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

MEMORANDUM OF POINTS & AUTHORITIES

IN SUPPORT OF

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER

PREFATORY STATEMENT

Defendants collectively move this Court for summary judgment on all counts. This lawsuit began on October 29, 2009, with the filing of the original complaint ("Complaint" [Doc. No. 1]). That complaint was followed by a first amended complaint ("FAC" [Doc. No. 75]), which was followed by a second amended complaint ("SAC" [Doc. No. 76]), which in turn was followed by the extant third amended complaint ("TAC" [Doc. No. 126]). The TAC was filed a year into discovery on September 17, 2012. Formal discovery in this case was lengthy, beginning in September 2011 and continuing until January 18, 2013. (Scheduling and Procedures Order [Doc. No. 99]).

After 17 months of discovery, the record in this case demonstrates several facts that are undisputed, remarkable, and dispositive in relation to this motion. First, the TAC is almost entirely fiction as it relates to those parties we will term the "Secondary Defendants," consisting of the Center for Security Policy ("CSP"), Christine Brim, Adam Savit, and Sarah Pavlis (collectively, the "CSP Defendants"), David Yerushalmi, and the Society of Americans for National Existence ("SANE"). Indeed, with respect to the allegations relevant to the actual elements of liability of the Secondary Defendants, the TAC is entirely false without exception. In short, the Secondary Defendants sought to conduct a perfectly legal documentary film project, acted responsibly, and had no knowledge of, or participation in, any act that would have violated any statutory, contractual, or common law duty owed to Plaintiffs.

And with regard to the liability of Paul David Gaubatz ("Dave Gaubatz") and Chris Gaubatz ("Chris") (collectively the "Gaubatz Defendants"), the undisputed factual record demonstrates that Plaintiffs have simply failed to make out a case for liability under any of the theories proposed.

The undisputed factual record also exposes other salient facts worth noting prefatorily.

First, Plaintiffs have moved from alleging in the Complaint, the FAC, the SAC, and finally the TAC, that Chris interned for, and entered into a confidentiality agreement with, the Council on American-Islamic Relations Action Network Inc. ("CAIR-AN"), to sworn testimony that it was not CAIR-AN (nor CAIR-Foundation, Inc. ["CAIR-F"]), but a third, non-party entity called CAIR, to subsequently sworn statements that it was not CAIR-AN, nor this non-party entity CAIR, but rather CAIR-F. In short, as the record shows, and as we will demonstrate below, neither Plaintiff has actual standing (or privity) to allege claims based upon a contractual or even a fiduciary relationship with Chris.

Second, Plaintiffs' claims of statutory wrongdoing are based not on actual facts but on what Plaintiffs only *assume* Chris did based in turn on what Plaintiffs only *assume* their own employees might have done. For example, in Count Two of the TAC, Plaintiffs allege that Chris took documents from a shared drive or email server in violation of the Stored Communications Act. Chris swears in his answers to interrogatories and in his live deposition testimony that he did no such thing. Plaintiffs' answers to interrogatories concede they have no way of knowing whether Chris took any document from a computer, and if from a computer, whether it was taken from a hard drive on a desk top (which would not implicate the statute), or from a shared drive or email server (which might implicate the statute). In other words, Plaintiffs admit that they have no *facts* to show that Chris violated the statute; they merely allege it is so.

Similarly, Plaintiffs' claims of illegal wiretapping are all predicated upon a claim that the "one-party consent rule" is rendered a nullity because the subsequent disclosure of the recordings to Dave Gaubatz and CSP were in violation of Chris' fiduciary duty of confidentiality arising presumably from a confidentiality agreement or some other objectively knowable duty of non-disclosure. Yet, again, Chris swears he signed no such agreement and never received any instructions, expressed or implied, on the confidential nature of the information to which he was

exposed. Plaintiffs not only have no evidence of such a signed confidentiality agreement or instructions of confidentiality, their own evidence, as provided by Raabia Wazir, who served as Chris' supervisor, demonstrates that Plaintiffs have only fabricated the notion that Chris signed such an agreement. Indeed, Wazir and Plaintiffs' own testimony demonstrates that no one working for Plaintiffs—literally no one—ever bothered to instruct Chris about, much less mention, the confidential or proprietary nature of the information to which he might be exposed while volunteering.

Finally, the record will also demonstrate that Plaintiffs have suffered no damages resulting from the actions alleged in the TAC. And even if there were some theoretical class of damages available to them, Plaintiffs have provided no basis to calculate those damages beyond rank speculation.

With this preface, we turn to the extant claims against each of the Defendants.

OVERVIEW OF THE EXISTING CAUSES OF ACTION

As a result of the Court's respective rulings in the Gaubatz Defendants' motion to dismiss[1] and in the CSP Defendants' motion to dismiss,[2] the existing causes of action against Defendants have been reduced from what is alleged. Necessarily, we treat the TAC together with the Court's prior rulings as our guide.[3]

Count One. Count One of the TAC alleges various theories of violations of Title I ("Federal Wiretap Act") of the Electronic Communications Privacy Act ("ECPA") and the District of Columbia's analog statute (D.C. Code §§ 23-541, *et seq.*) ("D.C. Wiretap Act").

[1] *Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311 (D.D.C. 2011) ("*CAIR I*")

[2] *Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz*, 891 F. Supp. 2d 13 (D.D.C. 2012) ("*CAIR II*").

[3] A useful chart of the extant allegations against Defendants as set out in narrative form in the text below is attached hereto as Attachment I.

What follows is a delineation of what theories of liability apply to which Defendants based both upon the TAC allegations and this Court's prior rulings:

(1) Chris Gaubatz: Plaintiffs allege that Chris violated provisions of the Federal and D.C. Wiretap Acts (respectively, 18 U.S.C. §§ 2511(1)(a)-(d)[4] and D.C. Code § 23-542(a)(1)) by using an audio-video[5] recorder concealed on his body to record conversations of Plaintiffs' employees ("Audio-Video Recordings") and by disclosing the audio portions of the Audio-Video Recordings to Dave Gaubatz and to CSP. (TAC at ¶¶ 80-87).

(2) Dave Gaubatz: While the allegations do not expressly allege *respondeat superior* liability against Dave Gaubatz for all of the actions of Chris, we assume that is the case given the general allegations that Chris worked for Dave Gaubatz. (TAC at ¶ 41). Count One also alleges Dave Gaubatz is liable under both the Federal and D.C. Wiretap Acts (respectively 18 U.S.C. §§ 2511(c)-(d) and D.C. Code § 23-542(a)(2)-(3)) for using and disclosing the contents of the audio portions of the Audio-Video Recordings when he allegedly posted them on his website and when he provided them to CSP. (TAC at ¶¶ 53, 67, 87). Finally, Plaintiffs also allege that Dave Gaubatz procured violations of the D.C. Wiretap Act by employing Chris to obtain the Audio-Video Recordings. (TAC at ¶ 84).[6]

(3) CSP Defendants: The extant allegations of Count One claim that the CSP Defendants are (1) liable under the Federal Wiretap Act only for providing certain select, edited

[4] While the TAC cites to 18 U.S.C. §§ 2511(A) & (B) and 2511(C) & (D) (TAC at ¶¶ 80, 87), the proper statutory references should be to §§ 2511(1)(a) & (b) and 2511(1)(c) & (d), respectively.

[5] The video portions of the digital recordings are not properly at issue here since the statute only refers to the interception of oral communications. *See generally* 18 U.S.C. § 2511(1); *United States v. Koyomejian*, 970 F.2d 536, 538-39 (9th Cir. 1992) (holding that Title I of the ECPA is only concerned with "aural acquisition," not video); *see also* D.C. Code § 23-542(a)(1) (referring only to the interception of wire and oral communications).

[6] The allegations of ¶ 84 of the TAC notwithstanding, the Court has ruled in response to the CSP Defendants' motion to dismiss that there is no procurement liability under the Federal Wiretap Act. *CAIR II*, at 23-24, 35. Also, the allegations of secondary liability (*i.e.*, aiding and abetting or conspiracy) are not recognized under either the Federal or D.C. Wiretap Acts. *Id.* at 24, 35.

clips of the audio portions of the Audio-Video Recordings to WND ("WND Clips")[7] and (2) liable under the D.C. Wiretap Act for procurement liability and for using and disclosing the WND Clips. (TAC at ¶¶ 57, 87)

(4) SANE and David Yerushalmi: While not expressly addressed in this Court's prior rulings, and because there are no allegations that SANE or Yerushalmi engaged in any direct acts in violation of the Federal Wiretap Act, we assume that the extant allegations of Count One against SANE and Yerushalmi are as follows: (1) primary liability under the Federal Wiretap Act and the D.C. Wiretap Act for all of the bad acts of Chris and Dave Gaubatz under a theory that Chris and Dave Gaubatz were agents of both SANE and Yerushalmi (*i.e., respondeat superior*) (TAC at ¶¶ 22-25) and (2) procurement liability against Yerushalmi and SANE under the D.C. Wiretap Act. (TAC at ¶ 84). It is important to note here that there are no allegations that SANE or Yerushalmi participated in the CSP Defendants' use and disclosure of the WND Clips. (TAC at ¶ 57).

Count Two. Count Two of the TAC alleges that Chris violated the Stored Communications Act ("SCA"), codified under Title II of the ECPA (18 U.S.C. §§ 2701-12), because he removed documents from Plaintiffs' shared computer drives and email servers.[8]

[7] As with Dave Gaubatz, there are no extant claims against CSP for procurement liability under the Federal Wiretap Act or for secondary liability under either the Federal Wiretap Act or the D.C. Wiretap Act. *Id*. at 23-24, 35. Moreover, while the Court has explicitly ruled that CSP has no primary liability through agency (*i.e., respondeat superior*) for purposes of Count Two, the Court's logic would apply *mutatis mutandis* to all the other causes of action (if Plaintiffs are heard to expand their claims of primary liability under Count One [or under the other causes of action] beyond those expressly set out by the Court in *CAIR II*). *Id.* at 27-29.

[8] While the allegations of the TAC themselves allege the wrongful acts under Count Two include removing documents from "computers or computer servers, networks, or systems" (TAC at ¶¶ 90-91), the Court's earlier ruling in response to the Gaubatz Defendants' motion to dismiss makes clear that the SCA does not apply to hard drives from desk top computers or laptops. *CAIR I*, at 335 (stating that "the statute clearly is not triggered when a defendant merely accesses a physical client-side computer and limits his access to documents stored on the computer's local hard drive or other physical media"). Rather, liability under the SCA is only implicated if

(TAC at ¶¶ 90-91). While no other Defendants accessed any of Plaintiffs' computers or computer systems, presumably, Count Two seeks to apply *respondeat superior* liability to Dave Gaubatz, SANE, and Yerushalmi in the same way as Count One. Pursuant to the Court's ruling in *CAIR II*, there is neither secondary liability for any of the Defendants nor is their primary liability under an agency theory of *respondeat superior* liability for any of the CSP Defendants. *CAIR II* at 26-29, 35.

Count Three. Count Three alleges a common law claim of conversion, limited by the Court to a claim of conversion of physical documents.[9] The allegations of Count Three are, broadly stated and taken as a whole, that Chris converted documents belonging to Plaintiffs and the remaining Defendants conspired with, or aided and abetted, Chris to this end. (TAC at ¶ 97-99). Presumably there is a claim that Dave Gaubatz, SANE, and Yerushalmi have primary liability under an agency theory of *respondeat superior* here as well.

Count Four. Count Four alleges that Chris breached a fiduciary duty owed to Plaintiffs by taking and disclosing documents and by recording his conversations with Plaintiffs' employees and subsequently disclosing those recordings to others. (TAC at ¶¶ 102-04). Count Four also alleges that the remaining Defendants induced, conspired with, and aided and abetted Chris's breach of fiduciary duty. (TAC at ¶¶ 105-07).[10] Once again, we presume that there is a

---

documents were taken from an email server or shared drive or similar facility for electronic communications service. *Id.*

[9] *CAIR I*, at 338-40 (precluding digital documents).

[10] As noted in the accompanying text, the TAC includes language in this Count Four suggesting a claim of indirect liability for "inducement." This "inducement" allegation shows up in the breach of fiduciary duty count (TAC at ¶ 105), the trespass count (TAC at ¶¶ 130-31), the fraud count (TAC at ¶ 152), and the D.C. Uniform Trade Secrets Act (TAC at ¶ 161). We treat these allegations as a kind of secondary liability even though the District of Columbia has never recognized any kind of inducement liability as a species of secondary liability and only recognizes three distinct torts involving inducement that relate to this case, two of which Plaintiffs have alleged as separate causes of action: fraudulent inducement (Count Nine), wrongfully inducing breach of contract (Count Six), and wrongfully inducing breach of fiduciary

claim here that Dave Gaubatz, SANE, and Yerushalmi have primary liability under an agency theory of *respondeat superior*.

Count Five. Count Five alleges breach of contract by Chris. According to Plaintiffs, the underlying contract giving rise to this claim is an alleged Confidentiality and Non-Disclosure Agreement ("Confidentiality Agreement"), an unsigned form of which was attached to the SAC as Exhibit A (but not to the TAC). (TAC at ¶¶ 111-114). The remaining allegations of this cause of action in fact relate to Plaintiffs' subsequent claim of interference with contractual relations, which appears in Count Six.

Count Six. Count Six alleges that the remaining Defendants tortiously interfered with the alleged Confidentiality Agreement by conspiring with and aiding and abetting Chris's breach of contract. (TAC at ¶¶ 123-124).

Count Seven. Count Seven alleges trespass against Defendant Chris Gaubatz and secondary liability for inducing, conspiring, and aiding and abetting the alleged trespass on the part of the remaining Defendants. (TAC at ¶¶ 129-34). We once again presume that there is a claim here that Dave Gaubatz, SANE, and Yerushalmi have primary liability under an agency theory of *respondeat superior*.

Count Eight. Count Eight alleges a claim for unjust enrichment against all Defendants as an independent cause of action purportedly giving rise to a claim for restitution and disgorgement. (TAC at ¶¶ 138-141).

Count Nine. Count Nine alleges that Chris fraudulently induced Plaintiffs into accepting him into their volunteer internship program and that all the remaining Defendants induced, conspired with, and aided and abetted Chris's fraud. (TAC at ¶¶ 143-154). Again, we presume

---

duty. We discuss below, in the context of the Secondary Defendants' indirect liability exposure, the inapplicability of Plaintiffs' claims of inducement of breach of fiduciary duty.

that there is a claim here that Dave Gaubatz, SANE, and Yerushalmi have primary liability under an agency theory of *respondeat superior*.

Count Ten. Count Ten alleges violations of D.C. 36-401, *et seq*. ("D.C. Uniform Trade Secrets Act") against Chris for taking documents and Audio-Video Recordings from Plaintiffs' offices. The remaining Defendants are alleged to have induced, conspired with, and aided and abetted these violations. And finally, we presume that there is a claim here that Dave Gaubatz, SANE, and Yerushalmi have primary liability under an agency theory of *respondeat superior*.

STANDARD OF REVIEW

A defense motion for summary judgment is appropriate when the undisputed evidence available to the parties renders a claim unproven as a matter of law. *Bias v. Advantage Int'l, Inc*., 905 F.2d 1558, 1560-61 (D.C. Cir. 1990) ("Rule 56(c) of the Federal Rules of Civil Procedure provides for summary judgment where 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."). "Once the moving party has carried its burden, the responsibility then shifts to the nonmoving party to show that there is, in fact, a genuine issue of material fact. The Supreme Court has directed that the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." *Id*. (citations and internal quotation marks omitted).

Moreover, Plaintiffs may not now submit self-serving, conclusory affidavits to contradict the evidence in the record given Plaintiffs' failure to produce such evidence in response to Defendants' discovery requests designed to test the legal and factual basis for Plaintiffs' claims. *Poullard v. Smithkline Beecham Corp*., No. 02-1590, 2005 U.S. Dist. LEXIS 35182, at *45-*46 (D.D.C. Nov. 30, 2005) (Kollar-Kotelly, J.) (holding that conclusory, self-serving affidavits do not create a material fact dispute on a matter for which the party has the burden of proof).

In sum, the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotations omitted). Consistent with the design of the Federal Rules, the factual record before this Court, and the law, Defendants respectfully request that this Court grant Defendants summary judgment on all counts.

LEGAL ARGUMENT

I. The Undisputed Factual Record Demonstrates that Plaintiffs' Allegations against the Secondary Defendants Are Not Merely Unsubstantiated, They Are Patently False.

A. Reality: The Factual Record.

A straightforward reading of the TAC leads to the narrative that the Secondary Defendants, led by CSP, SANE, and Yerushalmi, engaged in a nefarious conspiracy with the Gaubatz Defendants to expose Plaintiffs' dirty laundry, including their alleged trade secrets, to steal confidential and proprietary documents, and then to expose all of this to the world so that everyone would know that Plaintiffs are connected to the *Muslim Mafia.* Indeed, the Secondary Defendants, at least according to the TAC, were so rabidly focused on this exposure, that they were prepared to commit crimes and torts and then to tell the world all about their illicit behavior as a kind of suicide pact to expose and harm Plaintiffs.

After 17 months of discovery, however, we now know that Plaintiffs' narrative describing the motives and conduct of all Defendants is simply wrong. But more relevant here is that the TAC's narrative about the motives and conduct of the Secondary Defendants is pure fiction. What follows is a cursory review of the undisputed factual record (more fully detailed in Defendants' Statement of Undisputed Material Facts ["Facts"] filed concurrently herewith) as it relates to the Secondary Defendants' participation in, and knowledge of, the acts alleged in the

TAC.

CSP is a non-profit public policy think tank located in Washington, D.C. CSP was founded in 1988 by Frank Gaffney. Gaffney began his public service career in the 1970s, working as an aide in the office of Democratic Senator Henry M. Jackson. From August 1983 until November 1987, Gaffney held the position of Deputy Assistant Secretary of Defense for Nuclear Forces and Arms Control Policy in the Reagan Administration. In April 1987, Gaffney was nominated to the position of U.S. Assistant Secretary of Defense for International Security Policy. Gaffney served as the acting Assistant Secretary for seven months. (Facts at ¶¶ 1-2).

CSP's mission statement includes promoting public policies on national defense based upon President Reagan's well-known doctrine of "peace through strength." CSP promotes these policies through research and educational programs. (Facts at ¶ 1).

One area of specific concern to CSP, even prior to September 11, 2001, was the threat to our national security from the global Islamist movement, led violently by Al Qaeda and similar groups, but more stealthily, both abroad and in the U.S., by Muslim Brotherhood affiliated groups, as exemplified by CSP's publication of a seminal work entitled, *Sharia: The Threat to America; An Exercise in Competitive Analysis; A Report of Team "B" II.* The co-participants and co-authors of this study included some of this nation's most-esteemed national security experts. The purpose of this report was to provide a scholarly and seriously researched study of the "threat doctrine" followed by Muslim Brotherhood affiliated groups and the specific threats they posed in their efforts to gain footholds within U.S. political, educational, and civic institutions, not unlike the threat posed by the Soviets during the Cold War. (Facts at ¶¶ 3-4).

One of the leading Muslim Brotherhood-Hamas front groups, at least according to the Department of Justice, the U.S. Attorney's Office, and the FBI, is the organization that uses the name CAIR. The name CAIR, as we've learned in discovery, is used by Plaintiffs sometimes to

describe CAIR-AN, the original organization founded in 1994 and called the Council on American-Islamic Relations, Inc. until 2007, when it changed its name to CAIR-AN; sometimes to describe CAIR-F; and sometimes to describe a non-party third entity, which purportedly consists of CAIR-AN and CAIR-F. (Facts at ¶¶ 5-28).

Two of CAIR-AN's founders were participants in an important meeting of the Muslim Brotherhood-Hamas conspiracy and caught on an FBI audio surveillance tape, which was introduced as a key piece of evidence to obtain guilty verdicts in one of the largest criminal trials prosecuting the Holy Land Foundation for Global Relief and Development and seven individuals ("HLF Trial"). Nihad Awad was one of the two CAIR-AN founders that participated in this meeting, and he remains today a board member of both Plaintiffs and the executive director of CAIR-F. Indeed, as documented in the Facts, Plaintiffs' connections to the Muslim Brotherhood and Hamas run so deep that CAIR was named as an unindicted co-conspirator in the HLF Trial. Even more than this, as a result of the evidence presented at the HLF Trial, and other evidence known to the FBI, the FBI has publicly stated that it will no longer liaison with CAIR in relation to the FBI's outreach to the Muslim community, even though CAIR bills itself as "America's largest Islamic civil liberties group." (Facts at ¶¶ 5-28).

As a result of Plaintiffs' close association with the Muslim Brotherhood-Hamas conspiracy in the U.S., CSP decided in late 2007 and early 2008, to put together a documentary film proposal ("CAIR Documentary Film Project") for widespread distribution to examine the Muslim Brotherhood groups operating in the U.S., with a special focus on Plaintiff CAIR-AN. Initially, the purpose and methodology of the CAIR Documentary Film Project was to bring together the public documents of the Muslim Brotherhood conspiracy in the U.S., much of which demonstrates Plaintiffs' involvement, alongside interviews of experts in the field of national security. (Facts at ¶¶ 29-41).

To do so, CSP turned to Manifold Productions, Inc. ("Manifold") to assist in the technical, cinematic, and film production elements of the CAIR Documentary Film Project. CSP and Manifold decided to form Publius Productions, LLC ("Publius") as a fifty-fifty joint venture. CSP's role was to finance the CAIR Documentary Film Project. (Facts at ¶¶ 37-41).

Over the course of several weeks, Publius informed Gaffney that they would need B-roll for the documentary. B-roll consists of film clips (not necessarily with audio), used for cinematic effect to bring together pieces of a documentary. For example, if the documentary included an interview of an expert who was discussing Plaintiffs' involvement in public demonstrations on behalf of convicted terrorists, Publius would utilize B-roll video of such a public demonstration showing Plaintiffs' participation. (Facts at ¶¶ 30-36, 39-41).

CSP turned to Yerushalmi, who at the time was the president of SANE and general counsel to CSP, asking who he thought would be appropriate to supervise and manage all of the field work for obtaining the B-roll for the CAIR Documentary Film Project, such as hiring researchers to determine when and where Plaintiffs and other Muslim Brotherhood groups attended public events, and training and supervising the researchers to attend the public events with an inconspicuous camera to record the events without fanfare and public notice. (Facts at ¶¶ 42-43).

Yerushalmi recommended Dave Gaubatz for the position for several reasons. (1) Dave Gaubatz had already successfully managed for SANE one of two phases of a research study called the Mapping Sharia project over a period of six months.[11] During that time, Dave Gaubatz and a research team that he had hired, trained, and supervised, successfully gathered data from mosques across the country without any mishap or illegality. This data ultimately led to the

[11] Contrary to Plaintiffs' unsubstantiated allegations, the Mapping Sharia project has no connection with the CAIR Documentary Film Project. The two projects are completely separate and distinct. (Facts at ¶¶ 44, 51).

publication of the Mapping Sharia research project in two separate, respected peer-review journals. (2) Before hiring Dave Gaubatz for SANE's Mapping Sharia research, Yerushalmi had researched Dave Gaubatz's military and law enforcement background and had concluded that Dave Gaubatz was an experienced and highly respected military law enforcement officer and intelligence officer, having served on active duty in the military and as a civilian intelligence officer for more than two decades, including as a U.S. agent operating behind enemy lines during the Iraq War. And (3) Yerushalmi knew Dave Gaubatz personally and trusted that he would carry out any tasks professionally and legally. (Facts at ¶ 44).

To facilitate payment to Dave Gaubatz, who already had a contractual relationship with SANE for the Mapping Sharia project and was thus comfortable with this business arrangement, the parties decided that Publius would enter into a contract with SANE ("Publius-SANE Contract") as an independent contractor and that Dave Gaubatz would in turn enter into an agreement with SANE ("SANE-Gaubatz Contract") that would require Dave Gaubatz to carry out all of the terms of the Publius-SANE Contract. In fact, contractually and, more importantly, factually, the only role SANE played in the CAIR Documentary Film Project from the signing of these two contracts was for its bookkeeper in Arizona to transfer 100% of the funds received either from Publius or directly from CSP to Dave Gaubatz. (Facts at ¶¶ 47-55, 52-55, 213-20).

Insofar as SANE no longer played any role in the CAIR Documentary Film Project other than to facilitate the transfer of funds to Dave Gaubatz, Yerushalmi's involvement as SANE's president ended. However, CSP had asked that Yerushalmi provide legal advice on certain logistical questions that might arise during the CAIR Documentary Film Project. Yerushalmi, who was at the time and serves today as a non-paid general counsel to CSP, agreed to volunteer his services to provide legal advice if asked and to render a legal opinion if sought. During the entirety of the CAIR Documentary Film Project after the signing of the Publius-SANE Contract

and the SANE-Gaubatz Contract, Yerushalmi's sole role was to answer specific queries as legal advisor for the CAIR Documentary Film Project. (Facts at ¶¶ 75-77, 129-39, 143, 160, 195-204).

Prior to Chris beginning his volunteer work at CAIR-MD/VA, Dave Gaubatz asked Yerushalmi two legal questions: (1) Would it be legal for Chris to use an inconspicuous camera worn on his outer clothing to record B-roll in Virginia and in the District of Columbia? And (2), would it be legal for Chris to use an alias as a security measure so Plaintiffs would not connect Chris to Dave Gaubatz, the latter of whom was known as a vocal critic of Plaintiffs? (Facts at ¶¶ 131-35).

Yerushalmi answered the first question in the affirmative and informed Dave Gaubatz that as long as Chris was a party to the conversation in that he was physically present, visible, and in earshot, it should not create legal issues as long as Chris made the recordings with no intent or purpose, during the recordings or subsequently, of violating any statutory, contractual, or common law duty owed to a third-party, including Plaintiffs. (Facts at ¶ 133). Yerushalmi also noted that the recording device should be no better than the wearer's natural hearing to insure that it recorded only conversations in Chris's presence. (Facts at ¶¶ 134-35).

Yerushalmi answered the second question by informing Dave Gaubatz that Chris could use an alias, but he had to have the intent at all times to fulfill the duties of a volunteer, and that he should have no intent and take no action to violate any statutory, contractual, or common law duty owed to Plaintiffs or CAIR-MD/VA. (Facts at ¶ 132). Yerushalmi's legal advice to Dave Gaubatz also included the conditions that Chris present no false documentation and that he accept no payment for his services or even reimbursement for any expenses. (Facts at ¶ 132).

Chris, who was employed, paid, trained, and supervised by Dave Gaubatz, began his volunteer work at CAIR-MD/VA in late March 2008. It is worth noting here that Plaintiffs have

stipulated that no Audio-Video Recordings or documents removed by Chris from CAIR-MD/VA give rise to any of Plaintiffs' causes of action against Defendants. (Facts at ¶¶ 57, 60, 78-80, 122-29).

During Chris's tenure volunteering at CAIR-MD/VA, he did spend two days in April 2008 volunteering at Plaintiffs' Offices, working in the document storage room moving some documents and sorting others for shredding. (Facts at ¶¶ 81-84).

In April and May 2008, during his volunteer work at CAIR-MD/VA, Chris obtained Audio-Video Recordings of conversations to which he was a party and provided those to his father along with either oral or written daily reports of the highlights of his day volunteering at CAIR-MD/VA. Dave Gaubatz would in turn provide those Audio-Video Recordings to Brim who was tasked by CSP to act as Dave Gaubatz's liaison for Publius and CSP. Brim would typically review the files that contained the Audio-Video Recordings just to be certain there was content on the digital files and that they were not blank. Brim would also receive the daily reports either in writing or orally from Dave Gaubatz. Occasionally, Chris would deliver the Audio-Video Recordings directly to Brim. Yerushalmi would only receive reports on the daily activities from Dave Gaubatz if it was "pertinent" to a specific legal inquiry about evidence of Plaintiffs' criminal activity. (Facts at ¶¶ 57-77, 166, 177-83).

At some point during his volunteer work at CAIR-MD/VA, Chris discovered evidence of a massive fraud conducted by Morris Days, a senior official at CAIR-MD/VA ("Morris Days Fraud"). The evidence suggested that CAIR-MD/VA and Plaintiffs were involved in the fraud through a cover-up. Chris was asked by his supervisor at CAIR-MD/VA, Khalid Iqbal, who was also an officer and senior official working for Plaintiffs, to shred some of this evidence. Chris asked his father what he should do. (Facts at ¶¶ 63-77).

Dave Gaubatz in turn asked Yerushalmi what Chris should do about such documentary

evidence. Yerushalmi advised Dave Gaubatz that Chris should preserve any evidence of a crime and not participate in the destruction of evidence of a crime. Dave Gaubatz provided some of the documents Chris had provided to him to Yerushalmi and asked Yerushalmi to confirm that the documents were evidence of a serious criminal fraud. Yerushalmi reviewed these documents and confirmed that in his view the documents were evidence of a serious crime. Dave Gaubatz asked Yerushalmi what he should do about these documents, and Yerushalmi advised him as follows: Chris would have authority to remove the documents if he had express authority to take documents or implied authority to do so. Yerushalmi explained that implied authority would occur if a reasonable person under the circumstances would understand that he could remove documents (*i.e*., a document generally provided to the public). In addition, Yerushalmi advised Dave Gaubatz that in his opinion Chris had legal authority, if not a legal duty, to preserve evidence of a serious crime and to provide that to law enforcement. (Facts at ¶¶ 75-77, 136).

Dave Gaubatz provided Brim with some of the documents of the Morris Days Fraud Chris had removed from CAIR-MD/VA and explained that he considered these documents as evidence of a serious crime. All Defendants have clearly testified, and the documentary evidence supports this testimony, that none of the Defendants who had knowledge that Chris had removed documents from CAIR-MD/FA (*i.e.*, the Gaubatz Defendants, CSP, Brim, and Yerushalmi) considered these documents or the removal of these documents as part of the CAIR Documentary Film Project or as part of any contractual obligation or agreement. In fact, Brim did not review the documents but had them saved to a secured drive. Yerushalmi played no role in the transfer of documents to CSP and was not aware of what documents Dave Gaubatz had provided to CSP. (Facts at ¶¶ 138, 166-71, 184-86, 189-93).

After CAIR-MD/VA closed down in May 2008, in large measure from the fall out of the Morris Days Fraud, Iqbal recommended to Chris that he volunteer as an intern for "CAIR in

Washington, D.C." (*i.e.*, Plaintiffs' Offices). Chris informed his father, who then approved and authorized the move. In his application for the volunteer internship at Plaintiffs' Offices, Chris provided an email "resume" that included his alias, Dave Marshall, which he had used at CAIR-MD/VA, and it included the fact that he attended a local Virginia college and worked at a family construction business. Chris did not attend the college or work in a family construction business. Neither of the Gaubatz Defendants informed Yerushalmi, SANE, or the CSP Defendants that Chris had presented this resume. (Facts at ¶¶ 81, 108-16, 139).

Chris began his volunteer internship at Plaintiffs' Offices on or about June 16, 2008. From the moment he stepped into Plaintiffs' Offices until his last day, no one at Plaintiffs' Offices ever provided him with oral or written instruction about confidentiality or the proprietary nature of the materials or information he might encounter.[12] No written manuals were ever provided and no policies, rules, or procedures were ever explained to him. As evidenced by the Audio-Video Recordings, Chris's testimony and the testimony of his supervisor, Raabia Wazir, Chris was never instructed that the information he would be dealing with as a volunteer intern would be "confidential" or "proprietary." Indeed, at no time was Chris told that he should "take care" or "be careful" or "note that this is sensitive" when dealing with any information or materials. Nothing even remotely similar to such instructions, warnings, or parameters was provided to him by any of Plaintiffs' employees or representatives. Even when instructed to shred documents during his internship, Chris was not told that the materials needed to be shredded (and not simply thrown in the trash) because it was confidential, proprietary, or even sensitive material. Literally, not a single word of caution—ever. (Facts at ¶¶ 62, 84-107, 136,

[12] The exception to this, which is specifically addressed below, is that Chris's supervisor, Raabia Wazir, provided Chris with what she claims was a confidentiality agreement. The problem with this proposition, however, is that she never explained what the subject matter of the alleged confidentiality agreement entailed, nor did Chris review it, nor did Chris sign it or return it.

140-59).

As Chris testified and as the Audio-Video Recordings demonstrate, most of the time the interns at Plaintiffs' Offices were simply bantering and talking about how so much of their work was make-shift. The interns played games, and they talked politics. And as the Audio-Video Recordings evidence, not once did the interns mention during these many conversations that the materials with which they were working were confidential, proprietary, or sensitive in nature. Not once. Indeed, the recorded conversations demonstrate the loose and relaxed atmosphere in which the interns operated within Plaintiffs' Offices. (Facts at ¶¶ 136, 141, 148)

In fact, the only time the word "confidential" was even mentioned was on Chris's first day as an intern on June 16, 2008 (even though he had volunteered and worked in and among the documents in storage for two days in April). During his orientation, his supervisor, Wazir, handed him what she called a confidentiality agreement. Chris explicitly asked her if he should review and sign it then and there. Wazir's response was clear: no, do it on your own time. And she never mentioned it again, nor did anyone else. (Facts at ¶¶ 85-107, 140-44).

Moreover, at no time during this orientation did Wazir bother explaining what the confidentiality agreement said, what its subject matter was, or what its terms were. Nothing. She simply handed it to Chris and instructed him to review it on his own time. Indeed, Wazir's deposition testimony illustrates how unimportant this document was to her. She considered it akin to clicking on a download button for iTunes without reading it or paying it any mind. She herself had no recollection of ever reading the so-called confidentiality agreement and could not even recall if she signed one during her previous stint as an intern.[13] (Facts at ¶¶ 85-107, 140-

[13] In the same vein, Plaintiffs' claim that every intern was required to sign such a confidentiality agreement is manifestly belied by the fact that Plaintiffs could produce only 13 executed agreements from among the 24 interns who volunteered at Plaintiffs' Offices during Chris's tenure,. (Facts at ¶¶ 102-04).

53).

Within this factual reality, Chris's volunteer work at Plaintiffs' Offices proceeded as it had at CAIR-MD/VA. He obtained the Audio-Video Recordings by wearing an inconspicuous button camera on his external clothing, which only barely recorded audio within Chris's earshot, and even that was of very poor quality and oftentimes inaudible. Chris was always an active participant in the conversations he recorded or, at the very least, was a party to them by being physically present and visible to all. There were no secrets about who was present and who was not. (Facts at ¶¶ 57-62, 160-63).

Chris would typically provide the Audio-Video Recordings to his father, along with either an oral or written daily report of the highlights of his day. Dave Gaubatz would in turn provide the Audio-Video Recordings to Brim as his liaison to Publius-CSP, together with any relevant daily reports. Brim would only review the Audio-Video Recordings to be certain there was content on the digital files. There was never an expectation by any Defendant that the Gaubatz Defendants were required or expected to provide CSP (or any other Defendant) with documents removed from Plaintiffs' Offices. Indeed, the factual record shows that the CSP Defendants were not even interested in the documents. (Facts at ¶¶ 117, 139, 161-64, 166-220).

Chris's specific role as an intern at Plaintiffs' Offices was as an "outreach" intern. His supervisor, Wazir, expressly authorized him to take documents for his community outreach efforts, but she never told Chris which documents were permitted for him to utilize and which were not. He was simply left to decide for himself. (Facts at ¶¶ 228-31).

And as Chris testified, Wazir and others at Plaintiffs' Offices had encouraged him to peruse the materials at Plaintiffs' Offices to learn more about Plaintiffs and about Islam. There was never an instruction or a sense that Chris was not permitted to take the material home or that he could not share it with others. (Facts at ¶ 231).

And while Plaintiffs might take issue with this characterization of the express and implied authority granted to Chris to remove documents from Plaintiffs' Offices, this is exactly how Chris explained the environment to his father. And this is exactly how Dave Gaubatz explained the internship environment to Yerushalmi when Chris discovered more evidence of the Morris Days Fraud at Plaintiffs' Offices in D.C. (Facts at ¶¶ 138, 142, 144-46, 157, 166-70, 176, 182-86, 188-220, 224-35).

At some point during Chris's internship at Plaintiffs' Offices, he discovered more of the documentary evidence of the Morris Days Fraud and sought his father's advice. Again, Dave Gaubatz, after consulting with Yerushalmi, informed Chris that he could remove documents from Plaintiffs' Offices based on any one of three reasons: (1) he had expressed authority to do so (*i.e.*, for his outreach work); (2) he had implied authority to do so (*i.e.*, given the work environment and the nature of the documents, a reasonable person would understand he could remove the documents); or (3) to preserve evidence of a crime to provide to law enforcement. (Facts at ¶¶ 76-77, 135-37, 156, 228-29).

These instructions were based upon the legal advice provided to Dave Gaubatz by Yerushalmi. Yerushalmi based his legal advice on the environment described to him by Dave Gaubatz, who in turn relied on the description of the environment provided to him by Chris and by the Audio-Video Recordings themselves. (Facts at ¶¶ 76-77, 135-38, 156, 195-204, 228-29).

The only documents removed from Plaintiffs' Offices that Yerushalmi received were specific documents Dave Gaubatz provided to him to ask if Yerushalmi believed they were evidence of serious criminal activity, notably relating to the Morris Days Fraud, tax reporting violations, and violations of the Foreign Agent Registration Act. After review, Yerushalmi did not retain the documents. Indeed, at no time did Dave Gaubatz inform Yerushalmi how Chris obtained the documents from Plaintiffs' Offices—that is, whether they were available to Chris as

expressly or impliedly authorized by Plaintiffs, or by virtue of what Yerushalmi termed legal authority to preserve evidence of a serious crime. (Facts at ¶¶ 77, 135-38, 156, 195-204).

Dave Gaubatz provided CSP with certain documents that he described to Brim as evidence of serious crimes. Brim did not review the documents but simply saved them to a secure drive. The CSP Defendants never reviewed the documents nor made any use of them until after this litigation began and only in response to subpoenas from the FBI and ICE. (Facts at ¶¶ 184-86).

There is evidence of a telephone call on August 9, 2008, at the time of Chris's internship at Plaintiffs' Offices, during which we can hear Chris speaking to someone at WND, and it is clear from the conversation that he is discussing the internship and the Audio-Video Recordings. What is equally clear from the record is that none of the Secondary Defendants knew of any contract or even contact between the Gaubatz Defendants and WND about a book referencing the CAIR Documentary Film Project by the Gaubatz Defendants until April 2009, well after the field work inside Plaintiffs' Offices had come to a close. What is also clear from the record is that none of the Secondary Defendants participated in any way in the research, document collection, writing, publication, or selling of the book *Muslim Mafia.* (Facts at ¶¶ 166-76, 188-220).

In fact, the first that any of the Secondary Defendants even learned of a such a book deal was in April 2009, long after Chris and the other researchers working for Dave Gaubatz had left Plaintiffs' Offices. In April 2009, Dave Gaubatz informed CSP and Brim of his intentions to publish a book that would disclose the fact of the CAIR Documentary Film Project. Brim responded to Dave Gaubatz in a lengthy email reminding him of his contractual obligations not to disclose the existence of the CAIR Documentary Film Project or to disclose the materials Chris and Dave Gaubatz had produced as daily reports. Dave Gaubatz replied by lengthy letter

to Brim and made it crystal clear that as far as all of the parties involved in the CAIR Documentary Film Project were concerned, the only thing CSP, Brim, and Yerushalmi had ever expected or wanted were the Audio-Video Recordings. The documents Chris had removed from Plaintiffs' Offices were never part of the CAIR Documentary Film Project, and CSP had no claim to them whatsoever not only because CSP had never contracted for them, but because CSP had never had any interest in them. CSP agreed and actually entered into an agreement with Dave Gaubatz making this point explicit.[14] (Facts at ¶¶ 188-92).

B. Reality: The Law.

Based on the quite obvious fact that none of the Secondary Defendants had any knowledge of any actual wrongdoing by the Gaubatz Defendants or any knowledge of any illicit intent to commit any wrongdoing by the Gaubatz Defendants, the Secondary Defendants cannot be liable for any of the statutory, contractual, or common law claims Plaintiffs have asserted against them.

1. Primary (Direct) Liability. For any of the Secondary Defendants to have primary liability for their own actions (direct liability as opposed to vicarious primary liability through agency), there has to be evidence that the Secondary Defendants engaged in some prohibited conduct, and that they did so knowingly. *See* 18 U.S.C. §§ 2511(1)(a)-(d) & D.C. Code §§ 23-542. In both statutory regimes, for a "use" or "disclosure" violation, the using or disclosing party must know or have reason to know that the intercepted communications were obtained illegally. In this case, that would require the Secondary Defendants to know or have

[14] What is unique about the April 2009 correspondence between Dave Gaubatz and CSP/Brim, is its probative value about Dave Gaubatz's view of the removal of the documents from Plaintiffs' Offices and the fact that this was absolutely separate and independent from the CAIR Documentary Film Project and entirely outside of the CSP Defendants' (and of SANE's and Yerushalmi's) interest. Indeed, the parties were so clearly of the same mind that an agreement was signed that made it contractually binding. And all of this took place before any book was published and well before the start of this litigation.

reason to know that Chris was not a party to the communications or that, even as a party to the communications, he intended to intercept the communications "***for the purpose of*** committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 USCS § 2511(2)(d) (emphasis added).[15]

In this case, Plaintiffs argue that the exception to the one-party consent rule applies to create liability for Chris's actions based upon their claim that Chris subsequently breached some fiduciary duty of non-disclosure by using and disclosing the Audio-Video Recordings.[16] While we will treat this argument below in the context of showing that there was no such fiduciary duty of non-disclosure such that there could have been no primary violation of either the Federal or D.C. Wiretap Acts for any Defendant, for purposes of the Secondary Defendants, the Plaintiffs must show that the Secondary Defendants had knowledge of or reason to know that Chris had some fiduciary duty relating to non-disclosure.

There is nothing in the record to suggest that the Secondary Defendants had such actual or constructive knowledge. *McCann v. Iroquois Mem. Hosp.*, 622 F.3d 745, 753 (7th Cir. 2010)

---

[15] While the D.C. Wiretap Act includes within the "for the purpose of" exception to the one-party rule any "injurious act" (D.C. Code § 23-542(b)(3)), in response to the CSP Defendants' argument in their motion to dismiss that this added provision was unconstitutionally vague, Plaintiffs expressly restricted their "for the purpose of" claims to the torts of interference with contract (*i.e.*, the Confidentiality Agreement) and breach of fiduciary duty. (*See* CSP Defs.' Mot. to Dismiss [Doc. No. 97] at 26-28; Pls.' Opp'n to Mot. to Dismiss [Doc. No. 103] at 22).

[16] While Plaintiffs argue that the "for the purpose of" exception to the one-party consent rule also applies because Chris intercepted the Audio-Video Recordings for the purpose of breaching the alleged Confidentiality Agreement, this argument fails for three reasons. One, there was in fact no Confidentiality Agreement between either Plaintiff and Chris. Two, notwithstanding Plaintiffs' claims, the Secondary Defendants had no knowledge of, nor were they ever provided a copy of, the so-called Confidentiality Agreement, nor told of its terms. In fact, Chris was specifically instructed to not enter into any such agreement or special relationship that might create a fiduciary duty and to remain simply as an intern doing his job. (Facts at ¶¶ 137, 143-45). And, three, as noted in the CSP Defendants' Reply Brief in support of their motion to dismiss, it is simply illogical to argue that Chris made the recordings for the purpose of the Secondary Defendants' interference with the alleged Confidentiality Agreement. That would render the "for the purpose of" exception a tautology. (CSP Defs.' Reply Br. in Supp. of Mot. to Dismiss [Doc. No. 108] at 14); *see also* note 19, *infra*, and accompanying text.

("To be liable under § 2511(1)(c) or § 2511(1)(d), a defendant must know or have reason to know sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of the Wiretap Act. ***It is not enough to know that the conversation was intercepted; the defendant must also be able to tell that none of the statutory exceptions apply***.") (citations, quotation marks and brackets omitted) (emphasis added). As noted by the Tenth Circuit in *Thompson v. Dulaney*, 970 F.2d 744, 749 (10th Cir. 1992):

> This language, found in each of subsections (c) and (d), compels the conclusion that, to establish liability under one of those sections, a plaintiff must demonstrate a greater degree of knowledge on the part of a defendant. The defendant must know 1) the information used or disclosed came from an intercepted communication, and 2) ***sufficient facts concerning the circumstances of the interception such that the defendant could***, with presumed knowledge of the law, ***determine that the interception was prohibited in light of Title III***. Although a defendant may be presumed to know the law, to establish use and disclosure liability under Title III, ***a defendant must be shown to have been aware of the factual circumstances that would violate the statute***.

(emphasis added) (citations omitted); *see also Peavy v. Dall. Indep. Sch. Dist*., 57 F. Supp. 2d 382, 387-89 (D. Tex. 1999) (holding that constructive knowledge must be based upon some fact that would allow a reasonable person to conclude that the tapes were illegally recorded).

In this case, Dave Gaubatz had informed CSP, through Yerushalmi as the legal adviser, not only that Chris had no confidentiality agreement nor specific instructions about the confidentiality of the discussions within Plaintiffs' Offices, but also that Plaintiffs' operations were run without any instructions, rules, or procedures relating to the confidentiality of the discussions between the parties within Plaintiffs' Offices. (Facts at ¶¶ 135-38, 144-59, 166-71, 195-204). Quite simply, none of the Secondary Defendants could possibly have been on legal notice of such a non-disclosure fiduciary duty even if one actually existed. While there is absolutely nothing on the Audio-Video Recordings to provide legally effective constructive

knowledge under these criminal statutes, only Brim, and by implication, CSP, were ever in possession of the Audio-Video Recordings during the filming at Plaintiffs' Offices. (Facts at ¶¶ 178-83). SANE never had possession of the Audio-Video Recordings or listened to them. (Facts at ¶¶ 213-17). Yerushalmi never had possession and only obtained possession and viewed them subsequent to this litigation. (Facts at ¶ 198). Savit and Pavlis only came into contact with the Audio-Video recordings long after the recording at Plaintiffs' Offices had ended. (Facts at ¶¶ 205-12).

Indeed, even if Brim would have reviewed the Audio-Video Recordings with care as she received them from Dave Gaubatz, there is nothing on those recordings that would have constructively informed her that somehow Chris had a fiduciary duty not to disclose the content of his conversations at Plaintiffs' Offices. In fact, if such a fiduciary duty of confidentiality could somehow have arisen spontaneously by some implication during Chris's volunteer internship, Chris would be liable for breach of fiduciary duty if he had merely come home and told his college roommate about his day, including perfectly mundane discussions about perfectly mundane tasks that had nothing to do with confidential or secret information. Moreover, for the Secondary Defendants to be liable, each one individually would have to have constructive knowledge of this spontaneous, implied fiduciary duty that somehow magically extended to confidentiality. Even then, what was recorded would have to have been confidential—as opposed to instructions or explanations of mundane tasks or simply just office banter amongst interns, which is what it mostly was.

And beyond all of this, for the Secondary Defendants to be liable, they would have to have actual or constructive knowledge that Chris was making the Audio-Video Recordings "***for the purpose of***" breaching this duty. As articulated in *Sussman v. ABC,* 186 F.3d 1200, 1202-03 (9th Cir. 1999):

> Under section 2511, "the focus is not upon whether the interception itself violated another law; it is upon whether the purpose for the interception—***its intended use***—was criminal or tortious." *Payne v. Northwest Corp*., 911 F. Supp. 1299, 1304 (D. Mont. 1995), *aff'd in part and rev'd in part*, 113 F.3d 1079 (9th Cir. 1997). *See also Deteresa v. American Broad. Cos*., 121 F.3d 460, 467 n.4 (9th Cir. 1997) (emphasizing the distinction between a taping that is itself tortious or criminal, and one carried out for the purpose of committing some other crime or tort). Where the taping is legal, but is done for the purpose of facilitating some further impropriety, such as blackmail, section 2511 applies. ***Where the purpose is not illegal or tortious, but the means are, the victims must seek redress elsewhere***.

Id. (emphasis added). Given the factual record, there is not a scintilla of evidence that the Secondary Defendants had such knowledge nor is there even a reasonable inference of such knowledge.

The only other extant allegations of direct primary liability against the Secondary Defendants are for interference with a contract of confidentiality and for unjust enrichment. We need not pause long here. A claim of interference with contract requires a contract. *Paul v. Howard Univ*., 754 A.2d 297, 308-09 (D.C. Ct. App. 2000) (holding plaintiff has the burden of proof to show (1) the existence of a contract; (2) knowledge of the contract; (3) intentional procurement of a breach of the contract; and (4) damages resulting from the breach). There is no evidence of any contract, oral or written, and more importantly, there is no evidence that even if there were such a binding contract, the Secondary Defendants knew of it and sought to interfere with it. And the unjust enrichment claim requires actual enrichment. *News World Commc'ns v. Thompsen*, 878 A. 2d 1218, 1222 (D.C. Ct. App. 2005). The record provides indisputable evidence that none of the Secondary Defendants profited or were enriched in any way from Chris's actions or more generally from the CAIR Documentary Film Project. (Facts at ¶¶ 172-76, 194, 203-04, 208, 212, 218-19).

2. Primary (Indirect) Liability: Agency. The Court has already ruled that the CSP Defendants had no agency relationship with the Gaubatz Defendants relative

to Chris's actions as a volunteer intern for purposes of Count Two. Not only does the Court's reasoning on the CSP Defendants' lack of agency liability apply *mutatis mutandis* to all the causes of action, the factual record demonstrates beyond cavil that Dave Gaubatz (and by implication his employees, Chris and the other researchers) were arms-length independent contractors. *See generally Hickey v. Borners*, 28 A.3d 1119, 1123-25 (D.C. Ct. App. 2011). First, that is how the contracts with Dave Gaubatz were constructed. Second, and more importantly, that is how the contractual relationships actually unfolded. Dave Gaubatz was in charge of identifying, training, supervising, and actually paying his researchers (*i.e.*, Chris). Dave Gaubatz was hired for his professional expertise and not in the course of CSP's (or Publius's or SANE's) ordinary course of business. Dave Gaubatz decided where, when, and how the Audio-Video Recordings would take place on a daily basis and only "coordinated" with Brim by informing her and only "coordinated" with Yerushalmi when he needed advice about what Dave Gaubatz considered evidence of a crime. None of the CSP Defendants had day-to-day control over Dave Gaubatz or his researchers. Indeed, none of the Secondary Defendants ever had any material contact with Chris or any of the researchers until after all of the internships had come to an end. (Facts at ¶¶ 37-44, 47-55, 118-138).

To the extent that the CSP Defendants did not have a principal-agent relationship with the Gaubatz Defendants, *a fortiori* SANE and Yerushalmi did not. The factual record is clear that SANE acted only as a contract facilitator to transfer funds from Publius and CSP to Dave Gaubatz. Yerushalmi acted only as a legal advisor and had no access to the Audio-Video Recordings, and he only viewed, in the context of providing legal advice, certain documents that Dave Gaubatz believed were evidence of serious crimes based upon his extensive law enforcement background. Thus, SANE exercised no control over Dave Gaubatz and certainly not over Chris. Yerushalmi did not even have a contractual relationship with Dave Gaubatz

(much less with Chris) and was acting strictly as legal adviser on specific questions. (Facts at ¶¶ 195-204; 213-20).

3. Inducement, Conspiracy, and Aiding & Abetting. The remainder of the causes of action against the Secondary Defendants alleging liability do so on the bases of allegations of inducement, conspiracy, and aiding and abetting. The Court of Appeals for the District of Columbia has held flatly that the District has not recognized the independent tort of aiding and abetting. *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, No. 11-cv-1067, 2013 D.C. App. LEXIS 154, at *24-25, (D.C. Ct. App. Apr. 11, 2013) ("In jurisdictions that have recognized the tort of aiding and abetting the breach of fiduciary duty, the plaintiff must show: (1) a fiduciary duty on the part of the primary wrongdoer, (2) a breach of this fiduciary duty, (3) knowledge of this breach by the alleged aider and abettor, and (4) the aider and abettor's substantial assistance or encouragement of the wrongdoing. However, as we noted in *Flax v. Schertler*, '[t]he separate tort of aiding-abetting has not yet, to our knowledge, been recognized explicitly in the District.'"); *Flax v. Schertler*, 935 A.2d 1091, 1108, n.15 (D.C. Ct. App. 2007); *see also 3M Co. v. Boulter*, 842 F. Supp. 2d 85, 119 (D.D.C. 2012) ("According to the District of Columbia Court of Appeals, to which this Court looks on issues of District of Columbia law, the tort of aiding and abetting is not recognized under District law."). However, as the court noted in *Pietrangelo*, the District of Columbia does recognize the specific tort of inducing a breach of fiduciary duty as a kind of aggravated aiding and abetting akin to inducing a breach of contract.[17] As described by the *Pietrangelo* court and in the cases cited by the court, inducement requires the existence of a fiduciary duty, the breach of the duty, and a third party

[17] Indeed, if one follows the cases cited by the *Pietrangelo* court for the origination of the tort for inducing a breach of fiduciary duty in the District of Columbia, it originates in an inducement of breach of contract case. *See Int'l Underwriters, Inc. v. Boyle*, 365 A.2d 779, 784 (D.C. Ct. App. 1976) (citing *Group Ass'n Plans, Inc. v. Colquhoun*, 466 F.2d 469, 471 (D.C. Cir. 1972)).

who intended to induce the breach, together with damages proximately caused from the breach.[18] *Pietrangelo,* 2013 D.C. App. LEXIS 154, at *26.

In order for any of the Secondary Defendants to be liable either for inducement or conspiracy, there must be some evidence that the Secondary Defendants actually intended to induce Chris to engage in some tort, or, in the case of conspiracy, actually entered into an agreement with Chris to do so. *Weishapl v. Sowers,* 771 A.2d 1014, 1023-24 (D.C. Ct. App. 2001) (requiring "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or in a lawful act in an unlawful manner; and (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement (4) pursuant to, and in furtherance of, the common scheme"). But the factual record is not only devoid of these kinds of intentions or agreements touching the Secondary Defendants, the factual record instead demonstrates that the Secondary Defendants desired only to legally obtain B-roll and literally nothing else.

Given the overwhelming and undisputed evidence that (1) the Secondary Defendants themselves engaged in no wrongdoing; (2) the Gaubatz Defendants were not agents of the Secondary Defendants; and (3) the Secondary Defendants had no knowledge of or intention that Chris would breach a fiduciary duty or any other statutory, contractual, or common law duty owed to Plaintiffs, the Plaintiffs' complaint against the Secondary Defendants fails entirely. As such, the CSP Defendants, Yerushalmi, and SANE respectfully request this Court to grant them summary judgment on all counts.

II. Plaintiffs Have Failed to Meet the Minimum Burden to Establish Primary Liability against Any of the Defendants.

[18] It should be noted that in the District of Columbia, inducement has only been adopted as a valid avenue of tort liability for breach of contract and breach of fiduciary duty. Although Plaintiffs allege inducement as a kind of secondary liability for trespass, fraud, and misappropriation of trade secrets, none of which appear to have been recognized in the District of Columbia, it does not affect the analysis since the Secondary Defendants did not have the requisite "guilty knowledge" to have engaged in any act giving rise to secondary liability.

A. Federal and D.C. Wiretap Acts (Count One).

As discussed in great detail in the CSP Defendants' motion to dismiss and in their reply brief in support of the motion, the Federal and D.C. Wiretap Acts both provide a statutory exception termed the one-party consent rule. *See* 18 U.S.C. § 2511(2)(d) & D.C. Code § 23-542(b)(3); (*see also* CSP Defs.' Mot. to Dismiss [Doc. No. 97] at 14-24; Reply Br. in Supp. of Mot. to Dismiss [Doc. No. 108] at 12-14). Now that the parties and the Court have the benefit of discovery and the actual Audio-Video Recordings, there is no factual dispute that the Audio-Video Recordings were all obtained by Chris and the other researchers wearing an inconspicuous button camera on the exterior of their clothing where the "interceptor" was both visible and physically present. Moreover, the Audio-Video Recordings alleged to have been obtained in violation of the Federal and D.C. Wiretap Acts are the best evidence that not only was Chris a party to the conversations, but the Audio-Video Recordings actually intercepted the participants less well than Chris or the others could hear with their own natural auditory senses. *United States v. Brown*, No. 10-100-BAJ-SCR, 2011 U.S. Dist. LEXIS 12932, at *9-10, (M.D. La. Feb. 8, 2011) (holding that in order to apply the one-party consent rule a party to the conversation need not be an active conversant but merely present and visible (citing *Pitts Sales, Inc. v. King World Prods.*, 383 F. Supp. 2d 1354 (S.D. Fla. 2005))).

The only exception to the applicability of the one-party consent rule in this case, as noted above with respect to the Secondary Defendants and as expressly argued by Plaintiffs themselves in their opposition to the CSP Defendants' motion to dismiss,[19] is that Chris recorded the Audio-

[19] (*See* Pls.' Opp'n to Mot. to Dismiss [Doc. No. 103] at 22). While it is true Plaintiffs attempted to include "tortious interference with contract" as falling within the "for the purpose of" exception to the one-party consent rule, this argument fails for three reasons. One, there was no contract. Two, if there was such a contract, Defendants were unaware of it. Three, the alleged "interference with contract" would have occurred even before the recordings or any disclosure

Video Recordings "for the purpose of" some subsequent breach of a fiduciary duty. The only subsequent behavior relating to the Audio-Video Recordings that could have even remotely violated some fiduciary duty owed by Chris to Plaintiffs would have been the use and disclosure of the Audio-Video Recordings by Chris when he provided them to his father and on occasion to CSP directly. But the argument that Chris made the Audio-Video Recordings "for the purpose of" subsequently violating some fiduciary duty requires a factual-legal inferential chain that the record in this case simply does not support.

First, Plaintiffs have to convince this Court that an unpaid intern with no written agreement rises to the level of a fiduciary. *CAIR I*, at 341 (requiring a "searching inquiry into the nature of the relationship, the promises made, the type of services or advice given and the legitimate expectations of the parties" to establish a fiduciary (citing *Firestone v. Firestone*, 76 F.2d 1205, 1211 (D.C. Cir. 1996))). In this case, the factual record, given the Audio-Video Recordings, demonstrates that the nature of Chris' relationship to Plaintiffs was not as a paid employee. More, Chris entered into no agreements and made no promises, oral or written, either about confidentiality or even about the nature of the internship. Indeed, no court in the land, as far as Defendants' research indicates, has ever found a volunteer intern to be a fiduciary, particularly under facts and circumstances similar to those presented here.

Moreover, Plaintiffs are attempting to equate a volunteer intern with an employee to boot-strap in a kind of automatic fiduciary relationship. But, an intern for whom the "employer" does not pay minimum wage or social security benefits is, per the IRS, tested by the fact that the intern provides no benefit (fiduciary or otherwise) to the "employer":

> The following six criteria must be applied when making this determination:
> 1. The internship, even though it includes actual operation of the facilities of the

---

and thus could not be a subsequent purpose of the Audio-Video Recordings. *See also* note 16, *supra*.

employer, is similar to training which would be given in an educational environment;
2. ***The internship experience is for the benefit of the intern***;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. ***The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded***;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet #71 at http://www.dol.gov/whd/regs/compliance/whdfs71.htm (emphasis added). Plaintiffs paid Chris no wage and paid no benefits of any kind. Thus, for Plaintiffs to have legally avoided paying Chris a minimum wage and other legally mandated benefits, Plaintiffs had to take the position, at least with the IRS, that their interns provided them no real value and the relationship was based not on what the interns did for Plaintiffs but for what Plaintiffs did for the interns. *See also Pietras v. Bd. of Fire Comm'rs*, 180 F.3d 468, 473 (2d Cir. 1999) (applying the employer-employee/master-servant analysis to Title VII, an employee must at least receive substantial financial benefits).

As the Court noted in its earlier ruling, a fiduciary duty must arise out of some agreement or at least some implicit understanding between the parties. *See CAIR I*, at 341. In this case, Plaintiffs attempt to argue that the fiduciary duty somehow just existed at the moment Chris began his internship. (Facts at ¶¶ 145-59). But that is not the law.

Plaintiffs, however, also attempt to argue that the conversations recorded on the Audio-Video Recordings, and the tasks assigned to Chris, somehow imply a fiduciary duty. How that happens Plaintiffs nowhere explain. But, even assuming that to be the case, there is not a hint anywhere in the cited Audio-Video Recordings that the conversations recorded or the tasks

assigned involved any duty of non-disclosure. (Facts at ¶¶ 145-54).

That is, even assuming that a fiduciary duty arose implicitly between Plaintiffs and their volunteer unpaid interns, not every such duty involves non-disclosure. Employees have the duty to perform their tasks at work all the time, and there is nothing inherently secret about the tasks they do. Thus, if an employee comes home and talks to her husband or her college roommate about the work she did during the day and discloses the substance of her conversations at work, there is no breach of fiduciary duty unless the specific duty carries with it the duty of non-disclosure and the information actually disclosed breaches that duty. While some fiduciary duties do include confidentiality (*i.e.*, lawyers, doctors, board members and officers of a company), most such duties arising from mundane employment do not. *AT&T Commc'ns of Cal., Inc. v. Pac. Bell*, Nos. 99-15668 & 99-15736, 2000 U.S. App. LEXIS 23215, at *12-13 (9th Cir. Sept. 8, 2000) (holding no duty of confidentiality by employees in a trade secret context without some prior agreement or instruction about confidentiality and holding expressly that "[t]he proprietor of a trade secret may not unilaterally create a confidential relationship without the knowledge or consent of the party to whom he discloses the secret"). *A fortiori*, an unpaid volunteer intern, especially in the factual context of this case, necessarily fits into the latter category.

Thus, for Plaintiffs to fit this case into the "for the purpose of" exception to the one-party consent rule, they must have some facts or reasonable inferences from the facts that (1) an unpaid, volunteer intern had a fiduciary duty; (2) the fiduciary duty in this particular case was one of non-disclosure; and (3) the substance of the disclosure in this case—that is, the substance of the Audio-Video Recordings disclosed—actually constituted a breach of non-disclosure *by disclosing the kind of secret information* such implied fiduciary duty reached. The factual record in this case needs no further development at this stage. Plaintiffs have not and cannot meet their

burden to establish either the existence of a fiduciary duty or its breach in any given circumstance.

B. Violation of the SCA (Count Two).

The discussion here relative to Plaintiffs' failure to meet its burden of a violation of the SCA as alleged in Count Two requires little discussion. Chris swears under oath that he never removed documents from Plaintiffs' shared drive or email server. The evidence establishes that interns had authority and access to the shared drives and email servers and could save those documents themselves on the desk-top hard drives or even print them out and leave them on the tables available to all interns. Indeed, the desk-top hard drives were available to all the interns. (Facts at ¶¶ 154, 156-59).

Plaintiffs' entire factual case that Chris violated the SCA is a "belief" that he must have done so. But this belief is belied by the factual record, and a belief cannot give rise to a claim that Chris violated a criminal statute. Indeed, we are well beyond the allegation stage of this litigation; Plaintiffs must now come forward with *evidence* to support their claims. Here, Plaintiffs have provided no evidence that any of the documents they claim to have come from some computer came from a shared drive or email server. Nor have Plaintiffs retained a forensic IT expert to assess their computer system to make that determination. (Facts at ¶¶ 156-59). Without some actual evidence that Chris did what he swears he did not do, Plaintiffs have not even raised a colorable claim that any of the documents Chris removed from Plaintiffs' Offices were copied by Chris from a shared drive or email server. *See CAIR I*, at 335 (stating that "the statute clearly is not triggered when a defendant merely accesses a physical client-side computer and limits his access to documents stored on the computer's local hard drive or other physical media").

C. Violation of the D.C. Uniform Trade Secrets Act (Count Ten).

The TAC added, *inter alia*, a tenth cause of action for Chris misappropriating Plaintiffs' trade secrets in violation of D.C. Code § 36-401. The inclusion of this cause of actions presents two major issues for Plaintiffs, neither of which they can overcome.

The first issue is that Plaintiffs have the burden of proof to establish that any of the documents Chris removed from Plaintiffs' Offices or the Audio-Video Recordings Chris disclosed included such information that "[d]erives 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." D.C. Code § 36-401(4)(A). Thus, Plaintiffs must be able to point to some fact that evidences at least by reasonable inference that (1) the information taken by Chris had "independent economic value"; (2) that this "independent economic value" derived in the main from its being secret; and (3) that a party from whom the information was kept secret could actually "obtain economic value from its disclosure." *See Catalyst & Chem. Servs. v. Global Ground Support*, 350 F. Supp. 2d 1, 9-10 (D.D.C. 2004) ("In order to be protected under the Trade Secrets Act, the combination must derive some value from its secrecy."); *see generally Deegan v. Strategic Azimuth LLC*, 768 F. Supp. 2d 107, 110-13 (D.D.C. 2011). In this case, Plaintiffs have failed to establish any of these three elements.

Specifically, as noted below at some length in the discussion of damages, Plaintiffs have failed to demonstrate beyond rank speculation that the information allegedly misappropriated had any "independent economic value." While Plaintiffs seem to claim that the documents had value to them because they spent personnel time creating them (although without proffering any admissible evidence to this effect), there is zero indication in the record that the information allegedly misappropriated had an "independent economic value" to any other competitor. (Facts

at ¶¶ 238-45). And as the statute makes clear, it is meant to make uniform the District's law and the law of all states which have passed the Uniform Trade Secrets Act. D.C. Code § 36-408. A quick perusal of those jurisdictions that have dealt with "independent economic value" makes plain that such independent economic value does not arise because the information has some subjective value to Plaintiffs, nor simply because Plaintiffs spent money putting the information together, nor because the misappropriating party might expend funds to obtain the information (another "measurement" Plaintiffs attempt to apply to create a measure of damages). Rather, independent economic value derives, as it does from the common law of trade secrets, from the specific competitive advantage it provides to Plaintiffs' competitors. *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 900 (Minn. 1983) ("(b) *Independent economic value from secrecy*. This statutory element carries forward the common law requirement of competitive advantage."). In all of Plaintiffs' descriptions of its damages, other than rote declarations, there is simply no evidence that any specific document would have provided any competitor with an advantage in the market place. Moreover, what Plaintiffs claim as "secret" were typically descriptions of Plaintiffs' *public* activities and *public* representations. At the very least, per the statute, the information must be secret, which it wasn't. But beyond its secrecy, it must have some independent economic value in the competitive marketplace, which it doesn't.

The second issue this cause of action raises is that Plaintiffs' failure to make out a case for misappropriation of trade secrets is fatal to all of its common law tort claims (with the possible exception of trespass—although even here the trespass is predicated on a claim that the grant of authority to enter Plaintiffs' Offices was fraudulently induced due to some fraudulent intent to misappropriate trade secrets). The statute specifically sets forth that the D.C. Uniform Trade Secrets Act ***preempts*** all such common law claims. D.C. Code § 36-407(a); *see also DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 83-84 (D.D.C. 2007) (holding that conspiracy

claims cannot be artificially broadened to remove them from the statutory preemption). All of Plaintiffs' common law claims are variations on exactly the same theme: Chris used fraud and breach of fiduciary duty to convert Plaintiffs' confidential trade secrets. Indeed, Plaintiffs describe their damages for each of these common law counts in exactly the same way (albeit Plaintiffs' purported measurement of these damages varies). As such, the common law counts are all preempted by the failed misappropriation of trade secrets claim.

D. The Common Law Counts: No Compensable Damages.

1. Speculative Damages Are Not Compensable. If the common law counts somehow survive preemption, for each of the common law counts (with the exception of trespass, which allows for nominal damages), Plaintiffs may not merely allege compensable damages, they must provide evidence of such damages beyond mere speculation. *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 793 (D.C. Cir. 1983) ("[I]t is elementary that 'speculative' damage will not support an action for common law fraud."). The entire bases of Plaintiffs' claims of damages is that it has somehow been hurt by the disclosure of the information obtained by Chris, and that this disclosure will somehow hurt them—presumably at some point in the future because they've shown no actual past or present harm. *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 119 (D.C. Cir. 1982) ("The traditional American rule, adopted in the District of Columbia, is that recovery of damages based on future consequences may be had only if such consequences are 'reasonably certain.' Recovery of damages for speculative or conjectural future consequences is not permitted.") (footnotes omitted). Moreover, Plaintiffs must show that the damages they allege, even as speculative as they may be, were proximately caused by the disclosure or other bad acts. *CAIR I*, at 341 (noting proximately caused damages as an element of breach of fiduciary duty); *Day v. Avery*, 548 F.2d 1018, 1028 (D.C. Cir. 1976) ("A necessary ingredient of the tort of misrepresentation—as, in olden times, of

any action on the case—is that the claimant suffer harm by reason of the tortious conduct. Appellant has demonstrated no ability to prove, in the event of a trial, any causal connection between the misrepresentation and the injury which he charges. The only damage to which he points was his outraged sensibilities . . . .") (footnotes omitted). Even more specifically, for the cause of action of conversion, the measure of damages in this case, where Plaintiffs do not claim that Chris converted a document, such as a promissory note, with some intrinsic value, or even a document such as a literary or scientific work with some objective market value or licensing value, Plaintiffs must be able to show that Plaintiffs were actually harmed by the copying of the document or the taking of a document destined for a shredder and then be able to measure that value beyond mere speculation. *Pearson v. Dodd*, 410 F.2d 701, 707-08 (D.C. Cir. 1969) ("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 ***and sold as a commodity on the market***, it is properly protected as property.") (emphasis added); *Duggan v. Keto*, 554 A. 2d 1126 (D.C. Ct. App. 1996) (citing fair market value as the traditional measure of damages for conversion in the case of documents). As demonstrated by Plaintiffs' answers to interrogatories and live testimony, Plaintiffs have not even made an effort to establish any measure of fair market value, and even if they had, Plaintiffs have demonstrated that they have no clue if they have suffered any damages as a result of the alleged conversion and disclosure of their information. Moreover, if they could show some actual harm was the proximate result of the alleged bad acts, Plaintiffs have not even attempted to measure those damages caused by such harm by way of expert testimony or some objective measurement.

2. Plaintiffs'[20] Specific Damage Claims May Not Result from Reputational Damages, Loss of Donations, and Diminution in Ability to Lobby. We note at the outset that Plaintiffs have disclaimed any damages that would result from harm to their reputation as a result of the disclosure of the documents or Audio-Video Recordings, a loss of donations, or a diminution in their ability to lobby. (Facts at ¶¶ 238-39).

3. Plaintiffs' Specific Damage Claims Fail. On September 29, 2011, the Gaubatz Defendants served interrogatories on Plaintiffs seeking a description and accounting of Plaintiffs' damages. This was followed up by the CSP Defendants' interrogatories served on November 14, 2011, similarly seeking information on the kinds and measurement of Plaintiffs' damage claims. Plaintiffs stonewalled until they supplemented their answers to the CSP Defendants' interrogatories a third time, serving them on Defendants on October 25, 2012, with less than three months remaining in discovery. Plaintiffs supplemented their Initial Disclosures on January 8, 2013, with but minor variations on the calculations presented earlier (Facts at ¶ 242). In those answers and supplemented disclosures, Plaintiffs exposed exactly why they had stonewalled. Plaintiffs' answers to the interrogatories claim that the documents and information taken by Chris had four types of value: commercial, intrinsic, confidential, and investment/proprietary value. Plaintiffs add a purported valuation measurement for diminishment of trade secrets in their supplemented Initial Disclosures. (Facts at ¶ 242). Not surprisingly, Plaintiffs provide no documentation evidencing these claims and no expert testimony to opine about their validity. Indeed, Plaintiffs' actual explanations and calculations

[20] While both Plaintiffs seek these various types of claimed compensable damages, it is important to note that Plaintiff CAIR-AN has only a potentially compensable claim in the tort of trespass because it owned no computers or inventory at Plaintiffs' Offices, had no employees there, and has expressly disclaimed any interest in the documents. These claims, to the extent that they even exist, could only possibly belong to CAIR-F (or, more likely, to the non-party, third entity, CAIR). (Facts at ¶¶ 13-17, 240-41).

of these values are patently wrong, illogical, and speculative. We take each in turn.

Plaintiffs first claim the documents taken had commercial value. (Facts at ¶ 242). Plaintiffs claim commercial value is the amount of money someone (in this case, Defendants) would have spent to obtain the documents from Plaintiffs. Aside from the fact that no court in the land has so measured "commercial value," common usage and case law establish that "commercial value" in the context of damages must be based on evidence of some relationship to some actual market where things have a value in commerce. *Eagle Maint. Servs. v. D.C. Contract Appeals Bd*., 893 A.2d 569, 579-80 (D.C. 2006) (finding no mitigation of damages where no substantial evidence of the use of a building had commercial value beyond the potential for commercial use). There are three problems with Plaintiffs' notion. One, by definition, that is not the commercial value of the documents, but the money CSP expended on the CAIR Documentary Film Project. Two, even assuming, *arguendo,* CSP spent this money with the intention of obtaining these documents (which it didn't), this still cannot be the commercial value. If Jones steals Smith's car worth $5,000, but spends $10,000 to do so, the commercial value of the car remains $5,000. And, as noted, the third problem with this claim is factual. CSP did not spend a dime to get documents from Plaintiffs. But, even if it had, that would not and could not be the commercial value of the documents.

Plaintiffs next claim, at least in their supplemental answers to interrogatories, is that the documents have intrinsic value measured by how much Plaintiffs have spent in legal fees and costs to initiate this litigation. (Facts at ¶ 242). Putting aside the word "intrinsic" to describe this fantastic rubric of damages, this claim fails for three reasons. One, attorneys' fees and litigation costs are simply not recoverable under any of the common law counts alleged here. *Kennedy v. District of Columbia*, 654 A.2d 847, 862 (D.C. Ct. App. 1995) ("Under the 'American Rule,' a prevailing party is not entitled to recover attorneys' fees in the absence of

express statutory or contractual authorization."). Two, if attorneys' fees and costs of litigation were a proper measure of damages, Plaintiffs would be free to create damages without a relationship to the information and documents actually taken. And three, Plaintiffs appear to be claiming that the "intrinsic value" of the documents is not only how much they spent on legal fees to get the Gaubatz Defendants to turn them over early in this litigation in response to the Court's preliminary injunction, but also a "value" related to Plaintiffs continuing this litigation to "maintain control" over those documents. It is hard to understand the logic of this claim against any of the Defendants, but it impossible to fathom how it applies to the Secondary Defendants who have never claimed a proprietary interest in the documents.

Plaintiffs' third claim of value is one that arguably might actually have merit, especially under the D.C. Uniform Trade Secrets Act. Here, Plaintiffs claim there is a value in the confidential (*i.e.*, secret) nature of the material. (Facts at ¶¶ 242-43). The problem here is twofold. One, Plaintiffs nowhere describe how the material's secret or confidential nature created value (as we discussed above relative to the D.C. Uniform Trade Secrets Act). More importantly, all Plaintiffs do is arbitrarily assign a value of $10 per document. Plaintiffs designated no expert to provide some kind of expert testimony on how they arrived at this value, nor do they provide any lay testimony that would shed any light on this valuation. Indeed, as the Rule 30(b)(6) testimony of both Plaintiffs (by Corey Saylor) demonstrates, all of Plaintiffs' measurements of value were simply speculation and sheer guess work. Specifically, Plaintiffs testified that this $10 per document figure was arrived at by taking the so-called costs of Plaintiffs' creation of these documents (itself an arbitrary value) and combining them in some unknown or "uncertain" fashion to arrive at a fixed value per document. (Facts at ¶¶ 243).

Plaintiffs' fourth valuation approach, termed the investment/proprietary valuation, is in fact nothing more than the purported method Plaintiffs claimed to have used to arrive at the $10

per document value for the "loss of confidentiality" damages. (Facts at ¶¶ 242-43). Here, Plaintiffs assert without any evidence or proof that the value of each document is based upon the time it took to prepare it. Now, this rendition of value is on its face suspect, in that it might take Smith one hour to write a cogent letter but take Jones two hours to produce the same thing. But leaving that aside, Plaintiffs simply heap guesswork on top of rank speculation to actual monetize this rubric of alleged damages. Specifically, Plaintiffs, without any basis in fact, assume that each page of each document, depending upon the generic type of document, took some theoretical person "X" a total of "Y" minutes/hours to produce. When Plaintiffs knew who produced the document, they multiplied the speculative Y times the salary of the employee who created the document to arrive at a value. Nowhere do Plaintiffs produce evidence that this Y value has any relationship to any real world assessment. It is merely a number about which Plaintiffs could not explain how it was determined. When Plaintiffs did not know who produced the document, or if they knew it was produced by someone Plaintiffs did not pay, well, that did not get in the way—Plaintiffs simply *assigned* a value to the time. (Facts at ¶ 243).

Finally, Plaintiffs claim to measure the damage to their disclosure of their trade secrets by simply taking five percent of CAIR-F's expenditures for the years 2008-09. When asked during their deposition to explain the rationale or basis for such measurement, Plaintiffs had literally no answer. (Facts at ¶¶ 244-45).

Beyond the incoherence if not silliness of these speculative, if not outright artificial valuation methods, Plaintiffs conceded in their live testimony that they had no idea why they came up with these valuations. And even if they could rationalize the categories and measurements at this post-discovery stage, the problem is that there is simply no evidence in the record that Plaintiffs were actually damaged by the relatively short period of time the Gaubatz Defendants had possession of copies of these documents (or documents destined for the

shredder) before returning them to Plaintiffs. Moreover, as noted above, there is not a scintilla of evidence that the disclosure of this information did any harm to Plaintiffs. Quite simply, Plaintiffs' common law counts fail because they have **not** been harmed by any of the alleged bad acts.

III. Plaintiffs Lack Standing or Privity to Pursue Any of Their Claims.

Plaintiffs have alleged in the Complaint, the FAC, the SAC, and finally the TAC, that Chris interned for, and entered into a confidentiality agreement with, CAIR-AN, not CAIR-F. It was so clear from the FAC and the SAC (and by implication the TAC) that Plaintiff CAIR-AN was the contracting party with the fiduciary relationship to Chris allegedly giving rise to all of the causes of action, that this is exactly how the Court described the allegations when it ultimately concluded that adding CAIR-F was appropriate under Rules 20 and 21. In that ruling the Court stated, "Although Chris Gaubatz's internship is alleged *to have formally been with CAIR-AN*, both CAIR-AN and CAIR-F claim an interest in the documents and materials allegedly taken from their shared office space and employees of both organizations are alleged to have been the subjects of surreptitious recordings made by Chris Gaubatz." *CAIR I*, at 323 (emphasis added).

Thus, after three years of amended pleadings and after a full year of discovery at the time Plaintiffs finally filed their TAC, Plaintiffs were certain that Chris interned with CAIR-AN and entered into a confidentiality agreement and fiduciary relationship with CAIR-AN, not CAIR-F. At best, CAIR-F's involvement had something to do with shared office space, shared employees, shared documents, and maybe even shared computers. But, when Defendants learned through discovery that this was impossible because CAIR-AN had no employees or interns since at least 2007, no equipment, and even no inventory (*i.e.*, documents), Plaintiffs got clever and submitted sworn testimony that Chris actually volunteered as an intern and worked for "CAIR," which is

not a party to this litigation, but is apparently an entity made up of the two corporate Plaintiffs, CAIR-AN and CAIR-F. Indeed, Plaintiffs' sworn testimony asserts that the fiduciary duty Plaintiffs claim Chris owed them and allegedly breached was in fact owed to this non-party third entity, CAIR. (Facts at ¶¶ 11-17). But when Defendants confronted Plaintiffs with the fact that this entity was not a party to this litigation and sought discovery of what this entity was in fact, Plaintiffs subsequently backtracked over their own sworn testimony and asserted that Chris had only worked for, and had only breached, some nebulous fiduciary duty owed to CAIR-F, not CAIR-AN. Indeed, Plaintiffs entered into an explicit stipulation that this third-party entity, CAIR, had no claims whatsoever in this litigation. (Facts at ¶ 17). But this means that all of the allegations in the TAC predicated upon Chris's relationship to CAIR-AN are false. CAIR-AN's only possible interest in this lawsuit is under the trespass claim as landlord to CAIR-F.[21] Yet, Plaintiffs' newest claim that it is only CAIR-F that had a relationship with Chris and that the employees, interns, computers, and documents all belonged to CAIR-F, runs head-first into the brick wall that is Plaintiffs' actual allegations that it was CAIR-AN, and stumbles over its sworn testimony that it is a third-entity, CAIR, that really owns the claims against Chris and any of the other parties.

Under the Federal Rules and especially in this Circuit, Plaintiffs cannot so freely excuse their sworn testimony that Chris's contractual and fiduciary relationship existed only with a third, non-party entity called CAIR. *Bergman v. Paulson*, 555 F. Supp. 2d 25, 33 (D.D.C. 2008) (stating that "a party may not create a material issue of fact simply by contradicting its prior sworn testimony" provided in answers to interrogatories). Indeed, the actual evidence in this

[21] The problem with any claim, including trespass, by CAIR-AN is that CAIR-AN's corporate status was revoked in September 2008 and has never been reinstated. (Facts at ¶ 8). Pursuant to statute, the only activity allowed by law for such a corporation is "to wind up and liquidate its business and affairs" or to seek reinstatement. D.C. Code § 29-106.02(c). This lawsuit is part of neither.

case does not show that Chris ever had—or ever could have had—any contract with CAIR-AN or CAIR-F since the only entity Plaintiffs ever publicly exposed to Chris, or to anyone else, is the entity referred to as CAIR, which is the singular organization that had existed since 1994. (Facts at ¶¶ 16, 110). Nowhere on Plaintiffs' entire website, the alleged confidentiality agreement, the reams of public documents in which Plaintiffs variously claim some interest, is there a single mention of CAIR-AN or CAIR-F, as opposed to the single entity CAIR. And CAIR is not a legal d/b/a for either CAIR-AN or CAIR-F. Plaintiffs' public references all point to a single entity with a singular historical continuity since its founding in 1994, CAIR, who should be suing. But this nebulous entity is not suing, although it appears to have been the original plaintiff in the original Complaint, before being pushed aside by CAIR-AN in the FAC, SAC, and TAC. *See, e.g., Lans v. Gateway 2000, Inc.*, 84 F. Supp. 2d 112 (D.D.C. 1999) (refusing, in a patent infringement case, to permit substitution of the current owner of the patent for the originally named plaintiff who had owned the long-since assigned patent); *Vianix Del. LLC v. Nuance Commc'ns, Inc.*, Civ. No. 09-0067, 2009 U.S. Dist. LEXIS 40992 (D. Del. May 12, 2009) (refusing to permit a plaintiff asserting copyright infringement claims to substitute the owner of the copyright for the party originally named as plaintiff who was not the legal owner because the original plaintiff "could not have suffered an invasion of its legally protected interest" and, therefore, did not have Article III standing when the complaint was filed). In sum, the current Plaintiffs lack standing and privity to pursue any of the claims at issue.

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,

/s/ David Yerushalmi
David Yerushalmi, Esq. (DC Bar No. 978179)
LAW OFFICES OF DAVID YERUSHALMI, P.C.
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20001
david.yerushalmi@verizon.net
Tel: (646) 262-0500; Fax: (801) 760-3901
Lead Counsel for Defendants Center for Security Policy, Christine Brim, Adam Savit, Sara Pavlis, and SANE

/s/ Robert J. Muise
Robert J. Muise, Esq. (D.C. Court Bar No. MI 0052)
AMERICAN FREEDOM LAW CENTER
P.O. Box 131098
Ann Arbor, Michigan 48113
Tel (734) 635-3756 / Fax (801) 760-3901
rmuise@americanfreedomlawcenter.org
Co-Counsel for Defendants Center for Security Policy, Christine Brim, Adam Savit, Sara Pavlis, SANE, and David Yerushalmi

/s/ J. Thomas Smith
J. Thomas Smith (admitted *pro hac vice*)
J. THOMAS SMITH ATTORNEY AT LAW
2020 Fieldstone Parkway, Suite 900-264
Franklin, TN 37069-4337
Tel: (615) 790-2150
jthomsmith@gmail.com
Co-Counsel for Defendants Center for Security Policy, Christine Brim, Adam Savit, Sara Pavlis, and SANE

/s/ Martin Garbus
Martin Garbus (admitted *pro hac vice*)
Eaton & Van Winkle LLP
3 Park Avenue, 16th Floor
New York, NY 10016
Tel: (212) 561- 3625
mgarbus@evw.com
Co-Counsel for Gaubatz Defendants

/s/ Dan Horowitz
Dan Horowitz (admitted *pro hac vice*)
Law Office of Daniel Horowitz
P.O. Box 1547
Lafayette, California 94549
Tel: (925) 283-1863
horowitz@whitecollar.us
Co-Counsel for Gaubatz Defendants

/s/ J. William Eshelman
J. William Eshelman (D.C. Bar No. 141317)
1747 Pennsylvania Avenue NW, Suite 300
Washington, DC 20006
Tel: 202- 454-2830
WEshelman@butzeltp.com
Co-Counsel for Gaubatz Defendants

ATTACHMENT I

	Count 1: Fed. Wiretap	Count 1: D.C. Wiretap	Count 2: Fed. SCA	Count 3: Conversion	Count 4: Breach of Fid. Duty	Count 5: Breach of Contract	Count 6: Interfer w/Contract	Count 7: Trespass	Count 8: Unjust Enrich	Count 9: Fraud	Count 10: Trade Secrets
Primary Liability (Direct)											
Chris Gaubatz	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y
Dave Gaubatz	Y	Y (+ procure)*	N	N	N	N	Y	N	Y	N	N
CSP Defendants	Y (WND Clips)**	Y (+ procure)*	N	N	N	N	Y	N	Y	N	N
SANE & Yerushalmi	N	Y (procure)***	N	N	N	N	Y	N	Y	N	N
Primary Liability (Agency)											
Chris Gaubatz	N	N	N	N	N	N	N	N	N	N	N
Dave Gaubatz	Y	Y	Y	Y	Y	N	N	Y	Y	Y	Y
CSP Defendants	N	N	N	N	N	N	N	N	N	N	N
SANE & Yerushalmi	Y	Y	Y	Y	Y	N	N	Y	Y	Y	Y
Secondary Liability											
Conspiracy											
Chris Gaubatz	N	N	N	Y	Y	N	N	Y	N	Y	Y
Dave Gaubatz	N	N	N	Y	Y	N	N	Y	N	Y	Y
CSP Defendants	N	N	N	Y	Y	N	N	Y	N	Y	Y
SANE & Yerushalmi	N	N	N	Y	Y	N	N	Y	N	Y	Y
Aiding & Abetting											
Chris Gaubatz	N	N	N	Y	Y	N	N	Y	N	Y	Y
Dave Gaubatz	N	N	N	Y	Y	N	N	Y	N	Y	Y
CSP Defendants	N	N	N	Y	Y	N	N	Y	N	Y	Y
SANE & Yerushalmi	N	N	N	Y	Y	N	N	Y	N	Y	Y
Inducement											
Chris Gaubatz	N	N	N	N	Y	N	N	Y	N	Y	Y
Dave Gaubatz	N	N	N	N	Y	N	N	Y	N	Y	Y
CSP Defendants	N	N	N	N	Y	N	N	Y	N	Y	Y
SANE & Yerushalmi	N	N	N	N	Y	N	N	Y	N	Y	Y

*Note: Same allegations as under Federal Wiretap Act plus procurement liability.
**Note: Only for use/disclosure of the WND Clips
***Note: Only for procurement liabillity

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

LAW OFFICES OF DAVID YERUSHALMI, P.C.

/s/ David Yerushalmi
David Yerushalmi, Esq.