IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

-v.-

PAUL DAVID GAUBATZ, *et al*.,

Defendants.

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

REPLY BRIEF

MEMORANDUM OF POINTS & AUTHORITIES

IN SUPPORT OF

MOTION FOR LEAVE TO FILE MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER

PREFACE

Plaintiffs' opposition to Defendants' motion seeking leave to file a motion for summary judgment ("Motion" at Doc. No. 120) is at once both incredible and incredibly devoid of legal or logical argument. After literally inviting Defendants to file this Motion in their reply brief in support of their motion for leave to file a third amended complaint, and then explicitly consenting to this Motion during a substantive meet-and-confer, Plaintiffs filed a "Notice of Non-Consent" (Doc. No. 121) as an after-the-fact effort to withdraw their written and oral consents on the grounds that they "were less than precise." Yet, even Plaintiffs' purported Notice of Non-Consent raises imprecise and dubious, if not dishonest, grounds for such withdrawal. From inception, the reality of Plaintiffs' pursuit of this litigation, now more than 2.5 years old, is far from the plea of excusable imprecision made by Plaintiffs here and on the occasion of every previous filing.

Recidivistic imprecision, which might charitably be characterized as excusable neglect on the first occasion or even the second, becomes inexcusable when it is routinized as a litigation strategy. *See Yesudian ex rel. United States v. Howard Univ*., 270 F.3d 969, 971 (D.C. Cir. 2001) (discussing generally the standard of excusable neglect and citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 123 (1993), as the standard); *see also Diggs v. Kralik*, 2006 U.S. Dist. LEXIS 46947 (S.D.N.Y. July 7, 2006) (warning "that continued neglect may no longer be viewed as 'excusable'"). The facts now on full display demonstrate that Plaintiffs' "imprecision" has become the norm and each imprecision is subsequently rationalized by arguments that have no basis in fact or in the rules governing our adversarial system of justice. Plaintiffs' serial imprecision has long left the arena of even inexcusable neglect and presents itself rather starkly as a reckless disregard of the law and procedures that govern federal

litigation. And, when this recklessness is subsequently layered with excuses that contradict the plain facts, it becomes transparent for what it is: at best a tactical ineptitude; at worst, malfeasance. Defendants respectfully suggest that Plaintiffs' tactical ineptitude should not be tolerated by this court or any court and Defendants' Motion should be granted.

ARGUMENT

I. Plaintiffs' "Imprecision," Employed as a Tactical Ineptitude, is Not Excusable Neglect and Presents a Demonstrable Case for Granting the Motion.

Defendants understand that despite Plaintiffs' consent to the Motion, the decision to grant this Motion and to set a briefing schedule is within the court's sound discretion. Fed. R. Civ. P. 56(b) ("Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery."). However, Plaintiffs' consent is important for three reasons. First, notwithstanding Plaintiffs' effort to establish a fixed rule that this court would not entertain a motion for summary judgment until the end of a formal discovery period (*see* Pls.' Opp'n at 1-2)—a discovery period which this court recognized at the scheduling conference was unusually long (*i.e.*, one year, four months and 18 days, from September 1, 2011 until January 18, 2013)—this court made clear that should a party wish to file a motion for summary judgment in advance of the court issuing a briefing schedule in the ordinary course, it must file a motion requesting a briefing schedule and justify that motion, precisely as Defendants have done here. (Court's Resp. at Scheduling Conference on Sept. 1, 2011). Indeed, the Scheduling Order (Doc. No. 99) issued by this court following the scheduling conference does not suggest even by implication that this Motion is in any way premature or improper. (Scheduling Order at § 10(h) [requiring that the court first establish a briefing schedule before a party may file a motion for summary judgment]).

Second, discovery in this case, now ongoing for nine months, has been quite extensive.

Plaintiffs' discovery requests alone have resulted in extensive document production by all Defendants, resulting in the production of more than 2,700 pages of documents, and with no Defendant withholding any responsive documents. Specifically, Plaintiffs have served five sets of document requests (four separate and distinct sets served upon the Gaubatz Defendants and one upon Defendant Center for Security Policy ["CSP"]). Defendants have also fully responded to five sets of requests for admissions propounded by Plaintiffs (again, four separate and distinct sets served upon the Gaubatz Defendants and one set served upon CSP). While it is true that to date Plaintiffs have not produced a single document in response to the CSP Defendants' requests for production of documents, which were served upon Plaintiffs on November 14, 2011, that tactical approach to their own lawsuit speaks to Plaintiffs' approach to federal litigation and not to the adequacy of discovery. Furthermore, Plaintiffs have served formal responses (without documents) to the CSP Defendants' document requests and requests for admissions, and to the Gaubatz Defendants' interrogatories and requests for admissions, and these responses and sworn answers speak volumes in support of a motion for summary judgment in favor of Defendants as set forth in the Motion.

Third, while Defendants' Motion is formally a request to brief a motion for partial summary judgment, it is "partial" only to the extent that the only cause of action that would remain after granting the proposed motion for summary judgment would be the single common law cause of action for trespass precisely because trespass allows for nominal damages. But, this court would certainly have good cause, *sua sponte*, to dismiss this single claim based upon the prudential issues applied to retaining supplemental jurisdiction when all federal claims have been dismissed. *See generally Fin. Gen. Bankshares v. Metzger*, 680 F.2d 768 (D.C. Cir. 1982) (discussing the prudential issues relative to supplemental jurisdiction of state law claims

following dismissal of federal claims at eve of trial); *see also Szymkowicz v. D.C.*, 814 F. Supp. 124, 129 (D.D.C. 1993) (refusing to even consider supplemental jurisdiction when the federal claims are dismissed well in advance of trial).[1]

The question, however, of this court's ultimate ruling on the instant Motion is in fact informed not only by Plaintiffs' written and oral consents to the filing of this Motion, but also the substantive arguments raised by Defendants' Motion itself and Plaintiffs' conscious decision not to respond to those substantive arguments. Moreover, in Plaintiffs' written consent to this Motion as set forth in their reply brief in support of Plaintiffs' motion for leave to file a third amended complaint, Plaintiffs defended their attempt to amend the complaint yet a third time by arguing that Defendants' arguments would be more appropriately raised in a motion for summary judgment. And, as will be discussed below, notwithstanding Plaintiffs' imprecise and dubious efforts at revisionism, their arguments, articulated on two separate occasions in their reply brief, made it clear that they were arguing that Defendants' opposition to the third amendment was more appropriately raised ***at this time*** in the form of a motion for summary judgment.

Below, we set out each instance of Plaintiffs' "imprecision" employed as a kind of tactical ineptitude to needlessly prolong this litigation while simultaneously refusing to present any evidence during the already lengthy discovery process to carry their evidentiary burdens as Plaintiffs. Each of these instances is also explicitly tied to a substantive argument in favor of granting Defendants' proposed motion for summary judgment and thus a demonstration of this

[1] As the court undoubtedly recognizes, even before getting to the proposed motion for summary judgment, should the court grant CSP Defendants' pending motion to dismiss on all the statutory claims, the court would lack federal question jurisdiction and would have the option to reject supplemental jurisdiction over the remaining common law counts.

Motion's propriety, both as a procedural and substantive matter.[2]

A. Plaintiffs' Attempt to Withdraw Their Written Consent Evidences the Merits of this Motion.

Plaintiffs essentially plead with the court to ignore their consent to this Motion, provided first in writing on two separate occasions in Plaintiffs' reply brief in support of their motion to file a third amended complaint (Doc. No. 118) and then confirmed orally during a substantive meet-and-confer prior to the filing of this Motion. In their awkward "Notice of Non-Consent" (Doc. No. 121), Plaintiffs attempt to avoid the explicit import and consequence of their statement, repeated twice, that in lieu of opposing Plaintiffs' motion to file a third amended complaint on futility grounds, Defendants should file a motion for summary judgment.[3] To explain their own advice to Defendants to file this Motion, Plaintiffs initially argue that Defendants took these statements out of context (Pls.' Notice of Non-Consent at 1 ["Defendants' assertion of consent is based on certain statements in previous filings which are taken out of

[2] While not directly relevant to this Motion, it is apropos to the discussion of Plaintiffs' use of imprecision as tactical ineptitude to point to Plaintiffs' certification to this court that their motion for leave to file a third amended complaint was based upon a claim of "newly discovered evidence." When this court ordered Plaintiffs to specify what that evidence was, Plaintiffs' re-filed motion claimed that "but for" some newly discovered evidence, Plaintiffs would have had no basis to name David Yerushalmi (the CSP Defendants' lead counsel) and another organization as defendants. Yet, Plaintiffs' counsel had stated in another matter in this court before U.S. Magistrate Judge David Kay that she was absolutely certain that Yerushalmi had conspired to "steal" documents from Plaintiffs' offices. And, when U.S. Magistrate Judge Kay said, "Let's assume that happened . . .," Plaintiffs' counsel interrupted and retorted, "It did happen." (Defs.' Opp'n to Pls.' Mot. for Leave to File Third Am. Compl. at 8-9 [citing Yerushalmi Decl. at Ex. 1 at 70:5-20]). Despite Plaintiffs' counsel's unequivocal declaration in open court of this absolute knowledge of the facts of wrongdoing (which Defendants and Yerushalmi adamantly deny), Plaintiffs, with a bold and calculated arrogance, characterized to this court that their counsel's earlier statement in open court was but "a good faith representation" of "strong suspicions." (Pls.' Reply in Supp. of Mot. to File Third Am. Compl. ["Pls.' Reply Br."] at 4.)

[3] (Pls.' Reply Br. 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."]).

context"]), but then, employing their patented imprecision, proceed to concede that while Plaintiffs did consent by arguing in favor of the propriety of this Motion, they really did not mean it. And, while they plead imprecision, Plaintiffs' revisionist explanation requires a treatise-long statement about what they actually meant, which itself brutally contradicts the context for their two statements. Specifically, Plaintiffs attempt to explain and re-craft their statements as follows:

> [T]he statements in Plaintiffs' reply brief perhaps were less than precise in that they did not explicitly state that Defendants were "free" to file a summary judgment motion *consistent with the applicable rules and the Court's scheduling order*. All Plaintiffs intended to convey was that there was a time and place for summary judgment arguments to be made, but that the appropriate time and place was not in opposition to a motion to amend the complaint. By making that point Plaintiffs did not intend to give consent to the filing of a summary judgment motion out-of-time.

(Pls.' Reply Br. at 2).

Plaintiffs' re-worked argument, however, is at once grammatically and contextually disingenuous and substantively wrong. Grammatically, Plaintiffs had originally stated that Defendants "***are*** free to do that [file a motion for summary judgment]." Nowhere in their reply brief do Plaintiffs suggest this Motion is appropriate only at some future time, but rather in the present tense. And, Plaintiffs use of the present tense in their reply brief points to the contextual disingenuousness of their re-crafted argument here. Plaintiffs' statements that Defendants "are free" to file a motion for summary judgment come precisely to operate as a counter to Defendants' argument that the putative amendments are futile given Plaintiffs' failure in their discovery responses to fix the pleading inadequacies of the proposed amended complaint. Indeed, how would a motion for summary judgment operate as a substitute for Defendants' opposition to the proposed third amended complaint if it were not filed now in place of Defendants' futility argument? If Plaintiffs were arguing in their reply brief, as they now claim,

for filing a motion for summary judgment only at some future time as the correct procedural mechanism for a "futility" argument in opposition to the proposed third amended complaint, the incongruous effect would be that Defendants would have conceded the futility argument and would have abandoned any effective relief to prevent Plaintiffs' use of tactical ineptitude to prolong this litigation beyond reasonable bounds. But, the law is clear: a motion for summary judgment is not a procedurally disfavored step-child but an important procedural and substantive tool for due process. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the ***just***, ***speedy*** and ***inexpensive determination of every action***.") (internal quotations omitted) (emphasis added).

Even more to the contextual point, Plaintiffs' advice to Defendants to file a motion for summary judgment in lieu of Defendants' futility argument was manifestly in response to Defendants' explicit notice in their opposition brief that in addition to the futility argument, Defendants intended to file this Motion on the heels of their opposition to the motion for leave to file a third amended complaint.[4] In reality, Plaintiffs were arguing that the court should ignore the futility arguments and wait for the soon-to-be-filed motion for leave to file a motion for summary judgment. Now that Defendants have acted in accord with Plaintiffs' own advice, Plaintiffs now change their tune and ask this court to ignore the very motion they argued was appropriate in lieu of Defendants' futility argument.

Finally, even beyond the grammatical and contextual shortcomings of Plaintiffs' revisionism, Plaintiffs' actual effort at rewriting their consent is to no avail because it attempts to

[4] (Defs.' Opp'n in Supp. of Mot. to File Third Am. Compl. ["Defs.' Opp'n Br."], n. 1 at 2 ["In fact, Defendants anticipate seeking leave from this Court to file a motion for summary judgment in the coming days."]).

literally amend the Federal Rules of Civil Procedure and this court's Scheduling Order. To begin, as the Motion makes clear under the rubric of "Standard of Review" (Motion at 6-9), the proper time for a motion for summary judgment is "after adequate discovery." *See, e.g*., *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).

Thus, even given Plaintiffs' rewrite of their advice to Defendants to file a motion for summary judgment, the re-worked advice is that Defendants are "'free' to file a summary judgment motion *consistent with the applicable rules and the Court's scheduling order*." (Pls.' Reply Br. at 2 (emphasis in original)). But this re-crafted advice does not support their argument that the Motion is premature. As pointed out in the Motion and above, a motion for summary judgment is both ripe and eminently appropriate when, "after adequate discovery," the undisputed evidence in the record supports judgment in favor of the moving party. And, as also carefully documented in the Motion and above, after nine months of extensive (burdensome and costly) discovery, the undisputed evidence in the record supports summary judgment on all causes of action save trespass.

What is most telling about Plaintiffs' newly contrived advice is that Plaintiffs now purposefully eschew any substantive response to the Motion that would explain what discovery they anticipate would uncover evidence that would put at issue any of the legal issues now ripe

for decision. (Pls.' Reply Br. at 1 ["While Plaintiffs certainly dispute Defendants' claims as to what there is and is not evidence of and believe the evidence adduced during discovery will support all of its claims, the issue presented by Defendants' Motion for Leave is one of procedure and timing."]). But what Plaintiffs fail to do is actually explain why "procedure or timing" make this Motion premature. *See, e.g.*, *Chung Wing Ping v. Kennedy*, 294 F.2d 735, 737 (D.C. Cir. 1961) ("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); *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) [now Rule 56(d)], 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.").

Indeed, beyond ignoring the ***procedural*** jurisprudence of Rules 56(c) and (d),[5] which holds a motion for summary judgment is timely "after adequate discovery," and, further, that pleas for more time for discovery must specifically identify the legal issues and evidence that the non-moving party seeks to discover, Plaintiffs seek to rely on this court's Scheduling Order to hold that all of this jurisprudence is of no consequence, and that this court has an iron-clad rule that this Motion would only be ripe after the full one-year-and-five-months discovery period. But, that is not what this court's Scheduling Order says, nor is it what this court advised at the scheduling conference. At the scheduling conference, the court was clear: it did not want piecemeal filings of partial summary judgment motions. In this Motion, Defendants took the time and effort to carefully document each cause of action upon which they sought to move for summary judgment and the specific factual and legal basis for doing so. Plaintiffs, for their part, expressly and purposefully avoid those arguments and leave it to vague, imprecise, and substantively incorrect arguments of "procedure and timing" to counter Defendants very precise, fact-based legal arguments.

And, beyond all of this, the Scheduling Order is clear. If a party seeks to file a motion for summary judgment, the court must first set a briefing schedule. (Scheduling Order at § 10(h)). That briefing schedule is precisely what is sought by this Motion. Not surprisingly given their tactical ineptitude, Plaintiffs' effort to withdraw their consent in the face of unavailing and improper arguments against the Motion itself, renders their opposition to Defendants' Motion

[5] Defendants note that in the discussion in the Motion of such a claim by the non-moving party that additional discovery is needed, the Motion refers to Rule 56(f) following the numbering of the case law referring to Rule 56(f). However, Defendants should have noted that Rule 56(f) was amended and reassigned to Rule 56(d) in the 2010 amendments.

actually supportive of it. For these reasons and the reasons set forth in the Motion, Defendants respectfully ask the court to set an expeditious briefing schedule for Defendants' motion for summary judgment.

B. Plaintiffs' Attempt to Withdraw Their Oral Consent Provided During the Meet-and-Confer for this Motion Evidences Plaintiffs' Bad Faith.

Beyond their efforts to withdraw the written consent to this Motion, Plaintiffs incredulously attempt to contend that their oral consent to this Motion, provided during a substantive meet-and-confer, was somehow the result of a "miscommunication and misunderstanding between counsel during a telephone call." (Pls.' Notice of Non-Consent at 1). Plaintiffs go on to represent to this court that the actual meet-and-confer was a short telephone conversation of "less than 60 seconds." (*Id*. at 2). This is false. According to the digital telephone time log of Defendants' counsel (and Defendants were represented by two separate counsel, Messrs. Muise and Yerushalmi, both of whom certify the following), the meet-and-confer lasted for nearly seven minutes (precisely, 6:54) and included Defendants' counsel identifying each and every basis for the Motion. Plaintiffs' counsel, Nadhira al-Khalili, unequivocally consented to the filing of the Motion and agreed explicitly that Plaintiffs' consented to Defendants' filing of a motion for summary judgment.

Plaintiffs' counsel's argument that she believed the Motion "in large part overlapped with the issues already raised in the pending motion to dismiss filed by the CSP Defendants," is in some measure true, but as with many representations by Plaintiffs to this court, it is so imprecise and misleading that it is a distortion of the conversation. Not surprisingly, Plaintiffs' counsel does not inform this court why she assumed the proposed motion for summary judgment would only cover the issues previously raised in the pending motion to dismiss. Nonetheless, the discussions during the meet-and-confer explicitly tied this Motion with Defendants' arguments

raised in their opposition to Plaintiffs' motion for leave to file a third amended complaint to the extent that many of the issues relating to "futility" do indeed overlap with this Motion, and *because Plaintiffs claimed in defense of their motion to amend that the proper procedural mechanism for Defendants to advance a challenge to their claims was via a motion for summary judgment*. Given Plaintiffs' earlier written arguments that Defendants should file this Motion as a substitute for Defendants' futility arguments, Al-Khalili's characterization of her consent being the result of a "miscommunication and misunderstanding between counsel" can only be described as a purposeful distortion. While Defendants cannot know what Plaintiffs' counsel was thinking during the meet-and-confer, her expressed knowing and voluntary consent must, as a matter of law, bind Plaintiffs. If this were not the case, meet-and-confer conferences and other routine stipulations between counsel would be futile in the extreme.

Further, as set forth below, Plaintiffs' excuse of "imprecision" for both their written and oral consents to this Motion actually pale in comparison to the substantive imprecision brought to bear by Plaintiffs as a form of tactical ineptitude meant to prolong this litigation without rhyme, reason, or merit.

II. Plaintiffs' "Imprecision," Employed as Tactical Ineptitude, Extends to the Substantive Claims and Demonstrates that Defendants' Proposed Motion for Summary Judgment is Timely and Appropriate.

A. Plaintiffs' Confusion About the Real Plaintiff Party-in-Interest Evidences that a Motion for Summary Judgment is Appropriate.

As set out in the Motion in some detail, Plaintiffs have alleged in their Second Amended Complaint (as in the original Complaint[6] and in the First Amended Complaint[7]), that Defendant

[6] (Compl. at ¶¶ 11 & 15).
[7] (First Am. Compl. at ¶¶ 11 & 26).

Chris Gaubatz was employed as a volunteer intern by Plaintiff CAIR-AN[8] and in fact that he entered into the alleged confidentiality agreement with CAIR-AN. (Motion at 25-28). On this ground alone, CAIR-F's[9] claims arising out of the internship, including breach of contract, tortious interference with contract, and breach of fiduciary duty are facially suspect. But, again as noted in the Motion, during discovery Plaintiffs have decided that the real party-in-interest, the party that hired Defendant Chris Gaubatz as a volunteer intern, was not Plaintiff CAIR-AN, but in fact Plaintiff CAIR-F. Indeed, according to Plaintiffs' answers to interrogatories, only CAIR-F actually employs its employees and interns. (Motion, n. 16 at 28). Aside from contradicting the allegations in the Complaint that it was CAIR-AN that hired Defendant Chris Gaubatz, Plaintiffs' new position as to the real party-in-interest now renders Plaintiff CAIR-AN's claims facially suspect and, indeed, legally deficient.

This, however, is not the end of Plaintiffs' confusion. As noted in the Motion, Plaintiffs' original answers to Defendant CSP's interrogatories provided no answer to the question about which Plaintiff entered into the confidentiality agreement with Defendant Chris Gaubatz. (Motion at 14). Yet, after Defendants filed this Motion, Plaintiffs decided to serve supplemental answers to Defendant CSP's interrogatories. These supplemental answers attempt to make it clearer who the real party-in-interest is as the contracting party to the alleged confidentiality agreement. Thus, in Plaintiffs' Supplemental Answer to Interrogatory No. 14, Plaintiffs answer under oath as follows:

> 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

[8] We refer to Plaintiff Council on American-Islamic Relations Action Network, Inc., as "CAIR-AN," as in the Motion.
[9] We refer to Plaintiff CAIR-Foundation, Inc., as "CAIR-F," as in the Motion.

> signer with that Plaintiff, and the date the signer signed the Confidentiality and Non-Disclosure Agreement.
>
> Answer: Without waiving the previous objections, an employee of CAIR-Foundation would have signed the Confidentiality Agreement on behalf of "CAIR". The witness and signer is generally the person to whom the signer reports. In this instance, Raabia Wazir, who was employed as CAIR-Foundations' Outreach Coordinator, gave Defendant Chris Gaubatz a copy of the Confidentiality Agreement on or about June 16, 2008. She instructed him to sign it and return it to her.

(Pls.' Supplemental Answers to Def. CSP's First Set of Interrogs. at 8, attached hereto as Ex. 1).

Aside from the notable fact that Plaintiffs do not assert that Defendant Chris Gaubatz actually signed the confidentiality agreement, something Defendant Chris Gaubatz denies doing (Motion at 26), and aside from the notable fact that Plaintiffs do not even assert that CAIR-F's representative, Raabia Wazir, actually signed the agreement, the answer expressly contradicts the Complaint by swearing under oath that the real party-in-interest as the contracting party is CAIR-F. And, without a pause, Plaintiffs supplement their earlier answer to Interrogatory No. 15, which seeks to get at the real party-in-interest for those claims predicated upon Defendant Chris Gaubatz's employment as a volunteer intern (*i.e.*, breach of fiduciary duty), in relevant part as follows:

> 15. Identify which Plaintiff hired Defendant Chris Gaubatz as an intern, which employee of that Plaintiff acting on behalf of that Plaintiff entered into the intern employment agreement with Defendant Chris Gaubatz, and the date that intern employment agreement was entered into. State the terms of the intern agreement entered into with Defendant Chris Gaubatz at inception and provide the dates and terms of any modifications of that intern employment agreement and which employee of the contracting Plaintiff acting on behalf of that Plaintiff entered into the modification agreement(s).
>
> Answer: Without waiving the previous objections, Chris Gaubatz's first date volunteering at CAIR was in April 9, 2008 where he was instructed to assist organizing a storage room on April 9, April 10 and June 12. As an intern, he worked for CAIR-Foundation, which does business as the Council on American-Islamic Relations or "CAIR". . . .

(Pls.' Supplemental Answers to Def. CSP's First Set of Interrogs. at 15 at Ex. 1).

So we now learn that indeed CAIR-F is the proper party-in-interest and not CAIR-AN. As such, Plaintiffs have unequivocally conceded that CAIR-AN had no contractual privity with Defendant Chris Gaubatz and, indeed, as we learned in Plaintiffs' answer to Interrogatory No. 1 in both Plaintiff's original answers and in their supplemental answers, all "CAIR" employees were employed by CAIR-F, not CAIR-AN. In other words, Defendant Chris Gaubatz *never* came in contact with *anyone* employed by CAIR-AN, rendering any claims of breach of some fiduciary duty owed to CAIR-AN also facially suspect and legally deficient.

Beyond the fact that Plaintiffs' sworn testimony now expressly contradicts the allegations of their complaint, where "CAIR" is used to mean CAIR-AN and it is allegedly CAIR-AN that hired Defendant Chris Gaubatz and entered into the confidentiality agreement with him, we now learn that Plaintiffs have reversed themselves and swear that it was CAIR-F. And, indeed, it is CAIR-F which does business as "CAIR" and which dealt with Defendant Chris Gaubatz exclusively.[10]

But, Plaintiffs' tactical ineptitude still does not end here. Notwithstanding Plaintiffs' Supplemental Answers to Interrogatory Nos. 14 and 15, which have informed us definitively that

[10] Plaintiffs' confusion or imprecision as to which Plaintiff is the real party-in-interest is no accident, but rather very much a part of Plaintiffs' tactical ineptitude. Thus, as noted in the Motion, all of this "imprecision" could have and should have been cleared up when the Gaubatz Defendants challenged the original Complaint with their motion to dismiss on the very confusion of Plaintiff CAIR-AN suing in the name of a non-entity referenced in the Complaint as Council on American-Islamic Relations. (Motion at 3). Plaintiffs' First and Second Amended Complaints purportedly fixed this "imprecision" by telling us that CAIR-AN is "CAIR" and CAIR-F is merely a "supporting organization to CAIR and its mission." (Second Am. Compl. at ¶ 11). Yet, now we're told that CAIR-AN had no employees or interns during Defendant Chris Gaubatz's internship and that all agreements (*i.e.*, employment-fiduciary relationship and confidentiality agreements) were between Plaintiff CAIR-F and Defendant Chris Gaubatz. In what capacity is CAIR-AN a plaintiff is hardly a rhetorical question at this stage in the proceedings.

CAIR-F is the real party-in-interest and that it does business as "CAIR," all directly contradicting the allegations of the Complaint, Plaintiffs have sworn under oath, albeit somewhat mysteriously, that there is a third "entity," besides Plaintiffs, and also called "CAIR," that is the real party-in-interest. See, for example, Plaintiffs' Answer to Interrogatory No. 16 where Plaintiffs testified as follows:

> 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. (emphasis added).

(Pls.' Answer to Interrog. No. 16 [Ex. 1 to Motion at 23] [Doc. No. 120-1]).

If we accept Plaintiffs' Answer to Interrogatory No. 16, which contradicts both the allegations of the Complaint and Plaintiffs' Supplemental Answers to Interrogatories Nos. 14 and 15, the real party-in-interest, "CAIR," is really not CAIR-AN or CAIR-F, but some kind of third entity, which is not a party plaintiff in this lawsuit. And, it was this non-party entity which hired Defendant Chris Gaubatz and was the "entity" that entered into a fiduciary relationship with Defendant Chris Gaubatz, and which should have alleged the breach of contract and fiduciary duty causes of action. Quite obviously, if we accept Plaintiffs' Answer to Interrogatory

No. 16, this court should not only grant Defendants' Motion, but should ultimately grant Defendants' motion for summary judgment dismissing claims raised by Plaintiffs' CAIR-AN and CAIR-F, since neither of these "entities" are the "entity" that is the real party-in-interest, with the exception of the trespass claims since presumably, although it is not clear from the complaint, both Plaintiffs have a property interest in the offices where Defendant Chris Gaubatz was volunteering as an intern.

While more could be detailed on Plaintiffs' tactical ineptitude on this issue of the real party-in-interest,[11] what is clear at this stage is that only Plaintiffs know who the real party-in-

[11] For example, in the Second Amended Complaint at ¶¶ 10-11, Plaintiffs assert that CAIR-AN and CAIR-F are non-profit organizations. In another federal lawsuit, Plaintiffs claim that CAIR-AN is an IRC § 501(c)(4) organization (*i.e*., non-profit lobbying organization but without the benefits of tax-deductibility for donors), and CAIR-F is an IRC § 501(c)(3) organization (*i.e*., charitable non-profit with minimal lobbying activities permitted with the benefit of tax-deductibility for donors (*see* 26 U.S.C. §§ 501(c)(3)-(4)). (*See* Second Am. Compl. [Doc. No. 16] at ¶ 5 filed in *Council on Am.-Islamic Relations. Action Network, Inc. v. Schlussel*, Case No. 2:11-cv-10061-AC-MKM (E.D. Mich. filed Apr. 27, 2011)). If, as Plaintiffs now swear under oath, CAIR-AN and CAIR-F do business and operate as a single "entity," they would be in violation of IRS regulations designed to establish a fire-wall between the lobbying organization (*i.e*., the 501(c)(4) entity) and the non-lobbying charitable organization (*i.e*., the 501(c)(3) entity). *See, e.g., Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983) (observing the IRS requirement that the 501(c)(4) entity's activities be organizationally separate from the tax-deductible fund raising activities of the 501(c)(3) organization); *see also* IRS publication, 2000 EO CPE, Ch. S., Ward. L. Thomas & Judith E. Kindell, "Affiliations Among Political, Lobbying and Educational Organizations," § 3.B. at 259, available online at IRS website at http://www.irs.gov/pub/irs-tege/eotopics00.pdf ("In essence, an organization affiliated with an IRC 501(c)(3) organization must observe the formalities of its separate organizational status and deal with the IRC 501(c)(3) organization at arm's length. Otherwise, its activities may be considered activities of the IRC 501(c)(3) organization, especially if the IRC 501(c)(3) organization provides any subsidy.")

Indeed, given Plaintiffs' imprecision about who and what they are, it is not surprising that the IRS has revoked both CAIR-AN's 501(c)(4) status and CAIR-F's 501(c)(3) status. *See* IRS online notice of revocation for CAIR-F at http://apps.irs.gov/app/eos/displayRevocation.do?dispatchMethod=displayRevokeInfo&revocationId=56704&ein=770646756&exemptTypeCode=al&isDescending=false&totalResults=1&postDateTo=&ein1=&state=DC&dispatchMethod=searchRevocation&postDateFrom=&country=US&city=&searchChoice=revoked&indexOfFirstRow=0&sortColumn=ein&resultsPerPage=25&names=cair&zipCode=&deductibility and IRS online notice of revocation for CAIR-AN at

interest is, or should be, to pursue the claims against Defendants. And, this is so because only Plaintiffs own and control this information. Yet, Plaintiffs have so tortured the record in this case that Defendants' proposed motion for summary judgment is not only ripe, it is demonstrably appropriate. For this reason and the other bases raised herein and in the Motion, Defendants respectfully request that this court grant their Motion and set a briefing schedule for Defendants' motion for summary judgment.

B. Plaintiffs' Have Failed to Carry Their Evidentiary Burden on either the Federal & D.C. Statutory Causes of Action or the Damages Issue of the Common Law Counts.

As set forth in detail in the Motion, Plaintiffs have failed to carry their evidentiary burden to establish the requisite elements of either the federal and D.C. statutory counts or the damages issue of the common law counts (save trespass). Plaintiffs' response, however, is not merely imprecision or tactical ineptitude, it is studied avoidance. As noted above, Plaintiffs purposefully have decided to avoid the substance of the Motion and the specific facts developed in the Motion supporting the timeliness and appropriateness of a motion for summary judgment. Instead, Plaintiffs make three entirely unsupported arguments about "procedure."

First, Plaintiffs claim that it should not be bound by their sworn answers to Defendants' interrogatories because Plaintiffs have interposed general (*i.e.*, generic) and specific objections to the interrogatories. (Pls.' Opp'n Br. at 4-5). Plaintiffs then explain their rationale by asserting, without any citation to the Federal Rules of Civil Procedure or to any precedent, that "[i]f Defendants believe their interrogatories are proper, not overly broad, and otherwise defensible

---

http://apps.irs.gov/app/eos/displayRevocation.do?dispatchMethod=displayRevokeInfo&revocationId=89700&ein=521887951&exemptTypeCode=al&isDescending=false&totalResults=1&postDateTo=&ein1=521887951&state=All...&dispatchMethod=searchRevocation&postDateFrom=&country=US&city=&searchChoice=revoked&indexOfFirstRow=0&sortColumn=ein&resultsPerPage=25&names=&zipCode=&deductibility=all.

and that Plaintiffs' brief answers provided subject to objections are insufficient, then it is incumbent upon Defendants to file a motion to compel seeking a further response." (Pls.' Opp'n Br. at 5). But this is quite patently wrong. First, Plaintiffs did in fact provide specific sworn answers to the interrogatories, albeit subject to their objections. But these objections do not render their answers inadmissible, but rather complain about the form of the interrogatories. Second, to the extent that Plaintiffs are arguing that their own answers are somehow not admissible evidence simply, Plaintiffs must act in accordance with Rule 56(c)(2). *See* Fed. R. Civ. P. 56(c)(2). Rule 56(c)(2) makes clear that a party opposing the admissibility of evidence must present that objection in the context of the motion for summary judgment itself. In fact, Plaintiffs could have argued the merits of whatever objections they believe render their answers inadmissible, but, true to "imprecise" form, they have chosen not to. And finally, Plaintiffs argument borders on an admission that they are abusing the discovery process by providing responses that are purposefully vague and incomplete in order to impose a burden on Defendants to file a formal motion to compel before providing a proper response. If true, such tactics are subject to sanctions.[12]

Plaintiffs' second argument in opposition to the Motion claims that they should not be bound by their "brief answers," or their failure to produce even a single document in response to document requests served more than six months ago because Defendants have not taken any

[12] The fact that Plaintiffs have yet to produce a single scrap of paper in response to CSP Defendants' request for production documents, served on Plaintiffs on Nov. 14, 2011, is itself suggestive of Plaintiffs' tactical approach to the Rules. Indeed, in their opposition to this Motion, Plaintiffs even represent to the court that they intend to produce 3000 documents "within the next several days." To date, well after "the next several days," Plaintiffs have produced no such documents, notwithstanding their written representation to this court. (Pls.' Opp'n. Br. at 6). And, more to the point, if Plaintiffs have somehow discovered 3000 documents to produce in response to a document request served on them six and one-half months ago, what possible explanation do they have for the delay? Was not a single document available to them and producible within the very clear timelines provided by the Rules?

depositions. (Pls.' Opp'n Br. at 5-6). Yet, Plaintiffs cite no legal support for the proposition that a party moving for summary judgment must conduct the discovery (*i.e.*, depositions) the non-moving party thinks appropriate. By ignoring the Federal Rules of Civil Procedure, Plaintiffs have crafted an argument that is absurd on its face. In fact, Rule 56(c)(1)(A) states that "[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." In other words, there is no requirement that a party use deposition testimony in lieu of or in addition to sworn answers to interrogatories. Moreover, the only question is whether the evidence developed through discovery establishes that there is no genuine dispute over any material fact. F. R. Civ. P. 56(a).

To the extent that Plaintiffs are claiming that additional discovery would create a genuine dispute over a material fact, as noted in the Motion, the analysis for such a claim is based upon Rule 56(d).[13] Yet, as noted in the Motion itself, Plaintiffs are required to state what evidence they believe they will develop with further discovery. *King v. United States Dep't of Justice*, 830 F.2d 210, 232 (D.C. Cir. 1987) ("Rule 56(f) [now Rule 56(d)] 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."). And, as pointedly argued in the Motion, all of the evidence relating to Plaintiffs' primary violations of the Federal and D.C. statutory violations and the damages element of the common law counts *is in the possession and*

[13] *See* note 5 *supra*.

control of Plaintiffs. This brute fact explains why Plaintiffs, in their opposition to this Motion, have not suggested even a single evidentiary fact they wish to develop with further discovery. And the reason is simple: there is none.

Plaintiffs third and final argument in opposition to the Motion is simply incoherent. Plaintiffs cite *AT&T Corp. v. Dataway Inc*., 577 F. Supp. 2d 1099, 1109 (N.D. Cal. 2008), as some kind of evidentiary rule that all answers to interrogatories by the moving party are magically converted into hearsay. This argument is wrong on so many counts it is hard to know where to begin. We will not prolong this agony beyond the three most obvious reasons this argument is absurd. First, hearsay is a specific evidentiary rule and nowhere in Rule 801 of the Federal Rules of Evidence is hearsay defined so as to prohibit the use of the moving party's sworn answers to interrogatories in support of a civil motion. Moreover, answers to interrogatories operate as sworn testimony, and, unless that testimony is asserting the truth of a matter of an out-of-court statement that does not fall within one of the hearsay exceptions, the answers are not hearsay, irrespective of whether they are the moving party's answers or some other party's answers. Fed. R. Civ. P. 33(c) ("An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.") Second, *AT&T Corp. v. Dataway, Inc.* does not even remotely stand for Plaintiffs' novel, if not absurd, new evidentiary rule on hearsay. Simply, the court was noting that the moving party's specific statements of damages in its answers were themselves based upon hearsay, not creating some new generic rule that turns all answers to interrogatories of the moving party into hearsay. Third, even if Plaintiffs are somehow arguing that Defendant Chris Gaubatz's specific answers to interrogatories are in fact hearsay, which is manifestly not the case, that argument must be made as to specifics, either in the context of Plaintiffs' opposition to this Motion or in their opposition to Defendants' motion

for summary judgment. Plaintiffs have made no such argument.

CONCLUSION

Plaintiffs have failed to explain why this court ought to treat this Motion as anything other than a consent motion. Moreover, Plaintiffs have purposefully avoided confronting the evidence supporting a motion for summary judgment detailed in the Motion and have opted instead to argue "procedure." But, Plaintiffs' "procedure" arguments are not only unsupported by any legal argument, they are facially absurd. 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,

LAW OFFICES OF DAVID YERUSHALMI, P.C.

/s/ David Yerushalmi
David Yerushalmi, Esq. (DC Bar No. 978179)
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, and Sara Pavlis

AMERICAN FREEDOM LAW CENTER

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

/s/ Erin Mersino
Erin Mersino, Esq. (MI Bar No. P70886)
THOMAS MORE LAW CENTER
P.O. Box 393
Ann Arbor, MI 48106
emersino@thomasmore.org
Tel: (734) 827-2001
Co-Counsel for Defendants Center for Security Policy, Christine Brim, Adam Savit, and Sara Pavlis

/s/ Martin Garbus
Martin Garbus (admitted *pro hac vice*)
Eaton & Van Winkle LLP
3 Park Avenue, 16th Floor
mgarbus@evw.com
New York, NY 10016
Tel: (212) 561- 3625
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
horowitz@whitecollar.us
Tel: (925) 283-1863
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
Fax: (202) 454-2805
Email: WEshelman@butzeltp.com
Co-Counsel for Gaubatz Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 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.

LAW OFFICES OF DAVID YERUSHALMI, P.C.

/s/ David Yerushalmi
David Yerushalmi, Esq.