needless to say, besides the failure to provide any affidavit or other admissible evidence to make any of the assertions above, footnote 13's conclusion does not follow from its premise.

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[6] (*See* Pls.' Mot. for Recons. at 4-19 [Doc. No. 172]).

As such, Defendants respectfully request that the Court grant their motion for summary judgment as to Plaintiff CAIR-AN's conversion claims.

B. Plaintiffs' Conversion Claims Are Foreclosed because They Have Elected Their Remedy to Take Possession of the Documents.

As noted above, Plaintiffs' Exhibit 52 consists of Plaintiffs' sworn answers to Defendant CSP's First Set of Interrogatories. Indeed, these answers are the fourth and final answers Plaintiffs provided to these interrogatories, having crafted an original set of answers, a supplement, then a first supplement, followed by a second supplement, leading to a third and final supplement. (*See* Exs. 15-17 & 21 to Muise Decl. [Doc. Nos. 154-16-154-18 & 154-22, respectively]). In their sworn answers, Plaintiffs make clear that all documents allegedly taken by Chris Gaubatz, and which are the subject of this litigation, have been returned to Plaintiffs pursuant to the consent order agreed to by Plaintiffs and the Gaubatz Defendants. (Pls.' Ex. 52 at 3-4 [culminating in this sworn statement: "All documents stolen from Plaintiffs' offices were at the time and are now in the possession of CAIR-Foundation."]); *see also* Mem. Op. at 17 [discussing consent order requiring the Gaubatz Defendants to return all documents removed from Plaintiffs' offices]).

It is hornbook law, and indeed the law of the District of Columbia, that when property is subject to a conversion claim, the party whose property has been taken has one of three alternative remedies available: seize the property through lawful self-help; sue for the return of the property, typically referred to as a replevin action; or sue for money damages by bringing an action for conversion. Restatement (Second) of Torts, § 922 ("The amount of damages for the conversion of a chattel is diminished by its recovery or acceptance by a person entitled to its possession."). The comment to this section of the Restatement just cited explains:

> Comment on Subsection (1):
>
> b. When a chattel has been converted and the person entitled to its possession recovers it, whether by legal process or by self-help, or when the converter tenders its return and the return is accepted, the damages recoverable for the conversion are diminished to the extent of the value of the chattel at the time of its recovery or return. When chattels have been taken and have not been returned, the damages for the conversion include the full value of the chattel at the time of taking, or under some circumstances its value at a later time, together with any special damages resulting from the taking, and interest. (*See* § 927).
>
> In lieu of seeking damages for its value, the owner may regain possession of the chattel by an action of replevin or by self-help or by accepting an offer to return it made by the converter.

Id. Thus, in *Smith v. Whitehead*, 436 A.2d 339, 351 (D.C. 1981), the Court of Appeals for the District of Columbia noted that a suit for replevin was an alternative remedy to a conversion action. The court referenced this hornbook law because the defendant was claiming that the mere availability of a suit for replevin, *but not actually pursued*, forecloses the injured party from bringing a conversion action for damages. In response, the court explained that "an action for conversion lies as an alternative to, rather than a substitute for, a suit for the replevin of property." *See also United States v. Paine Lumber Co*., 206 U.S. 467, 473 (1907) ("It was hence concluded 'the cutting was waste, and, in accordance with well-settled principles, the owner of the fee may seize the timber cut, arrest it by replevin, or proceed in trover for its conversion.'"); *Roebuck v. Walker--Thomas Furniture Co*., 310 A.2d 845, 847 (D.C. 1973) (noting earlier related action wherein the trial court dismissed the conversion action for damages due to a successful suit for replevin of the furniture); *see also* D.C. Code §§ 16-3702 & -3710 (limiting damages in a replevin action when property was "eloigned by the defendant" and thus unavailable to be returned to the rightful owner).[7]

[7] In the second paragraph of footnote 16 of Plaintiffs' Notice filing, Plaintiffs assert without citation to any relevant law that the return of the documents does not affect their claim for conversion damages. This, of course, is not the law. The only case Plaintiffs cite to relates to

Plaintiffs have received all of the documents they claim were stolen by Chris Gaubatz. Indeed, Plaintiffs have even received the documents they had earmarked for destruction. While Plaintiffs did not expressly bring a suit for replevin, the consent order granting them injunctive relief achieved the same result. They have made no claims (and presented no evidence) that the documents they received from the Gaubatz Defendants were damaged or of a lesser value when they were returned to them. Plaintiffs have elected their remedy and have no extant claim for conversion.

C. Plaintiffs' Have Failed to Present Any Admissible Evidence that Any of the Documents Are the Proper Subject of a Conversion Claim.

To the extent that Plaintiffs are claiming that it is the content or information contained in the documents they now possess that provides liability for conversion, Plaintiffs must provide admissible evidence that the loss of the content of the documents, as an intangible right, is compensable in a conversion action. The United States Court of Appeals for the District of Columbia has explained the principles underlying this analysis as follows:

> It is clear that on the agreed facts appellants committed no conversion of the physical documents taken from appellee's files. Those documents were removed from the files at night, photocopied, and returned to the files undamaged before office operations resumed in the morning. Insofar as the documents' value to appellee resided in their usefulness as records of the business of his office, appellee was clearly not substantially deprived of his use of them.
>
> This of course is not an end of the matter. It has long been recognized that documents often have value above and beyond that springing from their physical possession. They may embody information or ideas whose economic value depends in part or in whole upon being kept secret. The question then arises whether the information taken by means of copying appellee's office files is of the type which the law of conversion protects. The general rule has been that ideas or information are not subject to legal protection, but the law has developed exceptions to this rule. Where information is gathered and arranged at some cost

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pre-judgment interest in the event of damages in the first instance. While it would seem obvious that one cannot earn pre-judgment interest on $0 of damages, that is apparently exactly what Plaintiffs seem to be suggesting. (Pls.' Notice at 27 n.16 [citing *Duggan v. Keto*, 554 A.2d 1126, 1137-39 (D.C. 1989)]).

> and sold as a commodity on the market, it is properly protected as property. Where ideas are formulated with labor and inventive genius, as in the case of literary works or scientific researches, they are protected. Where they constitute instruments of fair and effective commercial competition, those who develop them may gather their fruits under the protection of the law.
>
> The traditional rule has been that conversion will lie only for the taking of tangible property, or rights embodied in a tangible token necessary for the enforcement of those rights. This overly restrictive rule has recently been relaxed in favor of the reasonable proposition that any intangible generally protected as personal property may be the subject matter of a suit for conversion.
>
> This protection is developed by the branch of the law known as common law copyright, which reserves to an author the right of first publication of his work.
>
> The question here is not whether appellee had a right to keep his files from prying eyes, but whether the information taken from those files falls under the protection of the law of property, enforceable by a suit for conversion. In our view, it does not. The information included the contents of letters to appellee from supplicants, and office records of other kinds, the nature of which is not fully revealed by the record. Insofar as we can tell, none of it amounts to literary property, to scientific invention, or to secret plans formulated by appellee for the conduct of commerce. Nor does it appear to be information held in any way for sale by appellee, analogous to the fresh news copy produced by a wire service.
>
> Appellee complains, not of the misappropriation of property bought or created by him, but of the exposure of information either (1) injurious to his reputation or (2) revelatory of matters which he believes he has a right to keep to himself. Injuries of this type are redressed at law by suit for libel and invasion of privacy respectively, where defendants' liability for those torts can be established under the limitations created by common law and by the Constitution.

Pearson v. Dodd, 410 F.2d 701, 707-08 (D.C. Cir. 1969).

If Plaintiffs cannot provide the Court with any evidence of the loss of the use of the content or information prior to the return of the documents, the situation is akin to the photocopies made in *Pearson,* which in turn requires a showing of some unique property right arising from the uniquely protected literary, scientific, or secret commercial content that loses its value when taken by an unauthorized third-party. With the *Pearson* analysis in mind, Defendant CSP served Plaintiffs with a specific interrogatory to understand whether the taking of any information or content allegedly contained in the documents removed by Chris Gaubatz deprived

Plaintiffs of the actual use of the information. (Interrog. No. 11 at Pls.' Ex. 52). Specifically, subpart (3) of the interrogatory asked if Plaintiffs had an original or copy of the document after it was taken by Chris Gaubatz and subpart (4) asked if Plaintiffs retained the information contained on the document in useable form after the document was taken by Chris Gaubatz. Plaintiffs responded in pertinent part as follows:

> Without waiving previous objections, the following answer applies only for CAIR-Foundation. CAIR-AN did not plan to utilize any document, actually utilize any document, keep any documents or copies, or retain any information subsequent to Defendants' theft. ***Furthermore, Plaintiffs' Answers to (3) and (4) are the same: it is irrelevant if the CAIR plaintiffs had an original or copy of the document or whether CAIR retained the information in some other format. Additionally, it is burdensome for CAIR to respond to this particular inquiry***.

(Interrog. Ans. No. 11 at Pls.' Ex. 52) (emphasis added). This testimony makes clear that there is no evidence to suggest Plaintiffs were damaged by the loss or absence of the information or content of the document. Indeed, nowhere in the record Defendants have scoured do Plaintiffs provide any facts to know if and how Plaintiffs were actually damaged by the removal of physical documents—the information or content of which Plaintiffs retained throughout—and which have long since been returned to Plaintiffs. But that leaves Defendants' Notice filing. Perhaps that document points to facts in the record the Court and Defendants have missed.

So it is we turn to Defendants' Notice to see if we have gained the clarity from Plaintiffs the Court sought and required.

Defendants' Notice breaks down each of the causes of action into two basic sections. The "A" section purports to discuss the "elements" of the cause of action, including the requirement of the fact of damages (or not), and the measure of damages. The remaining sections purport to set out the facts that show that each Defendant is potentially liable for that cause of action. Plaintiffs' discussion of conversion is no exception. Plaintiffs' Notice, however, provides literally nothing new about the "fact" of damages. Plaintiffs appear to rely

heavily on *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, No. 3:09-cv-58, 2011 U.S. Dist. LEXIS 113702 (E.D. Va. Oct. 3, 2011), which examined Virginia's conversion law of damages, principally, we assume, because of the alternative measurements of damages discussed therein. But if *E.I. du Point de Nemours & Co*. stands for anything, it stands for the two first principles of the law of conversion. The first such principle was made clear in the *Pearson* case noted earlier: to even assert the fact of damages from documents Plaintiffs now possess, they must present admissible evidence that there was some protectable property right that merged with these documents. *E.I. du Pont de Nemours & Co.*, 2011 U.S. Dist. LEXIS 113702, at *11-*12 ("1) Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights. 2) One ***who effectively prevents the exercise of intangible rights of the kind customarily merged in a document*** is subject to a liability similar to that for conversion, even though the document itself is not converted.") (quoting Restatement (Second) of Torts, § 242) (emphasis added). Thus, even if we were to assume that the documents in question included such intangible rights (which they do not), nowhere in the record do Plaintiffs provide any evidence that the removal of the documents, while Plaintiffs retained all of the content or information contained within those documents, caused Plaintiffs any harm whatsoever. Without evidence of the ***fact of damages***, we do not even get to the question of how to *quantify* damages. *Day v. Avery*, 548 F.2d 1018, 1028 (D.C. Cir. 1976); *see also Meeker v. Stuart*, 188 F.Supp. 272 (D.D.C. 1960) ("It is a well established principle that while the fact of damages must be established definitely, the amount need not be proven mathematically.").

The antecedent problem for Plaintiffs, therefore, is that nowhere in the record do they actually identify the factual predicates to even begin to assess whether the allegedly converted documents, which Plaintiffs recovered, contain the kind of *Pearson* property rights that merge into the documents themselves. While it is true that Plaintiffs narrate a tale in their various briefs

and in their recently filed Notice that the documents contained donor lists and mosque lists that they claim were both proprietary to Plaintiff CAIR-F and confidential, there is simply no evidence of that anywhere in the record. Specifically, the only place Plaintiffs actually point to in the record for evidence of any alleged intangible rights is their third supplemented answers to Defendant CSP's first set of interrogatories—again, Plaintiffs' Exhibit 52. (Pls.' Notice at 24-25 n.15, 26). But the only remotely substantive answer to these interrogatories is Plaintiffs' answer to Interrogatory No. 5. This answer consists of a narrative and a table. The narrative simply describes Plaintiffs' proposed approaches ***to quantify*** its damages. (Pls.' Ex. 52 at 4-5). But none of this narrative speaks to ***the fact of damages***: did the documents contain the kind proprietary information like trade secrets or the like that resulted in Plaintiffs suffering injury immediately upon the removal of the documents from their offices?

To avoid summary judgment on this issue, Plaintiffs were required to proffer actual facts, not unsworn narrative, to carry their burden that the documents, which they claim are the subject of their conversion claim, contained the *Pearson* protected interests. Instructive for these purposes is *Ruesch v. Ruesch Int'l Monetary Servs., Inc.*, 479 A.2d 295 (D.C. 1984), which held that the customer list at issue was not a protected trade secret. In so ruling, the Court of Appeals for the District of Columbia undertook a very demanding and exhaustive examination of the kinds of factors a plaintiff must establish to make out a case for a trade secret under the common law of the District of Columbia:

> A trade secret has been authoritatively defined as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound . . . or a list of customers." 4 RESTATEMENT OF TORTS § 757, comment b, at 5 (1939). n2 In determining whether given information should be afforded trade secret protection, many courts have considered the six factors listed in the Restatement:
>
> (1) The extent to which the information is known outside of [the] business;
>
> (2) the extent to which it is known by employees and others involved in

> [the] business; (3) the extent of measures taken by [the employer] to guard the secrecy of the information; (4) the value of the information to [the employer] and to his competitors; (5) the amount of effort or money expended by [the employer] in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. at 6.

Ruesch, 479 A.2d at 296. In our case, we do not know any of these factors. Beyond Plaintiffs' naked assertion that all of the documents had "confidential value" (Pls.' Ex. 52 at 4)—a conclusory statement we know to be false since many of these documents appear to be public emails and brochures or even published articles—there is nothing in the record to inform us that these specific documents contained ***information*** not known to the public or to others outside Plaintiffs' business, let alone information that "is used in [Plaintiffs'] business, and which gives [Plaintiffs] an opportunity to obtain an advantage over competitors who do not know or use it." Nor we do know the extent to which the information contained in these documents was known to those who accessed Plaintiffs' offices. We do not know what measures Plaintiffs used to protect the information contained in these documents (*e.g.*, are we to believe that the emails, brochures, and published articles, or for that matter the mosque lists, were kept secret by requiring the *third parties* who were recipients of this information or who had access to it to sign a confidentiality agreement?). And we do not know the ease or difficulty with which the information contained in these documents could be properly acquired by others.

This evidentiary void is best illustrated by looking at the narrative relating to confidentiality. Here, Plaintiffs do not tell us why or how a document was confidential, nor do Plaintiffs even provide the facts that might allow us to infer a document was confidential. All we learn here from Plaintiffs is that "all documents Defendants took from Plaintiffs' office have confidential value. Plaintiffs' calculate the confidential value of every single document that was returned to Plaintiff as $10 per document." (Pls.' Ex. 52 at 4). But this is, in the first instance,

merely a conclusory statement, and, in the second, a purely speculative if not random dollar valuation.

Moreover, even the table contained in Plaintiffs' Exhibit 52 does not come close to providing evidence of the cost to Plaintiffs for producing this information. (Pls.' Ex. 52 at 4-10). Plaintiffs themselves tell us that this table is based upon rank speculation, which patently violates the second principle of the law of conversion damages set out by the very case relied upon by Plaintiffs: a plaintiff in a conversion action may not recover speculative damages or damages calculated through speculation. *E.I. du Pont de Nemours & Co*, 2011 U.S. Dist. LEXIS 113702 ,at *25-*26, n. 13. Specifically, Plaintiffs provide no affidavit based upon ***personal knowledge*** to validate their assumptions, no expert testimony relating to those assumptions, and no survey evidence of Plaintiffs' employees providing some factual predicate for the speculations proffered. Plaintiffs claim to quantify "investment" value by guessing about how much time it took to gather the information and create the document. Yet, in 30 of the 55 line items of documents grouped together in the table, Plaintiffs do not even know who created the document. For these "Unknown" authors and compilers, Plaintiffs proceed to guess at how long it took them to do the work, and then guess at the hourly rate paid to these "Unknown" persons. Indeed, we do not even know if the "Unknowns" worked for Plaintiffs or were paid anything by Plaintiffs for the work.

Even more to the point here, we are not told how the content or information of these documents was gathered by Plaintiffs to know if in fact it was the product of creative, scientific, or commercial genius protected by the *Pearson* rule—mosque lists, for example, are provided to the public for free from any number of public sources.[8] And while some donor lists might be

[8] (*See, e.g.*, Wikipedia list of US mosques at http://tinyurl.com/424nwca; MosquesMasjids.com at http://www.mosquesmasjids.com); IslamiCity.com at http://tinyurl.com/pwgq2fe.

trade secrets based upon the Restatement's analysis, they are most certainly not treated by courts as *ipso facto* trade secrets. *Am. Red Cross v. Palm Beach Blood Bank*, 143 F.3d 1407, 1410 (11th Cir. Fla. 1998) ("After reviewing the incomplete record in this case, we are unable to determine that Red Cross is substantially likely to establish that its donor lists are trade secrets.").

Further, there is no affidavit or other sworn document providing the factual predicate necessary under *Pearson* to allow these documents to "speak for themselves":

> The question here is not whether appellee had a right to keep his files from prying eyes, but whether the information taken from those files falls under the protection of the law of property, enforceable by a suit for conversion. In our view, it does not. The information included the contents of letters to appellee from supplicants, and office records of other kinds, ***the nature of which is not fully revealed by the record***. Insofar as we can tell, none of it ***amounts to literary property, to scientific invention, or to secret plans formulated by appellee for the conduct of commerce***. Nor does it ***appear to be information held in any way for sale*** by appellee, analogous to the fresh news copy produced by a wire service.

Pearson, 410 F.2d at 708. The *Pearson* problem exists here in spades. Not only is there no testimony about how any of the alleged proprietary documents fit into any of the *Pearson* protected categories, Plaintiffs have not even placed these documents into the record by including them in their motion filings—that is, they are simply not a part of the record. And if they have been placed in the record such that Defendants just missed this submission, Plaintiffs have yet to file an authenticating affidavit. *Akers v. Liberty Mut. Group*, 744 F. Supp. 2d 92, 97 (D.D.C. 2010).[9]

As is evident from the record in this matter, Plaintiffs can point to no actual admissible evidence that there was any protected property interest in the content or information contained in

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[9] The only two authenticating declarations Defendants can locate are the two declarations filed by Gadeir Abbas, one in support of CAIR-F's motion for summary judgment (Doc. No. 156-46) and one in opposition to Defendants' motion for summary judgment (Doc. No. 164-3). Neither of which provides the requisite authentication of the documents at issue.

the alleged documents or, even if there were, that the removal of the documents proximately caused an injury (*i.e.*, the fact of damages). As such, Defendants respectfully request that the Court grant summary judgment in Defendants' favor on Plaintiffs' conversion claims.

D. Plaintiffs' Have Provided No Measure of Damages Other Than Rank Speculation.

Even if Plaintiffs could survive all of the fatal hurdles detailed above in their effort to make out a claim for conversion damages, Plaintiffs' Notice has provided no new measure of damages, nor indeed a new explanation of their previously proffered damage quantification theories. The Court has already had the benefit of Defendants' careful analysis of Plaintiffs' proposed methods for quantifying their alleged damages (Defs.' MSJ Mem. at 39-43; Defs.' Facts at ¶¶ 243-48) and Plaintiffs' rebuttal. (Pls.' Opp. Mem. at 35-40 [Doc. No. 164])). The Court rejected Plaintiffs' theories and demanded the Notice filing. Insofar as Plaintiffs have provided literally nothing new not previously analyzed in Defendants' original motion and available to the Court when it ordered the filing of the Notice, Defendants respectfully request the Court to grant summary judgment in Defendants' favor on Plaintiffs' claims on the grounds that Plaintiffs have provided neither the fact of damages nor a theory for quantifying its phantom injuries with a "fair degree of probability." (Order, § (e)(i)d. at 3).

E. Even If Plaintiffs Could Establish a Cognizable Claim for Conversion Damages, Plaintiffs Have Provided No Evidence that the Secondary Defendants[10] Should Be Held Liable.

We begin here with yet another example of how Defendants' Notice tests the boundaries of frivolousness. Throughout its Opinion, the Court made clear that there simply was no evidence that Defendants Savit or Pavlis were involved in any activity that implicated them in

[10] For purposes herein, "Secondary Defendants" has the same meaning as in Defendants' original motion for summary judgment: all Defendants except Chris and David Gaubatz, referred to as the "Gaubatz Defendants."

any way in the CAIR Documentary Film Project, including the recording of conversations in Plaintiffs' offices or in the removal of any documents. (Mem. Op. at 38-39 [concluding by observing "[i]ndeed, Plaintiffs entirely fail to respond to (and therefore concede) Defendants' statements that Savit and Pavlis had no role in the CAIR Documentary Film Project during the time relevant to this litigation."]; 41 ["Similarly, Plaintiffs have not provided any evidence that Defendants Savit and Pavlis knew that these communications were obtained via interception."]; 45 ["Plaintiffs provide no evidence to show that Savit and Pavlis brought about or caused the interceptions by Chris Gaubatz and indeed concede that Savit and Pavlis had no role in the development of the CAIR Documentary Film Project."]; 50 ["Plaintiffs have produced no evidence that Savit and Pavlis, even as employees of CSP, played a role in controlling or directing David Gaubatz. Accordingly, any claims premised on *respondeat superior* liability against these Defendants are dismissed."]).

Yet, Plaintiffs seem oblivious to the Court's rulings and even more dishonest about the factual record by claiming time and again in their Notice that the factual record establishes the full participation of Savit and Pavlis in all of the alleged bad acts. (*See, e.g*., Pls.' Notice at 6 ["Plaintiffs have also adequately demonstrated that defendants CSP, SANE, Yerushalmi, Pavlis, Savit, Brim, and Dave Gabautz agreed to infiltrate plaintiffs' offices, record clandestine video without plaintiffs' knowledge or consent, and steal thousands of documents from plaintiff in furtherance of a common scheme they collectively named the 'CAIR Film Project.'"]; 12 [identical quote]; 22 ["Defendants CSP, Brim, Savit, and Pavlis were also members of the conspiracy to have Chris Gaubatz trespass onto plaintiffs' property to effect their common scheme of placing plaintiffs in their collective, bigoted 'cross-hairs.'"]; 23 ["Therefore, the record clearly shows that CSP and its employees, Brim, Pavlis, and Savit, are subject to punitive damages for trespass."]; 36 [claiming Savit and Pavlis willfully engaged in bad acts and profiting

thereby, thus providing liability for unjust enrichment]). Although none of these absurd assertions relate to the claim of conversion *per se*, it seems clear this was more oversight than foresight. But one thing is certain from the facts and this Court's Opinion—no matter how cavalier Plaintiffs might be about Rule 11: Defendants Savit and Pavlis have no liability for conversion or any other claim and to insist otherwise, as Plaintiffs have done in their Notice, is inexcusable.[11]

As to the remainder of the Secondary Defendants, Plaintiffs appear to claim that Defendants CSP, Brim, SANE, and Yerushalmi conspired with and aided and abetted the Gaubatz Defendants in converting Plaintiffs' documents. (Pls.' Notice at 30-32). Noticeably, Plaintiffs claim the Secondary Defendants are liable for Chris Gaubatz's alleged breach of fiduciary duty and fraud also based upon a theory of *respondeat superior* liability.[12] Given the

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[11] Another example of Plaintiffs' insulting treatment of the law and the factual record, albeit relatively unimportant in the scheme of things, is their tentative suggestion in a footnote that Plaintiffs as corporations should be allowed to claim emotional distress damages arising from the conversion. (Pls.' Notice at 23-24 n.14) (citing *Citizens United v. F.E.C.*, 558 U.S. 310 (2010)). First, this class of damages appears nowhere in the Third Amended Complaint nor in any of Plaintiffs' prior descriptions of their damages. (*See* Pls.' Ex. 52). Second, it goes without saying that Plaintiffs have not put any evidence into the record that Plaintiffs, as corporations, have suffered emotional distress. Third, Plaintiffs cannot seriously understand there to be an analogy between a corporation metaphorically speaking through advertisements, agreements, and campaign financing, on the one hand, and feeling emotional distress on the other. The law recognizes no such analogy and never has. *Golden Archer Invs. v. Skynet Fin. Sys., LLC*, No. 11 Civ 3673, 2013 U.S. Dist. LEXIS 35690, at *3-*5 (S.D.N.Y. Feb. 22, 2013) (gathering cases holding that corporations have no claims for emotional distress).

[12] It is noteworthy, and indeed revelatory, that nowhere in Plaintiffs' Notice, wherein they discuss *repondeat superior* liability, do they even mention the Court's sub-agency theory as propounded anew in its Opinion. (*See* Defs.' Recons. Mem. at 4-19 [Doc. No. 175-1]). Indeed, as if to underscore Plaintiffs' rejection of the Court's sub-agency theory, in every single reference to *respondeat superior* liability made in the Notice, Plaintiffs pointedly do ***not*** assert that the Secondary Defendants controlled David Gaubatz, who in turn controlled Chris Gaubatz (as the Court suggested Plaintiffs might have meant), but rather that Defendants (whether independently or collectively) controlled Chris Gaubatz ***directly*** and not through some two-tiered sub-agency relationship. (Pls.' Notice at 5 ["Plaintiffs further seek to hold all of the remaining defendants, including David, vicariously liable for Chris's breach under a theory of *respondeat superior* for initiating the film project and ***for their ongoing supervision of Chris*** during the

Court's expansive treatment of Plaintiffs' *respondeat superior* claims in its Opinion, Defendants hereby incorporate their arguments against *respondeat superior* liability as previously set out in detail in their motion for reconsideration. (Defs.' Mem. in Supp. of Mot. for Recons. at 4-19 [Doc. No. 175-1] ("Defs.' Recons. Mem.")).

As to the claims for aiding and abetting liability, Plaintiffs' appear to take issue with the state of the law in the District of Columbia and assert, through a footnote, that there is still room for aiding and abetting liability in the District. (Pls.' Notice at 1-2, n. 1). Defendants reject this assertion and continue to maintain that the D.C. Court of Appeals has not accepted aiding and abetting liability, neither as an independent tort nor as some kind of vicarious or indirect liability, notwithstanding the invitation to do so by the *Halberstam* court. *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983). (*See* Defs.' MSJ Mem. at 28-29; Defs.' Opp'n Mem. to Pl. CAIR-F's MSJ at 24-30 [Doc. No. 163] ["Defs.' Opp'n Mem."]). Moreover, even if *Halberstam*'s aiding and abetting were a viable theory of liability in the District, to withstand a motion for summary judgment, Plaintiffs must provide some evidence that the Secondary Defendants had knowledge of Chris Gaubatz's unauthorized taking of documents. *Id*. (*See* Defs.' Opp'n Mem. at 26-29).

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time of his fraudulent 'internship' at plaintiffs' offices."]; 7 ["Finally, each defendant is also liable for breach of a fiduciary duty under the theory of *respondeat superior*. ***Defendants entered into an agreement in which they employed and instructed Chris*** to seek an internship under an assumed, fictitious identity to access, copy, and remove documents and other secret information including confidential conversations from plaintiffs' offices."]; 11 ["Plaintiffs further seek to hold the remaining defendants, including David Gaubatz, vicariously liable for Chris Gaubatz's fraud under a theory of *respondeat superior* ***in their role initiating CSP's film project and for guiding Chris*** as he defrauded plaintiffs throughout his 'internship.'"]; 12 ["The remaining defendants are also liable for fraud under the theory of *respondeat superior*. ***Defendants entered into an agreement in which they employed and instructed Chris*** to obtain an internship under an assumed, false identity to access and to copy and/or remove documents from plaintiffs' offices. Therefore, plaintiffs further seek to hold all of the remaining defendants, including David, vicariously liable for Chris's breach under a theory of *respondeat superior* ***for initiating the film project and for their ongoing supervision of Chris*** during the time of his months-long fraud against plaintiffs."]; 13 ["Therefore, ***because defendants entered into an agreement with Chris*** to obtain an internship with plaintiffs under false pretenses, defendants are liable for fraud committed by Chris under the doctrine of *respondeat superior*."]).

While CSP, Brim, and Yerushalmi had knowledge that Chris Gaubatz had removed documents from Plaintiffs' offices, Yerushalmi had provided clear and appropriate legal advice on when such document removal was proper, and all of the Secondary Defendants were under the quite reasonable assumption that Chris Gaubatz was only removing documents he was authorized to remove. (Defs.' Facts at ¶¶ 166-71).

To be clear, and notwithstanding Plaintiffs' wild and false suggestions to the contrary, obtaining documents from Plaintiffs' offices was never a part of the CAIR Documentary Film Project, and there is no evidence in the record whatsoever that the Secondary Defendants had knowledge of any illegal removal of documents.[13] And while the Court held in its Opinion that

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[13] Plaintiffs' Notice is replete with false assertions of fact and fraudulent citations to the record that claim to show knowledge. A few examples are in order. Plaintiffs claim that Brim's work on an analysis of Plaintiffs' real estate holdings and the "FARA report" indicated she had knowledge that Chris Gaubatz allegedly converted the documents tortiously taken from Plaintiffs' offices. (Pls.' Notice at 30-31). But the record citations evidence no such thing. Specifically, why would Brim have knowledge of conversion just because Chris Gaubatz provided her with public or even Plaintiffs' own documents relating to real estate ownership? How would Brim know that these specific documents were not freely available to Chris Gaubatz to copy and remove? They all related to real estate ownership documented by public records. Plaintiffs also seem to draw a mysterious line between what they term the "FARA report" and Brim's knowledge of the alleged conversion. Yet, there is no evidence in the record whatsoever that Brim had actual or constructive knowledge at the time she coordinated the production of the "FARA report" (Pls.' Ex. 84 [Doc. No. 176-11] that the one document David Gaubatz provided her that was included in the "FARA report" (*i.e.*, the visitor register) was improperly removed from Plaintiffs' offices. Plaintiffs appear to make an issue of several documents included in the so-called "FARA report," but there is no evidence in the record that any of those documents came from the Gaubatz Defendants except the visitor register. (Pls.' Ex. 83 [Doc. No. 176-10]). But why would an out-dated visitor register, hand-signed and available presumably to the guests who signed it, be evidence of a conversion from Plaintiffs' offices? Why would Chris Gaubatz not be in lawful possession of a guest register in the course of his duties as an outreach coordinator? The real thrust of Plaintiffs' argument is not that Brim had actual or constructive knowledge of conversion ***from the facts in the record***, but rather, based on Plaintiffs' even more unsubstantiated conspiracy claim, there must have been an ***agreement*** to pilfer these documents—a claim which we treat subsequently in the text.

Plaintiffs make a similarly wild claim about facts in the record they claim evidence SANE and Yerushalmi's "knowledge" of the conversion. As support for this claim, Plaintiffs cite to the SANE-Gaubatz Agreement. (Pls. Ex. 28 [Doc. No. 156-27]. However, there is simply no dispute anywhere in the record that this agreement was only a conduit to have SANE provide

there was a fact dispute relating to constructive knowledge of a possible breach of fiduciary duty imposed upon Brim, and thus upon CSP, in the context of Count I (Mem. Op. at 38), this was based solely upon Brim's opportunity to review all of the audio-video recordings to discern illicit recordings.[14] But there is nothing in the recordings nor in the factual record that would have suggested to the Secondary Defendants[15] that Chris Gaubatz's removal of documents was anything but legal.

The final claim of liability for the conversion claims is based upon a conspiracy. Conspiracy requires an agreement to convert the documents, as Plaintiffs' acknowledge. (Pls.' Notice at 1, n. 1). Once again, however, none of the factual record cited to by Plaintiffs evidences any sort of agreement for Chris Gaubatz to purloin documents from Plaintiffs' offices. To begin, as noted above, there was nothing in the agreement between David Gaubatz and CSP (or SANE for that matter) that included the removal of documents from Plaintiffs' offices, much less any tortious removal of documents. Rather, David Gaubatz sought and received legal advice from Yerushalmi as to the circumstances that permitted Chris Gaubatz to remove documents lawfully, all the while informing Yerushalmi and Brim that Chris Gaubatz was only removing

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David Gaubatz the funds that came from CSP. Moreover, there is absolutely no dispute in the record that the CAIR Documentary Film Project did not involve removal of documents from Plaintiffs' offices. But even if this were all a matter of fact dispute, there is no evidence in the record that SANE had any knowledge of any documents being removed from Plaintiffs' offices, and the only knowledge Yerushalmi had of such removal was predicated upon David Gaubatz's assurances that Chris Gaubatz was conducting his affairs as an intern lawfully and according to Yerushalmi's legal advice relating to the circumstances for lawful removal of documents. (Defs.' Facts at ¶¶ 166-237). Indeed, the very SANE-Gaubatz Agreement Plaintiffs point to as evidence of a conspiracy ***requires David Gaubatz to perform his services legally***. (Pls.' Ex. 28 at Bates CSP390).

[14] Defendants strenuously object to the Court's analysis of "knowledge" and "willfulness" at issue in Count I and have raised their objections explicitly in their motion for reconsideration, all of which Defendants have incorporated into this motion for summary judgment to the extent they impact upon a claim of "constructive knowledge" under any of the tort theories alleged.

[15] Defendants SANE, Pavlis, and Savit were not even aware documents were removed. (Defs.' Facts at ¶¶ 205-12, 217).

documents when he was legally authorized to do so. None of these facts create a conspiracy between any of the Secondary Defendants and the Gaubatz Defendants to engage in conversion. (Defs.' Facts at ¶¶ 166-71; 195-204; 213-220).

For all of the foregoing reasons, Defendants respectfully request that the Court grant their motion for summary judgment on Count III for conversion.

II. Defendants Have Failed to Establish the Elements for Breach of Fiduciary Duty.

Plaintiffs' Notice fails to allege, let alone demonstrate through record evidence, any compensatory damages for an alleged breach of fiduciary duty.[16] (Pls.' Notice at 2-7). Yet, Plaintiffs begin their section on this claim with citations to three cases that all call for damages proximately caused by the breach. (Pls.' Notice at 1) ("To state a claim for breach of fiduciary duty, the claimant must allege (1) the existence of a fiduciary duty and (2) a violation of that duty that (3) proximately causes injury. *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 24 F. Supp. 2d 66, 75 (D.D.C. 1998) (citing *Griva v. Davison*, 637 A.2d 830, 846-47 (D.C. 1994)); *Armenian Genocide Museum & Mem'l, Inc. v. Cafesjian Family Found., Inc*., 607 F. Supp.2d 185, 190-91 (D.D.C. 2009).") Indeed, this Court's earlier ruling made clear that Plaintiffs have the burden of showing *actual* damages (*n.b*., not simply implied nominal damages) in order to assert this claim. *Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 341 (D.D.C. 2011) ("CAIR II") ("Under District of Columbia law, a plaintiff asserting a claim for breach of fiduciary duty must allege that (i) the defendant had a duty to the plaintiff, (ii) the defendant breached that duty, and (iii) the breach was the proximate cause of an injury.")

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[16] Plaintiffs' argument that they need not show actual damages to seek punitive damages in a breach of fiduciary claim is another example of Plaintiffs' abusive approach to the generous (albeit objectionable) opportunity to make out a case for damages through the Notice filing. There is simply no basis in law to have made this argument, which they repeat by implication when they treat their fraud claim, which we address later in the text.

However, instead of presenting evidence of compensatory damages proximately caused by an alleged breach, Plaintiffs effectively assert in a footnote that this Court and the cases to which Plaintiffs had just cited in their own Notice filing were all wrong, claiming that "[a] showing of actual damages is not required for punitive damages to be awarded for this tort: punitive damages depend not upon the amount of actual damage but rather upon the intent with which the wrong was done." (Pls.' Notice at 1, n. 3).

Defendants won't even bother trying to unpack the logic, or rather the illogic, of that statement. On its face, the second half of the sentence following the colon neither supports nor is supported by the first half. Moreover, the three cases cited to support this proposition are all, shall we say, ill-fitted. The first is a 1915 libel *per se* case where the appellate court approved of the trial court's jury instructions that punitive damages may be permitted with no more than the nominal damages, which may be awarded in a libel *per se* action. *Wash. Post Co. v. O'Donnell*, 43 App. D.C. 215, 240 (D.C. Cir. 1915). The second case, a 1930 wrongful repossession case, is, admittedly, a somewhat poorly articulated decision that might be read to mean that in a replevin action to recover goods improperly repossessed, actual damages are not required, but presumably because there are nominal damages. *Wardman-Justice Motors, Inc. v. Petrie*, 39 F.2d 512, 516-17 (D.C. 1930). But whatever confusion Plaintiffs might have encountered upon reading this 84-year old case, a quick effort to Shepardize the citation establishes that Plaintiffs are once again wrong about the law and wrong about the precedential import of this particular case. Thus, in *Franklin Inv. Co. Inc. v. Smith*, 383 A.2d 355 (D.C. 1978), the court expressly held that "punitive damages may not be awarded where there is no basis for an award of compensatory damages," citing to *Wardman-Justice Motors, Inc*. for that very proposition. *Id.* at 358.

After a line of cases in the District following the rule requiring some kind of actual

proven damages before there may be an award of punitive damages, the Court of Appeals for the District so held in unambiguous terms in the seminal case of *Maxwell v. Gallagher*, 709 A.2d 100 (D.C. 1998): "We think the essence of our case law is this: A plaintiff must prove a basis for actual damages to justify the imposition of punitive damages. The amount of such damages may be nominal, stemming from the difficulty of quantifying them or from some other cause. But without proof of at least nominal actual damages, punitive damages may not be awarded." *Id.* at 104 (footnote omitted). *Maxwell* has been cited as binding on the federal courts applying state law. *Feld v. Feld*, 783 F. Supp. 2d 76, 77 (D.D.C. 2011) ("[*Maxwell*] sets forth the general rule for the District of Columbia that a plaintiff cannot recover punitive damages unless there is a 'basis in evidence for actual damages,' even if only nominal in amount.").

The third case cited by Plaintiffs for the erroneous proposition that actual damages need not be proven to sue for exemplary damages is simply inapposite, as one might expect given the actual state of the law. *Mariner Water Renaturalizer, Inc. v. Aqua Purification Sys., Inc.*, 665 F.2d 1066, 1068 (D.C. Cir. 1981) (reviewing the lower court's award of actual damages but not punitive damages and never addressing the issue of whether punitive damages may be awarded in the absence of actual injury).

Plaintiffs nowhere have provided evidence of any injury for any tort much less for breach of fiduciary duty, and their Notice expressly confirms this failure. On this basis alone, Defendants respectfully suggest that this Court must grant their motion for summary judgment on Count IV for breach of fiduciary duty.

If for some reason beyond the ken of Defendants, the Court were to overlook this failure of proof as to the damage element for this tort, the Court would still be duty-bound to grant summary judgment against Plaintiff CAIR-AN for the reasons articulated above in the conversion context. Specifically, CAIR-AN had no employees through whom the corporate

entity could have acted and with whom Chris Gaubatz could have entered into a fiduciary relationship on behalf of CAIR-AN. (Mem. Op. at 22-23). As such, there could not have been a fiduciary relationship between the two parties. Defendants would also respectfully suggest that given the fact that the record in this case is devoid of any conspiratorial agreement between the Secondary Defendants and the Gaubatz Defendants, this Court must grant summary judgment in favor of the Secondary Defendants to the extent Plaintiffs rely on conspiracy liability. And to the extent Plaintiffs' claims for breach of fiduciary duty liability are predicated upon *respondeat superior* or aiding and abetting liability, Plaintiffs respectfully suggest that there are no facts to support either and, in the case of aiding and abetting, there is no legal basis to support such a claim. (*See* Defs.' Recons. Mem. at 4-19 [analyzing *respondeat superior* liability]; Defs.' MSJ Mem. at 28-29; Defs.' Opp'n Mem. at 24-30 [analyzing aiding and abetting liability]; *see also supra* sec. E [analyzing conspiracy in conversion context]; Defs.' MSJ Mem. at 29 [analyzing conspiracy liability]; Defs.' Opp'n Mem. at 30-31 [analyzing conspiracy claim against attorney]).[17]

III. Defendants Have Failed to Establish the Elements for Trespass.

Plaintiffs claim no compensatory damages relating to their claim that Chris Gaubatz trespassed upon their premises. Rather, they claim nominal damages and seek punitive damages. (Pls.' Notice at 16). Plaintiffs' theory of trespass is not that Chris Gaubatz lacked expressed permission to enter into and remain in Plaintiffs' offices, but rather that his misrepresentations about who he was and the concealment of his alleged tortious intentions amounted to a fraudulent inducement to gain Plaintiffs' permission. (Pls.' Notice at 14). Seemingly, a variation of this argument is that even if consent was not fraudulently induced in the first

[17] We note here Plaintiffs' ongoing disregard of the factual record in the context of their claims for breach of fiduciary duty liability against Defendants Savit and Pavlis. (Pls.' Notice at 6).

instance, Chris Gaubatz's tortious conduct exceeded his authority to be on the premises and thus constitutes trespass. (Pls.' Notice at 15 [citing case law for "vitiated" consent]).

As the Court did in *CAIR II*, we shall examine these two "branches" of Plaintiffs' trespass claim separately. (*CAIR II*, at 344-45). The first branch or category of Plaintiffs' trespass claim is that Chris Gaubatz did not truthfully represent who he was when he applied for his internship at Plaintiffs' offices. (Pls.' Notice at 16). But the case law cited by Plaintiffs and by the Court in *CAIR II* make clear that a consent obtained through fraud that results in a consent based upon a mistake of fact only vitiates the consent when the mistake of fact "concern[s] the nature of the invasion of his interests or the extent of the harm to be expected from it." Restatement (Second) of Torts, § 892B(2). In other words, the mere fact that Chris Gaubatz provided false information about who he was (*i.e.*, false name and college attended, or even whether he was or was not a practicing Muslim) in and of itself does not constitute trespass. Rather, a trespass claim exists when the mistake of fact goes to the nature of the invasion of the owners' property interest or the harm to be expected. Thus, had Chris Gaubatz, operating under an alias and even with a false resume about his college, entered into the premises to carry out his duties as an intern and had he then conducted himself in a lawful manner (as Defendants contend the factual record demonstrates), there would be no trespass because he would not have invaded a property interest nor caused a harm reasonably anticipated from such entry. This point is best expressed by Judge Posner in a Seventh Circuit case cited by this Court in *CAIR II* as authority for a fraudulently induced consent leading to a claim of trespass:

> How to distinguish the two classes of case—the seducer from the medical impersonator, the restaurant critic from the meter-reader impersonator? The answer can have nothing to do with fraud; there is fraud in all the cases. It has to do with the interest that the torts in question, battery and trespass, protect. The one protects the inviolability of the person, the other the inviolability of the person's property. The woman who is seduced wants to have sex with her seducer, and the restaurant owner wants to have customers. The woman who is

victimized by the medical impersonator has no desire to have sex with her doctor; she wants medical treatment. And the homeowner victimized by the phony meter reader does not want strangers in his house unless they have authorized service functions. The dealer's objection to the customer who claims falsely to have a lower price from a competing dealer is not to the physical presence of the customer, but to the fraud that he is trying to perpetuate. The lines are not bright—they are not even inevitable. They are the traces of the old forms of action, which have resulted in a multitude of artificial distinctions in modern law. But that is nothing new.

There was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. The test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves). The activities of the offices were not disrupted, as in *People v. Segal*, 78 Misc. 2d 944, 358 N.Y.S.2d 866 (Crim. Ct. 1974), another case of gaining entry by false pretenses. *See also Le Mistral, Inc. v. Columbia Broadcasting System, supra*, 402 N.Y.S.2d [815] at 81 n. 1 [(1st. Dep't 1978)] nor was there any "inva[sion of] a person's private space," *Haynes v. Alfred A. Knopf, Inc., supra*, 8 F.3d [1222] at 1229 [(7th Cir. 1993)], as in our hypothetical meter reader case, as in the famous case of *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (Mich. 1881) (where a doctor, called to the plaintiff's home to deliver her baby, brought along with him a friend who was curious to see a birth but was not a medical doctor, and represented the friend to be his medical assistant), as in one of its numerous modern counterparts, *Miller v. National Broadcasting Co*., 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668, 679 (Ct. App. 1986), and as in *Dietemann v. Time, Inc*., 449 F.2d 245 (9th Cir. 1971), on which the plaintiffs in our case rely. *Dietemann* involved a home. True, the portion invaded was an office, where the plaintiff performed quack healing of nonexistent ailments. The parallel to this case is plain enough, but there is a difference. *Dietemann* was not in business, and did not advertise his services or charge for them. His quackery was private.

No embarrassingly intimate details of anybody's life were publicized in the present case. There was no eavesdropping on a private conversation; the testers recorded their own conversations with the Desnick Eye Center's physicians. There was no violation of the doctor-patient privilege. There was no theft, or intent to steal, trade secrets; no disruption of decorum, of peace and quiet; no noisy or distracting demonstrations. Had the testers been undercover FBI agents, there would have been no violation of the Fourth Amendment, because there would have been no invasion of a legally protected interest in property or privacy. *United States v. White*, 401 U.S. 745, 28 L. Ed. 2d 453, 91 S. Ct. 1122 (1971); *Lewis v. United States*, 385 U.S. 206, 211, 17 L. Ed. 2d 312, 87 S. Ct. 424 (1966); *Forster v. County of Santa Barbara*, 896 F.2d 1146, 1148-49 (9th Cir. 1990); *Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348, 1355 (5th Cir. 1979). "Testers" who pose as prospective home buyers in order to gather evidence of housing discrimination are not trespassers even if they are private

> persons not acting under color of law. Cf. *id*. at 1355. The situation of the defendants' "testers" is analogous. Like testers seeking evidence of violation of antidiscrimination laws, the defendants' test patients gained entry into the plaintiffs' premises by misrepresenting their purposes (more precisely by a misleading omission to disclose those purposes). But the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land. We need not consider what if any difference it would make if the plaintiffs had festooned the premises with signs forbidding the entry of testers or other snoops. Perhaps none, *see United States v. Centennial Builders, Inc*., 747 F.2d 678, 683 (11th Cir. 1984), but that is an issue for another day.

J.H. Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1352-53 (7th Cir. 1995).

Similarly, the Fourth Circuit, following the *J.H. Desnick's* rationale and approach carefully, expressly held that simply providing false facts about oneself on a resume does not amount to a fraudulently induced consent giving rise to a trespass claim:

> Although the consent cases as a class are inconsistent, we have not found any case suggesting that consent based on a resume misrepresentation turns a successful job applicant into a trespasser the moment she enters the employer's premises to begin work. Moreover, if we turned successful resume fraud into trespass, we would not be protecting the interest underlying the tort of trespass—the ownership and peaceable possession of land. Accordingly, we cannot say that North and South Carolina's highest courts would hold that misrepresentation on a job application alone nullifies the consent given to an employee to enter the employer's property, thereby turning the employee into a trespasser. The jury's finding of trespass therefore cannot be sustained on the grounds of resume misrepresentation.

Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 518 (4th Cir. 1999).

The mere fact that Chris Gaubatz used a *nom de guerre* or even modified his resume to avoid being recognized as David Gaubatz's son does not in and of itself amount to a trespass. Rather, Plaintiffs' trespass claims—at least the first branch—requires Plaintiffs to show that Chris Gaubatz intended, and in fact did, engage in tortious conduct that goes to the property interest protected by trespass law. As the court noted in *J.H. Desnick*, merely taping conversations legally does not suffice to invade such an interest, especially if the recordings are part of a First Amendment protected documentary. Similarly, removing documents one is

authorized to take from the premises cannot amount to trespass even if the purpose is to publicize those documents—save some specific privacy interest or duty of non-disclosure. Thus, under the fraudulent inducement branch of Plaintiffs' trespass claims, their case rises or falls on whether Chris Gaubatz engaged in some tortious conduct such as breach of fiduciary duty (relating to his access to the premises) or liability under Counts I or II. As Defendants argue in their original motion for summary judgment and in their motion for reconsideration, Plaintiffs have failed to make a showing of such tortious conduct and, consequently, Plaintiffs' first branch of their trespass claims fails.

Indeed, this points to the conceptual proximity of the second category or branch of Plaintiffs' trespass claims with the first. For Chris Gaubatz to be liable for trespass under the theory that he exceeded whatever valid consent Plaintiffs' had provided, Plaintiffs must show that he did something that violated a duty owed to Plaintiffs relating to the property interest protected. Specifically, the issue here is whether Chris Gaubatz violated some duty owed to Plaintiffs such as a confidentiality agreement relating to conversations taking place at the premises or accessing documents on the premises for which he had no authority. This boils down to the same evidentiary requirement as in the first branch. Plaintiffs must point to a breach of fiduciary duty or liability under Counts I or II. Based upon Defendants' arguments as set forth in their original motion for summary judgment and in their motion for reconsideration, Defendants respectfully request that the Court grant summary judgment in their favor on Count VII for trespass.

Even if we assume, however, that the Gaubatz Defendants have exposure for trespass liability, it is clear from the record that the Secondary Defendants do not. Specifically, while Defendants were aware that Chris was operating under an alias, Defendants would respectfully suggest that given the fact that the record in this case is devoid of any conspiratorial agreement

between the Secondary Defendants and the Gaubatz Defendants to engage in tortious conduct relating to a protected property interest, this Court must grant summary judgment in favor of the Secondary Defendants to the extent Plaintiffs rely on conspiracy liability. And to the extent Plaintiffs' claims for trespass are predicated upon *respondeat superior* or aiding and abetting liability, Plaintiffs respectfully suggest that there are no facts to support either, and, in the case of aiding and abetting, there is no legal basis to support such a claim. (*See* Defs.' Recon. Mem. at 4-19 [analyzing *respondeat superior* liability]; Defs.' MSJ Mem. at 28-29; Defs.' Opp'n Mem. at 24-30 [analyzing aiding and abetting liability]; *see also supra* sec. E [analyzing conspiracy in conversion context]; Defs.' MSJ Mem. at 29 [analyzing conspiracy liability]; Defs.' Opp'n Mem. at 30-31 [analyzing conspiracy claim against attorney]).[18]

IV. Defendants Have Failed to Establish the Elements for Unjust Enrichment.

Plaintiffs seem to recognize the elements for a claim of unjust enrichment: "Unjust enrichment occurs when: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust." *Bregman v. Perles*, No. 12-7091, 2014 U.S. App. LEXIS 5975, at *7 (D.C. Cir. Apr. 1, 2014) (quoting *Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1076 (D.C. 2008)). The third element is typically the result of illegal or tortious conduct which actually triggers the claim (*i.e.*, for purposes of the statute of limitations). *Id.* ("Thus, a claim for unjust enrichment accrues only when the enrichment actually becomes unlawful, *i.e.*, where there has been a wrongful act giving rise to a duty of restitution.") (quotation marks and citations omitted).

So, if we were to begin our analysis at the end, we would properly note that Plaintiffs'

[18] We note again Plaintiffs utter disregard of the factual record in the context of their claims that Savit and Pavlis are liable for trespass. (Pls.' Notice at 22).

unjust enrichment claims fail if there is no underlying liability against Chris Gaubatz for some wrongful act. But we need not begin at the end for the beginning is fatal to Plaintiffs' unjust enrichment claims.

Thus, in order for Plaintiffs to make a claim of unjust enrichment, they must demonstrate that there is some factual showing somewhere in the record that evidences that Plaintiffs conferred a benefit upon each of the Defendants. We begin with Chris Gaubatz, since if he has no duty of restitution under an unjust enrichment theory, it is hard to imagine how any of the other Defendants would fall within the theory's reach given that no other Defendant had any contact with Plaintiffs and received nothing from Plaintiffs.

Plaintiffs' Notice appears to argue that the benefit conferred upon Chris Gaubatz was the internship itself. (Pls.' Notice at 34). But if the internship was the benefit conferred upon Chris Gaubatz, given that he was a volunteer, what is he to return? Moreover, throughout this litigation, Plaintiffs have claimed that Chris Gaubatz's internship was a contractual arrangement, which included an oral employment agreement that gave rise to a fiduciary duty. (Pls.' Facts at ¶¶ 69-79 [Doc. No. 156)]). While the breach of confidentiality agreement claims have been rejected by the Court (Mem. Op. at 56-58), Plaintiffs continue to pursue their claims that Chris Gaubatz entered into an agreement to work as an intern for Plaintiffs, giving rise to his fiduciary duty. But this highlights a fundamental flaw in all of Plaintiffs' unjust enrichment claims. As the Court noted in *CAIR II*, unjust enrichment is an alternative remedy for recovery. *CAIR II* at 324. However, courts do not allow an unjust enrichment claim when the claimant alleges, or at least recognizes, that there was an enforceable underlying agreement. *Plesha v. Ferguson*, 725 F. Supp. 2d 106, 112 (D.D.C. 2010) (collecting cases holding that there can be no claim for unjust enrichment when claimant asserts an express or implied contract). In our case, Plaintiffs are claiming the benefit of the contractual arrangement of the internship that allegedly gave rise

to a fiduciary duty and are suing for damages. Indeed, as the Court has made clear, even Plaintiffs' claim of a fiduciary duty must arise out of an expressed or implied agreement between the principal and agent, which in turn arises out of the at-will contract of internship employment,[19] (Mem. Op. at 28-34), which is no less a contract than any other. As such, Plaintiffs may not pursue their unjust enrichment claim for equitable relief at the same time they are claiming tort damages arising under contract.

Plaintiffs also seem to recognize another problem of their unjust enrichment claims. That is, whatever benefit Chris Gaubatz gained from his volunteer internship, there was nothing to return to Plaintiffs. In other words, Plaintiffs cannot satisfy the second prong of a viable unjust enrichment claim. Chris Gaubatz retained no benefit because he received nothing remotely tangible. To get around this problem, Plaintiffs head off into left field and ask this Court to provide Plaintiffs not with the benefit they provided to Chris Gaubatz, but with the benefit Chris Gaubatz earned as a researcher for David Gaubatz. Needless to say, Plaintiffs cite to no case law in this District or elsewhere for the proposition that unjust enrichment may allow for a benefit to be turned over to a plaintiff even when the defendant did not receive the benefit from the plaintiff, directly or indirectly. Barring some statutory authority or precedential case law in this District authorizing such a novel extension of the theory of unjust enrichment, this Court must deny Plaintiffs' claims for unjust enrichment against all Defendants, insofar as none of the other Defendants ever had any contract with Plaintiffs or received any benefit from them.

V. Defendants Have Failed to Establish the Elements for Fraud.

Like their claims for breach of fiduciary duty, Plaintiffs claim no actual damages arising from any alleged fraud, only punitive damages. (Pls.' Notice at 8). Plaintiffs are simply wrong

[19] In *CAIR II*, the Court recognized the at-will employment contract inherent in the internship position. *CAIR II* at 343.

on this point, once again. As we noted earlier, the seminal decision on this question from the District of Columbia is *Maxwell*. *Maxwell* gathered a line of previous decisions to bolster its view that punitive damages were not available without some actual compensatory damages.[20] *Maxwell,* 709 A.2d at 104. One of the earlier decisions relied upon by the *Maxwell* court was a decision alleging, *inter alia*, fraud and exemplary damages. In that case, the Court of Appeals expressly held that "actual damages are a prerequisite to exemplary or punitive damages in this jurisdiction." *Bay Gen. Indus. v. Johnson*, 418 A.2d 1050, 1058 (D.C. 1980).

If for some reason the Court were to overlook this failure of proof as to the damage element for fraud, the Court would still be duty-bound to grant summary judgment against Plaintiff CAIR-AN for the reasons articulated above. Specifically, CAIR-AN had no employees to whom Chris Gaubatz could have made any misrepresentations. (Mem. Op. at 22-23). As such, CAIR-AN could not be a receptacle for fraud nor could it have relied on anything Chris Gaubatz said or did not say. Defendants would also respectfully suggest that given the fact that the record in this case is devoid of any conspiratorial agreement between the Secondary Defendants and the Gaubatz Defendants, this Court must grant summary judgment in favor of the Secondary Defendants to the extent Plaintiffs rely on conspiracy liability. And to the extent Plaintiffs' claims for breach of fiduciary duty liability are predicated upon *respondeat superior* or aiding and abetting liability, Defendants respectfully suggest that there are no facts to support either and, in the case of aiding and abetting, there is no legal basis to support such a claim. (*See* Defs.' Recon. Mem. at 4-19 [analyzing *respondeat superior* liability]; Defs.' MSJ Mem. at 28-29; Defs.' Opp'n Mem. at 24-30 [analyzing aiding and abetting liability]; *see also supra* sec. E

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[20] We note here again that Plaintiffs have the burden of proving *actual* damages, even if the amount of those damages is nominal. The "nominal" damages referred to here are not the same as *presumed* nominal damages, which apply in this case only in the context of the trespass claims.

[analyzing conspiracy in conversion context]; Defs.' MSJ Mem. at 29 [analyzing conspiracy liability]; Defs.' Opp'n Mem. at 30-31 [analyzing conspiracy claim against attorney]).[21]

VI. Defendants Have Failed to Establish the Elements for Misappropriation of Trade Secrets.

Like their conversion claim, which required a showing of a protected property interest akin to a trade secret, Plaintiffs base their claim for a violation of the D.C. Uniform Trade Secrets Act[22] on their naked assertions that the 455 documents identified in their Exhibit 52 (Interrogatory Answer 5) are all trade secrets. To assert a trade secret, Plaintiffs must fit <u>each</u> of these 455 documents into the statute's definition:

> (4) "Trade secret: means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> > (A) Derives actual or potential independent economic value, from not being generally known to, and not being readily ascertainable by, proper means by another who can obtain economic value from its disclosure or use; and
> >
> > (B) Is the subject of reasonable efforts to maintain its secrecy.

D.C. Code § 36-401. In their original motion for summary judgment, Defendants focused on Plaintiffs' failure to provide any evidence to establish that the content of these 455 documents had actual or potential economic value. (Defs.' MSJ Mem. at 35-36). Plaintiffs' entire argument opposing Defendants' motion on this point was pure narrative about what they allege Chris Gaubatz did and of what Plaintiffs claim the information and content contained in the audio recordings and documents consisted. (Pls.' MSJ Opp'n at 33-34). But this is narrative in a brief, not facts in the record. As we saw in the conversion context, courts require a party claiming a

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[21] We note yet again Plaintiffs' ongoing disregard of the factual record in the context of their claims for fraud against Defendants Savit and Pavlis. (Pls.' Notice at 6).

[22] Defendants reassert their preemption argument as set forth in their motion for summary judgment because it is clear that the essence of all of Plaintiffs' common law claims is that Defendants took what they claim to be protected confidential trade secrets. (Defs.' MSJ Mem. at 36-37).

trade secret under the common law to come forward with admissible evidence to satisfy an analysis typically consisting of the Restatement's six factors. We repeat those factors here for ease of reference:

> A trade secret has been authoritatively defined as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound . . . or a list of customers." 4 RESTATEMENT OF TORTS § 757, comment b, at 5 (1939). n2 In determining whether given information should be afforded trade secret protection, many courts have considered the six factors listed in the Restatement: (1) The extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the employer] to guard the secrecy of the information; (4) the value of the information to [the employer] and to his competitors; (5) the amount of effort or money expended by [the employer] in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.* at 6.

Ruesch, 479 A.2d at 296. Courts in Maryland also apply this analysis under their version of the Uniform Trade Secrets Act, as do most other courts. *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655 (4th Cir. 1993) (applying in Maryland); *Structural Pres. Sys., LLC v. Andrews*, No. MJG-12-1850, 2013 U.S. Dist. LEXIS 102511, at *14-*16 (D. Md. July 22, 2013) (applying six-factor analysis in Maryland after holding that "The existence of a trade secret is a conclusion of law based upon the applicable facts"); *see also Householder Group, LLLP v. Mason*, No. 10-0918, 2012 U.S. Dist. LEXIS 141335, at *16-*17 (D. Ariz. Sept. 30, 2012); *Wound Care Ctrs., Inc. v. Catalane*, No. 10-336, 2011 U.S. Dist. LEXIS 12084, at *44-*45 (W.D. Pa. Feb. 8, 2011) (applying six-factor Restatement analysis in Pennsylvania).

As we saw in the conversion context, Plaintiffs have simply failed to proffer any evidence that they satisfy most or even some of the factors courts look to when deciding whether a document such as a mosque list or a donor list or any other document is a trade secret. And as we noted above in the conversion context, while some donor lists might be trade secrets based

upon the Restatement's analysis, they are most certainly not treated by courts as *ipso fac*to trade secrets. *Am. Red Cross*, 143 F.3d at 1410 ("After reviewing the incomplete record in this case, we are unable to determine that Red Cross is substantially likely to establish that its donor lists are trade secrets.").

In their Notice, Plaintiffs do not even attempt to point to any evidence in the record to establish any of the six factors. (Pls.' Notice at 40-41). While Plaintiffs make a back-handed stab to make out a case for the third factor relating to the effort to keep the information secret, this effort fails because it is far too generalized and, in one case, just plain wrong. (Pls.' Notice, § VI.D. at 41). Specifically, Plaintiffs only come up with two generalized facts to suggest that these 455 *specific* documents are kept secret from outside eyes: (1) Plaintiffs' premises are entered by invitation or permission only and (2) interns like Chris Gaubatz had to sign a confidentiality agreement. Even if we accepted these facts as relevant, they say nothing about why these 455 specific documents Plaintiffs have labeled trade secrets are in fact kept secret as opposed to the other 12,000 documents Plaintiffs allege Chris Gaubatz stole. Is every document and public brochure that sits in the reception area of Plaintiffs' offices also a trade secret because the front door is locked? Of course not. *See also Ruesch*, 479 A.2d at 296 (defining a trade secret as "any formula, pattern, device or compilation of information *which is used in one's business*, and *which gives him an opportunity to obtain an advantage over competitors who do not know or use it*) (emphasis added).

Moreover, as the factual record demonstrates, Plaintiffs were in fact not careful about requiring temporary and short-term interns to sign the so-called non-disclosure agreement. For example, Plaintiffs did not require Chris Gaubatz to sign a non-disclosure agreement when he volunteered in their offices as a visiting intern from a CAIR office in Herndon before he formally began his internship at Plaintiffs' offices in Washington, D.C. (Defs.' Facts at ¶¶ 82-84). At no

time during his formal internship with Plaintiffs did Chris Gaubatz sign such a document, and he was not an exception to the rule. Of the 24 interns who volunteered at Plaintiffs' offices during Chris Gaubatz's tenure, Plaintiffs could produce only 13 signed non-disclosure agreements. (Defs.' Facts at ¶¶ 97-104). Plaintiffs offer no counter to this glaring evidentiary shortcoming nor any explanation why they fail to provide their interns with any oral or written instruction about confidentiality, trade secrets, or even the proprietary nature of the material the interns handle. (Defs.' Facts at ¶¶ 99-101). Further, outreach interns like Chris Gaubatz were allowed to decide for themselves which documents they should use for their quite public outreach programs. (Defs.' Facts at ¶ 156). These are not the kinds of practices that evidence trade secrecy. More to the point, Plaintiffs do not even attempt to identify even a shred of evidence relating to any of the other Restatement factors to establish that each of the 455 documents did in fact contain trade secret information.

Problematically, ***and this is important***, in the Opinion denying Defendants' summary judgment, the Court seemed to simply accept Plaintiffs' proposition of secrecy based solely upon Plaintiffs' non-evidentiary claims that they kept secret their contact lists at mosques, outreach strategy, and legislative advocacy plans. (Mem. Op. at 33-34 ["Although Defendants question the proprietary, non-public nature of this information, the Court notes that it includes CAIR-F's contacts lists at mosques, outreach strategy, and legislative advocacy plans, information which Plaintiffs claim they kept secret."]) To support this proposition (*i.e.*, that these documents were "kept secret"), the Court cites to paragraphs 73-75 of CAIR-Fs' statement of facts in support of its motion for partial summary judgment. Indeed, we would suggest going back to include paragraph 72, where CAIR-F claims that Chris Gaubatz had access to actual trade secret information as evidenced by the audio recordings. (*See* Pls.' Facts at ¶¶ 72-75). The problem with the Court's treatment of the three paragraphs (and four, if one counts paragraph 72, which

we have thrown in for good measure) is that the evidence to which the paragraphs cite—which is what establishes a fact in the record, not the factual narrative describing that evidence—does nothing to establish that Plaintiffs sought to keep this information secret. We will address each of these paragraphs in further detail in the order in which they appear in the statement of facts.

Beginning with paragraph 72, this paragraph only cites to audio recordings that say nothing about secrecy themselves. In other words, CAIR-F's narrative explanation that the recordings capture trade secrets is not a sworn statement based upon personal knowledge, but instead a conclusory claim that provides neither factual evidence to support the claim itself nor any basis to satisfy the Restatement's six-factor analysis (let alone a specific statement of fact setting forth the alleged trade secret). Similarly, paragraph 73 claims that "CAIR employees gave Chris Gaubatz access to sensitive lists of mosque contacts." But the actual evidence simply shows an email cover for digital lists of what appear to be mosque contacts. There is no reference in the evidence itself that these mosque contacts are "sensitive" or that these lists could not be easily obtained through open and public sources. Indeed, as we noted earlier, mosque lists abound on the Internet, and most of these public mosques provide contact information. We simply have no idea, and the Court certainly does not know, just how sensitive or secret these lists were, if at all. Paragraph 74 characterizes the evidence it references as proof that CAIR-F employees provided Chris legislative advocacy strategies and "contracts [sic] with mosques." The narrative at paragraph 74, however, does not claim this information was secret. Moreover, the actual evidence cited there is once again nothing but an audio recording where we can assume or not that we are listening to "legislative advocacy strategies" and something about "mosque contracts," but there is nothing about the *actual* recordings—that is, the *actual* evidence—which informs us that this information fits into the Restatement's six factors or that it is a trade secret for some other reason. And finally, paragraph 75 is no different. Here we are

told in narrative form that Plaintiffs shared with Chris Gaubatz sensitive information about Plaintiffs' personnel. But the actual evidence is Chris Gaubatz speaking to someone outside of Plaintiffs' premises about matters that on their face say nothing about the secrecy of any specific information and certainly nothing that fits within the Restatement's six factors relative to personnel.[23]

In conclusion, while Plaintiffs offer lots of unsworn, conclusory narrative about *secret* information, they have offered literally nothing by way of evidence to move that claim from an empty allegation to a fact that might create a factual dispute to defeat Defendants' motion. Without actual facts, Defendants respectfully suggest that Plaintiffs have failed to carry their burden that Chris Gaubatz misappropriated any *trade secrets*.

The remainder of the section of Plaintiffs' Notice relating to trade secrets includes a sentence asserting conspiracy and aiding and abetting liability (although not *respondeat superior* liability),[24] with the balance setting out dollar amounts for damages based upon what looks to be a repeat of Plaintiffs' unjust enrichment claims and the ubiquitous claim for punitive damages. As such, Defendants would respectfully suggest that given the fact that the record in this case is devoid of any conspiratorial agreement between the Secondary Defendants and the Gaubatz Defendants, this Court must grant summary judgment in favor of the Secondary Defendants to

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[23] Moreover, the only "personnel" matter Chris Gaubatz gets close to discussing is the fraud perpetrated by Morris Days, who was the CAIR-Maryland/Virginia ("CAIR-MD/VA") non-lawyer posing as a lawyer. But this "personnel" matter relates to the Herndon office, which Plaintiffs have stipulated has nothing to do with this litigation. (Mem. Op. at 9 ["Plaintiffs have stipulated that no audio recordings made by Chris Gaubatz at CAIR MD/VA are a basis for any of their claims against Defendants. Further, Plaintiffs have expressly stipulated that Chris Gaubatz's removal of documents from the CAIR MD/VA offices are not the basis for any of their claims against Defendants."] [citations omitted]).

[24] While Plaintiffs seem to limit their trade secrets claim to just Plaintiff CAIR-F (Pls.' Notice at 37 n.26), they continue to refer to all Defendants in the aggregate so we must assume they continue to claim that Savit and Pavlis are liable under this count as well. We note here our objection to that claim as we have on several occasions previously.

the extent Plaintiffs rely on conspiracy liability. And to the extent Plaintiffs' claims for trade secret misappropriation liability are predicated upon *respondeat superior* or aiding and abetting liability, Plaintiffs respectfully suggest that there are no facts to support either and, in the case of aiding and abetting, there is no legal basis to support such a claim. (*See* Defs.' Recon. Mem. at 4-19 [analyzing *respondeat superior* liability]; Defs.' MSJ Mem. at 28-29; Defs.' Opp'n Mem. at 24-30 [analyzing aiding and abetting liability]; *see also supra* sec. E [analyzing conspiracy in conversion context]; Defs.' MSJ Mem. at 29 [analyzing conspiracy liability]; Defs.' Opp'n Mem. at 30-31 [analyzing conspiracy claim against attorney]).

CONCLUSION

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

[Signature pages follow.]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 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.

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