IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNCIL ON AMERICAN-ISLAMIC RELATIONS, Plaintiffs, v. PAUL DAVID GAUBATZ; CHRIS GAUBATZ, a.k.a. "David Marshall"; and JOHN AND JANE DOE NOS. 1-10, Defendants.	)	Civil Action No. 09-2030 (CKK) Judge Colleen Kollar-Kotelly

REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION TO AMEND COMPLAINT

Plaintiff, Council on American-Islamic Relations Action Network, Inc., previously misnamed "Council on American-Islamic Relations," submits this reply memorandum in further support of its motion for leave to file its First Amended Complaint.

A. Defendants Misconstrue the Applicable Standard and Relevant Considerations

Defendants oppose Plaintiff's motion claiming that "Plaintiff submits no reason that the amended pleading should be filed" (Opp'n at 1) and complaining that its motion was filed "without a declaration and without a showing of good cause." (*Id.* at 15.) Defendants both overlook the substantive additions to the amended complaint and misconstrue the standard for determining whether to grant leave to amend under Rule 15. First, the amended complaint is necessary to add an additional cause of action and an additional plaintiff and to correct the misnomer in the original complaint. Second, the law provides that leave to amend shall be freely given unless there is a good reason ***not*** to grant leave. *Steinbuch v. Cutler*, 463 F. Supp. 2d 1, 3 (D.D.C. 2006) ("The presumption runs in the plaintiff's favor that he may amend his complaint '[i]n the absence of any apparent or declared reason ….'") (quoting *Foman v. Davis*, 371 U.S.

178, 182 (1962)). As such, it is Defendants' burden to identify some reason why leave should not be granted. They have failed to do so.

Defendants first argue that "[t]here is no benefit to the filing of the amended complaint and the time and expense that it will impose on defendants is unnecessary." (Opp'n at 1.) But that is not a basis upon which to deny a motion for leave to amend, especially in light of the fact that discovery has not begun and will need to be conducted irrespective of whether leave to amend is granted. In any event, the burdens associated with defending against new or additional claims or allegations are not the type of prejudice to a defendant that will justify denying leave to amend. *See Hisler v. Gallaudet Univ.*, 206 F.R.D. 11, 14 (D.D.C. 2002) ("an 'adverse party's burden of undertaking discovery, standing alone, does not suffice to warrant denial of a motion to amend a pleading'") (quoting *United States v. Cont'l Ill. Nat'l Bank & Trust Co.*, 889 F.2d 1248, 1255 (2d Cir. 1989)).

Defendants next contend that "nothing has changed with the proposed amended complaint making its filing simply a dilatory tactic." (Opp'n at 2.) Defendants again ignore the fact that the amended complaint adds an additional cause of action and an additional plaintiff, but even if it did not do so, there is no obstacle to (and indeed every practical reason to encourage) the filing of an amended complaint to make non-substantive corrections or clarifications. Even where a plaintiff's putative amendment has been unduly delayed (which Plaintiff's has not), courts routinely grant leave to amend where the amendment would do no more than clarify legal theories or make technical corrections. *See Harrison v. Rubin*, 174 F.3d 249, 253 (D.C. Cir. 1999).

Defendants also mischaracterize the motion to amend as a "tactical delay" designed "to avoid confronting the fully briefed legal issues in the Rule 12(b)(6) motion." (Opp'n at 12; *see*

also id. at 3 (arguing "the motion [to dismiss] should proceed").) While the First Amended Complaint does obviate certain of the technical pleading arguments made in the motion to dismiss, it does not moot the motion entirely and Plaintiff has never suggested that the Court should not rule on that motion. There is no need to refile or rebrief the motion and there is no reason the Court cannot consider the arguments from the motion to dismiss in light of the First Amended Complaint. It is actually Defendants who seek an unwarranted tactical advantage in resisting any attempt to amend the complaint either now or after the Court rules on the motion to dismiss. (*See* Opp'n at 3 ("This is another reason why the motion should proceed and if granted, plaintiff should not be given leave to amend.").) If there are pleading defects that can be cured by amendment, there is no just reason not to permit Plaintiff the opportunity to correct those either before or after the Court rules on the motion to dismiss.

B. The First Amendment Bars Neither the Original Nor the First Amended Complaint

The crux of Defendants' opposition is effectively a futility argument premised on a regurgitation of the incorrect and inapposite First Amendment arguments made in their motion to dismiss. But neither the original nor the amended complaint focuses, as Defendants contend, "solely on First Amendment protected conduct"[1] (Opp'n at 4) and the First Amendment simply has no application.

First, the principal authority relied upon by Defendants, *Bartnicki v. Vopper*, 532 U.S. 514 (2001), explicitly excludes from its application the sort of factual scenario presented by this case. In *Bartnicki*, the Supreme Court held that the First Amendment protected the defendants' publication of an illegally intercepted telephone conversation, but critical to the Court's holding

[1] Defendants conveniently omit from their list of quotations from the First Amended Complaint (Opp'n at 4-5) all of the allegations about their deception of and theft from Plaintiff, actions which are not even speech, much less "First Amendment protected conduct." Accordingly, even if the allegations selectively quoted by Defendants did relate to "First Amendment protected conduct" (which, as detailed *infra*, they do not) the First Amended Complaint does not "focus[] ***solely***" upon such conduct.

was the fact that the defendants had "***played no part*** in the illegal interception" and that "their access to the information on the tapes was obtained ***lawfully***, even though the information itself was intercepted unlawfully by someone else."[2] *Id.* at 525 (emphasis added). Here though, Defendants were very much participants in the unlawful conduct. The defendants in *Bartnicki* were third parties to the illegality who came upon the recording through no unlawful conduct of their own. By contrast, Defendants themselves gained access to Plaintiff's facilities through misrepresentation and under false pretenses and stole documents and made surreptitious recordings in violation of their legal duties and obligations. In holding that "speech by a law-abiding possessor of information" was protected, *Bartnicki* emphasized that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." 532 U.S. at 529. That is precisely what Plaintiff is seeking to do.

Further, Defendants are not, as they suggest, members of the "news media." (Opp'n at 2 n.2.) But even if they were, such status would give them "no special immunity from the application of general laws" and "no special privilege to invade the rights and liberties of others." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 679 (1991). Even "[t]he press may not with impunity break and enter an office or dwelling to gather news," *id.* at 669, or "disregard promises that would otherwise be enforced under state law." *Id.* at 672. Accordingly, the First Amendment does not protect Defendants' conduct in intruding upon the property of others, deceiving others, breaching contractual and fiduciary duties, stealing property, and violating Plaintiff's reasonable expectations of confidentiality.

To be sure, both the original and amended complaints allege facts relating to Defendants' dissemination and disclosure of the surreptitiously-obtained materials and reference Mr.

[2] The Court's ruling was also premised on the assumption that the subject matter of the conversation was a matter of public concern. 532 U.S. at 525. This is another point of distinction, but for present purposes it is unnecessary to delve into this complicated factual and legal issue as applied to this case.

Gaubatz's book as it is a source of many admissions and/or evidence of Defendants' unlawful conduct. But it does not follow, as Defendants continue to insist, that either complaint "attack[s] First Amendment protected conduct" or seeks to recover damages for purely reputational injury, which is all that the First Amendment forecloses absent satisfaction of the constitutional libel standard. *See Cohen*, 501 U.S.at 669-71. It is not disclosure or publication as such that the First Amendment protects, but rather liability for purely reputational injury flowing from publication. The First Amendment does not privilege someone to steal valuable non-public information such as trade secrets, proprietary data, or privileged materials and, having so stolen it, to disclose it and thereby impair the value it had by virtue of its confidentiality. Indeed, *Bartnicki* left open the question of whether the First Amendment would protect the disclosure of "trade secrets or domestic gossip or other information of purely private concern" ***by even a law-abiding possessor of information*** (which, as detailed *supra*, Defendants were not). 532 U.S. at 533.

C. Defendants' Arguments Regarding the Value of the Documents Go to a Factual Issue and Are Inappropriate for a Motion to Dismiss and/or Opposition to a Motion for Leave to Amend the Complaint

As part of their general challenge to the viability of the Complaint and First Amended Complaint, Defendants seek to diminish the value of the proprietary, privileged, and confidential information they stole and disclosed. (*See* Opp'n at 10-11.) As previously noted, challenges to the nature or quantum of damages are not a proper basis for dismissal (or, by the same rationale, denying a motion for leave to amend as futile). (*See* Doc. 37 at 9-10.) In any event, the fact that some of the documents stolen by Defendants were intended to be shredded does not, as Defendants attempt to argue, make the confidentiality of the information contained within those documents any less valuable. That an entity possessing valuable intangible property or confidential materials would choose to shred old or excess documents reflecting that information is not an indication of a lack of value in that information; to the contrary, disposing of documents

in that fashion reflects a desire to protect and maintain the confidentiality of the information. By stealing those documents, Defendants interfered with and destroyed the confidential character of the information which represented a critical component of its value.

Nor does the fact that damages may be difficult to quantify so as to justify a temporary restraining order and/or preliminary injunction mean that a plaintiff is foreclosed from seeking to prove and recover those damages. (*See* Opp'n at 11.)

D. The Case Is Not Moot

As detailed in the opposition to Defendants' motion to dismiss (*see* Doc. 37 at 26-27), this case is in no way mooted by Defendants' agreement to the terms of the preliminary injunction and their return of what they claim to be all of the surreptitiously-obtained documents and recordings (a claim which has not yet been explored and tested). If it were that simple, a car thief could escape liability merely by returning the stolen car and declaring "no harm, no foul." Plaintiff is entitled to carry its case to judgment and prove its claims for compensatory, unjust enrichment, and punitive damages; Defendants, having been caught in their theft, cannot moot the case by simply returning that which they stole.

E. Neither Correction of Plaintiff's Legal Name Nor the Addition of CAIR-Foundation, Inc. as a Plaintiff Constitutes a Substitution of Parties

Defendants concede that "[i]f CAIR is CAIR-AN and CAIR-Foundation is somehow a legitimate part of some corporate entity, the name change is of no great importance." (Opp'n at 12.) Defendants' own record makes clear that this is the case.

As the documents submitted with the motion to dismiss show, the Council on American-Islamic Relations, Inc. was incorporated in 1994 and, in 2007, changed its name to Council on American-Islamic Relations Action Network, Inc. (*See* Doc. 34-2, Horowitz Decl., Exhs. 2, 4, 7, 8.) Accordingly, both Council on American-Islamic Relations, Inc., and Council on American-

Islamic Relations Action Network, Inc. refer to the same entity. The original complaint mistakenly employed the old name (albeit omitting the "Inc."), but the entity at issue is the same. Council on American-Islamic Relations is not, as Defendants claim, a "defunct corporation" (Opp'n at 13); rather, it is a validly operating corporation that has simply changed its name.

Further, CAIR-Foundation is not just "a legitimate part of some corporate entity," it is itself a legitimate corporate entity. (*See* Doc. 34-2, Horowitz Decl., Exh. 11, Exh. A.)

Accordingly, as Defendants' concede, "the name change is of no great importance" and there is no reason not to grant leave to amend so that the full, current name is identified.

The misnomer is obvious from the corporate filings Defendants have themselves already submitted, but to the extent Defendants demand an "under oath" statement that the original complaint reflected an inadvertent misnomer, counsel will do so. (*See* Exh. A.) Because no substitution of parties is made in the amended complaint,[3] leave to amend is sought under Rule 15, which requires no showing of an honest or understandable mistake as some courts have required for an amendment under Rule 17. However, to the extent Defendants' contend there is a substitution of parties, the attached declaration of counsel makes clear that the misnomer was a good faith oversight and was in no way intended to confuse anyone. As detailed previously, the misnomer did not, in fact, confuse anyone. (*See* Doc. 37 at 3-6, Doc. 43 at 3-4.) Indeed, Defendants' own motion to dismiss indicates their understanding that "on June 11, 2007, the Board of Directors of CAIR voted to change the name to CAIR-AN." (Doc. 34-1 at 2.)

[3] Defendants' claim that "two organizations are now substituted" (Opp'n at 12) is incorrect. The name of the original plaintiff is being corrected and a second plaintiff is added. There is no entity that was a party to the original complaint which would no longer be a party to the amended complaint. Accordingly, there is simply no substitution. The authority relied upon by Defendants, such as *Lans v. Gateway 2000, Inc.*, 84 F. Supp. 2d 112 (D.D.C. 1999), involves situations where a party brings an action in its own name even though the right being asserted is actually owned by another party. Here, the party always intended to bring the action in its own name, it just stated its name less than completely. *See Hilgraeve Corp. v. Symantec Corp.*, 212 F.R.D. 345, 347-48 (E.D. Mich. 2003) (granting motion to amend complaint to correct name of plaintiff from "Hilgraeve Corporation" to "Hilgraeve, Inc." because "Defendant has adduced no evidence that the *entity* bringing this suit … would change following the proposed amendment to the complaint").

F. The First Amended Complaint Does Not Inject Any Jurisdictional Issues

Defendants again argue that all of this somehow implicates the Court's diversity jurisdiction. (Opp'n at 12-13.) It was never Plaintiff's intention to give the impression that CAIR Maryland-Virginia was "part of plaintiff" (Opp'n at 13), and the amended complaint actually revises the references in the original complaint quoted by Defendants to eliminate any potential confusion. (*See* First Amended Complaint ¶¶ 17-18.) Moreover, even if Defendants' theory of an unincorporated association (Opp'n at 14) were correct, CAIR Maryland-Virginia could have no effect on diversity in this case because, as Defendants themselves have noted (*see* Doc. 34 at 1), that entity was dissolved in 2008 and, therefore, could not be a member of any unincorporated association as it existed in October 2009 and, even when it did exist, it was a Maryland corporation. (*See* Doc. 34-2, Horowitz Decl., Exh. 1.)

CONCLUSION

For the reasons stated above and in Plaintiff's opening memorandum, the Court should grant leave to amend and order the Clerk to docket the attached First Amended Complaint.

Respectfully submitted,

Dated: March 15, 2010

/s/Daniel Marino
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