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 **DEFENDANTS' NOTICE OF CONSENT MOTION AND MOTION FOR LEAVE TO FILE MOTION FOR PARTIAL SUMMARY JUDGMENT & BRIEF IN SUPPORT**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at a date and time to be determined, before the Honorable Colleen Kollar-Kotelly, United States District Court Judge, Defendants Dave Gaubatz and Chris Gaubatz (collectively referred to as the "Gaubatz Defendants"), and Defendants Center for Security Policy ("CSP"), Christine Brim, Adam Savit, and Sara Pavlis (collectively referred to as "CSP Defendants") hereby will and do move the court pursuant to this court's Scheduling and Procedures Order (Doc. No. 99 at 6) to grant leave for Defendants to file a motion for partial summary judgment and for the court to set a briefing schedule.

Defendants' motion is based on the pleadings and papers of record and accompanying memorandum of points and authorities in support.

LOCAL RULE 7(m) CERTIFICATION

The undersigned hereby certify pursuant to Local Rule 7(m) that Plaintiffs, through their reply brief (Doc. No. 118) filed in support of their motion for leave to file a third amended complaint (Doc. No. 112), have consented to Defendants' filing of a motion for summary judgment by stating clearly on two occasions that Defendants should be "free" to file such a motion. (Pls.' Reply in Supp. of Mot. to File Third Am. Compl. at 12 ["If Defendants would like

to file a motion for summary judgment, then they are free to do that."], at 13 ["Again, if Defendants would like to file a motion for summary judgment, then they are free to do that."]).

Further, on May 1, 2012, Defendants' counsel telephoned Plaintiffs' counsel to conduct a meet-and-confer and to confirm that Plaintiffs continue to maintain their stated position that to the extent Defendants believe they have a valid basis for summary judgment, Plaintiffs consent to Defendants filing a motion for summary judgment. During this conference, Defendants' counsel detailed the basis for this motion, and Plaintiffs' counsel confirmed their position as set forth in their reply brief and further confirmed that they consent to the filing of this motion.

WHEREFORE, Defendants hereby request that the court grant their motion and set a briefing schedule for a motion for partial summary judgment.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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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

MOTION FOR LEAVE TO FILE MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Defendants seek leave of this court to file a motion for partial summary judgment for the reason that Plaintiffs' claims for statutory violations are ripe for summary judgment. In addition, Plaintiffs' failure to produce evidence of a validly existing contract provides a basis for summary judgment on the breach of contract and the tortious interference with contract claims. Finally, Plaintiffs' failure to provide evidence of any kind substantiating a claim for damages under any of the common law claims renders the common law counts (exclusive of the trespassing claim) similarly ripe for summary judgment.

OVERVIEW OF ALLEGATIONS

Count One of the Second Amended Complaint[1] alleges four distinct theories of violations of Title I of the ECPA ("Federal Wiretap Act") and the District of Columbia's analog statute (D.C. Code §§ 23-541, *et seq.*) ("D.C. Wiretap Act"). The theories of liability are as follows:

(1) Plaintiffs[2] allege that Defendant Chris Gaubatz violated provisions of the Federal and D.C. Wiretap Acts (respectively, 18 U.S.C. §§ 2511(1)(a) & (b)[3] and D.C. Code § 23-542(a)(1)) by using an audio-video[4] recorder concealed on his body to record conversations of Plaintiffs' employees. (Compl. at ¶ 70). There are no allegations, expressed or implied, even suggesting

[1] The Second Amended Complaint will be cited throughout as "Compl."
[2] Throughout, Plaintiff Council on American-Islamic Relations Action Network, Inc. will be referred to as "CAIR-AN" and Plaintiff CAIR Foundation, Inc. will be referred to as "CAIR-F."
[3] While the Complaint cites to 18 U.S.C. §§ 2511(A) & (B) and 2511(C) & (D) (Compl. at ¶¶ 70, 77), the proper statutory references should be to §§ 2511(1)(a) & (b) and 2511(1)(c) & (d), respectively.
[4] 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. Cal. 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).

that Defendant Dave Gaubatz ("Dave Gaubatz") or CSP Defendants[5] collectively or individually engaged directly in an interception of an oral communication.

(2) Plaintiffs allege that Defendants Dave Gaubatz, CSP, and Christine Brim "willfully procured Defendant Chris Gaubatz to intercept the oral communications of Plaintiffs' employees," presumably also in violation of 18 U.S.C. §§ 2511(1)(a) & (b) and D.C. Code § 23-542(a)(1). (Compl. at ¶ 74). There are no allegations that Defendants Savit or Pavlis violated this procurement provision.

(3) Plaintiffs allege that Defendant Dave Gaubatz and the CSP Defendants conspired with, and aided and abetted, Defendant Chris Gaubatz in the act of intercepting the oral communications. (Compl. at ¶¶ 75-76).

(4) Finally, while Plaintiffs broadly allege that the Gaubatz Defendants have disclosed and used the contents of the recordings in violation of 18 U.S.C § 2511(1)(c) and § 2511(1)(d) and D.C. Code §§ 23-542(a)(2) and (a)(3), (Compl. at ¶¶ 44 and 57), only one allegation sets out an actual act of disclosure or use by CSP Defendants—that is, providing a compilation of the recordings to Joseph Farah. (Compl. at ¶ 47).

Count Two of the Second Amended Complaint alleges that Defendant Chris Gaubatz violated the Stored Communications Act ("SCA"), codified under Title II of the ECPA (18 U.S.C. §§ 2701-2712). Specifically, Plaintiffs allege that Chris Gaubatz knowingly obtained wire or electronic communications by accessing Plaintiffs' "computers or computer servers, networks, or systems" without the requisite authority. (Compl. at ¶¶ 80-81). The only allegation directed against Defendants Dave Gaubatz and the CSP Defendants in this count is that they

[5] Throughout, Defendants Chris Gaubatz and Dave Gaubatz shall be referred to collectively as the Gaubatz Defendants. Defendants Center for Security Policy ("CSP"), Christine Brim, Adam Savit, and Sara Pavlis shall be referred to collectively as the "CSP Defendants."

conspired with, and aided and abetted, Defendant Chris Gaubatz in violating the SCA. (Compl. at ¶¶ 82-83).

Count Three alleges a claim of conversion, limited by the court to a claim of conversion of physical documents.[6] The allegations of Count Three are, broadly stated and taken as a whole, that Defendant Chris Gaubatz converted the documents and the remaining Defendants conspired with or aided and abetted Defendant Chris Gaubatz to this end. (Compl. at ¶ 87).

Count Four alleges that Defendant Chris Gaubatz 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. (Compl. at ¶¶ 92-94). According to the Second Amended Complaint, Plaintiffs allege that the fiduciary duty arose out of Defendant Chris Gaubatz's characterization as an "employee," which somehow gave rise to a "duty of confidentiality and the duty of loyalty." (Compl. ¶ 92). Count Four also alleges that the remaining Defendants conspired with and aided and abetted Defendant Chris Gaubatz's breach of fiduciary duty. (Compl. at ¶¶ 95-97).

Count Five alleges breach of contract by Defendant Chris Gaubatz. According to Plaintiffs, the underlying contract giving rise to this claim is an alleged Confidentiality and Non-Disclosure Agreement ("Confidentiality Agreement"), which is attached to the Second Amended Complaint at Exhibit A. (Compl. at ¶¶ 101-104). The remaining allegations of the cause of action in fact relate to Plaintiffs' subsequent claim of interference with contractual relations. Thus, Count Six alleges that the remaining Defendants tortiously interfered with Plaintiffs' alleged Confidentiality Agreement with Defendant Gaubatz by conspiring with and aiding and abetting Defendant Chris Gaubatz's breach of contract. (Compl. at ¶¶ 113-114).

[6] (Mem. Op. at 42-45) (Doc. No. 73).

Count Seven alleges trespass against Defendant Chris Gaubatz and secondary liability for conspiracy and aiding and abetting the alleged trespass by the remaining Defendants. (Compl. at ¶¶ 119-124).

Finally, 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. (Compl. at ¶¶ 129-131).

PROCEDURAL STATUS

The original complaint in this matter was filed more than two and one-half years ago in October 2009. (Doc. No. 1). Through a motion for a temporary restraining order (Doc. No. 2) and, ultimately, a consent order granting a preliminary injunction filed November 30, 2009 (Doc. No. 22), Plaintiff CAIR-AN obtained from the Gaubatz Defendants ***all*** of the original audio-video recordings and ***all*** of Plaintiffs' original documents which are the focus of this litigation. On or about July 12, 2010, CAIR obtained another copy of the audio-video recordings from Defendant CSP in response to a subpoena *duces tecum*.

The Gaubatz Defendants filed a motion to dismiss pursuant to Rule 12(b)(6) on December 20, 2009. (Doc. No. 34). In response to Plaintiffs' confusion over its own name and the filing of the original complaint in the name of an entity that never existed, "Council on American-Islamic Relations," Plaintiffs attempted to file an amended complaint as a matter of right in order to set out the two distinct corporate Plaintiffs (CAIR-AN and CAIR-F) (Doc. No. 40). By minute entry dated February 2, 2010, the court denied Plaintiffs' filing in that it was filed more than 21 days after the filing of the Gaubatz Defendants' earlier motion to dismiss.

On March 1, 2010, Plaintiff CAIR-AN filed a motion for leave to file an amended complaint (Doc. No. 43), and the Gaubatz Defendants filed their opposition on March 10, 2010

(Doc. No. 44).

A month later, on April 12, 2010, Plaintiffs filed a motion for leave to file a second amended complaint (Doc. No. 48), seeking to add the CSP Defendants and additional causes of action. After briefing by the parties, on June 24, 2011, the court granted Plaintiffs' motion and denied the Gaubatz Defendants' motion to dismiss (except as to the claim of conversion of electronic documents, which the court granted). (Doc. No. 72). The court filed concurrently with its order a Memorandum Opinion (Doc. No. 73), explaining its rationale for its order. *Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311 (D.D.C. 2011) ("*CAIR*").

On July 18, 2011, the Gaubatz Defendants' answered the second amended complaint (hereafter "Complaint") (Doc. No. 85). On September 1, 2011, the CSP Defendants filed a motion to dismiss Counts One and Two of the Complaint (Doc. No. 97) and their Answer to the Complaint (Doc. No. 98). Plaintiffs' filed their opposition to the CSP Defendants' motion to dismiss (Doc. No. 103) on October 11, 2011, and the CSP Defendants promptly filed their reply (Doc. No. 108). The CSP Defendants' motion to dismiss is *sub judice*.

On September 21, 2011, the parties filed their Joint Discovery Plan, thereby commencing discovery in this case. (Doc. No. 101).

On March 3, 2012, Plaintiffs filed a motion for leave to file a third amended complaint (Doc. No. 111), which the court denied without prejudice for failure to comply with Local Rule 7(m) (Min. Order dated Mar. 5, 2012). Plaintiffs re-filed their motion on March 9, 2010. (Doc. No. 112).

On March 26, 2012, Defendants filed their opposition to Plaintiffs' motion to amend (Doc. No. 113), and on April 5, 2012, Plaintiffs filed their reply (Doc. No. 118). Plaintiffs'

motion for leave to file a third amended complaint is *sub judice* as well.

STANDARD OF REVIEW

Since Defendants are seeking leave of the court to permit them to file a partial motion for summary judgment, Defendants will base their arguments on the standards generally applicable to a motion for summary judgment. Thus, 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) (emphasis in original).

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).

Finally, Plaintiffs' may not delay disposition of the motion for summary judgment under Rule 56(f) when the evidence to rebut the motion is in the control and possession of Plaintiffs

themselves and they have refused to produce that evidence in response to Defendants' discovery requests. *King v. United States Dep't of Justice*, 830 F.2d 210, 232 (D.C. Cir. 1987) ("Rule 56(f) may not be invoked by mere assertion that discovery is incomplete or that specific facts necessary to oppose summary judgment are unavailable; opposing party must demonstrate how additional time will enable him to rebut movant's allegations of no genuine issue of fact."). Indeed, the prevailing standard is as follows:

> This circuit has found that under Rule 56(f) a request for continuance must be supported by "good reasons for [the non-movant's] complete inability to produce the evidence necessary to defeat the motion for summary judgment." The rule [56(f)] was not created to act as "a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious." The burden under Rule 56(f) requires that [a] party invoking its protections must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits as otherwise required by Rule 56(e) and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact. . . . If the court determines that the discovery sought appears irrelevant, or if discovery would be wholly speculative, relief under Rule 56(f) must be denied.

Greenberg v. Food & Drug Admin., 803 F.2d 1213, 1223-24 (D.C. Cir. 1986) (citations omitted).

And, when the non-moving party controls and possesses the critical evidence to establish its case and meet its burden, it may not sit back and refuse to produce evidence, claiming only after a motion for summary judgment is lodged that more time is needed for discovery. *Chung Wing Ping v. Kennedy*, 294 F.2d 735, 737 (D.C. Cir. 1961) ("It is beyond dispute that a motion for continuance is addressed to the sound discretion of the court. We note that appellants [non-moving party] did nothing to obtain discovery until some ten months after filing their complaint, when the merits of their case was called into question by the summary judgment procedure. Diligent prosecution of a cause of action which is dependent for success upon discovery demands that the plaintiff seek discovery in preparation of his case and not as a back-door

defense to a test of the merits of his claim."); *Bus. Equip. Ctr., Ltd. v. De Jur-Amsco Corp.*, 465 F. Supp. 775, 782-83 (D.D.C. 1978) ("BEC likewise has had an ample opportunity to gather evidence to support its claims and raise a genuine, material dispute of fact. First of all, it has mentioned the availability of evidence outside the record, and some of its denials of DeJur's facts, if valid, ***would be supportable by data from its own records***. The purpose of invoking the summary judgment procedure is to 'smoke out' those facts. Having failed to come forward with those facts so that they may be tested, BEC must assume the risk of whether DeJur's facts are sufficient to support its legal argument.") (emphasis added; footnotes omitted).

In this case, Plaintiffs have had years to examine the audio-video recordings and any evidence from their own computers and employees, and more than eight months since this court's Scheduling Order (Doc. No. 99) to gather the necessary evidence (which they possess) to support their claims. *Hull v. Eaton Corp*., 825 F.2d 448, 452-53 (D.C. Cir. 1987) ("The plain language of Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. In such a situation, there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.") (emphasis added); *see also L. Orlik, Ltd. v. Helme Products, Inc.*, 427 F. Supp. 771, 778 (S.D.N.Y. 1977) ("Finally, the defendants contend that summary judgment should be denied because the defendants had not yet conducted pretrial discovery on the issue of waiver. The defendants have not satisfied Rule 56(f), however, which requires the party opposing a motion for summary judgment to state reasons why he cannot present facts essential to justify his opposition. The issue on which the defendants seek

discovery is waiver, and facts concerning this issue must, by their very nature, be facts within the knowledge and control of the defendants.").

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). Defendants contend that, consistent with the design of the Federal Rules and Plaintiffs' consent to this motion, this case is ripe for summary judgment in their favor.

LEGAL ARGUMENT

I. The Evidence Available to the Parties Demonstrates that Plaintiffs Cannot Establish the Requisite Elements for Liability under Count One of the Complaint for Violation of the Federal Wiretap Act.

As set out above, Count One of the Complaint alleges that Defendants are liable under various theories of direct and secondary liability under the Federal and D.C. Wiretap Acts (collectively the "Wiretap Acts"). While Defendants reassert and incorporate the arguments for dismissal set forth in the CSP Defendants' motion to dismiss (Doc. No. 97) and in their opposition brief filed in response to Plaintiffs' motion for leave to file a third amended complaint (Doc. No. 113), at this stage in the proceedings, there is sufficient discovery to permit Defendants to move beyond the pleadings and to seek summary judgment in their favor on Count One. At the very least, to avoid summary judgment on Count One, Plaintiffs must be able to establish a factual dispute on the material question of a primary violation under the Wiretap Acts.

As refined by the CSP Defendants' motion to dismiss (Doc. No. 97) and their reply brief filed in support (Doc. No. 108), Plaintiffs' Count One claims must at the outset establish that Defendant Chris Gaubatz intercepted an "oral communication uttered by a person exhibiting an

expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). The courts have held that the test of a justifiable expectation that oral communications will not be intercepted requires allegations that the person subject to the interception had "(1) . . . a ***subjective expectation of privacy***, and (2) whose expectation was ***objectively reasonable***." *United States v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978) (emphasis added); *see also United States v. Dunbar*, 553 F.3d 48, 57 (1st Cir. 2009) (holding that the test of expectation of privacy follows the Fourth Amendment analysis as set forth in *Katz v. United States*, 389 U.S. 347 (1967)).

Keeping in mind that Plaintiffs have possessed all of the audio-video recordings at issue in this case for several years now and have had access to their own employees for that same time period,[7] Plaintiffs' discovery responses to several distinct interrogatories and requests for production of documents specifically designed to get at the evidence for such "subjective expectation of privacy" and the evidence that such subjective expectation was "objectively reasonable" renders their claims of violations of the Wiretap Acts void of any supporting evidence. Specifically, CSP Defendants sought answers to the following interrogatories:

> Identify by date, time, precise location, persons involved, and precise statements recorded of all conversations recorded by Defendant Chris Gaubatz with the "electronic device concealed on his person" as alleged in the Second Amended Complaint that you claim contain any statements to which any person associated with CAIR would have a reasonable expectation of privacy in making. In light of the fact that you have the recordings, CSP Defendants demand a response that quotes verbatim the precise statements for each recorded conversation that serve as the basis for your claim that there was a reasonable expectation of privacy in making the statement and identify the CAIR employee or intern whose communication was recorded. Further, CSP Defendants demand that you identify the specific disk by file name as provided by CSP in response to the subpoena *duces tecum* served upon CSP (and marked as Exhibit 2 to Christine Brim's

[7] For a thorough discussion of Plaintiffs' access, possession, and control of this evidence, see the CSP Defendants' motion to dismiss at pages 13-14 (Doc. No. 97) and their reply brief filed in support of their motion at pages 11-12 (Doc. No. 108).

> deposition on July 12, 2010, as the Rule 30(b)(6) deponent for CSP) and time count to locate the start and finish of each such recorded conversation.

(CSP Defs.' First Set of Interrogs. at No. 3 [served upon Plaintiffs Nov. 14, 2011] at Ex. 1).[8] Plaintiffs' answer to this interrogatory pointedly provides zero evidence of any specific conversation and any specific subjective expectation of privacy to meet Plaintiffs' burden of proof for a subjective expectation of privacy that might possibly be tested for objective reasonableness:

> Without waiving the previous objections, Chris Gaubatz was not authorized to record any conversations that took place on CAIR's premises or at a CAIR-sponsored event. All discussions that take place inside CAIR's offices are considered private. All persons who work at CAIR, either as employees or volunteers have an expectation that their conversations will not be recorded for the purpose of committing crimes or torts. The Plaintiffs reserve the right to amend this answer as discovery continues.

(Pls.' Answers to CSP Defs.' First Set of Interrogs. at No. 3 [served upon CSP Defendants Dec. 14, 2011] at Ex. 1). Plaintiffs' answer, however, wholly fails to address the two-prong test of a reasonable expectation of privacy. On its face, the answer is unreasonable. Even assuming this kind of blanket "subjective expectation of privacy" Plaintiffs here implicitly argue applies to their office environment, the question remains whether such expectation would be objectively reasonable under any given set of circumstances. For example, if Defendant Chris Gaubatz was bantering about the weather with fellow interns, would the discussant's subjective expectation of privacy be objectively reasonable? In other words, a subjective expectation of privacy is by definition subjective and relative to the context and circumstances of the specific conversation, and it is tested for objective reasonableness given the content and context of the conversation. Plaintiffs have failed to provide any evidence of even a single conversation where they could

[8] All subsequent references to the CSP Defendants' interrogatories and Plaintiffs' answers thereto are to this first set of interrogatories and answers, which are attached to this motion as Exhibit 1.

argue a subjective expectation of privacy existed, much less that the expectation was objectively reasonable.

Another example makes this point. If fellow interns were speaking loudly while Defendant Chris Gaubatz was openly and obviously speaking on the telephone to an outsider, and thus "intercepting" the ambient conversations, would the speakers have a subjective expectation of privacy that would, if they claimed such expectation, be objectively reasonable?

The essence of Plaintiffs' failure to even remotely meet their burden of proof may be found in Plaintiffs' opposition brief to the CSP Defendants' motion to dismiss. Specifically, in arguing that the CSP Defendants' motion was premature on this question of reasonable expectation of privacy, Plaintiffs stated as follows:

> Further, it cannot be said ***at this stage of the litigation*** that Plaintiffs have failed to state any facts plausibly supporting a "reasonable" expectation of privacy; reasonableness is a ***highly fact-specific inquiry***. *United States v. Smith*, 978 F.2d 171, 180 (5th Cir. 1992). Whether there is a reasonable expectation of privacy if [sic] a "case-by-case" inquiry, especially in the context of the workplace. *O'Connor v. Ortega*, 480 U.S. 709, 718 (1987). ***Because the reasonableness inquiry is so fact-intensive***, the Court should decline to decide this issue as a matter of law.

(Pls.' Opp'n to CSP Defs.' Mot. to Dismiss [Doc. No. 103] at 14) (emphasis added). The problem with Plaintiffs' argument in the context of the motion to dismiss, as noted in the CSP Defendants' reply brief, is that the Complaint is devoid of any factual allegations of a subjective expectation of privacy. But "at this stage of the litigation," given Plaintiffs' sworn testimony in its answer to this interrogatory, the failure to provide ***any*** factual context for this "highly fact-specific inquiry" resolves this matter against Plaintiffs indisputably. Plaintiffs possess and control the facts to meet their burden—a burden only Plaintiffs bear—and must produce this evidence to allow Defendants to test Plaintiffs' claims of a reasonable expectation of privacy. Defendants have no obligation to force Plaintiffs to make their case. Plaintiffs have failed to

establish the facts—facts which Plaintiffs have access to and control over. Consequently, a motion for summary judgment is proper.

The contrast between Plaintiffs' earlier position in opposition to the CSP Defendants' motion to dismiss Count One and Plaintiffs' position now when forced to make their case is an example of classic double-speak. On the one hand, Plaintiffs argued in their opposition to the CSP Defendants' motion to dismiss that the all-important and critical facts to make their case—facts which they possess and control—need not be laid bare in the Complaint to avoid dismissal. On the other hand, in their sworn answers to interrogatories, Plaintiffs now argue that the question of the objective reasonableness of their claim of subjective expectation of privacy is not fact-intensive, but merely resolved by a blanket rule: any conversation under any set of facts in Plaintiffs' offices carries with it both a subjective expectation of privacy and an objective reasonableness. This is not the law, and Plaintiffs have conceded that it is not the law in their earlier opposition to the CSP Defendants' motion to dismiss. In short, Plaintiffs cannot have it both ways. They cannot avoid a dismissal on the pleadings by arguing that the subjective expectation of privacy can only be developed after a careful review of the facts and then, in discovery, produce not a single fact or conversation where such subjective expectation is said to exist. Thus, Defendants respectfully suggest that the time is ripe for a motion for summary judgment on Count One in that Plaintiffs have presented no evidence of an interception of an "oral communication."

Even assuming, *arguendo*, that Plaintiffs could move beyond this rudimentary predicate for a violation of Count One, Plaintiffs must still provide evidence that the congressionally mandated one-party consent rule does not apply in this case by presenting some evidence that Defendant Chris Gaubatz recorded the conversation "for the purpose of" a criminal or tortious

act. 18 U.S.C. § 2511(2)(d). And, as argued in the CSP Defendants' motion to dismiss, this statutory exception to the one-party consent rule requires Plaintiffs to prove, *with evidence*, a nexus between the audio recordings and the **subsequent** criminal or tortious act.[9] And, as above, this is all the more so when Plaintiffs have access to and possess the evidence, if it indeed exists, to meet their burden.

Defendants' position is once again best clarified with some context of Plaintiffs' arguments to avoid dismissal. In their opposition brief to the CSP Defendants' motion to dismiss, Plaintiffs relied exclusively on the torts of breach of fiduciary duty and interference with contract to attempt to by-pass the one-party consent rule.[10] Specifically, Plaintiffs argued that by disclosing the content of the audio-video recordings, Defendant Chris Gaubatz's recordings were "for the purpose of" tortious conduct. But, as the CSP Defendants argued in their reply brief in support of their motion to dismiss, for Plaintiffs' argument to meet the requisite nexus, they must show that Defendant Chris Gaubatz actually recorded a conversation the disclosure of which would breach the alleged fiduciary duty or Confidentiality Agreement.[11]

So, CSP Defendants sought to test Plaintiffs' argument by serving upon Plaintiffs interrogatories that asked them to specify the recorded conversations the disclosure of which would violate either the alleged Confidentiality Agreement or some fiduciary duty. But, as in the case of the claim of reasonable expectation of privacy, Plaintiffs provided no such recorded conversations. Rather, Plaintiffs make the preposterous claim in their answers to these interrogatories that any conversation taking place in its offices and revealed by Defendant Chris Gaubatz to any third-party would be both a breach of fiduciary duty and the alleged

[9] (CSP Defs.' Mot. to Dismiss at 14-20 [Doc. No. 97]; CSP Defs.' Reply in Supp. of Mot. to Dismiss at 13-14 [Doc. No. 108]).
[10] (Pls.' Opp'n to CSP Defs.' Mot. to Dismiss at 17-19 [Doc. No. 103]).
[11] (CSP Defs.' Reply in Supp. of Mot. to Dismiss at 13-14 [Doc. No. 108]).

Confidentiality Agreement. In effect, Plaintiffs now take the untenable position that had Defendant Chris Gaubatz informed his father that a fellow intern told him at the office that it might rain later in the day, that disclosure qualifies as a tort. The specific interrogatories and Plaintiffs' answers follow:

> 2 Identify by date, time, precise location, persons involved, and precise statement(s) recorded of all conversations recorded by Defendant Chris Gaubatz with the "electronic device concealed on his person" as alleged in the Second Amended Complaint that you claim contain any information that constitutes a "trade secret," "confidential information," or "any other proprietary data of CAIR" as defined in the Confidentiality and Non-Disclosure Agreement. In light of the fact that you have the recordings, CSP Defendants demand a response that quotes verbatim the precise statements that serve as the basis for your claim in this case that the recorded conversations contain a "trade secret," "confidential information," or "any other proprietary data of CAIR" covered by the Confidentiality and Non-Disclosure Agreement. Further, CSP Defendants demand that you identify the specific disk by file name as provided by CSP in response to the subpoena *duces tecum* served upon CSP (and marked as Exhibit 2 to Christine Brim's deposition on July 12, 2010, as the Rule 30(b)(6) deponent for CSP) and time count to locate the start and finish of each such recorded conversation.
>
> Answer: Without waiving the previous objections, Chris Gaubatz was not authorized to record any conversations that took place on CAIR's premises or at a CAIR-sponsored event. All discussions that take place inside CAIR's offices are considered private, confidential and proprietary, and not are [sic] subject to recording. Any instance of recording said conversations was a violation of the Confidentiality Agreement.
>
> ***
>
> 4. Identify by date, time, precise location, persons involved, and precise statements recorded of all conversations recorded by Defendant Chris Gaubatz with the "electronic device concealed on his person" as alleged in the Second Amended Complaint that you claim contain any statements and / or information the disclosure of which breaches any alleged fiduciary duty. In light of the fact that you have the recordings, CSP Defendants demand a response that quotes verbatim the precise statements for each such recorded conversation that serve as the basis for your claim that the disclosure of the recorded conversation breached any fiduciary duty and identify the CAIR employee or intern whose communication was recorded. Further, CSP Defendants demand that you identify the specific disk by file name as provided by CSP in response to the subpoena *duces tecum* served upon CSP (and marked as Exhibit 2 to Christine Brim's

> deposition on July 12, 2010, as the Rule 30(b)(6) deponent for CSP) and time count to locate the start and finish of each such recorded conversation.
>
> Answer: Without waiving the previous objections, each time that Chris Gaubatz entered into CAIR's offices and recorded conversations of CAIR staff and employees with the purposes of conducting a "six-month counterintelligence operation" for his father, SANE, CSP, or any other person or organization, he breached his fiduciary duty to work for and on behalf of CAIR as a CAIR intern. He further breached that duty when he disclosed the recording [sic] the third parties.

The fatal shortcomings of Plaintiffs' answers are patent. In the context of the alleged Confidentiality Agreement, the disclosure of any of the audio-video recordings by Defendant Chris Gaubatz can only operate as a breach if the conversations included covered confidential information. The court has already noted the vagueness of the term "Confidential Information" in what appears to be a software confidentiality agreement awkwardly, if not poorly, converted for use by Plaintiffs. *CAIR*, 793 F. Supp. 2d at 344. But Plaintiffs' sworn answer as to what is "Confidential Information" amounts to an absolute gag on disclosing the content of any conversation Defendant Chris Gaubatz might have been privy to at Plaintiffs' offices. But this is both absurd on its face and renders the Confidentiality Agreement void as against public policy. *United States ex rel. Head v. Kane Co*., 668 F. Supp. 2d 146, 152 (D.D.C. 2009) (citing Restatement (Second) of Contracts for the proposition that "a private agreement is unenforceable on grounds of public policy if its enforcement is clearly outweighed by a public interest"); *see also* Restatement (Second) of Contracts, §§ 178-79.

Given Plaintiffs' view of the scope of the term "Confidential Information," Defendant Chris Gaubatz would have surrendered his right to Freedom of Speech—given the fact that he would now be exposed to criminal liability—regarding ***any*** information he heard while at Plaintiffs' offices even though Plaintiff would have absolutely ***no*** legitimate interest or basis to protect that information. Indeed, under Plaintiffs' theory, had Defendant Chris Gaubatz

disclosed information he had learned about the weather while at Plaintiffs' offices to his father, he would have violated a fiduciary duty and the Confidentiality Agreement, and he would have thus been liable under the Wiretap Acts, and quite possibly have committed a crime—all to protect Plaintiffs' non-existent interest in the weather. That cannot be. But because Plaintiffs have chosen not to provide even a scintilla of evidence that the audio-video recordings dealt with any information that might conceivably have been proprietary, private, or confidential, Plaintiffs are left to argue the absurd. The same argument of course applies to the ambiguously alleged fiduciary duty.

Thus, Plaintiffs have failed to produce a single conversation that would, if disclosed, have breached a fiduciary duty owed to Plaintiffs. Indeed, even absurdly assuming a volunteer intern owed a duty of confidentiality akin to an attorney-client relationship, to argue, as Plaintiffs have, that Defendant Chris Gaubatz owed a duty not to disclose information he heard at Plaintiffs' offices that did not remotely bear on some specific aspect of the fiduciary relationship, renders Plaintiffs' position on the scope of the duty owed to Plaintiffs legally unique in the world and indefensible. Not surprisingly, Defendants can find no reported case anywhere that would even suggest such a fiduciary duty exists.

This point is underscored by Plaintiffs' answer to the CSP Defendants' specific interrogatory which sought to understand the basis and scope of this alleged fiduciary duty owed by a volunteer intern:

> 16. Identify which Plaintiff entered into a fiduciary relationship with Defendant Chris Gaubatz, which employee of that Plaintiff acting on behalf of that Plaintiff entered into the fiduciary relationship with Defendant Chris Gaubatz, and the date that fiduciary relationship with Defendant Chris Gaubatz was established. State the specific and general fiduciary duties asked of Defendant Chris Gaubatz, the employee who made such request(s) of Defendant Chris Gaubatz, the fiduciary duties Defendant Chris Gaubatz agreed to perform, and the date of each such request and assent by Defendant Chris Gaubatz.

> Answer: Chris Gaubatz was hired to work for CAIR, the entity comprised of CAIR Foundation and the Council on American-Islamic Relations Action Network, Inc. He entered into a fiduciary relationship with CAIR on the first date of his internship. Several staff members held supervisory status over him and gave him instruction, including but not limited to Raabia Wazir, Jumana Kamal, Corey Saylor, and Nadhira Al-Khalili. In most cases, when Chris Gaubatz was asked to perform certain tasks, he agreed. However, he took liberties that he was not permitted to take, such as accessing secure computers, and looking into drawers and files, into which he was not asked or permitted to look. At times, he took documents that he was specifically instructed to shred and placed them into the trunk of his car. On at least one occasion, he was asked to stop shredding documents but when the staff member who gave him the instruction was not present, he went into the basement of CAIR's businesses, continued to shred certain documents, and removed other documents from CAIR's offices. He also breached his fiduciary duty by giving stolen documents to third parties and allowing them to publish the documents. He breached his fiduciary duties to CAIR by video recording CAIR staff and volunteers inside CAIR, giving the recordings to third parties, and allowing those videos to be broadcast. Plaintiffs reserve the right to amend this answer as discovery continues.

While Plaintiffs' sworn testimony in this answer provides at least general factual claims relating to a breach of fiduciary duty relating to Plaintiffs' **documents**, the only thing Plaintiffs can say about the audio-video recordings is to parrot the legal conclusion that such recordings and their disclosure amounted to a breach of fiduciary duty. But, Plaintiffs provide zero facts to substantiate that the fiduciary duty included, within its protective umbrella, recordings of conversations that were not in and of themselves related to sensitive information or the specifics of the fiduciary duty itself. In other words, Plaintiffs rely on a tautology. That is, Defendant Chris Gaubatz owed a fiduciary duty not to record or disclose perfectly innocent, non-proprietary conversations because that is how Plaintiffs describe the breach of the duty. But what Plaintiffs fail to do is provide facts that would even suggest that a fiduciary duty with a volunteer intern even existed, much less the breach of a fiduciary duty of some meaningful and reasonable scope relating specifically to the recorded conversations. Plaintiffs' version of fiduciary duty, Defendants respectfully submit, would dwarf the attorney-client privilege and even the

confidentiality imposed by statute and federal regulations on government employees dealing with matters of national security and classified materials.

Before leaving the issue of the scope of this alleged fiduciary duty, we would be remiss not to examine how Plaintiffs conceive of the genesis of this extraordinary and quite Draconian fiduciary duty. According to Plaintiffs' description of this fiduciary duty—a duty that rendered any innocent conversation sacrosanct and strictly confidential—the moment a volunteer intern begins his internship at Plaintiffs' offices, even though there is no evidence of any written employment agreement and without any expressed instructions articulating the existence of such a fiduciary duty, the young intern must understand by way of **implication** that he has taken on a fiduciary duty that renders every word he hears and every document he sees at Plaintiffs' offices, no matter how mundane and trivial, strictly confidential. We return to Interrogatory No. 16 and Plaintiffs' answer thereto:

> 16. Identify which Plaintiff entered into a fiduciary relationship with Defendant Chris Gaubatz, which employee of that Plaintiff acting on behalf of that Plaintiff entered into the fiduciary relationship with Defendant Chris Gaubatz, and the date that fiduciary relationship with Defendant Chris Gaubatz was established. State the specific and general fiduciary duties asked of Defendant Chris Gaubatz, the employee who made such request(s) of Defendant Chris Gaubatz, the fiduciary duties Defendant Chris Gaubatz agreed to perform, and the date of each such request and assent by Defendant Chris Gaubatz.
>
> Answer: Chris Gaubatz was hired to work for CAIR, the entity comprised of CAIR Foundation and the Council on American-Islamic Relations Action Network, Inc. ***He entered into a fiduciary relationship with CAIR on the first date of his internship.*** Several staff members held supervisory status over him and ***gave him instruction***, including but not limited to Raabia Wazir, Jumana Kamal, Corey Saylor, and Nadhira Al-Khalili. In most cases, when Chris Gaubatz ***was asked to perform certain tasks***, he agreed. However, ***he took liberties that he was not permitted to take***, such as accessing secure computers, and looking into drawers and files, into ***which he was not asked or permitted to look***. At times, he took documents that he was specifically instructed to shred and placed them into the trunk of his car. On at least one occasion, he was asked to stop shredding documents but when the staff member who gave him the instruction was not present, he went into the basement of CAIR's businesses,

> continued to shred certain documents, and removed other documents from CAIR's offices. He also breached his fiduciary duty by giving stolen documents to third parties and allowing them to publish the documents. (emphasis added).

Not once in this entire answer do Plaintiffs even intimate that Defendant Chris Gaubatz was told of some heightened duty of care rising to the level of a fiduciary. Merely, he was "given instruction," but without detailing what that instruction was. At best, the specificity of that instruction amounted to "shred this," "but not this." Even Plaintiffs' description of Defendant Chris Gaubatz going beyond the explicit instructions given simply states he did some things "he was not asked or permitted to" do. Nowhere do Plaintiffs state that they expressly forbade any of this; rather, only that "he was not asked or permitted to" do it. But that leaves a chasm and void from which Plaintiffs now construct an implicit fiduciary duty that leads to civil liability for disclosing conversations about the weather or other office banter. And, again, we are left with the weather and office banter examples precisely because Plaintiffs have provided no evidence of any other type of conversations.

And, without meaning to belabor this point, not once in this entire answer do Plaintiffs even intimate that Defendant Chris Gaubatz—an intern—was instructed on the importance of following instructions (*i.e.*, there was <u>*no*</u> explanation whatsoever of the nature and scope of his fiduciary duty) or that the documents he was dealing with required heightened diligence. Yet, from the moment he entered the offices, even before he was given any instruction, Plaintiffs contend that this incredible fiduciary duty of secrecy just existed. Indeed, Plaintiffs' own description of an office void of any instructions regarding secrecy—or notice of a heightened fiduciary duty for secrecy—fits hand-in glove with Defendant Chris Gabautz's testimony he provided by way of sworn answers to Plaintiffs' interrogatories:

> Subsequently, I informed my father that during my Internship at CAIR in Washington D.C., CAIR's policy of open access remained. CAIR provided no

> written or oral instruction on the confidentiality, privacy, or proprietary character of any of the CAIR documents or information available to the interns. To the contrary, the interns understood that they could and should read, copy, and even take home materials to learn more about CAIR. It was further implicitly understood that none of the information generally available to the interns was confidential, private, or proprietary and that to the extent there was information that was confidential, private, or proprietary at CAIR's offices in Washington, D.C., it was locked in private offices which I never accessed. In fact, it was a running joke among interns during the Internship that nothing of importance was ever done by the interns or made available to the interns except old and dated CAIR documents in which CAIR officials had no interest. For example, one of the big chores for interns during the Internship was shredding documents CAIR employees told us were "unimportant." CAIR never provided any instruction on the shredding process, whether the documents had to be shredded as opposed to just thrown out or disposed of in some other fashion, or taken home by the intern. In fact, I informed my father that the purpose in shredding was to make room for newer documents and not to destroy sensitive documents. Also, at times I was told I could just throw away documents in the garbage rather than shred them. There was no specific instruction regarding how to dispose of these documents. Further, typically, the documents were being shredded because CAIR had made digital copies, thereby retaining the document for whatever purpose it had for the documents, while just disposing of the paper copy. Finally, I informed my father that I would often take entire boxes of documents marked for shredding out of the office in plain sight and no CAIR employee ever asked me about this or instructed me to do otherwise. It was all in the open.
>
> I further informed my father that the CAIR offices in Washington D.C. were run very loosely and haphazardly. There was almost no supervision of interns, interns were never tasked to do anything important other than to shred documents and make routine telephone calls to members of the public for "outreach," there was no instruction whatsoever about what was or was not confidential, private, or proprietary, and, as a result of sheer boredom, interns often played games or chatted about mundane matters for most of the "working" day. I informed my father that as a result of the mundane work, the turnover for interns was high.

(Def. Chris Gaubatz's Answers to Pls.' First Set of Interrogs. at No. 4 [served upon Plaintiffs Dec. 2, 2011] at Ex. 2).

Plaintiffs' claims of even the *existence* of the fiduciary duty they describe are manifestly belied by their actual description when read with even a modicum of care. But even if a fiduciary duty existed, it could not be one with a scope that enveloped every word and every document within the walls of Plaintiffs' offices akin to the real secrets passed between client and

lawyer or between patient and doctor. As such, Defendants respectfully submit that Plaintiffs' failure to produce any evidence relating to the audio-video recordings in response to Defendants' focused discovery on fiduciary duty and the alleged breach of the Confidentiality Agreement renders Count One ripe for summary judgment.[12]

II. The Evidence Available to the Parties Demonstrates that Plaintiffs Cannot Establish the Requisite Elements for Liability Under Count Two of the Complaint for Violation of the SCA.

As with Count One, Plaintiffs' allegations in Count Two claim primary and secondary violations of the SCA by Defendant Chris Gaubatz and the remaining Defendants, respectively. The CSP Defendants' motion to dismiss has already demonstrated that the SCA does not allow for secondary civil liability. But, at this stage in the proceedings, it is appropriate and timely to challenge even the proposition that there is *primary* liability under this federal statute.

As set forth in detail in the CSP Defendants' opposition to Plaintiffs' motion for leave to file a third amended complaint, when this court ruled on the earlier Gaubatz Defendants' motion to dismiss, the court carefully explained that there could be no violation of the SCA if the documents alleged to have been obtained from Plaintiffs' computers were taken from the hard drive of the local desk top computer as opposed to an email server or networked email client computer. *CAIR*, 793 F. Supp. 2d at 335 ("[T]the statute clearly is triggered when a defendant directly or indirectly accesses the physical server-side computer dedicated to running an e-mail client by, for instance, downloading e-mails from the server. On the other hand, the statute clearly is not triggered when a defendant merely accesses a physical client-side computer and

[12] Defendants also contend that Plaintiffs' reliance on "for the purpose of" committing the tort of breach of fiduciary duty or interference with contract to get around the congressionally mandated one-party consent rule is also wanting because Plaintiffs have failed to produce any evidence of a fiduciary duty or a binding Confidentiality Agreement, much less damages (the issue of damages was raised in the context of Defendants' opposition to Plaintiffs' motion for leave to file a third amended complaint (Doc. No. 113) at pages 17-21). These arguments are taken up *infra*.

limits his access to documents stored on the computer's local hard drive or other physical media."). The court denied the Gaubatz Defendants' motion to dismiss because the allegations claimed in the **alternative** that Defendant Chris Gaubatz "accessed [CAIR-AN] and CAIR-Foundations' computers **or** computer servers, networks, or systems without authorization and/or knowingly or intentionally exceeded any authorization he did have to access [CAIR-AN] and CAIR-Foundation's computers **or** computer servers, networks, or systems." (Compl. at ¶ 80) (emphasis added). That is, the court recognized that the pleadings alleged that Defendant Chris Gaubatz accessed "computers," an allegation that would not in and of itself state a cause of action or give rise to liability under the SCA, but the pleadings also alternatively alleged that he accessed "computer servers, networks, or systems," an allegation which might very well fall under the SCA's purview. *Id.* at 335-36.

As a result, and literally tracking the court's guidance in its opinion cited above, Defendants served a request for production of documents and interrogatories on Plaintiffs to test this critical allegation underlying the alleged violation of the SCA. Thus, when the CSP Defendants sought to have Plaintiffs carry their burden and identify from which computer, server, or network they allege Defendant Chris Gaubatz took documents in violation of the SCA, Plaintiffs provided no information whatsoever, conceding they could not carry their burden.[13]

[13] The specific interrogatory propounded by Defendant CSP asks:

> 9. For each document (identified by its specific Bates number) produced in response to Request No. 4 of CSP's First Request for Production of Documents as documents taken by Defendant Chris Gaubatz in violation of 18 U.S.C. § 2701(a), ***identify*** on which CAIR computer you claim the document was stored when Defendant Chris Gaubatz copied / took it. ***Identify*** the computer by sufficient identifying terms to permit CSP to propound a request for a forensic inspection of each computer and a network survey, including computer name, machine ID, computer type (*i.e.*, desktop, laptop, server), manufacturer, computer model, computer serial number, and custodian (*i.e.*, the person at CAIR responsible for the computer and its primary user from May 1, 2008 to September 30, 2008) (emphasis added).

This is all the more telling since Plaintiffs have possessed, controlled, and have had full access to the computers allegedly involved in the SCA violation and to the documents purportedly taken in violation of the SCA since the Gaubatz Defendants complied with the court's Minute Entry Order of November 19, 2009, granting Plaintiffs' motion for a preliminary injunction. That is, whatever facts Plaintiffs need to properly allege and "plausibly" claim that documents were stolen from networked email client computers or servers, as opposed to local computer hard drives, have been available to Plaintiffs for more than two years. What Plaintiffs know or do not know today has nothing to do with additional discovery. This is underscored by Defendant Chris Gaubatz's sworn testimony provided to Plaintiffs in answer to Interrogatory No. 8 of Plaintiffs' Interrogatories:

> 8. Describe from where you took each and every hard copy or electronic file from CAIR's offices and how you accessed the files. Identify to whom you gave each and every document that you gave to David Gaubatz at any time either prior to and subsequent to the filing of this lawsuit, including individuals, government agencies or organizations.
>
> **ANSWER:** Without waiving any of the general objections or any claim of privilege, Defendant Chris Gaubatz answers as follows: While I have no

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For clarity, Request No. 4 of Defendant CSP's First Request for Production of Documents sought: "A copy of any and all documents CAIR claims Defendant Chris Gaubatz took from CAIR in violation of 18 U.S.C. § 2701(a)." *Plaintiffs produced no documents in response*. Specifically, Plaintiffs responded as follows:

> OBJECTION: Plaintiffs object to the Request on the ground that it asks for material that would require unreasonable efforts or expense on the part of Plaintiffs to produce. Defendants electronically obtained confidential documents from Plaintiffs, and these documents are already in the possession of CSP Defendants. Thus, this discovery may be obtained by alternative methods and at a cost more reasonable to Plaintiffs. In addition, to the extent that these documents have been re-produced in the book *Muslim Mafia* and websites, they are publicly available and Plaintiffs object to their production. RESPONSIVE DOCUMENTS: Without waiving the previous objection, Plaintiffs reserve the right to amend this response as discovery continues.

More to the point, Plaintiffs responded to Interrogatory No. 9 as follows:

> Answer: Without waiving the previous objections, no documents were produced in response to Request No. 4 of CSP's First Request for Production of Documents. The Plaintiffs reserve the right to amend this answer as discovery continues.

> independent recollection about from where I took any specific file, ***the only electronic or digital files I copied were files available to me on desk top computer hard drives belonging to desk top computers I had full authority to access and use freely. I copied and removed from CAIR no electronic or digital files from servers or shared drives.*** And, while I have no independent recollection about where I took any specific hard copy document, I took only hard copies of documents from CAIR that I had full, unfettered access to and authority to take. Any document I took was generally available in the office to all interns and / or were documents CAIR asked me to shred or merely throw away. I was never informed by any CAIR employee that I was allowed to access and take home some documents but not others. I was never informed by any CAIR employee that when CAIR asked me to shred or dispose of documents, that only shredding was permitted, or that I could not dispose of these documents on my own and in my own way, to include taking a copy home with me. (emphasis added).

Given the undisputed fact that Plaintiffs have failed to carry their burden to show that Defendant Chris Gaubatz took any documents from a SCA-covered computer (*i.e.*, a "accessing the physical server-side computer dedicated to running an e-mail client by, for instance, downloading e-mails from the server"), Defendants respectfully suggest that the time is ripe for summary judgment on this issue as well and would ask the court to grant Defendants leave to file a motion for summary judgment as to Count Two.

III. The Evidence Available to the Parties Demonstrates that Plaintiffs Cannot Establish the Existence of the Alleged Confidentiality Agreement between Plaintiffs and Defendant Chris Gaubatz.

In addition to the arguments raised above regarding Plaintiffs' interpretation of the scope of the Confidentiality Agreement and the unenforceability of any such agreement as void against public policy, there are yet more fundamental reasons to reject claims of a binding agreement between Plaintiffs and Defendant Chris Gaubatz. To address these issues, we begin with the court's earlier opinion denying the Gaubatz Defendants' effort to dismiss the breach of contract claim. The court reasoned:

> True, the agreement that is attached to and incorporated into the Second Amended Complaint identifies the relevant counter-party as the "Council on American-

> Islamic Relations" and not CAIR-AN, or the Council on American-Islamic Relations Action Network, Inc. *See id.* Ex. A (Confidentiality Agreement) at 1. Assuming without deciding that the reference is ambiguous, Plaintiffs are nonetheless entitled to conduct discovery before being asked to prove the existence of an enforceable agreement between Chris Gaubatz and CAIR-AN. Depending on what evidence Plaintiffs are able to marshal, the Gaubatz Defendants' argument may or may not win out in a motion for summary judgment. *See Novecon Ltd. v. Bulgarian-American Enter. Fund*, 190 F.3d 556, 564, 338 U.S. App. D.C. 67 (D.C. Cir. 1999) ("The party asserting the existence of an enforceable contract bears the burden of proof on the issue of contract formation."), *cert. denied*, 529 U.S. 1037, 120 S. Ct. 1531, 146 L. Ed. 2d 346 (2000). For now, it suffices to say that the question is one of intent, and it is a question that is not amenable to resolution at this stage of the proceedings.

CAIR, 793 F. Supp. 2d at 342. In his Answer to the Complaint, Defendant Chris Gaubatz denies signing or agreeing to the terms of the Confidentiality Agreement. (Gaubatz Defs.' Answer at ¶¶ 29-30, 101-04). But before we get to the question of whether the Confidentiality Agreement was even an executed agreement, we must return to the question raised by the court above: which Plaintiff actually claims to have been the contracting party?

We begin with the Complaint. The Complaint refers to Plaintiff CAIR-AN as CAIR. (Compl. at ¶ 10). The Complaint refers to Plaintiff CAIR-F as CAIR-Foundation. (Compl. at ¶ 11). Throughout the Complaint, Plaintiffs' allege that the Confidentiality Agreement was entered into between Defendant Chris Gaubatz and CAIR-AN. Yet, in Counts Nine and Ten (breach of contract and tortious interference with contract claims, respectively), the Complaint elides from a contract with CAIR-AN to a claim for breach of contract and interference with contractual relations on behalf of both Plaintiffs as if they were and are one and the same. Yet, the Complaint explicitly alleges Plaintiffs are two distinct corporations. (Compl. at ¶¶ 11-12). On this basis alone, Counts Nine and Ten are properly subject to dismissal as to Plaintiff CAIR-F.

But Plaintiffs' confusion about who and what they are does not end here. When the CSP

Defendants sought to determine which Plaintiff actually executed the alleged Confidentiality Agreement and by which corporate representative, Plaintiffs provided literally no answer. The specific interrogatory and answer follow:

> 14. Identify which Plaintiff signed the Confidentiality and Non-Disclosure Agreement and specifically state who signed the Confidentiality and Non-Disclosure Agreement on behalf of that Plaintiff, the official capacity / title of the signer with that Plaintiff, and the date the signer signed the Confidentiality and Non-Disclosure Agreement.
>
> Answer: Without waiving the previous objection, Plaintiffs reserve the right to amend this answer as discovery continues.

Aside from the fact that Plaintiffs provided no answer, their inexplicable reservation to amend the non-answer "as discovery continues" is of no effect. Only Plaintiffs know which of the two corporations might have signed an agreement Defendant Chris Gaubatz denies signing.[14] Yet, after the litigation has been ongoing for years and after discovery has been ongoing for more than eight months, Plaintiffs non-answer under oath demonstrates an utter failure to carry the burden to produce the supposed evidence that only they could possess—not Defendants. *CAIR*, 793 F. Supp. 2d at 342 (citing *Novecon Ltd*. for the proposition that "[t]he party asserting the existence of an enforceable contract bears the burden of proof on the issue of contract formation"). Thus, the undisputed facts are that Plaintiffs cannot carry their burden that the Confidentiality Agreement was fully executed by either Plaintiff CAIR-AN, as implicitly alleged in the Complaint,[15] or for that matter, by CAIR-F (or even Defendant Chris Gaubatz). Without an executed and validly binding contract, Plaintiffs have no claim for breach of the Confidentiality Agreement, or the tort cousin of this claim—interference with contract.

[14] As noted *infra*, Plaintiffs have produced no documents and that failure to produce includes the *failure to produce the alleged Confidentiality Agreement*.

[15] This point is important. The Complaint never actually alleges a fully executed agreement, but merely alleges that the Confidentiality Agreement was between Defendant Chris Gaubatz and Plaintiff CAIR-AN.

Yet, Plaintiffs' confusion over the actual parties to the Confidential Agreement does not end even here. When the CSP Defendants sought by interrogatory to determine which Plaintiff actually hired their employees and volunteer interns during the time period relevant to the Complaint, including Defendant Chris Gaubatz, Plaintiffs answer that it was CAIR-F.[16] So, we now have, according to Plaintiffs' sworn answers to interrogatories, an intern who was hired by and "volunteered for [Plaintiff] CAIR-F," but who, according to the Complaint, signed a Confidentiality Agreement with CAIR-AN—an agreement, however, which does not exist and which was signed by neither Plaintiff. All of this is juxtaposed against Defendant Chris Gaubatz's unequivocal denial of having signed any such agreement.

And, there remains yet another basis for summary judgment on the breach of contract and tortious interference claims. In its earlier opinion, this court cited to *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009), for the standard contract proposition that "to prevail on a claim of breach of contract, a party must establish (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach." *CAIR*, 793 F. Supp. 2d at 342. And, most pertinently, this statement of the

[16] The specific interrogatory and answer are as follows:

> 1. Identify each person, by providing the full name, current address, and phone number(s), with sufficient detail to permit the personal service of documents, including a subpoena, who worked at CAIR-AN and CAIR-F as an employee or intern from January 1, 2007 through December 31, 2008. Identify, for each employee or intern, whether the employee or intern worked or interned for CAIR-AN or CAIR-F, when the employee or intern began working at CAIR-AN or CAIR-F, and when the employment or internship concluded or if the employment or internship continues at present.
>
> Answer: Without waiving the previous objections, CAIR is an entity comprised of two different corporations, CAIR-Foundation, Inc. and the Council on American-Islamic Relations Action Network, Inc. At all relevant times, employees were paid by CAIR-Foundation. At all relevant times, volunteers volunteered for CAIR-Foundation.

law was proffered by the court in *Tsintolas Realty Co.* in its focus on the fourth element of damages. Indeed, *Tsintolas Realty Co*. revolved around, as in this case, a breach of a confidentiality agreement. Specifically, a landlord claimed that a tenant's disclosure of a confidentiality agreement in the context of a settlement agreement was a valid counterclaim and offset of damages against the settlement payment owed the tenant by the landlord. Immediately after the court set out the four elements of a viable breach of contract claim, it declared:

> It is a longstanding principle in civil law that there can be no monetary recovery unless the plaintiff has suffered harm. [M]ere breach without proof of monetary loss is *injuria absque damno, i.e.*, ***a wrong which results in no loss or damage, and thus cannot sustain an action.*** In other words, although adherence to the confidentiality provision was a significant obligation imposed on the tenants by the settlement agreement, the discernible consequences to the landlord of the tenants having attached a copy of the agreement to the motion were nil.

Tsintolas Realty Co. v. Mendez, 984 A.2d 181, 187 (D.C. 2009). As argued in some detail in Defendants' opposition to Plaintiffs' motion for leave to file a third amended complaint, Plaintiffs have reduced their claims for damages to a claim of diminution of value in the documents taken. (Defs.' Opp'n to Pls.' Mot. to File Third Am. Compl. [Doc. No. 113] at 18-21). Defendants incorporate those arguments here to avoid repeating them from their earlier opposition brief *verbatim*. Indeed, instructive in this regard are Plaintiffs' two purportedly responsive arguments set forth in their reply brief filed in support of their motion to amend.

Plaintiffs' first argument is that "discovery is not over." (Pls.' Reply Br. in Supp. of Mot. for Leave to File Third Am. Compl. [Doc. No. 118] at 13). For these purposes, this is really just an argument for "more discovery" under Rule 56(f). But as set forth in case after case in this district, the pertinent inquiry is whether there has been "adequate discovery" and this, in turn, is determined in large part by whether additional discovery is reasonably likely to lead to evidence creating a material fact dispute. *Bus. Equip. Ctr., Ltd.*, 465 F. Supp. at 782-83 (holding that the

non-moving party had "ample opportunity to gather evidence to support its claims and raise a genuine, material dispute of fact" and this is further established by the fact that the evidence it seeks "would be supportable by data from its own records."); *Hull*, 825 F.2d at 452-53 ("The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial."); *see also L. Orlik, Ltd.*, 427 F. Supp. at 778 ("Finally, the defendants contend that summary judgment should be denied because the defendants had not yet conducted pretrial discovery on the issue of waiver. The defendants have not satisfied Rule 56(f) . . . . The issue on which the defendants seek discovery is waiver, and facts concerning this issue must, by their very nature, be facts within the knowledge and control of the defendants.").

As is the case in Plaintiffs' proposed third amended complaint, Plaintiffs' assertion of damages under the contract cause of action and the tort claims all boil down to one claim: "diminishment of value of confidential and proprietary information." (Compl. at ¶ 89 (conversion), ¶ 98 (fiduciary duty), ¶ 109 (breach of contract), ¶ 115 (tortious interference with contract), and ¶ 125 (trespass)). But, this claim must be based upon some factual predicate of the value of the documents before the taking. And, to repeat the obvious, to the extent these facts exist and are not merely an attempt to raise a "metaphysical doubt," Plaintiffs control and possess these facts. After now several years of litigation in this case and eight months of discovery, Plaintiffs failure to come forward in its sworn answers to interrogatories with even a suggestion of supportable facts renders Plaintiffs' plea for yet more discovery meaningless and empty. As in *Tsintolas Realty Co.*, "mere breach without proof of monetary loss is *injuria absque damno, i.e.*, ***a wrong which results in no loss or damage, and thus cannot sustain an***

action." *Tsintolas Realty Co*., 984 A.2d at 187 (emphasis added).

Plaintiffs' second argument proffered in response to Defendants' demonstration that Plaintiffs have failed to come forward with any evidence of damages is quite simply incoherent. Plaintiffs argue that there are contract damages (in the context of trying to show there are damages for tortious interference) for "the loss of the benefit of the bargain." But this axiom of contract law (also applicable as a measure of damages for the tort of interference with contract) merely begs the question. What was the "benefit of the bargain?" What are the facts underlying this claim?

The Complaint alleges that the contract sued under in both the contract claim and the tortious interference claim was the Confidentiality Agreement. (Compl. at ¶¶ 109 & 115). Even if we assumed, *arguendo*, that such agreement was valid (or even exists), which Defendants strenuously contend was not valid (and does not exist), what is the value of keeping the documents confidential? As in *Tsintolas Realty Co.*, Plaintiffs must proffer some facts to establish the value of those documents and some evidence that their value was diminished by now being made public. Yet, Plaintiffs have provided no evidence or facts whatsoever on either issue. Not surprisingly, and as pointed out in Defendants' opposition to Plaintiffs' motion for leave to amend, Plaintiffs have not produced a single document in response to Defendants' requests for production of documents, and this includes requests to produce documents Plaintiffs claim, through the looking glass of a "metaphysical doubt," suffered diminished value. (Defs.' Opp'n to Pls.' Mot. to File Third Am. Compl. [Doc. No. 113] at 15). To this date, Plaintiffs have **not produced a single scrap of paper** even though Defendants have requested production of all the documents Plaintiffs contend are the subject of their damages claim and also the documents that would substantiate Plaintiffs' damages claims. (*See* Pls.' Resp. to CSP Defs.' First Req. for

Prod. of Docs., attached as Ex. 3).

For these reasons, Defendants respectfully request this court to grant Defendants leave to file a motion for summary judgment as to the contract and interference with contract claims.

IV. The Evidence Available to the Parties Demonstrates that Plaintiffs Cannot Establish the Requisite Element of Damages for Any of the Common Law Tort Claims.

As Defendants argued in their opposition brief to the Plaintiffs' motion for leave to file a third amended complaint, the element of damages extends to all the tort claims, with the exception of the trespass claim, which permits nominal damages as noted by this court. *CAIR*, 793 F. Supp. 2d at 340-42 (noting that a claim of breach of fiduciary requires a showing that "the breach was the proximate cause ***of an injury***" (emphasis added); *id.*, at 344-45 (noting that trespass allows for nominal damages). Plaintiffs' failure to produce any documents to substantiate these claims at this late stage in the litigation provides more than an adequate basis for Defendants to move for summary judgment as to these claims as well.

CONCLUSION

For the foregoing reasons, and consistent with Plaintiffs' consent to the filing of this motion, Defendants respectfully request that the court grant their motion and set a briefing schedule for a motion for partial summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2012, 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.

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