The Supreme Court of South Carolina

M. Lee Jennings, Respondent,

v.

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually, and BJR International Detective Agency, Inc., of whom Holly Broome is, Defendants, Petitioner.

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *Jennings v. Jennings,* 389 S.C. 190, 697 S.E.2d 671 (Ct. App. 2010). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

C.J.

J.

J.

J.

J.

Columbia, South Carolina

March 3, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Opinion No. 4711
Heard April 15, 2010 - Filed July 14, 2010

RECEIVED
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S.C. Supreme Court

M. Lee Jennings,. ..... Respondent,

v.

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and as BJR International Detective Agency, Inc., Defendants, of whom Holly Broome is, ... Petitioner.

BRIEF OF PETITIONER BROOME

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STATEMENT OF ISSUES ON APPEAL

I. DID THE COURT OF APPEALS ERR IN REVERSING THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT TO THE PETITIONER BECAUSE THE EMAILS IN QUESTION DID NOT FALL WITHIN THE DEFINITION OF ELECTRONIC STORAGE AS STATED IN THE CLEAR AND UNAMBIGUOUS LANGUAGE OF 18 U.S.C. §2510(17)(B)?

II. DID THE COURT OF APPEALS ERR IN REVERSING THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT TO THE PETITIONER ON THE GROUNDS THAT THERE WAS NO EVIDENCE IN THE RECORD THAT THE EMAILS IN QUESTION WERE IN FACT STORED FOR PURPOSES OF BACK UP PROTECITON BY ANY PERSON OR ENTITY?

STATEMENT OF THE CASE

This case was initiated by the Respondent on February 20, 2007 by filing and serving a Summons and Complaint against several Defendants, including the Petitioner Broome, alleging causes of action for interception of electronic communications pursuant to §17-30-10 and §17-30-135, S.C. Code Ann. (1976, as amended), and for invasion of privacy for publication of private affairs, invasion of privacy for wrongful intrusion into private affairs and conspiracy to intercept and disseminate the Respondent's private electronic communications. (Summons and Complaint filed February 20, 2007, R. pp. 1-10). The Complaint was answered by the Petitioner. (Answer of Petitioner Broome filed March 30, 2007, R. pp. 17-19). Subsequently, the Defendants consented to amendment of the Complaint by way of consent order. The Complaint was then amended to include causes of action for alleged violations of §16-16-10, *et seq.*, S.C. Code Ann. (1976, as amended), 18 U.S.C. §§2510-2522 and 18 U.S.C. §§2701-2712. (Amended Complaint filed July 25, 2007, R. pp. 102-108). Holly Broome filed an Answer to the Amended Complaint. (Answer of Petitioner Broome filed August 7, 2007, R. pp. 115-117). After discovery, all parties moved for summary judgment and the Respondent moved to amend his Complaint again to include additional parties and additional causes of action. A hearing was held before the Honorable L. Casey Manning on June 19, 2008 on all parties' Motions for Summary Judgment and on the Respondent's Motion to Amend his Complaint for the second time. At the hearing, counsel for the Respondent stipulated that there was no interception of the e-mails which are the subject of this suit and he was,

therefore, no longer pursuing the causes of action under §17-30-10, *et seq.* and 18 U.S.C. §§2510-2520, *et seq.* (Transcript of June 25, 2008 Hearing, R. pp. 587-588). He also stipulated that he was no longer pursuing the cause of action under §16-16-10, *et seq.* S.C. Code Ann. (1976, as amended) as there had been no conviction under that statute. (Transcript of June 25, 2008 Hearing, R. pp. 559-560). He also stipulated that the Respondent was no longer pursuing the cause of action for conspiracy to intercept the Respondent's e-mails because there had been interception under the above-referenced statutes. Therefore, the issues before the Court at the June 19, 2008 hearing were the Motions for Summary Judgment on the Respondent's cause of action alleging violation of the Federal Stored Communications Act, 18 U.S.C. §§2701-2712, the common law invasion of privacy claims for publicizing private affairs and wrongful intrusion, and the Respondent's Motion to Amend his Complaint to add an additional party defendant and an additional cause of action for damage to his business.

The Court issued an Order filed September 24, 2008 granting the Defendants' Motions for Summary Judgment as to the Respondent's cause of action alleging violation of the Federal Stored Communications Act and the causes of action for common law invasion of privacy for publicizing private affairs and wrongful intrusion. The Court denied the Respondent's Motion to Amend his Complaint to add an additional party defendant and an additional cause of action for damage to his business. (Order filed September 24, 2008 Granting Defendants' Motion for Summary Judgment Denying Plaintiff's Motion to Amend Complaint, R. pp. 404-415). A Motion to Reconsider was filed by the Respondent

and denied by the Court. This appeal followed. The portion of the Circuit Court Order granting the Defendants' Motions for Summary Judgment as to Respondent's common law invasion of privacy claims were not appealed and the only issues under appeal were the Circuit Court's granting Defendants' Motions for Summary Judgment as to the cause of action alleging violation of the Federal Stored Communications Act and the denial of the Respondent's Motion to Amend the Complaint for a second time.

The South Carolina Court of Appeals issued its Opinion on July 14, 2010. The Court of Appeals affirmed the Circuit Court's grant of summary judgment to Defendants Brenda Cooke, Individually, BJR International Detective Agency, Inc. and Gail M. Jennings on the Federal Stored Communications Act on the grounds that those Defendants did not access M. Lee Jennings' email account and, therefore, could not be held liable under 18 U.S.C. §2701, as found by the Circuit Court. Respondent did not specifically challenge that ruling and therefore it became the law of the case. The Court of Appeals also affirmed the Circuit Court's denial of M. Lee Jennings' motion to amend his complaint to add his wife's Family Court attorney as a party defendant on the grounds that there was no allegation that her Family Court attorney had accessed his email account, and therefore the amendment to add Mr. Neil as a party defendant would have been futile. Finally, the Court of Appeals reversed the Circuit Court's grant of summary judgment to Petitioner Holly Broome and ruled that the emails in question fell under the definition of stored communications as stated in the Stored Communications Act, 18 U.S.C. §2510(17)(B). *Jennings v. Jennings*, et al., 389

S.C. 190, 697 S.E.2d 671 (Ct. App. 2010). Petitioner Broome petitioned this Court for certiorari which was granted on March 3, 2011.

STATEMENT OF THE FACTS

This matter stemmed from a marital breakup between the Respondent M. Lee Jennings and Gail Jennings. Mr. Jennings fell in love with someone he met at the gym and informed Mrs. Jennings of this occurrence on June 21, 2006 and they immediately separated. (Depo. of M. Lee Jennings, R. pp. 533-535). Gail Jennings went to her daughter-in-law's home, Petitioner Holly Broome, and informed her and her son Allen (Holly's husband) of the separation on June 24, 2006. (Depo. of Petitioner Broome, R. pp. 498-501). As Holly Broome had been informed by Gail Jennings that Mr. Jennings was corresponding with his paramour via e-mail, she subsequently went into his e-mail account by changing his password and obtained copies of the e-mails which he had sent and received and opened, but had not deleted. (Depo. of Petitioner Broome, R. pp. 502-506). She later made copies of the e-mails and gave one to Gail Jennings, one to Brenda Cook, a private investigator and one to Gail Jennings' attorney. (Depo. of Appellant Broome, R. pp. 508-509). She later went back onto Mr. Jennings' e-mail account on several more occasions, but did not print those e-mails. (Depo. of Petitioner Broome, R. p. 512). During Family Court litigation in the summer of 2006, Respondent M. Lee Jennings learned that Petitioner Broome had gone into his e-mail account and this action followed.

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT TO THE PETITIONER BECAUSE THE EMAILS IN QUESTION DID NOT FALL WITHIN THE DEFINITION OF ELECTRONIC STORAGE AS STATED IN THE PLAIN LANGUAGE OF 18 U.S.C. §2510(17).

The Federal Stored Communications Act, 18 U.S.C. §2701, *et seq.* is a criminal statute which can impose civil liability. 18 U.S.C. §2707. As such, the statute is to be strictly construed, One who seeks to recover a penalty for the failure on the part of the defendant to discharge some duty imposed by law, must bring his case clearly within the language and meaning of the statute awarding the penalty. Such laws are to be expounded strictly against the offender and liberally in his favor ... And it is immaterial, for the purpose of the application of the rule of strict construction whether the proceedings for the enforcement of the penal law, be criminal or civil ... *South Carolina Department of Revenue v. Collins Entertainment Corp.*, 340 S.C. 77, 530 S.E.2d 635 (S.C. 2000).

When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and the court must apply the statute according to its literal meaning. *Paschal v. The State Election Commission*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *Paschal, supra.*

In the instant case, the Court of Appeals fully adopted the reasoning of the United States Court of Appeals for the Ninth Circuit in *Theofel v. Farey-Jones*,

359 F.3d 1066 (9th Cir. 2004) in determining that the Stored Communications Act protects all emails whether in a pre-transmission state prior to delivery and access by the recipient or in a post-transmission state after delivery and access by the recipient. The Court of Appeals reaches its determination through an analysis of *Theofel*, *supra* and the legislative history of the Stored Communications Act. This Court and our Federal Court of Appeals have long held that resort to statutory interpretation or legislative history or intent are unnecessary in the absence of ambiguity or uncertainty in the language of the statute. Where the language of the statute is doubtful or uncertain in meaning, a court can look at the circumstances and conditions existing at the time of its enactment, but where language is clear and explicit, courts cannot rewrite statutes and inject matters into statutes which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning. *Timmons v. South Carolina Tri-Centennial Commission*, 254 S.C. 378, 175 S.E.2d 805 (S.C. 1970). It is the statute, and not the report of a legislative committee, which is the authoritative expression of the law. A buried reference in a congressional committee report does not supersede the plain statutory structure and text of a statute and statutory analysis cannot operate as a post-hoc justification for permitting legislative history to trump the plain meaning of the text of a statute. *Rosmer v. Phizer, Inc.*, 263 F.3d 110 (4th Cir. 2001).

The United States Court of Appeals for the Fourth Circuit recently construed the damages provisions of the Federal Stored Communications Act and underscored the above-referenced rules of statutory construction in *Van Alstyne v.*

Electronic Scriptorium, 560 F.3d 199 (4th Cir. 2009). The Court of Appeals construed the damages provisions found in the Stored Communication Act 18 U.S.C. §2707(c). In construing the statute, the Court notes that when interpreting statutes it starts with the plain language. "It is well established that when the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms. In interpreting the plain language of the statute, we give the terms their ordinary, contemporary, common meaning, absent an indication Congress intended it to bear some different import. We follow the cardinal rule that statutory language must be read in context [because] a phrase gathers meaning from the words around it." *Van Alstyne*, *supra* at 204 (internal citations omitted). The Court determined that under the clear terms of 18 U.S.C. §2707(c) actual damages had to be proven in order to receive statutory damages. This result was accomplished by looking back at the immediately proceeding provision for recovering actual damages and interpreting the subsequent provision for recovering statutory damages of $1,000.00 per violation. The Court construes the statute according to its plain unambiguous terms. "Of course, when statutory language is plain and unambiguous - and we believe that the language of the SCA is - there is no need for recourse to legislative history." *Van Alstyne*, *supra* at 207.

In the instant case, the Court of Appeals resorts to legislative history absent a finding of ambiguity or uncertainty and does not give the plain unambiguous words of 18 U.S.C. §2510(17) their plain and ordinary meaning. The court, rather, follows the greatly expanded interpretation followed by the Ninth Circuit in

Theofel. This analysis is described as "...quite implausible and hard to square with the statutory text" in Orin S. Kerr, *A User's Guide to the Stored Communication Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1209-13, August, 2004; analyzing *Theofel, supra.* The Court of Appeals however, cites Professor Kerr approvingly in determining the proper definition for a remote computing service.

The Circuit Court properly held that under the facts of this particular case, the emails at issue were in a post-transmission state; i.e., they had been sent and received by the Respondent and saved by the Respondent at his discretion. The e-mails at issue were not in "temporary, intermediate storage incidental to the electronic transmission thereof" and they were not stored "by an electronic communication service for purposes of back-up protection", while in that temporary, intermediate storage prior to receipt by the Respondent. This construction of the Federal Stored Communications Act fully comports with the reasoning of the U.S. District Court for the Eastern District of Pennsylvania in *Fraser v. Nationwide Mutual Insurance Company, et al.*, 135 F.Supp.2d 623 (2001), *aff'd on other grounds*, 352 F.3d 107 (2003). The court in *Fraser* analyzed 18 U.S.C. §2701, *et seq.*, (the Stored Communications Act) and noted that it prohibits unlawful access to stored communications by intentionally accessing without authorization a facility through which an electronic service is provided or intentionally exceeds an authorization to access that facility and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system. 18 U.S.C.

§2701(a). Definitions to be used in interpreting the Federal Stored Communications Act as used in that chapter are the same definitions as found in 18 U.S.C. §2510. (18 U.S.C. §2711 - Definitions for chapter.) The term electronic storage is clearly defined in 18 U.S.C. §2510(17). "Electronic storage" means (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof, and (B) any storage of such communication by an electronic communication service for purposes of back-up protection of such communication. (*emphasis added*). The District Court in *Fraser* and the Circuit Court in the instant case thus correctly determined that under the clear definition of electronic storage, emails in the post transmission state (i.e., e-mails which had been sent and received and then not deleted by a user) do not fall within the definition of electronic storage as provided for in the statute. The court in *Fraser* noted, "The phrase "for purposes of backup protection of such communication" in the statutory definition makes clear that messages that are in post transmission storage, after transmission is complete, are not covered by Part "B" of the definition of electronic storage." The facts of Fraser were that Nationwide received Fraser's e-mail from storage after the e-mail had already been sent and received by the recipient. Nationwide acquired Fraser's e-mail from post-transmission storage. Therefore, Nationwide's conduct was not prohibited under the Stored Communications Act. *Fraser, supra* at 635, 636.

This is the exact situation concerning the emails at issue in this case. Petitioner Broome opened e-mails which had been sent and received by the Respondent and not deleted by the Respondent. (Depo. of Petitioner Broome, pp.

33-35, Responses to Request to Admit of Broome). Therefore, the Circuit Court correctly ruled that the e-mails in question fall outside the scope of the Federal Stored Communications Act pursuant to the reasoning found in *Fraser* and the clear language of the statute.

Under the construction of the Stored Communications Act adopted by the Court of Appeals, the Act would apply to all e-mails sent by a user and subsequently saved by that user who chose not to delete them, and to all e-mails received by a user and opened by a user and subsequently saved by that user who chose not to delete them. That is clearly outside of the definition of electronic storage as stated in the plain language of the Federal Stored Communications Act. Subsection (B) uses the adjective "such" to describe the communications to which it applies. "Such" is defined as "having a quality already or just specified or of the character, quality or extent previously indicated or implied". (Webster's New Collegiate Dictionary, 7th ed. 1971). In a legal context, "such" is defined as "Of that kind, having the particular quality or character specified. Identical with, being the same as what has been mentioned." (Black's Law Dictionary, 5th ed. 1979).

Thus, the term "any storage of <u>such</u> communication by an electronic communication services for purposes of backup protection of <u>such</u> communication" clearly refers to the communications just specified and previously indicated in subsection (A) which relates to temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof. There is no evidence and it is not alleged by the Respondent that the e-mails in question were in temporary, intermediate storage incidental to

the electronic transmission thereof at the time they were accessed by Petitioner Broome. It is uncontested that the e-mails had been sent and received, opened and not deleted by the Respondent at the time they were accessed. Therefore, the communications fall outside the clear language of the Federal Stored Communication Act. There is absolutely no evidence in the record and the Respondent does not allege that the e-mails in question had been stored by Yahoo for purposes of backup protection while they were in temporary, intermediate storage incidental to the electronic transmission thereof.

Therefore, the Circuit Court correctly granted Petitioner Broome's motion for summary judgment on the grounds that the e-mails in question did not meet the definition of being in electronic storage as found in the Federal Stored Communications Act as set forth in 18 U.S.C. §2510(17). To hold otherwise would mean that the Federal Stored Communications Act refers to all e-mails stored temporarily while awaiting opening by a user and any backup storage of such communications by an electronic communication service for purposes of backup protection prior to being received by a user and to all e-mails sent and saved by a user at his discretion and all e-mails received and saved by a user at his discretion. This basically means that under such construction, the Electronic Stored Communications Act applies to all e-mails saved by whatever entity at whatever time for whatever reason. Petitioner Broome urges that this Court should not adopt so broad a construction of the Act, especially in light of the rules of statutory construction as clearly set forth in this jurisdiction.

Petitioner Broome is mindful of Respondent's reliance on *Fisher v. Mt. Olive Lutheran Church*, 207 F.Supp.2d 914 (W.D. Wis. 2002). Petitioner Broome respectfully submit that the District Court in *Mt. Olive* and the Ninth Circuit cases cited by the Respondent ignore the plain, unambiguous language of the Act and incorrectly extend its scope to all e-mails transmitted and received by a user and then saved at the user's discretion in an electronic communications service. If Congress had intended that to be the scope of the Federal Stored Communications Act, then it clearly would have used the indefinite article "a" in place of the adjective "such" and added the words "or by a user" to 18 U.S.C. §2510(17)(B).

Therefore, the Circuit Court in the instant case properly construed "stored communication" as defined by the plain language of the Federal Stored Communications Act and granted summary judgment to Petitioner Broome. It did not resort to subtle or forced construction given the plain language of the statute.

II. THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT TO THE PETITIONER UNDER THE STORED COMMUNICATIONS ACT, 18 U.S.C §2510 AS THERE WAS NO EVIDENCE IN THE RECORD THAT THE EMAILS IN QUESTION WERE IN FACT STORED FOR PURPOSES OF BACK-UP PROTECTION BY ANY PERSON OR ENTITY.

Respondent presented no evidence that Petitioner Broome accessed an electronic communication while it was in electronic storage as that term is defined in the Act and, therefore, the Circuit Court properly granted summary judgment pursuant to Rule 220(c) SCACR. The Respondent presented no evidence at the hearing on Petitioner Broome's motion for summary judgment that the e-mails at

issue were in temporary, intermediate storage incidental to the electronic transmission thereof. The only evidence in the record was that the e-mails in question had been sent and/or received by the Respondent. Therefore, there was no evidence presented that fell within the definition of electronic storage as defined in 18 U.S.C. §2510(17)(a). There was no evidence presented by the Respondent which showed or tended to show that any such e-mails were stored for purposes of backup protection. The only evidence in the record was that the e-mails in question were the actual e-mails opened by the Respondent and then not deleted. The record is void of any evidence, documentary or testimonial, that the e-mails in question were stored for purposes of backup protection of those e-mails. Therefore, there was no evidence presented to the Circuit Court which showed or tended to show that the e-mails in question would fall within the definition of electronic storage as defined under the Act under either subsection (A) or subsection (B).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact; the moving party may discharge the burden or demonstrate the absence of a genuine issue of material fact by pointing out the absence of evidence to support the non-moving party's case. Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. The non-moving party must come forward with specific facts showing there is a genuine issue for trial. *Bennett v. Investors Title Insurance Company*, 370 S.C. 571, 635

S.E.2d 660, (S.C. Ct. App. 2006). No such evidence was presented by the Respondent in this case. Therefore, even if the definition of electronic storage refers to e-mails received by the Respondent and intentionally left on his e-mail at his discretion in his account with an electronic communication service, there must be some evidence that the e-mails in question were stored there for purposes of back-up protection. No such evidence was presented and, therefore, the Circuit Court correctly granted Petitioner Broome's motion for summary judgment as to Respondent's cause of action for alleged violation of the Federal Stored Communications Act.

However, the Court of Appeals in the instant case, following the reasoning of the Ninth Circuit in *Theofel, supra*, simply assumed that the emails in question were not deleted because the Respondent and/or his internet service provider Yahoo wished to save them for back-up protection. The only evidence in the record is that the emails accessed by the Petitioner were the very emails opened by the Respondent and not deleted. There is absolutely no evidence that they were copies of the emails which the Respondent had opened and which he or Yahoo had saved for back-up protection. This assumption is wholly unsupported by the evidence in the record and the aforestated Rules of Statutory Construction in general and in particular the strict construction of penal laws in a civil context. *South Carolina Department of Revenue, supra.*

CONCLUSION

The Court of Appeals erred in reversing the Circuit Court's grant of summary judgment to Petitioner Broome under the Stored Communication Act, 18

U.S.C. §2701, *et seq*. The communications accessed by the Petitioner were in a post-transmission state and did not fall within the definition of stored communications as contained in the plain and unambiguous language of the Act and even if the construction of "stored communications" was as broad as that adopted by the Court of Appeals, there was absolutely no evidence in the record which showed or intended to show that the emails at issue in this case fell within the broader definition since there is absolutely no evidence in the record which shows or tends to show that they were stored for purposes of back-up protection.

Respectfully submitted,

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of whom Holly Broome is,.....Petitioner,

PROOF OF SERVICE

The undersigned employee of Attorneys Lee, Eadon, Isgett, Popwell & Reardon, P.A., attorneys for the Petitioner, does hereby certify that service of the ***Brief of Petitioner***, in the above-referenced action, was made upon counsel of record through the United States Mail with sufficient postage affixed thereto, at the below listed addresses this the 4th day of April, 2011 as follows:

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BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Court of Appeals correctly held that the emails in question were stored for purposes of backup protection as contemplated by 18 USC § 2510(17)(B)?

II. Whether the Court of Appeals correctly held that emails in question were stored for purposes of backup protection when the user did not delete the emails after opening and reading the emails?

STATEMENT OF THE CASE

On February 20, 2007, Respondent filed and served upon Petitioner and others a Summons and Complaint alleging causes of action for interception of electronic communications pursuant to S.C. Code Ann. § 17-30-10 and S.C. Code Ann. § 17-30-135, invasion of privacy for publication of private affairs, invasion of privacy for wrongful intrusion into private affairs, and conspiracy. (February 20, 2007 Summons and Complaint, R.pp. 1-10). Petitioner Answered the Complaint on March 30, 2007. (March 30, 2007 Answer, R. pp. 17-19).

On May 2, 2007, Respondent filed and served a Notice of Motion and Motion for Summary Judgment. (May 2, 2007 Motion for Summary Judgment, R. pp. 26-73). Counsel for Respondent received a motion for summary judgment from Defendant Cooke on May 11, 2007, a motion for summary judgment from Petitioner Broome on May 17, 2007, (May 14, 2007 Motion for Summary Judgment, R. pp. 79-82); and a motion for summary judgment from Defendant Jennings on May 24, 2007.

On June 8, 2007, Respondent filed and served a motion to amend and supplement the February 20, 2007 Complaint so as to include causes of action for violation of not only the South Carolina Computer Crimes Act (S.C. Code Ann. § 16-16-10 et seq.), but also Title I of the Electronic Communications Privacy Act (18 U.S.C. §§ 2510-2522) and the Federal Stored Communications Act (18 U.S.C. §§ 2701-2712). (June 8, 2007 Motion to Amend and Supplement Complaint, R. pp. 86-101).

The defendants consented to the amendment by way of a Consent Order to Amend filed July 13, 2007 (July 13, 2007 Consent Order to Amend, R. pp. 111-14). Respondent filed and served his Amended Complaint on July 25, 2007, R. pp. 102-10).

Petitioner timely filed and served her Answer to the Amended Complaint. (August 7, 2007 Answer, R. pp. 115-117).

On February 25, 2008 counsel for Respondent received Petitioner Broome's motion for summary judgment as to Respondent's First Amended Complaint. (February 20, 2008 Motion for Summary Judgment, R. pp. 164-67).

On March 25, 2008, Respondent field and served a second Notice of Motion and Motion to Amend the first Amended Complaint wherein Respondent sought to amend his Complaint so as to include Petitioner Jennings' attorney, Thomas Neal, as a party to the action. (March 25, 2008 Notice of Motion and Motion to Amend and Supplement Complaint, R. pp. 168-81).

On April 18, 2008 Respondent filed and served a superseding Notice of Motion and Motion to Amend and Supplement the first Amended Complaint (April 18, 2008 Superseding Motion to Amend and Supplement, R. pp. 182-200). And on May 8, 2008, counsel for Respondent filed and provided to counsel for Petitioner a Memorandum in Opposition to Motion for Summary Judgment and in Support of Motion to Amend. (May 8, 2008 Memorandum of Respondent with Attachments, R. pp. 358-93).

On June 19, 2008, a hearing was held before The Honorable L. Casey Manning on Defendants' motions for summary judgment and Respondent's motion to amend his first Amended Complaint. At that time Respondent submitted another memorandum of law in support of his motion for summary judgment and in opposition to Petitioner' motions for summary judgment. (June 19, 2008 Memorandum of Respondent with Attachments, R. pp. 394-403).

At the June 19, 2008 hearing, Respondent voluntarily withdrew his causes of action arising under the South Carolina Homeland Security Act (S.C. Code Ann. § 17-30-10, *et seq.*), the South Carolina Computer Crimes Act (S.C. Code Ann. § 16-16-10, *et seq.*), and the Federal Electronic Communications Privacy Act (18 U.S.C. §§ 2510-2520). (Transcript of June 25, 2008 Hearing, R. pp. 587-88).

By Order filed September 24, 2008, Judge Manning granted Petitioner's motions for summary judgment as to Respondent's remaining causes of action and denied Respondent's motion to amend his first Amended Complaint. (September 24, 2008 Order Granting Summary Judgment and Denying Respondent's Motion to Amend Complaint, R. pp. 404-17).

On September 25, 2008 Respondent filed and timely served a notice of motion and motion to reconsider, vacate, set aside, alter or amend the September 24, 2008 order granting summary judgment (September 25, 2008 Motion to Reconsider, R. pp. 418-37), which the lower court denied by way of Order dated November 7, 2008. (November 7, 2008 Order, R. p. 438).

This appeal followed, and in its Opinion issued on July 14, 2010, the Court of Appeals reversed the Circuit Court's grant of summary judgment to Petitioner and ruled that the emails in question in this case fall under the definition of stored communications as contemplated by 18 U.S.C. §2510(17)(B). The Court of Appeals affirmed the balance of the lower court's order.

This Court granted Petitioners request for *certiorari* on March 2, 2011.

STATEMENT OF FACTS

At all times relevant to the facts set forth herein, Respondent had a private e-mail address at Yahoo.com, an internet service provider "ISP", with the identity "leedabeatlefan@yahoo.com". At no time did Respondent give anyone permission to access or use his private e-mail account which contained not only private communications, but also customer lists that were proprietary to Respondent's business.

In mid-January of 2007, pursuant to a production subpoena issued in family court proceedings, Respondent's counsel received from Defendant Cooke what was represented to be her entire investigative file, including her initial information sheet dated June 26, 2006 containing two handwritten pages (Respondents' May 8, 2008 Memorandum at Exhibit 1 – Detective Intake Form, R. pp.374-75). On the first page under "S17", the investigator states that she received a photograph of the alleged paramour as follows: "picture on E-mail." On the second page, under "S78" the alternate contact is shown to be "Holly", who is married to Defendant Jennings' son by her prior marriage, Petitioner Broome. Petitioner Broome's husband was formerly employed by Respondent, and at all times has been Respondent's competitor in the real estate appraisal business.

Also provided by Defendant Cooke were 46 pages of emails that had been surreptitiously downloaded and printed emails from Respondent's private email address (Respondents' May 8, 2008 Memorandum at Exhibit 2 - Investigator's January 15, 2007 list of responses to production subpoena. R. p. 377).

At the time of her deposition taken on February 19, 2007, Defendant Jennings admitted that on the Sunday after Respondent left the home, Petitioner Broome, without consent, hacked into Respondent's private and personal email account, retrieved email

messages and photographs, printed copies, and distributed these copies to Defendant Jennings' attorney (Mr. Neal) and to Defendant Cooke. (Deposition of Defendant Jennings, R. pp. 461-66).

Defendant Jennings also admitted that Petitioner Broome continued to surreptitiously enter and retrieve Respondent's private and personal emails and give them to Defendant Cooke during the time of Defendant Cooke's surveillance of Respondent. (Deposition of Defendant Jennings, R. pp. 461-66).

On February 19, 2007, Respondent's counsel deposed Defendant Cooke, the private investigator, who testified under oath that both Defendant Jennings and Petitioner Broome had given her emails on June 26, 2006 and thereafter during her continuing surveillance of the Respondent. Cooke admitted that she had received 46 pages of emails from Respondent's private email account, some of which predated her hiring date of June 26, 2006, and that she was aware of the content of these emails at the time she was hired as private investigator by Defendant Jennings. (Deposition of Defendant Cooke at pp. 22- 60, R. pp. 467-89).

On April 19, 2007, Respondent's counsel received Petitioner Broome's Responses to Requests to Admit in which she admits to opening and saving emails from Respondent's Yahoo email account after Defendant Jennings informed her that Respondent had been corresponding with a paramour via email. Petitioner Broome also admitted providing copies of the emails to Defendants Jennings and Cooke. (Petitioner Broome's Admissions, R. pp. 379-80).

On March 13, 2008, Respondent deposed Petitioner Broome who testified that the emails she illegally accessed went back for years, and that she had been involved in meetings

with Defendant Jennings and her attorney, Mr. Neal, who had instructed and encouraged her to continue to improperly access Respondent's email account. (Deposition Excerpts from Defendant Holly Broome of March 13, 2008, R. pp. 383-87).

From and including the date Defendant Jennings left the marital home (June 21, 2006), Petitioner Broome admits to illegally accessing and disseminating information stored on Respondent's private e-mail address without his permission, and to otherwise improperly procuring his private email communications.

ARGUMENT

I. The Court of Appeals correctly held the emails in question were stored for purposes of backup protection as contemplated by 18 USC § 2510(17)(B)

The Court of Appeals found the emails accessed and downloaded by Petitioner Broome were stored for the purposes of backup protection as contemplated by 18 U.S.C. 2510(17)(B). *Jennings v. Jennings*, 389 S.C 190, 203, 697 S.E.2d 671, 678 (Ct. App. 2010). In reaching this conclusion, the Court of Appeal properly considered the analysis of Federal District Courts having interpreted this statute and the legislative history of the Federal Stored Communications Act (SCA), 18 U.S.C. 2701 *et seq.*

Section 2701(a) of the SCA provides:

> Except as provided in subsection (c) of this section whoever-
> (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
> (2) intentionally exceeds an authorization to access that facility;
> and thereby obtains, alters, or prevents authorized access to a wire or electronic communication *while it is in electronic storage* in such system shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2701(a) (2006) (emphasis added).

Section 2510(17) of the United States Code defines electronic storage as:

> (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
> (B) any storage of such communication by an electronic communication service for purposes of *backup protection* of such communication.

18 U.S.C. § 2510(17) (2006) (emphasis added).

As noted by the Court of Appeals, "in construing federal statutes, the South Carolina Supreme Court has reviewed congressional reports to glean legislative intent." *Jennings, supra* 289 S.C. at 200, 697 S.E.2d at 676 (footnote 5) (citing *White v. S.C. Tax Comm'n,* 253 S.C. 79, 85-86, 169 S.E.2d 143, 145-46 (1969)). This Court has previously held:

> The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the Legislature. In ascertaining the intent of the Legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005) (internal citations omitted).

While Petitioner has abandoned in this appeal her contention that Yahoo is not an electronic communication service, she nevertheless contends the emails in question were not stored for the purposes of backup protection. The Court of Appeals properly adopted the reasoning of the United States Court of Appeals of the Ninth Circuit in *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004) in holding that emails which have been received by an email subscriber, but left on an internet service provider's (ISP's) server after being opened by the recipient, are stored for purposes of backup protection, as defined by §2510(17)(B):

> An obvious purpose for storing a message on an ISP's server after delivery is to provide a second copy of the message in the event that the user needs to download it again-if, for example, the message is accidentally erased from the user's own computer. The ISP copy of the message functions as a "backup" for the user. Notably, nothing in the Act requires that the backup protection be for the benefit of the ISP rather than the user. Storage under these circumstances thus literally falls within the statutory definition.

Id. at 1075.

"The majority of courts which have addressed the issue have determined that e-mail stored on an electronic communication service provider's systems after it has been delivered, as opposed to e-mail stored on a personal computer, is a stored communication subject to the

SCA." *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F.Supp.2d 548, 555 (S.D.N.Y. 2008).

As found by the Court of Appeals, the legislative history of the SCA supports the conclusion that the Act applies to the emails in question:

> Indeed, the legislative history of the SCA supports the conclusion that Congress intended for the SCA to apply to the conduct Broome engaged in here. For instance, both the House and Senate Reports state that section 2701 "addresses the growing problem of unauthorized persons deliberately gaining access to, and sometimes tampering with, electronic or wire communications that are not intended to be available to the public." H.R.REP. NO. 99-647, at 62 (1986); S.REP. NO. 99-541, at 35 (1986). Additionally, the Senate Report provides the following illustration of what conduct would constitute a violation of section 2701:
>
> > For example, a computer mail facility authorizes a subscriber to access information in their portion of the facilities storage. Accessing the storage of other subscribers without specific authorization to do so would be a violation of [section 2701].
>
> S.REP. NO. 99-541, at 36. Here, Broome has admitted that she accessed and read, without authorization, Husband's emails that were stored on Yahoo's system. The legislative history of the SCA indicates that Congress intended that such conduct would constitute a violation of section 270.

Jennings, 389 S.C. at 204, 697 S.E.2d at 678.

It is without consequence that Respondent's emails which were stored on Yahoo's servers and accessed by Petitioner were in a "post-transmission state," as § 2510(17)(B) "does not distinguish between intermediate and post-transmission storage." *See Theofel* at 1075-76. Petitioner's reliance on *Fraser v. Nationwide Mut. Ins. Co.*, 135 F. Supp. 2d 623 (E.D. Pa. 2001) *aff'd in part, vacated in part, remanded*, 352 F.3d 107 (3d Cir. 2003), for the proposition that § 2510(17)(B) only applies to back-up storage of emails held pending transmission is misguided. As the Ninth Circuit in *Theofel* found:

> *Fraser's* interpretation renders [§ 2510] subsection (B) essentially superfluous, since temporary backup storage pending transmission would already seem to qualify as "temporary, intermediate storage" within the meaning of subsection (A). By its plain terms, subsection (B) applies to backup storage regardless of whether it is intermediate or post-transmission.

Id. at 1075-76.

Further, the facts in the present case are easily distinguished from the facts in *Fraser*. As the United States District Court for the Western District of Wisconsin determined *Fischer v. Mt. Olive Lutheran Church*, 207 F. Supp. 2d 914 (W.D. Wis. 2002):

> In *Fraser*, it was undisputed that the email message accessed was not stored by an electronic communication service but was stored on the employer's server. In contrast, defendants Connor and Mt. Olive accessed plaintiff's email while it was stored on a remote, web-based server that is owned by Microsoft, an electronic communication service provider. Therefore, it is unnecessary to determine whether *Fraser* held correctly that the act could be violated only by accessing email that has not yet been downloaded to the recipient's hard drive.

Id. at 925 (citations omitted).

As noted by the Court of Appeals, in affirming the district court's decision in *Fraser* on different grounds, the Third Circuit questioned the District Court's interpretation of §2510(17)(B):

> [A]ccording to the District Court, the e-mail was in a state it described as "post-transmission storage." We agree that Fraser's e-mail was not in temporary, intermediate storage. But to us it seems questionable that the transmissions were not in backup storage-a term that neither the statute nor the legislative history defines. Therefore, while we affirm the District Court, we do so through a different analytical path, *assuming without deciding that the e-mail in question was in backup storage.*

Jennings, 389 S.C. at 205-06, 697 S.E.2d at 679 (quoting *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 114 (3d Cir. 2003)).

Petitioner cites *Van Alstyne v. Elec. Scriptorium, Ltd.*, 560 F.3d 199 (4th Cir. 2009), for the proposition that the Court of Appeals erred in looking to the legislative history to construe the SCA. Petitioner fails to acknowledge that under facts remarkably similar to the undisputed facts here,[1] the jury in *Van Alstyne* found that the defendants had violated the SCA by accessing Van Alstyne's AOL account and retrieving her personal emails without her consent or authorization. *Id.* at 203-04. This finding by the jury was not appealed, as the defendants only took exception to the award of damages. *Id.* The Fourth Circuit's analysis of the damages provisions of the SCA is not at issue in the present case.

Further, in the present case, the Court of Appeals did not look to the legislative history to conclude "that the emails in question were stored 'for the purposes of backup protection' as contemplated by section 2510(17)(B)." *Jennings* 389 S.C at 204, 697 S.E.2d at 678. Rather, the Court of Appeals looked to the legislative intent to reject Petitioner's strained construction of the SCA:

> Under Respondents' construction of the SCA, the unauthorized access of a person's emails from an ECS would be unlawful if the person had previously saved his emails somewhere else, but would be perfectly lawful if the person had not done so. However, such an interpretation would lead to strange results. For instance, a person whose emails were stored solely with an ECS would generally suffer greater harm if someone "alter[ed]" or "prevent[ed] authorized access" to his ECS-stored emails than a person who had saved his emails in additional

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[1] "With her suspicions aroused, Van Alstyne began pursuing the possibility that Leonard and ESL had broken into that private account. Sure enough, during a June 2006 deposition, Leonard admitted that he accessed Van Alstyne's AOL account after she left the company. He further testified that the emails produced during the deposition represented the only occasions on which he had accessed her account.

No doubt disturbed by Leonard's behavior, Van Alstyne promptly instituted an action against Leonard in the United States District Court for the Eastern District of Virginia, alleging that Leonard's actions violated the SCA-part of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C.A. § 2510, et seq. (West 2000)-and the Virginia Computer Crimes Act, Va.Code Ann. §§ 18.2-152.1, et seq. (2004)." *Van Alstyne*, 560 F.3d at 202-03.

> locations. Yet, under Respondents' construction of the SCA, only the person in the latter position would be protected. We do not believe that this was what Congress intended.

Id.

Here, Petitioner Broome accessed and downloaded Respondent's emails from his Yahoo email service provide by "hacking into" his email account and then retrieving Respondent's emails stored on Yahoo's remote, web-based servers. The Court of Appeals properly found the emails accessed and downloaded by Petitioner Broome were stored for the purposes of backup protection as contemplated by 18 U.S.C. 2510(17)(B).

II. The Court of Appeals correctly held that emails in question were stored for purposes of backup protection when the user did not delete the emails after opening and reading the emails.

The Court of Appeals correctly held that emails left on the ISP's server after being opened by Respondent were stored for the purpose of backup protection. As stated by the United States District Court of Appeals for the Ninth Judicial Circuit in *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004):

> An obvious purpose for storing a message on an ISP's server after delivery is to provide a second copy of the message in the event that the user needs to download it again -- if, for example, the message is accidentally erased from the user's own computer. The ISP copy of the message functions as a 'backup' for the user. Notably, nothing in the Act requires that the backup protection be for the benefit of the ISP rather than the user. Storage under these circumstances thus literally falls within the statutory definition.

Id. at 1075.

In following the rationale *Theofel*, the Court of Appeals held:

> Like the Ninth Circuit, we believe that one of the purposes of storing a backup copy of an email message on an ISP's server after it has been opened is so that the message is available in the event that the user needs to retrieve it again. In the present case, the previously opened emails were stored on Yahoo's servers so that, if necessary, Husband could access them again. Accordingly, we hold that the emails in

> question were stored "for purposes of backup protection" as contemplated by section 2510(17)(B.

Jennings, 289 S.C. at 204, 697 S.E.2d at 677-78.

The Court of Appeals properly rejected Petitioner's contention:

> [T]hat, because Husband has not claimed that he saved the emails anywhere else, the storage of his emails could not have been for the purposes of backup protection. However, courts interpreting section 2701 have issued rulings that would seem to allow Husband's cause of action in this case. *See* ("[W]here the facts indisputably present a case of an individual logging onto another's e-mail account without permission and reviewing the material therein, a summary judgment finding of an SCA violation is appropriate."); ("The majority of courts which have addressed the issue have determined that e-mail stored on an electronic communication service provider's systems after it has been delivered, as opposed to e-mail stored on a personal computer, is a stored communication subject to the SCA."); (rejecting argument that emails stored on Hotmail's system were not in "electronic storage").

Id.

Here, the undisputed facts are that Respondent opened emails on his Yahoo account, and rather than delete the emails after reading them, left them on Yahoo's server. It is clear that by not deleting the messages and removing them from his account, Respondent intended to save the messages. It is the email user who ultimately makes the decision of whether or not to retain (store) emails or delete them, and if the user decides to keep or "save" his emails by not deleting them, the emails are then stored for the purpose of backup protection.

Petitioner's insistence that there be some additional testimony or evidence that the Respondent "intended" to save the emails for back-up protection is nonsensical, as it is clear that by not deleting the emails Respondent intended to save his emails.

The Court of Appeals correctly held that Respondent's emails were stored for the purpose of backup protection.

CONCLUSION

Based upon the forgoing, the decision of the Court of Appeals should be affirmed.

Respectfully Submitted,

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May 4, 2011

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

RECEIVED
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S.C. Supreme Court

Opinion No. 4711
Heard April 15, 2010 - Filed July 14, 2010

M. Lee Jennings, ...Respondent,

v.

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and as BJR International Detective Agency, Inc., of whom Holly Broome is,.....Petitioner.

CERTIFICATE OF SERVICE

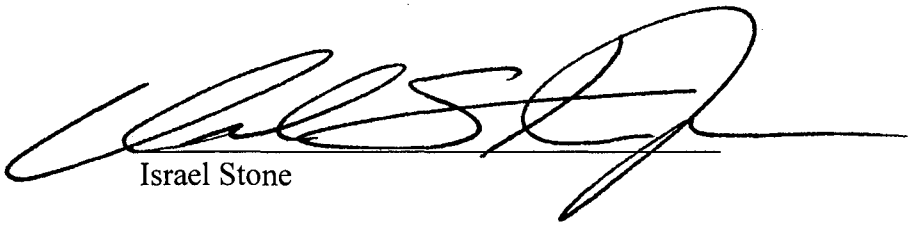
I, Israel Stone, a legal assistant for the law firm of Warner, Payne & Black, L.L.P./ElderLaw Services of South Carolina, P.A., attorneys for M. Lee Jennings, do hereby certify that on this date I caused a copy of **Brief of Respondent** to be served upon the party listed below by depositing a copy of same in the United States Mail, postage pre-paid, addressed to the following:

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May 4th, 2011

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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M. Lee Jennings,. .....Respondent,

v.

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and as BJR International Detective Agency, Inc., Defendants, of whom Holly Broome is,..... Petitioner.

REPLY BRIEF OF PETITIONER BROOME

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ARGUMENTS

I. THE RESPONDENT CONTINUES TO IGNORE THE RULES OF STATUTORY CONSTRUCTION FOLLOWED BY THIS COURT AND THE FOURTH CIRCUIT COURT OF APPEALS IN URGING THAT THE STORED COMMUNICATIONS ACT BE CONSTRUED ON THE BASIS OF WHAT RESPONDENT CONTENDS IT SHOULD SAY AS OPPOSED TO WHAT THE ACT ACTUALLY SAYS IN PLAIN AND UNAMBIGUOUS LANGUAGE.

Respondent's basic contention is that despite the specific, narrow definition of "Electronic storage" found in 18 U.S.C. §2510(17) and the Court of Appeals' failure to find any ambiguity or uncertainty in the language contained therein, the Court of Appeals was correct in applying a greatly expanded construction of the Stored Communications Act as being an omnibus internet privacy act which applies to all emails which have been sent and delivered. Respondent's urged construction would apply to all text messages or emails which were in temporary intermediate storage incidental to their electronic transmission and all emails or text messages which had been stored, or simply not deleted, at the discretion of the recipient or the electronic communication service regardless of whether such emails or text messages had simply not been deleted by the recipient through oversight or for purposes of back-up protection or for any purpose whatsoever. In effect, the construction of the Act urged by Respondent and adopted by the Court of Appeals construes the Stored Communications Act in its broadest possible terms regardless of the very specific, narrowly tailored language of the Act.

This flies in the face of the rules of statutory construction previously enunciated by this Court and the rules of construction of the Stored Communications Act enunciated by the Fourth Circuit Court of Appeals in *Van Alstyne v. Electronic Scriptorium*, 560 F.3d 199 (4th Cir. 2009). Such construction necessarily assumes that the Congress does not know the difference between use of the word "such" in subsection (B) of 18 U.S.C. §2510(17) and use of the word "a" or "all". It presupposes that the Stored Communications Act is a catchall for all electronic communications which have been delivered, whether opened by the intended recipient or not and whether stored by the intended recipient or by the electronic communication service for purposes of back-up protection. This flies in the face of this Court's often repeated rules of statutory construction and the Fourth Circuit Court of Appeals rules of construction of the statute in question as stated in *Van Alstyne*.

The fact that the Appellant (Defendant) in *Van Alstyne* failed to raise the proper construction of 18 U.S.C. §2510(17) as a defense and, therefore, the Fourth Circuit did not construe this section simply means that the Appellant (Defendant) failed to raise a valid argument, especially in light of the Fourth Circuit's strict construction of the damages provision of the Stored Communications Act construing the statute according to its plain, unambiguous terms.

The Circuit Court in the instant case properly construed §2510(17)(B) as referring to storage of the communication by the electronic communication service at whose discretion or instruction the communication is maintained rather than

merely where the communication is maintained, since it is a given that the communication is stored within an electronic communication services facility. The Circuit Court construed the language in §2510(17)(B) "for purposes of back-up protection of such communication" in light of 18 U.S.C. §2704 governing "back-up preservation" by service providers and logically concluded that the broad construction urged by Respondent would be a forced interpretation of the statute to ignore its plain meaning as well as other provisions of the Act, which provide a more specific and practical meaning. "The statute was not intended to protect any and all personal electronic communication storage on internet service providers by individuals, or it would have been written that way; it was intended to protect subscribers from the inherently peculiar operations of such internet service providers from computer hackers, such as when internet service providers are directed by the government under 18 U.S.C. §2704 to indefinitely back-up certain electronic communications or when they choose to do so for other reasons." (Order of Circuit Court, R. pp. 412, 413). This is the same conclusion reached by Professor Kerr in rejecting the greatly expanded definition adopted by the Ninth Circuit in *Theofel v. Farey-Jones*, 359 F.3d 1066, 1076 (9th Cir. 2004). Orin S. Kerr, *A User's Guide to the Stored Communication Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, Footnote 62, August, 2004.

Nevertheless, Respondents continue to urge, and the Court of Appeals adopted, the construction of §2510(17)(B) which encompasses all electronic communications whether received by the intended recipient or not, opened by the

intended or not, and stored either by the intended recipient or by the electronic communication service for whatever purpose.

II. RESPONDENT'S CONTENTION THAT THE EMAILS IN QUESTION WERE STORED FOR PURPOSES OF BACK-UP PROTECTION ASSUMES FACTS NOT IN EVIDENCE DESPITE RESPONDENT'S OPPORTUNITY TO PRESENT SUCH FACTS TO THE COURT.

The Respondent does not state that the emails in question were saved for purposes of back-up protection anywhere in his deposition or in the affidavits which he filed with the Court. Thus, there is absolutely no evidence in the record that the emails in question were saved for purposes of back-up protection by the Respondent or by his electronic communication service. Nevertheless, the Respondent and the Court of Appeals equate failure of an intended recipient to delete an email as the same as saving an email for purposes of back-up protection. This once again stretches the language contained in 18 U.S.C. §2510(17)(B) to the extent that the language "for purposes of back-up protection" is rendered meaningless. The practical affect of this assumed construction would mean that despite the specific and unambiguous words used in subsection (B), the practical meaning of subsection (B) would be that electronic storage means "any storage of any communication by any person or entity for any purpose."

It was incumbent upon Respondent at the hearing on petitioner's motion for summary judgment to come forward with specific facts showing that there was a

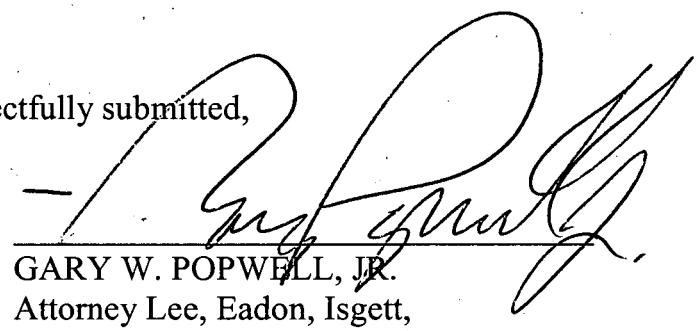
genuine issue for trial concerning whether or not the emails in question met the definition of electronic storage stated in §2510(17)(A) or (B). The Respondent cannot simply rest on mere allegations or denials contained in the pleadings when attempting to avail himself of a penal statute which allows a civil cause of action to be brought when the required facts showing a violation of the statute have not been placed at issue in the record. It was incumbent upon the Respondent to come forward with specific facts showing that there was a genuine issue for trial. *Bennett v. Investors Title Insurance Company*, 370 S.C. 571, 635 S.E.2d 660, (S.C. Ct. App. 2006). No such evidence was presented by the Respondent in this case.

CONCLUSION

The construction of the statute in question urged by the Respondent and adopted by the Court of Appeals ignores the language contained in the Stored Communications Act, 18 U.S.C. §2510(17)(B) and assumes that section contains language which it does not contain. Respondent's urged construction also assumes that the statute contains superfluous language concerning emails stored for "purposes of back-up protection, and that any showing that the electronic communications in question were in fact stored for purposes of back-up protection is unnecessary as that will be the reason for storage assumed by the Court as a matter of law. This construction of the statute is overly broad and for the foregoing reasons, the Opinion of the Court of Appeals should be reversed and the

Order of the Circuit Court granting Petitioner's summary judgment should be affirmed.

Respectfully submitted,

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May 19, 2011.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Opinion No. 4711
Heard April 15, 2010 - Filed July 14, 2010

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S.C. Supreme Court

M. Lee Jennings,. .....Respondent.

v.

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and as BJR International Detective Agency, Inc., Defendants, of whom Holly Broome is,.....Petitioner,

---

PROOF OF SERVICE

The undersigned employee of Attorneys Lee, Eadon, Isgett, Popwell & Reardon, P.A., attorneys for the Petitioner, does hereby certify that service of the ***Reply Brief of Petitioner Broome***, in the above-referenced action, was made upon counsel of record through the United States Mail with sufficient postage affixed thereto, at the below listed addresses this the 20th day of May, 2011 as follows:

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and as BJR International Detective Agency, Inc. of whom Holly Broome is,..... Petitioner,

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M. Lee Jennings,. .....Respondent.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

M. Lee Jennings, Appellant,

v.

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually, and BJR International Detective Agency, Inc., Respondents.

Appeal from Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 4711
Heard April 15, 2010 – Filed July 14, 2010

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Max N. Pickelsimer and Carrie A. Warner, both of Columbia, for Appellant.

Deborah Harrison Sheffield, Richard Giles Whiting, Gary W. Popwell, Jr. and John K. Koon, all of Columbia, for Respondents.

GEATHERS, J.: In this appeal, M. Lee Jennings (Husband) contends that the circuit court erred by granting Respondents' motions for summary judgment as to his cause of action for a violation of the Stored Communications Act, 18 U.S.C. §§ 2701-2712 (2006). Husband also argues that the circuit court erred by denying his motion to amend his complaint to add Thomas Neal (Neal) as a party defendant. We affirm in part, reverse in part, and remand for further proceedings.

FACTS/PROCEDURAL HISTORY

On June 21, 2006, Husband's wife, Gail Jennings (Wife), discovered a card for flowers in her car. Suspecting the flowers were not for her, Wife questioned Husband, who had recently borrowed her car, about the card. To Wife's dismay, Husband informed Wife that he had bought the flowers for another woman, with whom he had fallen in love. Although Husband refused to tell Wife the woman's full name, he mentioned that he had been corresponding with her via email at his office. That same day, the couple separated.

A few days later, Wife's daughter-in-law, Holly Broome (Broome), visited Wife at her home. Wife, who was extremely upset, told Broome about the separation and the conversation she had had with Husband. The next day, Broome, who had previously worked for Husband, logged onto Husband's Yahoo account from her personal computer by changing Husband's password. Broome proceeded to read emails that had been sent between Husband and his girlfriend. After reading a few of the emails, Broome called Wife, who came over to Broome's home. Broome printed the emails, and she and Wife made copies of them. They then gave one set of the emails to Neal, Wife's divorce attorney, and another set to Brenda Cooke (Cooke), a private investigator from the BJR International Detective Agency, Inc. (BJR) whom Wife had hired.

Broome subsequently logged onto Husband's Yahoo account on five or six additional occasions. Information she obtained about Husband's girlfriend as a result was communicated to Neal and Cooke. According to Broome, she never accessed any of Husband's unopened emails.

On June 29, 2006, Wife initiated an action in family court for divorce and separate support and maintenance. During the course of that litigation, which is still pending, Husband learned that Broome had accessed emails from his Yahoo account and that copies of those emails had been disseminated to Cooke and BJR.

In February 2007, Husband commenced this action against Wife, Broome, Cooke, and BJR, alleging causes of action for invasion of privacy (publicizing of private affairs and wrongful intrusion), conspiracy to intercept and disseminate private electronic communications, and violation of the South Carolina Homeland Security Act, S.C. Code Ann. §§ 17-30-10 to -145 (Supp. 2009) (HSA). The parties filed cross-motions for summary judgment in May 2007.

In June 2007, Husband filed a motion to amend his complaint, which was granted pursuant to a Consent Order to Amend issued July 13, 2007. Later that July, Husband filed his amended complaint, adding allegations of violations of the following statutes: (i) the South Carolina Computer Crime Act (CCA), S.C. Code Ann. §§ 16-16-10 to -40 (2003 & Supp. 2009); (ii) Title I of the Federal Electronic Communications Privacy Act (ECPA), 18 U.S.C. §§ 2510-2522 (2006); and (iii) Title II of the ECPA, 18 U.S.C. §§ 2701-2712 (2006), which is separately known as the Stored Communications Act (SCA).

In February 2008, Wife and Broome each moved again for summary judgment. Thereafter, Husband filed a motion to amend his complaint a second time. Among other things, Husband sought to add Neal as a party defendant.

A hearing regarding the parties' summary judgment motions and Husband's motion to amend his complaint was held in June 2008. At that hearing, Husband voluntarily withdrew his causes of action arising under the HSA, the CCA and Title I of the ECPA, as well as his cause of action for conspiracy.

By an order filed September 24, 2008, the circuit court granted Respondents' motions for summary judgment as to Husband's remaining

causes of action, and it denied Husband's motion to amend his complaint. With regard to Husband's claim under section 2701 of the SCA, the circuit court held that Husband had failed to allege all of the elements necessary for a cause of action. Additionally, the circuit court found that Husband was not entitled to relief under section 2701 because the emails at issue were not in "electronic storage" as that term is defined in 18 U.S.C. § 2510(17) (2006). Furthermore, the circuit court ruled that, even if the emails were in electronic storage, Husband could not recover against Wife or Cooke because their actions did not constitute a violation of section 2701.

Husband subsequently filed a motion to reconsider, which was denied by the circuit court. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in granting Respondents' motions for summary judgment on Husband's cause of action for a violation of the SCA on the ground that Husband failed to allege all of the elements necessary to successfully plead a cause of action under 18 U.S.C. § 2701 (2006)?

2. Did the circuit court err in granting Respondents' motions for summary judgment on Husband's cause of action for a violation of the SCA on the ground that the emails were not in "electronic storage" as defined in 18 U.S.C. § 2510(17) (2006)?

3. Did the circuit court err by not allowing Husband to amend his complaint to add Neal as a party defendant?

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court under Rule 56(c), SCRCP. Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted 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." In ascertaining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Belton v. Cincinnati Ins. Co., 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004).

A motion to amend a pleading is normally addressed to the sound discretion of the trial court. Porter Bros., Inc. v. Specialty Welding Co., 286 S.C. 39, 41, 331 S.E.2d 783, 784 (Ct. App. 1985). The trial court's decision will not be overturned "without an abuse of discretion or unless manifest injustice has occurred." Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). The discretion afforded to the trial court in granting or denying an amendment "is so broad that it will rarely be disturbed on appeal." Porter Bros., 286 S.C. at 41, 331 S.E.2d at 784.

DISCUSSION

I. Did the circuit court err in determining that Husband failed to allege all of the elements of a cause of action under section 2701 of the SCA?

Section 2701(a) of the SCA provides:

> Except as provided in subsection (c) of this section whoever—
>
> > (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
> >
> > (2) intentionally exceeds an authorization to access that facility;
>
> and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it

> is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2701(a) (2006) (emphasis added).

Husband contends that the circuit court erred by determining that he failed to allege all of the elements of a cause of action under Section 2701. We agree.

Here, the circuit court held that the allegations in Appellant's complaint were "fatally incomplete" because Appellant failed to specifically contend that Respondents "obtain[ed], alter[ed], or prevent[ed] authorized access to a wire or electronic communication while it [was] in electronic storage." Because the circuit court's ruling focused upon Appellant's complaint, it appears that the circuit court treated Respondents' motions for summary judgment as motions to dismiss under Rule 12(b)(6), SCRCP.[1] However, the requirements for granting summary judgment are obviously different than the requirements for granting a Rule 12(b)(6) motion to dismiss. For instance, in ruling on a Rule 12(b)(6) motion, the court is confined to the complaint. See Berry, 328 S.C. at 441, 492 S.E.2d at 797 ("A Rule 12(b)(6) motion to dismiss for failure to state a cause of action must be resolved by the trial

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[1] Rule 12(b)(6), SCRCP, provides that "failure to state facts sufficient to constitute a cause of action" is a defense in a civil action. Here, there is no evidence in the record that any of the Respondents filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP. Moreover, even if Respondents had done so, the circuit court's consideration of matters outside of the pleadings would have converted such a motion into a summary judgment motion. See Rule 12(b), SCRCP ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."); Berry, 328 S.C. at 441-42, 492 S.E.2d at 798 (holding that, by considering matters outside of the pleadings, the trial court converted a Rule 12(b)(6) motion to dismiss into a summary judgment motion).

judge based solely on the allegations established in the complaint.") (emphasis added). In contrast, in ruling on a summary judgment motion, "a court must consider everything in the record-pleadings, depositions, interrogatories, admissions on file, affidavits, etc." Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986).

In the present case, Husband introduced evidence showing that Broome logged onto Husband's Yahoo email account without authorization by changing Husband's password. He also presented evidence that Broome, without Husband's consent, read and printed emails that were stored in Husband's Yahoo email account. Importantly, at least one court has held that comparable proof was sufficient to withstand a summary judgment motion in a section 2701 action. See Fischer v. Mt. Olive Lutheran Church, Inc., 207 F. Supp. 2d 914, 924-26 (W.D. Wis. 2002) (denying summary judgment to defendants in a cause of action for a violation of section 2701 where evidence was presented to show that defendants logged onto plaintiff's Hotmail account without authorization and printed plaintiff's emails). Because the circuit court was ruling on motions for summary judgment, it was required to consider the evidence presented by Husband. Accordingly, we conclude that the circuit court erred by granting summary judgment to Respondents based merely upon the fact that Husband failed to expressly allege in his complaint that Respondents "obtain[ed], alter[ed], or prevent[ed] authorized access to a wire or electronic communication while it [was] in electronic storage." See 18 U.S.C. § 2701(a) (2006).

II. Did the circuit court err in holding that the emails were not in "electronic storage" as contemplated by 18 U.S.C. § 2510(17)?

By its terms, section 2701(a) applies only to communications that are in "electronic storage." See 18 U.S.C. § 2701(a) (2006). Section 2510(17) defines "electronic storage" as:

> (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

> (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

18 U.S.C. § 2510(17) (2006) (emphasis added).[2] In the present case, Husband contends that the emails in question fell within subsection (B) of section 2510(17) and that the circuit court therefore erred by holding that the emails were not in "electronic storage."[3] We agree.

In its decision, the circuit court held that the emails in question fell outside the scope of section 2510(17)(B) because: (i) they were not stored by an "electronic communication service" (ECS); and (ii) they were not stored "for purposes of backup protection." As discussed below, we find that the circuit court erred in reaching those conclusions.

A. Were the emails stored by an ECS?

An ECS is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15) (2006). In the present case, the circuit court denied recovery to

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[2] The definitions set forth in section 2510 have been incorporated into the SCA. See 18 U.S.C. § 2711(1) (2006).

[3] Several courts have held that the application of subsection (A) of section 2510(17) is limited to communications that have not yet been accessed by their intended recipient. See, e.g., In re DoubleClick, Inc. Privacy Litig., 154 F. Supp. 2d 497, 512 (S.D.N.Y. 2001) ("[I]t appears that [section 2510(17)(A)] is specifically targeted at communications temporarily stored by electronic communications services incident to their transmission—for example, when an email service stores a message until the addressee downloads it."); United States v. Weaver, 636 F. Supp. 2d 769, 771 (C.D. Ill. 2009) ("Because the emails here have been opened, they are not in temporary, intermediate storage incidental to electronic transmission."). Here, as noted above, Broome testified that she never accessed any of Husband's unopened emails.

Husband based in part on its finding that "Plaintiff has not asserted or provided evidence from which to conclude he is an 'electronic communication service.'" Although we agree with the circuit court that Husband is not an ECS, the circuit court framed the issue incorrectly. Specifically, the circuit court should have addressed whether Yahoo was an ECS, rather than whether Husband was an ECS. Here, the emails in question were stored on servers operated by Yahoo. Therefore, the emails were stored "by" Yahoo. See Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892, 901 (9th Cir. 2008) ("By archiving the text messages on its server, Arch Wireless certainly was 'storing' the messages."), rev'd on other grounds sub nom. City of Ontario v. Quon, No. 08-1332, 2010 WL 2400087 (U.S. June 17, 2010). Although any emails stored by Husband on the hard drive of his computer would not be covered by the SCA,[4] in this case, Broome did not access the emails in question from Husband's hard drive. Instead, she logged directly onto Yahoo's system and retrieved the emails from there. Accordingly, the relevant issue here is whether Yahoo constitutes an ECS.

Turning to that question, we hold that Yahoo is an ECS. Yahoo unquestionably provides its users with the ability to send or receive electronic communications. Any doubt regarding whether Yahoo constitutes an ECS is removed by the SCA's legislative history, which provides that "electronic mail companies are providers of electronic communication services." S. REP. NO. 99-541, at 14 (1986); see also H.R. REP. NO. 99-647, at 63 (1986) ("An 'electronic mail' service . . . would be subject to Section 2701.").[5]

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[4] See, e.g., Hilderman v. Enea TekSci, Inc., 551 F. Supp. 2d 1183, 1204-05 (S.D. Cal. 2008) (holding that emails stored by employee on hard drive of company-issued laptop were not in "electronic storage" as contemplated by the SCA); In re DoubleClick, 154 F. Supp. 2d at 511-13 (holding that computer programs known as "cookies" placed by internet advertising corporation on the hard drives of plaintiffs' computers were not in "electronic storage").

[5] Federal courts have looked to legislative history such as House and Senate Reports in interpreting the SCA. See, e.g., Fischer, 207 F. Supp. 2d at 925-26 (citing Senate Report); In re Nat'l Sec. Agency Telecomms. Records Litig., 483 F.Supp.2d 934, 939 (N.D. Cal. 2007) (citing House and Senate Reports). Additionally, in construing federal statutes, the South Carolina

Wife, however, contends that Yahoo was acting as a "remote computing service" (RCS), rather than an ECS, at the time that the emails were accessed. RCS is defined as "the provision to the public of computer storage or processing services by means of an electronic communications system." 18 U.S.C. § 2711(2) (2006).[6] The term refers to "the processing or storage of data by an off-site third party." Quon, 529 F.3d at 901; see also Orin S. Kerr, A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It, 72 Geo. Wash. L. Rev. 1208, 1213-14 (2004) (describing customers of RCS as those that "paid to have remote computers store extra files or process large amounts of data").

In the present case, it is questionable whether Yahoo was providing RCS with respect to the emails in question. For instance, in Quon, the Ninth Circuit held that Arch Wireless, a company providing text messaging services to the city of Ontario, was not an RCS and that Arch Wireless therefore violated the SCA when it disclosed to the city the contents of text messages sent by city employees. Quon, 529 F.3d at 900-03.[7] Nonetheless, even if

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Supreme Court has reviewed congressional reports to glean legislative intent. See White v. S.C. Tax Comm'n, 253 S.C. 79, 85-86, 169 S.E.2d 143, 145-46 (1969) ("Clearly demonstrative of the intent and purpose of Congress in enacting what is now Code Section 2056(b)(4) is the following quotation from Senate Report No. 1013 . . . .").

[6] An "electronic communications system" is "any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications." 18 U.S.C. § 2510(14) (2006).

[7] This holding was not on review in the U.S. Supreme Court's recent City of Ontario decision in which the Court reversed a portion of Quon. See City of Ontario, 2010 WL 2400087, at *7 (noting that "[t]he petition for certiorari filed by Arch Wireless challenging the Ninth Circuit's ruling that Arch Wireless violated the SCA was denied"). Rather, the issue addressed in City

Yahoo was acting as an RCS with respect to the emails at issue, there is no question that Yahoo was also acting as an ECS with regard to those same emails. Husband's account was still active, and Husband retained the ability to send (forward) any of the emails at issue to someone else. Notably, the House Report for the SCA indicates that, in such situations, the communications would still be protected under section 2701. See H.R. REP. NO. 99-647, at 63 (1986) ("[T]o the extent that a remote computing service is provided through an Electric Communication Service, then such service is also protected [under section 2701].").

Because Yahoo was providing ECS with respect to the emails at issue, this case is distinguishable from Flagg v. City of Detroit, 252 F.R.D. 346 (E.D. Mich. 2008), a case relied upon by Respondents. In that case, the court addressed whether text messages stored by a non-party service provider on behalf of the city of Detroit were discoverable in a civil action brought against the city. Id. at 347. The city claimed that disclosure of the text messages by the service provider was barred by section 2702(a) of the SCA, which prohibits RCS entities from knowingly divulging communications maintained on their systems and ECS entities from knowingly divulging communications that are in "electronic storage" on their systems. Id. at 349. The court disagreed with the city, finding that the service provider was acting as an RCS with respect to the text messages and that the city, as the "subscriber," could therefore give its consent to the disclosure of the messages under an exception set forth in section 2702(b)(3). Id. at 363.[8] The

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of Ontario was whether the city violated the Fourth Amendment by reviewing the text messages. Id. at *4.

[8] Section 2702(b)(3) provides: "A provider described in subsection (a) may divulge the contents of a communication . . . with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service." 18 U.S.C. § 2702(b)(3) (2006). Although, in Flagg, the city did not want to give its consent, the court concluded that the city, as a party to the action, was "both able and obligated to give its consent" so that the city could comply with a request for the production of the text messages under Rule 34 of the Federal Rules of Civil Procedure. 252 F.R.D. at 363 (emphasis added).

court gave the following explanation for its conclusion that the service provider was acting as an RCS:

> [T]he ECS/RCS inquiry in this case turns upon the characterization of the service that SkyTel presently provides to the City, pursuant to which the company is being called upon to retrieve text messages from an archive of communications sent and received by City employees in years past using SkyTel text messaging devices. . . . SkyTel is no longer providing, and has long since ceased to provide, a text messaging service to the City of Detroit—the City, by its own admission, discontinued this service in 2004, and the text messaging devices issued by SkyTel are no longer in use. . . . The Court finds, therefore, that the archive maintained by SkyTel constitutes "computer storage," and that the company's maintenance of this archive on behalf of the City is a "remote computing service" as defined under the SCA.

Id. at 362-63.

Here, unlike the situation in Flagg, Yahoo was providing email services to Husband at the time the emails at issue were accessed. Accordingly, Flagg is distinguishable from the present case.

B. Were the emails being stored "for purposes of backup protection"?

As noted above, to fall within section 2510(17)(B), a communication must not only be stored by an ECS, it must also be stored "for purposes of backup protection." In Theofel v. Farey-Jones, 359 F.3d 1066 (9th Cir. 2004), the Ninth Circuit addressed whether previously delivered emails held by an internet service provider (ISP) were stored "for purposes of backup protection" as contemplated by section 2510(17)(B). The court concluded that they were, explaining:

> An obvious purpose for storing a message on an ISP's server after delivery is to provide a second copy of the message in the event that the user needs to download it again—if, for example, the message is accidentally erased from the user's own computer. The ISP copy of the message functions as a "backup" for the user. Notably, nothing in the Act requires that the backup protection be for the benefit of the ISP rather than the user. Storage under these circumstances thus literally falls within the statutory definition.

Id. at 1075.

Like the Ninth Circuit, we believe that one of the purposes of storing a backup copy of an email message on an ISP's server after it has been opened is so that the message is available in the event that the user needs to retrieve it again. In the present case, the previously opened emails were stored on Yahoo's servers so that, if necessary, Husband could access them again. Accordingly, we hold that the emails in question were stored "for purposes of backup protection" as contemplated by section 2510(17)(B).

Respondents nonetheless contend that, because Husband has not claimed that he saved the emails anywhere else, the storage of his emails could not have been for the purposes of backup protection. However, courts interpreting section 2701 have issued rulings that would seem to allow Husband's cause of action in this case. See Cardinal Health 414, Inc. v. Adams, 582 F. Supp. 2d 967, 976 (M.D. Tenn. 2008) ("[W]here the facts indisputably present a case of an individual logging onto another's e-mail account without permission and reviewing the material therein, a summary judgment finding of an SCA violation is appropriate."); Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp. 2d 548, 555 (S.D.N.Y. 2008) ("The majority of courts which have addressed the issue have determined that e-mail stored on an electronic communication service provider's systems after it has been delivered, as opposed to e-mail stored on a personal computer, is a stored communication subject to the SCA.");

Fischer, 207 F. Supp. 2d at 925-26 (rejecting argument that emails stored on Hotmail's system were not in "electronic storage").

Furthermore, we do not find Respondents' argument to be convincing. Under Respondents' construction of the SCA, the unauthorized access of a person's emails from an ECS would be unlawful if the person had previously saved his emails somewhere else, but would be perfectly lawful if the person had not done so. However, such an interpretation would lead to strange results. For instance, a person whose emails were stored solely with an ECS would generally suffer greater harm if someone "alter[ed]" or "prevent[ed] authorized access" to his ECS-stored emails than a person who had saved his emails in additional locations. Yet, under Respondents' construction of the SCA, only the person in the latter position would be protected. We do not believe that this was what Congress intended.

Indeed, the legislative history of the SCA supports the conclusion that Congress intended for the SCA to apply to the conduct Broome engaged in here. For instance, both the House and Senate Reports state that section 2701 "addresses the growing problem of unauthorized persons deliberately gaining access to, and sometimes tampering with, electronic or wire communications that are not intended to be available to the public." H.R. REP. NO. 99-647, at 62 (1986); S. REP. NO. 99-541, at 35 (1986). Additionally, the Senate Report provides the following illustration of what conduct would constitute a violation of section 2701:

> For example, a computer mail facility authorizes a subscriber to access information in their portion of the facilities storage. Accessing the storage of other subscribers without specific authorization to do so would be a violation of [section 2701].

S. REP. NO. 99-541, at 36. Here, Broome has admitted that she accessed and read, without authorization, Husband's emails that were stored on Yahoo's system. The legislative history of the SCA indicates that Congress intended that such conduct would constitute a violation of section 2701.

C. Does the SCA apply to emails in a "post-transmission" state?

Respondents also argue for affirmance of the circuit court's decision on the ground that the emails in question were not in "electronic storage" as contemplated by section 2510(17) because they were in a "post-transmission" state. In making this argument, Respondents rely upon Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623 (E.D. Pa. 2001), aff'd on other grounds, 352 F.3d 107 (3rd Cir. 2003). In Fraser, the court addressed whether an employer violated the SCA when it accessed emails of its employee that were stored on the employer's server. Id. at 632. The court held that there was no violation because the emails were in "post-transmission" storage, meaning that they had already been retrieved by the intended recipient. Id. at 636. The court concluded that the SCA "provides protection only for messages while they are in the course of transmission." Id.

However, the district court's decision in Fraser was subsequently appealed to the Third Circuit, which affirmed on different grounds. See Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107 (3rd Cir. 2003). Specifically, the Third Circuit held that the employer's actions fell within the exception set forth in section 2701(c)(1) because the employer administered the email system and thus was acting as the ECS.[9] Id. at 114-15. Importantly, in reaching that result, the Third Circuit expressed skepticism regarding the district court's ruling that the emails were not in electronic storage, stating:

> [A]ccording to the District Court, the e-mail was in a state it described as "post-transmission storage." We agree that Fraser's e-mail was not in temporary, intermediate storage. But to us it seems questionable that the transmissions were not in backup storage—a term that neither the statute nor the legislative history defines. Therefore, while we affirm the District Court, we do so through a different analytical path,

---

[9] Section 2701(c)(1) provides: "Subsection (a) of this section does not apply with respect to conduct authorized . . . by the person or entity providing a wire or electronic communications service." 18 U.S.C. § 2701(c)(1) (2006).

> assuming without deciding that the e-mail in question was in backup storage.

Id. at 114 (emphasis added).

Moreover, in Theofel, the Ninth Circuit declined to follow the district court's holding in Fraser, reasoning:

> In contrast to subsection (A), subsection (B) [of section 2510(17)] does not distinguish between intermediate and post-transmission storage. Indeed, Fraser's interpretation renders subsection (B) essentially superfluous, since temporary backup storage pending transmission would already seem to qualify as "temporary, intermediate storage" within the meaning of subsection (A). By its plain terms, subsection (B) applies to backup storage regardless of whether it is intermediate or post-transmission.

Theofel, 359 F.3d at 1075-76 (emphasis added). Similarly, in Quon v. Arch Wireless Operating Co., Inc., 309 F. Supp. 2d 1204 (C.D. Cal. 2004), the court rejected the contention that the SCA did not apply to emails in a "post-transmission" state, explaining: "Part (B) [of section 2510(17)] states that the storage must be 'for the purpose of backup protection.' Backup protection clearly may be needed after transmission." Id. at 1208. For the foregoing reasons, we decline to follow the district court's decision in Fraser.

Respondents further claim that the legislative history of the SCA supports their position. Specifically, they point to a section of the applicable House Report that states that email messages stored by an RCS should "continue to be covered by section 2702(a)(2)" if left on the server after they were accessed by the user. See H.R. REP. NO. 99-647, at 65 (1986). Respondents appear to contend that this passage demonstrates that Congress intended for opened emails to be covered under section 2702(a)(2), as opposed to section 2701. In Theofel, the Ninth Circuit rejected a similar argument, explaining:

> The cited discussion [from the House Report] addresses provisions relating to remote computing services. We do not read it to address whether the electronic storage provisions also apply. The committee's statement that section 2702(a)(2) would "continue" to cover e-mail upon access supports our reading. If section 2702(a)(2) applies to e-mail even before access, the committee could not have been identifying an exclusive source of protection, since even the government concedes that unopened e-mail is protected by the electronic storage provisions.

359 F.3d at 1077 (citations omitted).

We agree with the Ninth Circuit's analysis in Theofel. In our view, it would be too much of a stretch to conclude that the above-referenced passage from the House Report demonstrates that Congress did not intend for section 2701 to apply to opened emails.

D. Did the circuit court err by granting summary judgment to Wife, Cooke, and BJR?

Alternatively, Wife, Cooke and BJR contend that, even if the emails were in "electronic storage," the circuit court's grant of summary judgment as to them should be affirmed because they did not engage in a violation of section 2701. We agree.

In its order granting summary judgment to Respondents, the circuit court held that "regardless of this Court's findings as to whether any violation of 18 USC § 2701 occurred, Plaintiff cannot obtain any relief or recovery against Defendant Jennings or Defendant Cooke, as Defendant Jennings and Defendant Cooke are not persons who potentially engaged in such alleged violation." Because Husband has not specifically challenged that ruling, it is the law of the case and requires affirmance. See Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (holding that an unappealed ruling is the law of the case).

aid, abet, or conspire with a person or entity engaging in a violation of section 2702); Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003) (holding that an ISP was not liable under sections 2511 and 2520 of the ECPA for aiding and abetting defendants who intercepted and disclosed oral communications).

III. Did the circuit court err by denying Husband's motion to amend his complaint to add Neal as a party defendant?

Finally, Husband contends that the circuit court erred by not allowing him to amend his complaint a second time to add Neal as a party defendant. We disagree.

Rule 15(a), SCRCP, sets forth the standard for granting motions to amend a pleading. It provides in pertinent part:

> A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.

Rule 15(a), SCRCP (emphasis added). Although leave to amend should generally be "freely given," this court has held that it may be denied where the proposed amendment would be futile. See Higgins v. Med. Univ. of S.C., 326 S.C. 592, 604-05, 486 S.E.2d 269, 275 (Ct. App. 1997).

Here, Husband has not alleged that Neal accessed Husband's email account. Therefore, because liability under the SCA extends only to those who actually engaged in a violation of that act, adding Neal as a party defendant would have been futile. Like Wife, Cooke, and BJR, Neal would have been entitled to summary judgment if he had been added as a defendant.

Accordingly, we conclude that the circuit court did not err in refusing to grant Husband leave to amend his complaint to add Neal as a party defendant.

CONCLUSION

For the foregoing reasons, we affirm the circuit court's grant of summary judgment as to Wife, Cooke, and BJR, as well as the circuit court's denial of Husband's motion to amend his complaint to add Neal as a party defendant. Additionally, we reverse the circuit court's grant of summary judgment as to Broome and remand the case for further proceedings. Accordingly, the circuit's court's decision is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

PIEPER, J., and CURETON, A.J., concur.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas For the Fifth Judicial Circuit

L. Casey Manning, Circuit Court Judge

Case No. 2007-CP-40-1125

M. Lee Jennings, ... Appellant,

v.

Gail M. Jennings, Holly Broome,
Brenda Cooke, Individually and BJR
International Detective Agency, Inc. ..... Respondents.

PETITION FOR REHEARING OF RESPONDENT BROOME

The Petitioner, Respondent Holly Broome, hereby petitions this Court for rehearing of this Court's Decision reversing the Circuit Court's grant of summary judgment for Petitioner as to the cause of action alleging violation of the Federal Stored Communications Act as set forth in the attached Memorandum.

Submitting counsel:

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July 28, 2010.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas For the Fifth Judicial Circuit

L. Casey Manning, Circuit Court Judge

Case No. 2007-CP-40-1125

M. Lee Jennings, ... Appellant,

v.

Gail M. Jennings, Holly Broome,
Brenda Cooke, Individually and BJR
International Detective Agency, Inc. ..... Respondents.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Respondent Holly Broome respectfully submits that this Court has overlooked or misapprehended the correct construction of the Federal Stored Communications Act, and overlooked or misapprehended the absence of evidence in the record that the emails in question were stored for purposes of back-up protection.

ARGUMENT

The Respondent Holly Broome respectfully submits that this Court has overlooked or misapprehended the plain language of 18 U.S.C. §2510(17) which defines electronic storage for purposes of the Act. The statute's words are clear and unambiguous on their face and there is, therefore, no room for statutory

construction and this Court should have applied the statute according to its literal meaning. *Paschal v. State Election Commission*, 317 S.C. 444, 436, 454 S.E.2d 890, 892 (1995). The Appellant in this case never contended that the emails in question fell within the definition of electronic storage as stated in §2510(17)(A). Therefore, the only question was whether or not any emails at issue were in temporary intermediate storage incidental to the electronic transmission thereof and were backed up in storage by Yahoo for protection of such emails. As such, the accessing of such emails by the recipient takes such emails out of the definition at issue and the Stored Communications Act no longer applies to such emails. This Court held that accessing such emails did not take them out of the definition found in the clear words of the statute. Such a construction of the statute "is quite implausible and hard to square with the statutory text." Kerr, Orin S., *User's Guide to the Stored Communications Act, and the Legislator's Guide to Amending It,* 72 Geo. Wash. L. Rev. 1208, 1209-13 (August, 2004); analyzing *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004). Such construction basically finds that the Stored Communications Act applies to any electronic communication whatsoever, whether received or not, accessed or not, and stored by any entity whatsoever. This clearly is not the intent of the statute.

Additionally, Respondent contends that the Court misapprehended and overlooked the complete absence of any evidence whatsoever in the record that the emails in question were in fact stored for purposes of back-up protection by any person or entity whatsoever. It is improper to assume that the emails in question

were stored for purposes of back-up protection by the Appellant or by Yahoo without any evidence whatsoever in the record which supports that assumption. The Appellant was charged with the obligation of coming forward with specific facts showing that there is a genuine issue for trial, in this case facts showing or tending to show that the emails in question were stored for purposes of back-up protection. There is absolutely no evidence in the record concerning this issue. Therefore, summary judgment is appropriate. *Bennett v. Investor's Title Insurance Company*, 370 S.C. 571, 635 S.E.2d 660 (S.C. Ct. App. 2006). Respondent contends that this Court has overlooked the absence of any such evidence in making this decision reversing the Circuit Court's grant of summary judgment to the Respondent.

Respectfully submitted,

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HOLLY BROOME

July 28, 2010.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas For the Fifth Judicial Circuit

L. Casey Manning, Circuit Court Judge

Case No. 2007-CP-40-1125

M. Lee Jennings, ... Appellant,

v.

Gail M. Jennings, Holly Broome,
Brenda Cooke, Individually and BJR
International Detective Agency, Inc. ..... Respondents.

CERTIFICATE OF SERVICE

The undersigned certifies that ***Respondent Broome's Petition for Rehearing and Memorandum in Support of Petition*** have been served upon the Appellant and Respondents Jennings and Cooke by depositing a copy of them in the United States Mail, postage prepaid, on July 28, 2010, addressed to their attorneys of record as follows: Max N. Pickelsimer, Esquire and Carrie A. Warner, Esquire - WARNER, PAYNE & BLACK, Post Office Box 2628, Columbia, South Carolina 29202; John K. Koon, Esquire - KOON & COOK, 2016 Gadsden Street, Columbia, S.C. 29201; and Deborah H. Sheffield, Attorney at Law - LAW OFFICES, 117 Brook Valley Road, Columbia, S.C. 29223; and Richard G. Whiting - LAW OFFICES, 1515 Lady Street, Columbia, S.C. 29201.

July 28, 2010.

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The South Carolina Court of Appeals

M. Lee Jennings, Appellant,

v.

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually, and BJR International Detective Agency, Inc., Respondents.

The Honorable L. Casey Manning
Richland County
Trial Court Case No. 2007-CP-40-01125

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

J. Pieper

J. Geathers

A.J. Cureton

Columbia, South Carolina
August 27, 2010

cc: Max N. Pickelsimer, Esquire
Carrie A. Warner, Esquire
Deborah Harrison Sheffield, Esquire
Gary W. Popwell, Jr., Esquire
John K. Koon, Esquire
Richard Giles Whiting, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Opinion No. 4711
Heard April 15, 2010 - Filed July 14, 2010

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and as BJR International Detective Agency, Inc. of whom Holly Broome is, ...Petitioner,

v.

M. Lee Jennings,. .....Respondent.

PROOF OF SERVICE

The undersigned employee of Attorneys Lee, Eadon, Isgett, Popwell & Reardon, P.A., attorneys for the Petitioner, does hereby certify that service of the ***Appendix***, in the above-referenced action, was made upon counsel of record through the United States Mail with sufficient postage affixed thereto, at the below listed addresses this the 24th day of September, 2010 as follows:

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT

L. Casey Manning, CIRCUIT COURT JUDGE

DOCKET NO. 2007-CP-40-1125

M. LEE JENNINGS,

APPELLANT,

V.

GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, individually and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,

RESPONDENTS.

RECORD ON APPEAL Vol. 1 of 2

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

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M. LEE JENNINGS,)
Plaintiff(s))
)
vs.)
WP & B, LLP
FEDERLAW SERVICES
OF SC, PA)
)
GAIL M. JENNINGS, HOLLY BROOME,)
BRENDA COOKE, individually and BJR)
INTERNATIONAL DETECTIVE AGENCY,)
INC.)
Defendant(s))

CIVIL ACTION COVERSHEET

2007 - CP - 40 - 1125

BARBARA A. CO
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RICHLAND COUNTY
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NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

If Action is Judgment/Settlement do not complete

☒ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

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- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
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- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
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Submitting Party Signature: _____ Date: February 20, 2007

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Florence, Horry, Lexington, Richland, Greenville**, and Anderson**

** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Case are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Cases which are appellate in nature such as appeals or writs of certiorari;

    c. Post Conviction relief matters;

    d. Contempt of Court proceedings;

    e. Forfeiture proceedings brought by the State;

    f. Cases involving mortgage foreclosures; and

    g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.

4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	DOCKET NO.: 2007-CP-40-_____ **SUMMONS**

RICHLAND COUNTY
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BARBARA A. SCOTT
C.C.C. & G.S.

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

WARNER, PAYNE, & BLACK, L.L.P.

Jan L. Warner
Post Office Box 2628 (29202)
1122 Lady Street, Ste 1200
Columbia, South Carolina 29201
Telephone: (803) 799-0554
Facsimile: (803) 799-2517
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
February 20, 2007

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	DOCKET NO.: 2007-CP-40-_____ **COMPLAINT**

RICHLAND COUNTY
FILED
2007 FEB 20 PM 3:18
BARBARA A. SCOTT
C.C.C. & G.S.

Plaintiff, for a Complaint against Defendants, alleges:

GENERAL ALLEGATIONS AND JURISDICTION

1. Plaintiff is a resident of Richland County, South Carolina. Defendant Gail M. Jennings is a resident of Richland County, South Carolina. Defendant Brenda Cooke ("Cooke" hereafter), individually and shareholder of business as BJR International Detective Agency, Inc. ("BJR" hereafter) does business in Richland County, South Carolina. Defendant Broome, upon information and belief, is a resident of Richland County, South Carolina.

2. Jurisdiction and venue are proper in this Court.

3. Plaintiff and Defendant Jennings are husband and wife who separated on or about June 21, 2006.

4. Defendant Broome ("Broome" hereafter) is the wife of Defendant Jennings' son (Defendant Jennings' daughter-in-law); Defendant Cooke and BJR are

licensed private investigators whom Defendant Jennings hired on or about June 26, 2006.

5. Plaintiff and Defendant Jennings are engaged in litigation in the Family Court for the Fifth Judicial Circuit for Richland County. Complaint for divorce was filed by Defendant Jennings on June 29, 2006.

6. At all times relevant herein, Plaintiff had a private e-mail address at yahoo.com with the identity "leedabeatlefan@yahoo.com". At no time did Plaintiff give anyone the permission to access or use his private e-mail account.

7. Beginning after June 21, 2006, upon information and belief, Defendant Broome illegally accessed Plaintiff's private e-mail address without his permission, and used a computer located at 309 Vincienne, and possibly other computers, to improperly procure Plaintiff's private electronic mail communications. After intercepting and accessing Plaintiff's private e-mail communications through an electronic communication system and printing the same, Defendant Broome used the improperly obtained communications in an attempt to gain an economic benefit for Defendant Jennings and Cooke and to gain a collateral advantage in the pending Family Court action.

8. The contents of Plaintiff's private electronic messages were disseminated visually and by copies being provided to Defendant Cooke, BJR employees, Defendant Jennings, Defendant Jennings' attorney and employees, the public record for Richland County, and as yet, unidentified third persons.

9. The foregoing acts were accomplished from and including June 21, 2006 through and including an unknown date, and possibly up to this date.

FOR A FIRST CAUSE OF ACTION

10. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

11. Plaintiff brings this cause of action pursuant to Sections 17-30-10, et seq. and 17-30-135 of the 1976 Code of Law, State of South Carolina, as amended.

12. Plaintiff alleges that his electronic communications have been intercepted, disclosed, and used in violation of the forgoing chapters and brings this civil cause of action against those persons and entities who intercepted, disclosed, used, and procured Plaintiff's private electronic communications.

13. Based thereon, Plaintiff is entitled to an immediate Order and injunction restraining all Defendants and their agents and employees from any further dissemination of Plaintiff's private electronic mail which was intercepted and used by them.

14. Pursuant to Sections 17-30-10, et seq. and 17-30-135 of the 1976 Code of Law, State of South Carolina, as amended, Plaintiff is further entitled to actual damages of not less than liquidated damages computed at the rate of $500.00 per day for each day in violation or $25,000.00, whichever is greater, alleging that, upon information and belief, from the date of the first interception, disclosure continues upon the public records and elsewhere through this date and Plaintiff is entitled damages at the rate of $500.00 per day for ever day on which the foregoing records continue to be used and disclosed.

15. Plaintiff is also entitled to punitive damages in an amount to be established by a jury, together with reasonable attorneys fees and other litigation costs

reasonably incurred and such other legal and equitable relief as the Court deems just and proper.

FOR A SECOND CAUSE OF ACTION
(INVASION OF PRIVACY – Publicizing of Private Affairs)

16. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

17. The Defendants herein gave publicity to matters that are private to the Plaintiff.

18. The disclosure of these communications would be highly offensive to a reasonable person and is not of legitimate public concern.

19. Further, Plaintiff did not consent to the disclosure of this private information.

20. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A THIRD CAUSE OF ACTION
(INVASION OF PRIVACY – Wrongful Intrusion)

21. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

22. Defendants' wrongful intrusions consist of watching, spying, and prying into Plaintiff's private affairs.

23. The wrongful intrusions concern those aspects of the Plaintiff, his personal relationships, and communications which one normally expects to be free from exposure to the Defendants.

24. Defendants' conduct is intentional, substantial and unreasonable, and is of a nature that would cause mental injury to a person of ordinary feelings and intelligence in the same circumstances.

25. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A FOURTH CAUSE OF ACTION
(CONSPIRACY)

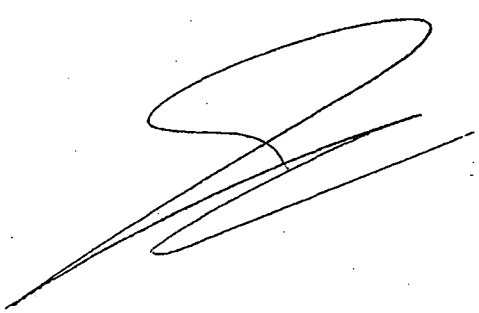
26. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

27. Defendants combined, with malice, for the purposes of injuring the Plaintiff.

28. By improperly intercepting and disseminating Plaintiff's private electronic communications, Defendants have caused Plaintiff to suffer special damages.

29. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

WHEREFORE, Plaintiff prays that relief be granted jointly and severally as requested herein above, together with such other legal and equitable relief as the Court may deem just and proper.



ROA000009

WARNER, PAYNE, & BLACK, L.L.P.

Jan L. Warner
Matthew E. Steinmetz
Post Office Box 2628 (29202)
1122 Lady Street, Ste 1200
Columbia, South Carolina 29201
Telephone: (803) 799-0554
Facsimile: (803) 799-2517
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
February 20, 2007

RECEIVED
2007 MAR 29 AM 10:51
WYCHE, P.A. & G.S., LLP
LEGAL SERVICES OF SC, PA

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	
M. Lee Jennings,)	C/A No.:2007-CP-40-1125
Plaintiff,)	
vs.)	
Gail M. Jennings, Holly Broome, Brenda Cooke, individually, and BRJ International Detective Agency, Inc.,)	ANSWER OF DEFENDANT BRENDA COOKE AND BJR INTERNATIONAL DETECTIVE AGENCY, INC.
Defendants.)	

RICHLAND COUNTY FILED
2007 MAR 28 PM 3:50
WYCHE, P.A. & G.S. SCOTT

TO: THE PLAINTIFF ABOVE-NAMED AND HIS ATTORNEY OF RECORD, JAN L. WARNER, ESQUIRE:

The Defendants, above named, hereby answers the Complaint herein and reserving the right to file a motion under Rule 12 of the South Carolina Rules of Civil Procedure, or any other disposition motion, answers Plaintiff's Complaint as follows:

FOR A FIRST DEFENSE

1. The Defendants specifically deny each and every allegation contained within the Complaint not hereinafter specifically or expressly admitted, qualified or explained.

2. Defendants, Brenda Cooke and BJR International Detective Agency, Inc. denies the allegations of 1 on the Complaint and would show unto the court that Defendant Cooke is a resident of Lexington County and that her principal place of business of business is in Lexington County. The fact that these Defendants do business in Richland County is insufficient to confer jurisdiction and venue in Richland County.

3. Brenda Cooke and BJR International Detective Agency, Inc. denies the allegations of 2 of the Complaint unless the Plaintiff can establish that jurisdiction and

venue is proper through some other named Defendant.

4. Responding to Paragraph 4 of the Complaint, Brenda Cooke admits that she is a licensed private investigator but denies that BJR is a private investigator but would show that it is a corporation for which she is employed. Defendant Cooke and BJR also admit that portion of Paragraph 4 which states that they were retained on or about June 26, 2006. All the rest and remainder of Paragraph 4 are denied.

5. Brenda Cooke and BJR International Detective Agency, Inc. admit the allegations of Paragraphs 3 and 5 of the Complaint.

6. Brenda Cooke and BJR International Detective Agency, Inc. are without sufficient information to admit or deny the allegations of Paragraph 6 of the Complaint and therefore deny same.

7. Paragraph 7 does not relate to these Defendants and no response is necessary.

8. Brenda Cooke and BJR International Detective Agency, Inc. admits that they received certain e-mails as alleged in Paragraph 8, but they are unable to ascertain where they came from and is without sufficient information to form a belief as to whether they are private.

9. Brenda Cooke and BJR International Detective Agency, Inc. deny the allegations of 9 of the Complaint.

10. No response is necessary to the allegations of Paragraphs 10, 11 and 12 of the Complaint.

11. Brenda Cooke and BJR International Detective Agency, Inc. denies the allegations of 13 of the Complaint and would show unto the court that no Order of

injunction restraining the Defendants and their agents and employees are appropriate under the circumstances.

12. Brenda Cooke and BJR International Detective Agency, Inc. deny the allegations of Paragraphs 14 through 29 and demands strict proof of the allegations.

FOR A SECOND AND AFFIRMATIVE DEFENSE

13. These Defendants realleges all allegations of their First Defense where inconsistent herein, as if repeated verbatim herein.

14. The allegations in the Complaint fails to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Procedure.

FOR A THIRD AND AFFIRMATIVE DEFENSE

15. These Defendants realleges all allegations of their First and Second Defenses where inconsistent herein, as if repeated verbatim herein.

16. These Defendants would show that the Plaintiff has brought this suit in an attempt to gain an unfair advantage. He violated his marital vows by entering into a sexual relationship with another woman while married. The doctrine of unclean hands will preclude a litigant from recovering in equity if that litigant acted unfairly. He comes to this court with unclean hands and if the Court balances the equities between the parties then the Plaintiff is forbidden to recover as a result. A party will have unclean hands if that party behaves unfairly in a matter. It is unfair for the wrongdoer in a marriage to commit adultery and then attempt to gain an unfair advantage by filing suit against all these Defendants.

WHEREFORE, the Defendants, having fully answered pray that the Complaint be dismissed with costs and attorney's fees and for other and further relief the Court may

deem just and proper.

KOON & COOK, PA

By: _____

John K. Koon
2016 Gadsden Street
Columbia, S.C. 29201
803-256-4082, telephone
803-254-0658, facsimile
Attorney for Defendants

Columbia, South Carolina
March 27, 2007

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)
	) C.A. No.: 2007-CP-40-1125
M. Lee Jennings,	)
Plaintiff,	)
vs.	)
	) CERTIFICATE OF SERVICE
	)
Gail M. Jennings, Holly Broome, Brenda Cooke, individually and BRJ International Detective agency, Inc.,	)
Defendants.	)

RICHLAND COUNTY
FILED
2007 MAR 28 PM 3:50
BARBARA A. SCOTT
C.C.C. & G.S.

I, Patty K. Boatwright, the undersigned Legal Secretary, of the law offices of Koon and Cook, P.A., attorneys for Defendant Brenda Cooke do hereby certify that I have served the Plaintiff's Attorney with a copy of Defendant Brenda Cooke's Answer in this matter, herein below specified by mailing of the same by United States Mail, postage prepaid, to the following address:

Jan L. Warner, Esquire
Warner, Payne & Black, LLP
Post Office Box 2628
Columbia, SC 29201

Patty K. Boatwright, Legal Secretary

Columbia, South Carolina

March 28, 2007

Attorneys

LEE, EADON, ISGETT, POPWELL AND REARDON, P.A.

LUTHER M. LEE (1923-1996)
SHEROD H. EADON, JR.
CHRISTOPHER G. ISGETT
GARY W. POPWELL, JR.
GERALD E. REARDON
BRETT A. OWENS - ASSOCIATE

RECEIVED
2007 APR -3 PM 12: 25
WP & B, LLP
LEDERLAW SERVICES
OF SC, PA

1314 LINCOLN STREET
POST OFFICE BOX 1505
COLUMBIA, SOUTH CAROLINA 29202
TELEPHONE (803) 799-9811
TELECOPIER (803) 779-8572
TOLL FREE (800) 882-0742
www.leiplaw.com

March 30, 2007

VIA HAND DELIVERY
The Honorable Barbara A. Scott
RICHLAND COUNTY CLERK OF COURT
1701 Main Street
Post Office Box 2766
Columbia, South Carolina 29202-2766

Re: M. Lee Jennings -vs- Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and BJR International Detective Agency, Inc.
Case No.: 2007-CP-40-1125

Dear Ms. Scott:

Please find enclosed for filing the original and two (2) copies of the Answer of Defendant Holly Broome, in the above-referenced matter. Please return a clocked copy with my courier.

By copy of this letter, I am serving a copy of the Answer on Jan L. Warner, Esquire, attorney for the Plaintiff; John K. Koon, Esquire, Attorney for Defendant Cooke; and Richard Whiting, Esquire, Attorney for Defendant Jennings.

Thank you very much for your attention in this matter. Hoping this letter finds you well, I am,

Respectfully yours,

GARY W. POPWELL, JR.

GWPJr/gsr
Enclosures

cc: Jan L. Warner, Esquire *(w/encls.)*
John K. Koon, Esquire *(w/encls.)*
Richard G. Whiting, Esquire *(w/encls.)*

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2007 APR -3 PM 12:35
WP&B, LLP FIFTH JUDICIAL SERVICES
OF SC, PA

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS,	)	CASE NO.: 07-CP-40-1125
PLAINTIFF,	)	
-vs-	)	**ANSWER OF DEFENDANT HOLLY BROOME**
GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,	)	
DEFENDANTS.	)	

TO: JAN L. WARNER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Defendant Holly Broome would respectfully answer the Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE

1. The allegations of paragraphs 1 through 5 referencing Defendant Broome are admitted. The other allegations are admitted upon information and belief.

2. The Defendant is without sufficient information to admit or deny the allegations of paragraph 6 and, therefore, denies same and demands strict proof thereof.

3. The allegations of paragraphs 7 through 29 are denied.

FOR A SECOND DEFENSE

4. The Defendant realleges all allegations of her First Defense where consistent herewith, as if repeated verbatim herein.

5. The allegations of the Complaint failed to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

6. The Defendant realleges all allegations of her First and Second Defenses where consistent herewith, as if repeated verbatim herein.

7. The Plaintiff has acted unfairly in the matter which is the subject of this litigation and the underlying litigation in the Family Court and comes into this Court with unclean hands and the Defendant Broome pleads the defense of unclean hands as a complete and total bar to this action. The Defendant will set forth the specifics of the Plaintiff's conduct which she alleges constitutes unclean hands at Plaintiff's request through discovery or through more particular allegations upon motion to make more definite and certain; however, the Defendant sees no need to make the specifics of Plaintiff's conduct part of the pubic record at this time.

WHEREFORE, having fully answered, the Defendant Holly Broome prays that the Complaint be dismissed with costs, and for such other and further relief as this Honorable Court may deem just and proper.

GARY W. POPWELL, JR.
Attorney for Defendant Holly Broome

ATTORNEYS LEE, EADON, ISGETT,
POPWELL AND REARDON, P.A.
Post Office Box 1505
Columbia, South Carolina 29202
(803) 799-9811

Columbia, South Carolina

March 30, 2007.

CERTIFICATE OF SERVICE

Re: M. Lee Jennings -vs- Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and BJR International Detective Agency, Inc.
Case No.: 2007-CP-40-1125

I, the undersigned, do hereby certify that a copy of the ***Answer of Defendant Holly Broome,*** in the above-referenced matter, has been served upon the following counsel of record, through the United States Mail with sufficient postage affixed thereto.

Jan L. Warner, Esquire
WARNER, PAYNE & BLACK
Post Office Box 2628
Columbia, South Carolina 29202

John K. Koon, Esquire
KOON & COOK
2016 Gadsden Street
Columbia, S.C. 29201

Richard G. Whiting, Esquire
LAW OFFICES
1515 Lady Street
Columbia, S.C. 29201

Gayle S. Reese

March 30, 2007.

LAW OFFICES OF
RICHARD G. WHITING
A PROFESSIONAL ASSOCIATION
1515 LADY STREET
POST OFFICE BOX 7877
COLUMBIA, SOUTH CAROLINA 29202

TELEPHONE (803) 256-9067
FACSIMILE (803) 256-0223
dick.whiting@whitinglawsc.com

April 20, 2007

Jan L. Warner, Esquire
Warner Payne & Black, LLP
Post Office Box 2628
Columbia, SC 29202

RE: M. Lee Jennings v. Gail Jennings, et al
Case No. 2007-CP-40-1125

Dear Jan:

Enclosed please find our Answer in the above captioned matter. By copy of this correspondence I am also serving on John K. Koon, attorney for Brenda Cook, individually, and BRJ International Detective Agency, Inc., and Gary W. Popwell, Jr., attorney of record for Holly Broome a copy of same.

Our answers to your Interrogatories and Request for Production should be forthcoming next week.

Please accept my kindest regards.

I am, very truly yours,

R. G. Whiting

Richard G. Whiting

/klh
enc: Answer of Defendant Jennings
cc: John K. Koon, Esquire w/enclosure
Gary W. Popwell, Jr. w/enclosure

RECEIVED
2007 APR 23 PM 12:59
W P & B, LLP
--UERLAW SERVICES
OF SC, PA

RECEIVED
2007 APR 23 PM 12:59
W P & B, LLP
LAWYERS SERVICES
OF SC, PA

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. Lee Jennings, Plaintiff, versus Gail M. Jennings, Holly Broome, Brenda Cook, individually and BJR International Detective Agency, Inc. Defendants.	ANSWER OF DEFENDANT GAIL M. JENNINGS Civil Action No. 2007-CP-40-1125

TO JAN L. WARNER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Defendant, Gail M. Jennings, responding to the allegations of Plaintiff's Complaint would allege as follows:

FOR A FIRST DEFENSE:

1. That she denies each and every allegation of the Complaint not hereinafter admitted, qualified or otherwise addressed.

2. That she admits those allegations of paragraph 1, 2, 3, 4, and 5.

3. As to the allegations of paragraph 6 the Defendant is informed and believes that the Plaintiff had in fact a private email address as set out in his Complaint, the Defendant does not have sufficient information to admit or deny

whether or not Plaintiff has given anyone permission to access or use his email account and therefore denies the same and demands strict proof thereof.

4. The Defendant is without sufficient information in which to form a belief or opinion as to the allegations as contained in paragraph 7 and therefore denies the same demanding strict proof thereof.

5. As to those allegations in paragraph 8 the Defendant would admit that certain emails were seen by her and that certain copies were made available to Defendant Cook and others, but Defendant is without sufficient information in which to form a belief or opinion as to the remainder of that paragraph and therefore denies same demanding strict proof thereof.

6. As to the allegations in paragraph 9 the Defendant is informed and believes that any act complained of by the Plaintiff stopped during the later part of July 2006.

7. As to the allegations in paragraph 10 the Defendant is informed and believes that no response is necessary and therefore none is made. However, if the Court deems that a response is necessary the Defendant denies.

8. The Defendant denies those allegations in paragraph 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29.

FOR A SECOND DEFENSE:

9. The Defendant re-alleges all allegations of her First Defense were consistent wherein as if repeated verbatim.

10. The allegations of the Complaint failed to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE:

11. The Defendant re-alleges all allegations of her First and Second Defenses where consistent herewith, as if repeated verbatim herein.

12. The Plaintiff has acted unfairly in the matter which is the subject of this litigation and the underlying litigation in the Family Court and comes into this Court with unclean hands and the Defendant Jennings pleads the defense of unclean hands as a complete and total bar to this action. The Defendant will set forth the specifics of the Plaintiff's conduct which she alleges constitutes unclean hands at Plaintiff's request through discovery or through more particular allegations upon motion to make more definite and certain; however, the Defendant sees no need to make the specifics of Plaintiff's conduct part of the public record at this time.

WHEREFORE, having fully answered, the Defendant Gail M. Jennings prays that the Complaint be dismissed with costs, and for such other and further relief as this Honorable Court may deem just and proper.

Richard G. Whiting
Attorney for Defendant Jennings
1515 Lady Street
Post Office Box 7877
Columbia, SC 29202
Telephone (803) 256-9067

April 20, 2007

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. Lee Jennings, Plaintiff, versus Gail M. Jennings, Holly Broome, Brenda Cook, individually and BJR International Detective Agency, Inc. Defendants.	)	CERTIFICATE OF SERVICE Civil Action No. 2007-CP-40-1125

I, Keri L. Hannon, assistant to Richard G. Whiting, attorney for the Defendant do hereby certify that I have this 20th day of April, 2007, served the Answer of Defendant Gail M. Jennings, via U.S. Postal Service, postage prepaid to the following addresss:

Jan L. Warner, Esquire
Warner Payne & Black, LLP
Post Office Box 2628
Columbia, SC 29202

John K. Koon, Esquire
Koon and Cook, P.A.
2016 Gadsden Street
Columbia, SC 29201

Gary W. Popwell, Jr. Esquire
Lee Eadon Isgett & Popwell
Post Office Box 1505
Columbia, SC 29202

Keri L. Hannon

Keri L. Hannon
Assistant to Richard G. Whiting
1515 Lady Street
Post Office Box 7877
Columbia, SC 29202

April 20, 2007

RECEIVED
2007 APR 23 PM 12:59
WARNER PAYNE & BLACK, LLP
ATTORNEYS AT LAW SERVICES
COLUMBIA, SC, PA

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT DOCKET NO.: 2007-CP-40-1125 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

FILED
2007 MAY -2 PM 3:38
BARBARA A. SCOTT
C.C.C. & G.S.

TO: RICHARD G. WHITING, ESQUIRE, ATTORNEY FOR DEFENDANT JENNINGS; GARY W. POPWELL, JR, ESQUIRE, ATTORNEY FOR DEFENDANT BROOME; JOHN K. KOON, ESQUIRE, ATTORNEY FOR DEFENDANT COOKE

YOU WILL PLEASE TAKE NOTICE that Plaintiff, by and through the undersigned counsel, will before a presiding judge of the Court of Common Pleas for the Fifth Judicial Circuit for Richland County at 1701 Main Street at a courtroom to be designated on the tenth day after service of this Notice upon you at 10:00 a.m. or at such time as may be scheduled by the Court, for an Order granting to Plaintiff Summary Judgment against all Defendants with regard to all causes of action contained in his Complaint, the grounds for the Motion being that there is no genuine material issue of fact but that Defendants engaged in the acts alleged in the Complaint, and that Plaintiff is entitled to a judgment as a matter of law and fact as to liability.

The grounds for this Motion shall be the attached affidavit, the pleadings herein, the Requests to Admit and Admissions attached hereto, and sworn testimony heretofore given, together with such other grounds and memoranda as may be presented at the hearing in this matter.

WARNER, PAYNE, & BLACK, L.L.P.

Jan L. Warner
Matthew E. Steinmetz
Post Office Box 2628 (29202)
1122 Lady Street, Ste 1200
Columbia, South Carolina 29201
Telephone: (803) 799-0554
Facsimile: (803) 799-2517
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
5/2/07, 2007

EXHIBIT 1

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

RECEIVED
2007 FEB 20 PM 3:41

M. LEE JENNINGS, Plaintiff(s)

vs.

W P & B, LLP
LEXISNEXIS LAW SERVICES
OF SC, PA

GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, individually and BJR INTERNATIONAL DETECTIVE AGENCY, INC. Defendant(s)

CIVIL ACTION COVERSHEET

2007 - CP - 40 - 1125

RICHLAND COUNTY FILED
2007 FEB 20 PM 3:1
BARBARA A. CC & GS CO

(Please Print)
Submitted By: Jan L. Warner
Address: P.O. Box 2628, Columbia, SC 29202

SC Bar #: 5947
Telephone #: (803) 799-0554
Fax #: (803) 799-2517
Other:
E-mail: jlw@janwarner.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (*Check One Box Below*)

Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Other (299)

Torts – Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Other (399) Invasion of Privacy, Violation Title 17.

Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

Inmate Petitions
☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799)

Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)

Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)

Submitting Party Signature: _____ Date: February 20, 2007

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Florence, Horry, Lexington, Richland, Greenville**, and Anderson**

** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Case are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Cases which are appellate in nature such as appeals or writs of certiorari;

    c. Post Conviction relief matters;

    d. Contempt of Court proceedings;

    e. Forfeiture proceedings brought by the State;

    f. Cases involving mortgage foreclosures; and

    g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.

4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	DOCKET NO.: 2007-CP-40-____ **SUMMONS**

RICHLAND COUNTY
FILED
2007 FEB 20 PM 3:18
BARBARA A. SCOTT
C.C.C. & G.S.

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

WARNER, PAYNE, & BLACK, L.L.P.

Jan L. Warner
Post Office Box 2628 (29202)
1122 Lady Street, Ste 1200
Columbia, South Carolina 29201
Telephone: (803) 799-0554
Facsimile: (803) 799-2517
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
February 20, 2007

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	DOCKET NO.: 2007-CP-40-_____ **COMPLAINT**

RICHLAND COUNTY
FILED
2007 FEB 20 PM 3:18
BARBARA A. SCOTT
C.C.C. & G.S.

Plaintiff, for a Complaint against Defendants, alleges:

GENERAL ALLEGATIONS AND JURISDICTION

1. Plaintiff is a resident of Richland County, South Carolina. Defendant Gail M. Jennings is a resident of Richland County, South Carolina. Defendant Brenda Cooke ("Cooke" hereafter), individually and shareholder of business as BJR International Detective Agency, Inc. ("BJR" hereafter) does business in Richland County, South Carolina. Defendant Broome, upon information and belief, is a resident of Richland County, South Carolina.

2. Jurisdiction and venue are proper in this Court.

3. Plaintiff and Defendant Jennings are husband and wife who separated on or about June 21, 2006.

4. Defendant Broome ("Broome" hereafter) is the wife of Defendant Jennings' son (Defendant Jennings' daughter-in-law); Defendant Cooke and BJR are

licensed private investigators whom Defendant Jennings hired on or about June 26, 2006.

5. Plaintiff and Defendant Jennings are engaged in litigation in the Family Court for the Fifth Judicial Circuit for Richland County. Complaint for divorce was filed by Defendant Jennings on June 29, 2006.

6. At all times relevant herein, Plaintiff had a private e-mail address at yahoo.com with the identity "leedabeatlefan@yahoo.com". At no time did Plaintiff give anyone the permission to access or use his private e-mail account.

7. Beginning after June 21, 2006, upon information and belief, Defendant Broome illegally accessed Plaintiff's private e-mail address without his permission, and used a computer located at 309 Vincienne, and possibly other computers, to improperly procure Plaintiff's private electronic mail communications. After intercepting and accessing Plaintiff's private e-mail communications through an electronic communication system and printing the same, Defendant Broome used the improperly obtained communications in an attempt to gain an economic benefit for Defendant Jennings and Cooke and to gain a collateral advantage in the pending Family Court action.

8. The contents of Plaintiff's private electronic messages were disseminated visually and by copies being provided to Defendant Cooke, BJR employees, Defendant Jennings, Defendant Jennings' attorney and employees, the public record for Richland County, and as yet, unidentified third persons.

9. The foregoing acts were accomplished from and including June 21, 2006 through and including an unknown date, and possibly up to this date.

FOR A FIRST CAUSE OF ACTION

10. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

11. Plaintiff brings this cause of action pursuant to Sections 17-30-10, et seq. and 17-30-135 of the 1976 Code of Law, State of South Carolina, as amended.

12. Plaintiff alleges that his electronic communications have been intercepted, disclosed, and used in violation of the forgoing chapters and brings this civil cause of action against those persons and entities who intercepted, disclosed, used, and procured Plaintiff's private electronic communications.

13. Based thereon, Plaintiff is entitled to an immediate Order and injunction restraining all Defendants and their agents and employees from any further dissemination of Plaintiff's private electronic mail which was intercepted and used by them.

14. Pursuant to Sections 17-30-10, et seq. and 17-30-135 of the 1976 Code of Law, State of South Carolina, as amended, Plaintiff is further entitled to actual damages of not less than liquidated damages computed at the rate of $500.00 per day for each day in violation or $25,000.00, whichever is greater, alleging that, upon information and belief, from the date of the first interception, disclosure continues upon the public records and elsewhere through this date and Plaintiff is entitled damages at the rate of $500.00 per day for ever day on which the foregoing records continue to be used and disclosed.

15. Plaintiff is also entitled to punitive damages in an amount to be established by a jury, together with reasonable attorneys fees and other litigation costs

reasonably incurred and such other legal and equitable relief as the Court deems just and proper.

FOR A SECOND CAUSE OF ACTION
(INVASION OF PRIVACY – Publicizing of Private Affairs)

16. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

17. The Defendants herein gave publicity to matters that are private to the Plaintiff.

18. The disclosure of these communications would be highly offensive to a reasonable person and is not of legitimate public concern.

19. Further, Plaintiff did not consent to the disclosure of this private information.

20. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A THIRD CAUSE OF ACTION
(INVASION OF PRIVACY – Wrongful Intrusion)

21. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

22. Defendants' wrongful intrusions consist of watching, spying, and prying into Plaintiff's private affairs.

23. The wrongful intrusions concern those aspects of the Plaintiff, his personal relationships, and communications which one normally expects to be free from exposure to the Defendants.

24. Defendants' conduct is intentional, substantial and unreasonable, and is of a nature that would cause mental injury to a person of ordinary feelings and intelligence in the same circumstances.

25. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A FOURTH CAUSE OF ACTION
(CONSPIRACY)

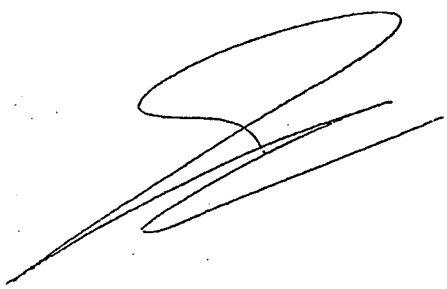
26. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

27. Defendants combined, with malice, for the purposes of injuring the Plaintiff.

28. By improperly intercepting and disseminating Plaintiff's private electronic communications, Defendants have caused Plaintiff to suffer special damages.

29. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

WHEREFORE, Plaintiff prays that relief be granted jointly and severally as requested herein above, together with such other legal and equitable relief as the Court may deem just and proper.



WARNER, PAYNE, & BLACK, L.L.P.

Jan L. Warner
Matthew E. Steinmetz
Post Office Box 2628 (29202)
1122 Lady Street, Ste 1200
Columbia, South Carolina 29201
Telephone: (803) 799-0554
Facsimile: (803) 799-2517
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
February 20, 2007

EXHIBIT 2a

RECEIVED
2007 APR 23 PM 12:59
W P & B, LLP
LAWYERS SERVICE
OF SC, PA

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

M. Lee Jennings,

Plaintiff,

versus

Gail M. Jennings, Holly Broome, Brenda Cook, individually and BJR International Detective Agency, Inc.

Defendants.

ANSWER OF DEFENDANT GAIL M. JENNINGS

Civil Action No. 2007-CP-40-1125

TO JAN L. WARNER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Defendant, Gail M. Jennings, responding to the allegations of Plaintiff's Complaint would allege as follows:

FOR A FIRST DEFENSE:

1. That she denies each and every allegation of the Complaint not hereinafter admitted, qualified or otherwise addressed.

2. That she admits those allegations of paragraph 1, 2, 3, 4, and 5.

3. As to the allegations of paragraph 6 the Defendant is informed and believes that the Plaintiff had in fact a private email address as set out in his Complaint, the Defendant does not have sufficient information to admit or deny

whether or not Plaintiff has given anyone permission to access or use his email account and therefore denies the same and demands strict proof thereof.

4. The Defendant is without sufficient information in which to form a belief or opinion as to the allegations as contained in paragraph 7 and therefore denies the same demanding strict proof thereof.

5. As to those allegations in paragraph 8 the Defendant would admit that certain emails were seen by her and that certain copies were made available to Defendant Cook and others, but Defendant is without sufficient information in which to form a belief or opinion as to the remainder of that paragraph and therefore denies same demanding strict proof thereof.

6. As to the allegations in paragraph 9 the Defendant is informed and believes that any act complained of by the Plaintiff stopped during the later part of July 2006.

7. As to the allegations in paragraph 10 the Defendant is informed and believes that no response is necessary and therefore none is made. However, if the Court deems that a response is necessary the Defendant denies.

8. The Defendant denies those allegations in paragraph 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29.

FOR A SECOND DEFENSE:

9. The Defendant re-alleges all allegations of her First Defense were consistent wherein as if repeated verbatim.

10. The allegations of the Complaint failed to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE:

11. The Defendant re-alleges all allegations of her First and Second Defenses where consistent herewith, as if repeated verbatim herein.

12. The Plaintiff has acted unfairly in the matter which is the subject of this litigation and the underlying litigation in the Family Court and comes into this Court with unclean hands and the Defendant Jennings pleads the defense of unclean hands as a complete and total bar to this action. The Defendant will set forth the specifics of the Plaintiff's conduct which she alleges constitutes unclean hands at Plaintiff's request through discovery or through more particular allegations upon motion to make more definite and certain; however, the Defendant sees no need to make the specifics of Plaintiff's conduct part of the public record at this time.

WHEREFORE, having fully answered, the Defendant Gail M. Jennings prays that the Complaint be dismissed with costs, and for such other and further relief as this Honorable Court may deem just and proper.

Richard G. Whiting
Attorney for Defendant Jennings
1515 Lady Street
Post Office Box 7877
Columbia, SC 29202
Telephone (803) 256-9067

April 20, 2007

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. Lee Jennings, Plaintiff, versus Gail M. Jennings, Holly Broome, Brenda Cook, individually and BJR International Detective Agency, Inc. Defendants.	)	CERTIFICATE OF SERVICE Civil Action No. 2007-CP-40-1125

I, Keri L. Hannon, assistant to Richard G. Whiting, attorney for the Defendant do hereby certify that I have this 20th day of April, 2007, served the Answer of Defendant Gail M. Jennings, via U.S. Postal Service, postage prepaid to the following addresss:

Jan L. Warner, Esquire
Warner Payne & Black, LLP
Post Office Box 2628
Columbia, SC 29202

John K. Koon, Esquire
Koon and Cook, P.A.
2016 Gadsden Street
Columbia, SC 29201

Gary W. Popwell, Jr. Esquire
Lee Eadon Isgett & Popwell
Post Office Box 1505
Columbia, SC 29202

Keri L. Hannon

Keri L. Hannon
Assistant to Richard G. Whiting
1515 Lady Street
Post Office Box 7877
Columbia, SC 29202

April 20, 2007

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WHG & B, LLP
LUERLAW SERVICES
OF SC, PA

EXHIBIT 2b

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W P & B, LLP FIFTH
OF SC, PA
LEGAL SERVICES

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS;)	CASE NO.: 07-CP-40-1125
PLAINTIFF,)	
-vs-)	**ANSWER OF DEFENDANT HOLLY BROOME**
GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,)	
DEFENDANTS.)	

TO: JAN L. WARNER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Defendant Holly Broome would respectfully answer the Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE

1. The allegations of paragraphs 1 through 5 referencing Defendant Broome are admitted. The other allegations are admitted upon information and belief.

2. The Defendant is without sufficient information to admit or deny the allegations of paragraph 6 and, therefore, denies same and demands strict proof thereof.

3. The allegations of paragraphs 7 through 29 are denied.

FOR A SECOND DEFENSE

4. The Defendant realleges all allegations of her First Defense where consistent herewith, as if repeated verbatim herein.

5. The allegations of the Complaint failed to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

6. The Defendant realleges all allegations of her First and Second Defenses where consistent herewith, as if repeated verbatim herein.

7. The Plaintiff has acted unfairly in the matter which is the subject of this litigation and the underlying litigation in the Family Court and comes into this Court with unclean hands and the Defendant Broome pleads the defense of unclean hands as a complete and total bar to this action. The Defendant will set forth the specifics of the Plaintiff's conduct which she alleges constitutes unclean hands at Plaintiff's request through discovery or through more particular allegations upon motion to make more definite and certain; however, the Defendant sees no need to make the specifics of Plaintiff's conduct part of the pubic record at this time.

WHEREFORE, having fully answered, the Defendant Holly Broome prays that the Complaint be dismissed with costs, and for such other and further relief as this Honorable Court may deem just and proper.

GARY W. POPWELL, JR.
Attorney for Defendant Holly Broome

ATTORNEYS LEE, EADON, ISGETT,
POPWELL AND REARDON, P.A.
Post Office Box 1505
Columbia, South Carolina 29202
(803) 799-9811

Columbia, South Carolina

March 30, 2007.

ROA000047

CERTIFICATE OF SERVICE

Re: **M. Lee Jennings -vs- Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and BJR International Detective Agency, Inc.**
Case No.: 2007-CP-40-1125

I, the undersigned, do hereby certify that a copy of the ***Answer of Defendant Holly Broome***, in the above-referenced matter, has been served upon the following counsel of record, through the United States Mail with sufficient postage affixed thereto.

Jan L. Warner, Esquire
WARNER, PAYNE & BLACK
Post Office Box 2628
Columbia, South Carolina 29202

John K. Koon, Esquire
KOON & COOK
2016 Gadsden Street
Columbia, S.C. 29201

Richard G. Whiting, Esquire
LAW OFFICES
1515 Lady Street
Columbia, S.C. 29201

Gayle S. Reese

March 30, 2007.

EXHIBIT 2c

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2007 MAR 29 AM 10:51
WP & G, LLP
LEXLAW SERVICES
DE SC, PA

STATE OF SOUTH CAROLINA) COUNTY OF RICHLAND)		IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. Lee Jennings, Plaintiff, vs. Gail M. Jennings, Holly Broome, Brenda Cooke, individually, and BRJ International Detective Agency, Inc., Defendants.	)	C/A No.:2007-CP-40-1125 ANSWER OF DEFENDANT BRENDA COOKE AND BJR INTERNATIONAL DETECTIVE AGENCY, INC.

RICHLAND COUNTY
FILED
2007 MAR 28 PM 3:50
BARBARA A. SCOTT
C.P. & G.S.

TO: THE PLAINTIFF ABOVE-NAMED AND HIS ATTORNEY OF RECORD, JAN L. WARNER, ESQUIRE:

The Defendants, above named, hereby answers the Complaint herein and reserving the right to file a motion under Rule 12 of the South Carolina Rules of Civil Procedure, or any other disposition motion, answers Plaintiff's Complaint as follows:

FOR A FIRST DEFENSE

1. The Defendants specifically deny each and every allegation contained within the Complaint not hereinafter specifically or expressly admitted, qualified or explained.

2. Defendants, Brenda Cooke and BJR International Detective Agency, Inc. denies the allegations of 1 on the Complaint and would show unto the court that Defendant Cooke is a resident of Lexington County and that her principal place of business of business is in Lexington County. The fact that these Defendants do business in Richland County is insufficient to confer jurisdiction and venue in Richland County.

3. Brenda Cooke and BJR International Detective Agency, Inc. denies the allegations of 2 of the Complaint unless the Plaintiff can establish that jurisdiction and

ROA000050

venue is proper through some other named Defendant.

4. Responding to Paragraph 4 of the Complaint, Brenda Cooke admits that she is a licensed private investigator but denies that BJR is a private investigator but would show that it is a corporation for which she is employed. Defendant Cooke and BJR also admit that portion of Paragraph 4 which states that they were retained on or about June 26, 2006. All the rest and remainder of Paragraph 4 are denied.

5. Brenda Cooke and BJR International Detective Agency, Inc. admit the allegations of Paragraphs 3 and 5 of the Complaint.

6. Brenda Cooke and BJR International Detective Agency, Inc. are without sufficient information to admit or deny the allegations of Paragraph 6 of the Complaint and therefore deny same.

7. Paragraph 7 does not relate to these Defendants and no response is necessary.

8. Brenda Cooke and BJR International Detective Agency, Inc. admits that they received certain e-mails as alleged in Paragraph 8, but they are unable to ascertain where they came from and is without sufficient information to form a belief as to whether they are private.

9. Brenda Cooke and BJR International Detective Agency, Inc. deny the allegations of 9 of the Complaint.

10. No response is necessary to the allegations of Paragraphs 10, 11 and 12 of the Complaint.

11. Brenda Cooke and BJR International Detective Agency, Inc. denies the allegations of 13 of the Complaint and would show unto the court that no Order of

injunction restraining the Defendants and their agents and employees are appropriate under the circumstances.

12. Brenda Cooke and BJR International Detective Agency, Inc. deny the allegations of Paragraphs 14 through 29 and demands strict proof of the allegations.

FOR A SECOND AND AFFIRMATIVE DEFENSE

13. These Defendants realleges all allegations of their First Defense where inconsistent herein, as if repeated verbatim herein.

14. The allegations in the Complaint fails to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Procedure.

FOR A THIRD AND AFFIRMATIVE DEFENSE

15. These Defendants realleges all allegations of their First and Second Defenses where inconsistent herein, as if repeated verbatim herein.

16. These Defendants would show that the Plaintiff has brought this suit in an attempt to gain an unfair advantage. He violated his marital vows by entering into a sexual relationship with another woman while married. The doctrine of unclean hands will preclude a litigant from recovering in equity if that litigant acted unfairly. He comes to this court with unclean hands and if the Court balances the equities between the parties then the Plaintiff is forbidden to recover as a result. A party will have unclean hands if that party behaves unfairly in a matter. It is unfair for the wrongdoer in a marriage to commit adultery and then attempt to gain an unfair advantage by filing suit against all these Defendants.

WHEREFORE, the Defendants, having fully answered pray that the Complaint be dismissed with costs and attorney's fees and for other and further relief the Court may

deem just and proper.

KOON & COOK, PA

By: _____

John K. Koon
2016 Gadsden Street
Columbia, S.C. 29201
803-256-4082, telephone
803-254-0658, facsimile
Attorney for Defendants

Columbia, South Carolina
March 27, 2007

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)
	) C.A. No.: 2007-CP-40-1125
M. Lee Jennings,	)
Plaintiff,	)
vs.	)
	) CERTIFICATE OF SERVICE
	)
Gail M. Jennings, Holly Broome, Brenda Cooke, individually and BRJ International Detective agency, Inc.,	)
Defendants.	)
	)

RICHLAND COUNTY
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2007 MAR 28 PM 3:50
BARBARA A. SCOTT
C.C.C. & G.S.

I, Patty K. Boatwright, the undersigned Legal Secretary, of the law offices of Koon and Cook, P.A., attorneys for Defendant Brenda Cooke do hereby certify that I have served the Plaintiff's Attorney with a copy of Defendant Brenda Cooke's Answer in this matter, herein below specified by mailing of the same by United States Mail, postage prepaid, to the following address:

Jan L. Warner, Esquire
Warner, Payne & Black, LLP
Post Office Box 2628
Columbia, SC 29201

Patty K. Boatwright, Legal Secretary

Columbia, South Carolina

March 28, 2007

EXHIBIT 3a

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
M. Lee Jennings,	)	C/A No.:2007-CP-40-1125
	)	
Plaintiff,	)	
vs.	)	DEFENDANT'S ANSWERS TO PLAINTIFF'S REQUEST FOR ADMISSIONS
	)	
Gail M. Jennings, Holly Broome, Brenda Cooke, individually, and BRJ International Detective Agency, Inc.,	)	
	)	
Defendants.	)	

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LEGAL LAW SERVICES OF SC, PA

TO: THE PLAINTIFF ABOVE-NAMED AND ITS ATTORNEY OF RECORD, JAN L. WARNER, ESQUIRE:

The Defendant Answers the Plaintiff's Request for Admissions as follows:

1. Admit that you received copies of e-mails taken from Plaintiff's yahoo e-mail account on or about June 26, 2006.

RESPONSE: Defendant Cooke admits only that she has been provided copies of e-mails sent by Plaintiff, M. Lee Jennings to his paramour. This Defendant is without information as to the accounts, dates or additional information and therefore denies the remaining request.

2. Admit that you had communications with Holly Broome who provided you with information contained in e-mails from Plaintiff's e-mail account after June 26, 2006.

RESPONSE: Denied except that communications were involved. The original of the e-mails are unknown to this Defendant. Any dates are unknown to this Defendant.

3. Admit that you used information contained in these e-mails to conduct surveillance on Plaintiff.

RESPONSE: Denied

Respectfully submitted,

KOON & COOK, P.A.

John K. Koon
Koon and Cook, PA
2016 Gadsden Street
Columbia, South Carolina 29201
(803) 256-4082

Attorney for Defendant

March 19, 2007

EXHIBIT 3b

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, -vs- GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	)	CASE NO.: 07-CP-40-1125 **DEFENDANT HOLLY BROOME'S RESPONSES TO PLAINTIFF'S FIRST REQUESTS TO ADMIT**

TO: JAN L. WARNER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Defendant Holly Broome would respectfully reply to the Plaintiff's First Requests to Admit as follows:

1. Admit that you accessed and retrieved e-mails from Lee Jennings' yahoo e-mail account after June 21, 2006.

RESPONSE: ***Defendant Broome admits that she opened saved e-mails from Lee Jennings' yahoo e-mail account after June 21, 2006 after her mother-in-law, Defendant Jennings, informed her that the Plaintiff had admitted to her that he had been corresponding with a paramour via email.***

2. Admit that you provided two (2) copies of those e-mail to your mother-in-law, Gail Jennings on or about June 25, 2006.

RESPONSE: *Admitted.*

3. Admit that you provided information contained in those e-mails to Brenda Cooke and Gail Jennings after June 26, 2006.

RESPONSE: *Admitted.*

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2007 APR 19 PM 12:20
W P & B, LLP
LAWYERS SERVICES
OF SC, PA

4. Admit that you continued monitoring Lee Jennings' e-mail account by accessing the same after June 26, 2006 and provided information contained therein.

RESPONSE: ***Admitted that she opened saved e-mails as aforestated after that date and provided information contained therein.***

GARY W. POPWELL, JR.
Attorney for Defendant Holly Broome

ATTORNEYS LEE, EADON, ISGETT,
POPWELL AND REARDON, P.A.
Post Office Box 1505
Columbia, South Carolina 29202
(803) 799-9811

Columbia, South Carolina

April 17, 2007.

CERTIFICATE OF SERVICE

Re: **M. Lee Jennings -vs- Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and BJR International Detective Agency, Inc.**
Case No.: 2007-CP-40-1125

I, the undersigned, do hereby certify that a copy of ***Defendant Holly Broome's Responses to Plaintiff's First Requests to Admit,*** in the above-referenced matter, has been served upon the following counsel of record, through the United States Mail with sufficient postage affixed thereto.

Jan L. Warner, Esquire
WARNER, PAYNE & BLACK
Post Office Box 2628
Columbia, South Carolina 29202

Gayle S. Reese

April 17, 2007.

EXHIBIT 3c

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
M. Lee Jennings,	)	C/A No.:2007-CP-40-1125
	)	
Plaintiff,	)	
vs.	)	DEFENDANT'S ANSWERS TO
	)	PLAINTIFF'S REQUEST
Gail M. Jennings, Holly Broome,	)	FOR ADMISSIONS
Brenda Cooke, individually, and BRJ	)	
International Detective Agency, Inc.,	)	
	)	
Defendants.	)	

TO: THE PLAINTIFF ABOVE-NAMED AND ITS ATTORNEY OF RECORD, JAN L. WARNER, ESQUIRE:

The Defendant Answers the Plaintiff's Request for Admissions as follows:

1. Admit that you received copies of e-mails taken from Plaintiff's yahoo e-mail account on or about June 26, 2006.

RESPONSE: Defendant Cooke admits only that she has been provided copies of e-mails sent by Plaintiff, M. Lee Jennings to his paramour. This Defendant is without information as to the accounts, dates or additional information and therefore denies the remaining request.

2. Admit that you had communications with Holly Broome who provided you with information contained in e-mails from Plaintiff's e-mail account after June 26, 2006.

RESPONSE: Denied except that communications were involved. The original of the e-mails are unknown to this Defendant. Any dates are unknown to this Defendant.

3. Admit that you used information contained in these e-mails to conduct surveillance on Plaintiff.

RESPONSE: Denied

RECEIVED
2007 MAR 16 AM 10:37
W. F. & E. L.L.P.
OF LAW SERVICES
SC, PA

Respectfully submitted,

KOON & COOK, P.A.

John K. Koon
Koon and Cook, PA
2016 Gadsden Street
Columbia, South Carolina 29201
(803) 256-4082

Attorney for Defendant

March 14, 2007

EXHIBIT 4

Excerpts from the Deposition of Gail Jennings
February 19, 2007

17

Now, did you have any of his e-mails at that time?
A: No, sir, I did not.
Q: When did you start getting his e-mails?
A: I received the e-mails on Sunday.
Q: How did you get into his e-mail box?
A: I did not.
Q: Who got into it?
A: Holly.
Q: How did she do it?
A: I don't know.
Q: Was she with you; were you with her?
A: No, sir, I was not.
Q: Now, who is Holly?
A: Holly is my daughter in law.
Q: Your daughter in law?
A: In law, yes, sir.

19

Okay. There were two copies made and where were they distributed?
A: Tom.
Q: Tom Neal?
A: Yes, sir.
Q: Okay. And where did the other one go?
A: Cookie.
Q: Okay. Did you give them to Cookie on the 26th?
A: The Monday, yes, sir.
Q: Okay. So, you gave out both copies that day?
A: Yes, sir.
Q: Now, did Holly go into ... how did ... did she

20

go into his e-mail after that?
A: Yes, sir.
Q: Okay. How many times?
A: I do not know.
Q: Did she give you copies of what was provided?
A: No, sir.
Q: How did Cookie, Ms. Cooke get the e-mails that were after the time of the ...
A: Holly took them by there.

Q: Holly took them by there?
A: Yes, sir.
Q: Did Holly have your husband's permission to go into his e-mail box?
A: No.

Now, when you gave the e-mails to Ms. Cooke, why did you give them to her?
A: I felt the more information she had to background the, you know, the more expediently she could get the information that was needed.
Q: And it would be less costly to you because you might know where you could find him?
A: Yes, sir.
Q: Is that correct?
A: Yes, sir.
Q: On the night that you went to the theater, did you get that information from an e-mail?
A: I do not know.
Q: Did Holly get it off an e-mail?
A: Yes, sir.

EXHIBIT 5

Excerpts from the Deposition of Brenda Cooke
February 19, 2007

49

Il right. Now, who are the different people that gave you these e-mails?
A: The two people that came to see me.
Q: And those are?
A: Ms. Jennings and Holly.
Q: So, Holly gave you Mr. Jennings e-mails?
A: This is what was given to me right.

53

Did you ask Ms. Jennings where ... and Holly where they got these e-mails?
A: No.
Q: Did it concern you that a client would give you e-mails from a spouse's e-mail box?
A: No.
Q: Why?
A: Because I don't care. I didn't care anything about the e-mails.
Q: You didn't?
A: No. The e-mails just showed me that there was an affair going on.
Q: Okay.
A: And it's my job to go out and find it.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	) IN THE COURT OF COMMON PLEAS) FIFTH JUDICIAL CIRCUIT) DOCKET NO.: 2007-CP-40-1125) **MOTION TO COMPEL**	FILED 2007 MAY -2 PM 3:38 BARBARA A. SCOTT C.C.C. & G.S.

I, Megan R. Crittenden, a paralegal for the law firm of Warner, Payne & Black, L.L.P. attorneys for the Plaintiff in the above-entitled action, do hereby certify that on this date I served a copy of **Motion for Summary Judgment** by depositing a copy in the United States Mail, postage prepaid, addressed to:

Gary W. Popwell, Esquire
Post Office Box 1505
Columbia, South Carolina 29202

Richard G. Whiting, Esquire
Post Office Box 7877
Columbia, South Carolina 29202

John K. Koon, Esquire
2016 Gadsden Street
Columbia, South Carolina 29201

Megan R Crittenden
Megan R. Crittenden

Columbia, South Carolina
May 2, 2007

Koon and Cook, P.A.

Attorneys at Law
2016 Gadsden Street
Columbia, South Carolina 29201

Historic Beaty House
229 S. Congress Street
Post Office Box 488
Winnsboro, South Carolina 29180

Columbia
Telephone: (803) 256-4082
Facsimile: (803) 254-0658

Winnsboro
Telephone: (803) 635-5912
Facsimile: (803) 635-4401
Toll Free from Columbia
Telephone: (803) 254-8583

John K. Koon
Stephen H. Cook
David N. Truitt
M. Paul Swearingen
William P. Frick

Reply to: COLUMBIA

May 10, 2007

The Honorable Barbara A. Scott
Richland County Clerk of Court
Post Office Box 2766
Columbia, South Carolina 29202

Re: M. Lee Jennings vs. Gail M. Jennings, Holly Broome, Brenda Cooke, Individually, and International Detective Agency, Inc.
Civil Action Number: 2007-CP-40-1125

Dear Ms. Scott:

Please find enclosed the original Notice of Motion and Motion for Summary Judgment and check in the amount of $25.00 for filing cost in reference to the above-captioned matter. By copy of this letter I am hereby serving the same on the Plaintiff's Counsel.

RECEIVED
2007 MAY 11 AM 11:35
WARNER P & B, LLP
LAW SERVICES
OF SC, PA

Thank you for your attention to this matter.

Sincerely,

KOON AND COOK, P.A.

By:

Amanda L. Wells, Legal Assistant

ALW/ss
Enclosure(s)

cc: **VIA U.S. POSTAL SERVICE**
Jan L. Warner, Esquire
Matthew E. Steinmetz, Esquire
Warner, Payne & Black, L.L.P.
Post Office Box 2628
Columbia, South Carolina 29202

VIA FACSIMILE
Gary Popwell, Esquire – (803)779-8572
Thomas Neal, Esquire – (803)929-0927
Richard Whiting, Esquire – (803)256-0223

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

RECEIVED
2007 MAY 11 AM 11:35
WYCHE, P.A., B.L.L.P.
OF SC, PA

M. Lee Jennings
☐ Plaintiff

CASE NO.
2007-CP-40-1125

v.

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually, And BJR International Detective Agency, Inc.,
☒ Defendant.

Plaintiff's Attorney:	Defendant's Attorney:
, Bar No. Address: phone: fax: e-mail: other:	John K. Koon, Bar No. 3600 Address: 2016 Gadsden Street Columbia, SC 29201 phone: (803) 256-4082 fax: (803) 254-0658 e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment
Estimated Time Needed: 1/2 Hour Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

[signature] 5/10/07
Signature of Attorney for ☐ Plaintiff / ☒ Defendant — Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

SCCA/233 (11-03)

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND M. Lee Jennings, Plaintiff, vs. Gail M. Jennings, Holly Broome, Brenda Cooke, Individually, and BJR International Detective Agency, Inc., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT DOCKET NO.: 2007-CP-40-1125 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

TO: JAN L. WARNER, ESQUIRE AND MATTHEW E. STEINMETZ, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that Defendant, Brenda Cooke, Individually, and BJR International Detective Agency, Inc., by and through the undersigned counsel, will before a presiding judge of the Court of Common Pleas for the Fifth Judicial Circuit for Richland County at 1701 Main Street at a courtroom to be designated on the tenth day after service of this Notice upon you at 10:00 a.m. or at such time as may be scheduled by the Court, for an Order granting to Defendant, Brenda Cooke, Individually, and BJR International Detective Agency, Inc. Summary Judgment against Plaintiff with regard to the defenses contained in her Answer, the grounds for the Motion being that there is no genuine issue of material fact and that Defendant, Brenda Cooke, Individually, and BJR International Detective Agency, Inc. is entitled to a judgment as a matter of law and fact as to liability.

The grounds for this Motion shall be the pleadings, Statutes, case law, Requests to Admit and Admissions attached hereto, and sworn testimony heretofore given by deposition with such

other grounds and memoranda as may be presented at the hearing in this matter.

KOON AND COOK, P.A.
By:

John K. Koon
Attorney for Defendant, Brenda Cooke, Individually, and BJR International Detective Agency, Inc.
2016 Gadsden Street
Columbia, SC 29201
(803) 256-4082

Columbia, South Carolina

May 7, 2007

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
M. Lee Jennings,	)	DOCKET NO.: 2007-CP-40-1125
	)	
Plaintiff,	)	
	)	**CERTIFICATE OF MAILING**
vs.	)	
	)	
Gail M. Jennings, Holly Broome, Brenda Cooke, Individually, and BJR International Detective Agency, Inc.,	)	
	)	
Defendants.	)	

I, Amanda L. Wells, the undersigned Legal Assistant, of the law offices of Koon and Cook, P.A., attorneys for the Defendant, Brenda Cooke, do hereby certify that I have served the Plaintiff's Attorneys, Jan L. Warner, Esquire and Matthew E. Steinmetz, Esquire with a copy of the Notice of Motion and Motion for Summary Judgment in this matter, herein below specified by mailing of the same by United States Mail, postage prepaid, to the following address:

Jan L. Warner, Esquire
Matthew E. Steinmetz, Esquire
Warner, Payne & Black, L.L.P.
Post Office Box 2628
Columbia, South Carolina 29202

Amanda L. Wells, Legal Assistant

Columbia, South Carolina
May 10, 2007

Attorneys

LEE, EADON, ISGETT, POPWELL AND REARDON, P.A.

LUTHER M. LEE (1923-1996)
SHEROD H. EADON, JR.
CHRISTOPHER G. ISGETT
GARY W. POPWELL, JR.
GERALD E. REARDON
BRETT A. OWENS - ASSOCIATE

1314 LINCOLN STREET
POST OFFICE BOX 1505
COLUMBIA, SOUTH CAROLINA 29202
TELEPHONE (803) 799-9811
TELECOPIER (803) 779-8572
TOLL FREE (800) 882-0742
www.leiplaw.com

May 14, 2007

VIA HAND DELIVERY
The Honorable Barbara A. Scott
RICHLAND COUNTY CLERK OF COURT
1701 Main Street
Post Office Box 2766
Columbia, South Carolina 29202-2766

Re: M. Lee Jennings -vs- Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and BJR International Detective Agency, Inc.
Case No.: 2007-CP-40-1125

Dear Ms. Scott:

Please find enclosed for filing the original and one (1) copy of Defendant Holly Broome's Notice of Motion and Motion for Summary Judgment, in the above-referenced matter.

By copy of this letter, I am serving a copy of the Notice of Motion and Motion for Summary Judgment on Jan L. Warner, Esquire, attorney for the Plaintiff

Thank you very much for your attention in this matter. Hoping this letter finds you well, I am,

Respectfully yours,

GARY W. POPWELL, JR.

GWPJr/gsr
Enclosures

cc: John K. Koon, Esquire *(w/encls.)*
Richard G. Whiting, Esquire *(w/encls.)*

RECEIVED
2007 MAY 17 AM 11:12
LEXISNEXIS LEGAL SERVICES OF SC, PA

STATE OF SOUTH CAROLNA
COUNTY OF RICHLAND

IN THE ☒ COURT OF COMMON PLEAS
☐ FAMILY COURT

M. Lee Jennings,
☐ Plaintiff

-vs-

Holly Broome, et al.
☒ Defendant
check box above indicating submitting party

CASE NO.: 07-CP-40-1125

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Name, S.C. Bar no. and address of Plaintiff's attorney	Name, S.C. Bar no. and address of defendant's attorney
telephone: fax: e-mail: other:	Gary W. Popwell, Jr. #7947 P.O. Box 1505 Columbia, S.C. 29202 telephone: 803-799-9811 fax: 803-779-8572 e-mail: Gary@leiplaw.com other:

✗ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete Sections II and III)

SECTIONI: Hearing Information

Nature of Motion: Motion for Summary Judgment
Estimated Time Needed: ½ Hour Court Reporter Needed: YES

SECTION II: Motion Type

✗ Written motion attached.
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Defendant — Date submitted: 5-14-07

SECTION III: Motion Fee

✗ PAID – AMOUNT: $25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instruction
Name of Court Reporter: _____
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other

_____
JUDGE
CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed

Collected by: _____
(print name)
☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS,	)	CASE NO.: 07-CP-40-1125
PLAINTIFF,	)	
-vs-	)	**DEFENDANT BROOME'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**
GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,	)	
DEFENDANTS.	)	

TO: JAN L. WARNER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant Holly Broome shall move on the tenth (10th) day after service of this Notice of Motion and Motion upon you, or as soon thereafter as counsel may be heard, for an Order granting her summary judgment against the Plaintiff on the grounds that there is no genuine issue of material fact at issue and Defendant Broome is entitled to judgment as a matter of law and fact as to liability.

This Motion is made pursuant to the South Carolina Rules of Civil Procedure, Rule 56, the pleadings, Statutes, case law, and Requests to Admit and Admissions attached hereto, and sworn testimony heretofore given by deposition with such other grounds and memoranda as may be presented at the hearing in this matter.

GARY W. POPWELL, JR.
Attorney for Defendant Holly Broome

ATTORNEYS LEE, EADON, ISGETT, POPWELL AND REARDON, P.A.
Post Office Box 1505
Columbia, South Carolina 29202
(803) 799-9811

RECEIVED
2007 MAY 17 AM 11:12
LEGAL SERVICES
OF SC, PA

Columbia, South Carolina
May 14, 2007.

CERTIFICATE OF SERVICE

Re: **M. Lee Jennings -vs- Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and BJR International Detective Agency, Inc.**
Case No.: 2007-CP-40-1125

I, the undersigned, do hereby certify that a copy of the ***Defendant Holly Broome's Notice of Motion and Motion for Summary Judgment***, in the above-referenced matter, has been served upon the following counsel of record, through the United States Mail with sufficient postage affixed thereto.

Jan L. Warner, Esquire
WARNER, PAYNE & BLACK
Post Office Box 2628
Columbia, South Carolina 29202

Gayle S. Reese

May 15, 2007.

LAW OFFICES OF
RICHARD G. WHITING
A PROFESSIONAL ASSOCIATION
1515 LADY STREET
POST OFFICE BOX 7877
COLUMBIA, SOUTH CAROLINA 29202

TELEPHONE (803) 256-9067
FACSIMILE (803) 256-0223
dick.whiting@whitinglawsc.com

May 24, 2007

VIA HAND DELIVERY
Honorable Barbara A. Scott
Richland County Clerk of Court
1701 Main Street
Columbia, SC 29202-2766

RE: M. Lee Jennins v. Gail M. Jennings, Holly Broome, Brenda Cooke, Individually, and BJR International Detective Agency, Inc.
Case No. 2007-CP-40-1125

Dear Ms. Scott:

Please find enclosed for filing the original and one (1) copy of Defendant Gail Jennings' Notice of Motion and Motion for Summary Judgment in the above referenced matter.

By copy of this letter I am serving the Notice of Motion and Motion for Summary Judgment on Jan L. Warner, Esquire, attorney for the Plaintiff, John K. Koon, Esquire, attorney for Defendant Cooke, and Gary W. Popwell, Jr., Esquire, attorney for Defendant Broome.

Thank you very much.

I am, very truly yours,

R. G. Whiting

Richard G. Whiting

/klh
enc: Motion Information Form
Notice of Motion and Motion for Summary Judgment
cc: Jan L. Warner, Esquire
John K. Koon, Esquire
Gary W. Popwell, Jr., Esquire

RECEIVED
2007 MAY 24 AM 11:49
LUERLAW SERVICES
OF SC, PA

CERTIFIED FAMILY COURT MEDIATOR

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

M. Lee Jennings,

☐ Plaintiff,

versus

Gail M. Jennings, et al,

☒ Defendant.

IN THE ☒ COURT OF COMMON PLEAS
☐ FAMILY COURT

RECEIVED
2007 MAY 24 AM 11:49

CASE NO. 07-CP-40-1125

MOTION INFORMATION FORM AND COVER SHEET

Name, S.C. Bar no. and address of plaintiff's attorney	Name, Sc. Bar no. and address of defendant's attorney
	Richard G. Whiting, Esquire 1515 Lady Street; PO Box 7877 Columbia, SC 29202
Telephone: Fax: e-mail: Other:	Telephone: (803) 256-9067 Fax: (803) 256-0223 e-mail: Other

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I AND III)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTION II AND III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment
Estimated Time Needed: 30 Minutes Court Reporter Needed: Yes

SECTION II: Motion Type

☒ Written Motion attached
☐ Form Motion –
I hereby move for relief or action by the court as set form in the attached proposed order.

Signature of Attorney for Plaintiff/Defendant — Date Submitted: 5/24/07

SECTION III: Motion Fee

☒ PAID AMOUNT: 25.00
☐ EXEMPT
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status
☐ State Agency v. Indigent Party
☐ Sexually Violet Predator Act
☐ Post-Conviction Relief
☐ Motion for stay in Bankruptcy
☐ Motion for Publication
☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or reduced to writing for motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other

JUDGE'S SECTION

☐ Motion fee to be paid upon filing of the attached order.
☐ Other

JUDGE CODE: DATE:

CLERK'S VERIFICATION

Collected by: DATE FILED:
☐ MOTION FEE COLLECTED:
☐ CONTESTED-AMOUNT DUE:

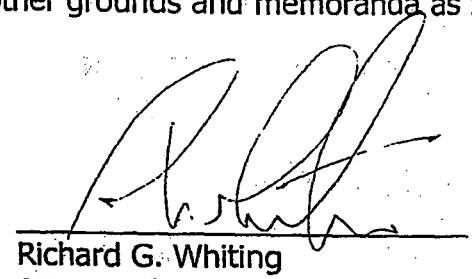
STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
M. Lee Jennings,	)	
	)	
Plaintiff,	)	DEFENDANT JENNINGS'
	)	NOTICE OF MOTION AND MOTION
versus	)	FOR SUMMARY JUDGMENT
	)	
Gail M. Jennings, Holly Broome, Brenda Cook, individually and BJR International Detective Agency, Inc.	)	Civil Action No. 2007-CP-40-1125
	)	
Defendants.	)	

TO: JAN L. WARNER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant Gail M. Jennings shall move on the tenth (10th) day after service of this Notice of Motion and Motion for Summary Judgment upon you, or as soon thereafter as counsel may be heard, for an Order granting her summary judgment against the Plaintiff on the grounds that there is no genuine issue of material fact at issue and that Defendant Jennings is entitled to judgement as a matter of law and fact as to liability.

This Motion is made pursuant to the South Carolina Rules of Civil Procedure, Rule 56, the Pleadings, Statues, case law, and Requests to Admit filed with Defendant Broome's attorney (already served and filed), and sworn testimony

heretofore given by deposition with such other grounds and memoranda as may be presented at the hearing in this matter.



Richard G. Whiting
Attorney for Defendant Jennings
1515 Lady Street
Post Office Box 7877
Columbia, SC 29202
Telephone (803) 256-9067

May 24, 2007

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. Lee Jennings, Plaintiff, versus Gail M. Jennings, Holly Broome, Brenda Cook, individually and BJR International Detective Agency, Inc. Defendants.	)	CERTIFICATE OF SERVICE Civil Action No. 2007-CP-40-1125

I, Keri L. Hannon, assistant to Richard G. Whiting, attorney for the Defendant do hereby certify that I have this 24th day of May, 2007, served Defendant Jennings' Notice of Motion and Motion for Summary Judgment, via U.S. Postal Service, postage prepaid to the following addresss:

Jan L. Warner, Esquire
Warner Payne & Black, LLP
Post Office Box 2628
Columbia, SC 29202

John K. Koon, Esquire
Koon and Cook, P.A.
2016 Gadsden Street
Columbia, SC 29201

Gary W. Popwell, Jr., Esquire
Lee Eadon Isgett & Popwell
Post Office Box 1505
Columbia, SC 29202

Keri L. Hannon

Keri L. Hannon
Assistant to Richard G. Whiting
1515 Lady Street
Post Office Box 7877
Columbia, SC 29202

May 24, 2007

RECEIVED
2007 JUN -8 AM 10: 29
WP & B, LLP
LEXISNEXIS LAW SERVICES
OF SC, PA

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS FOR THE
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS,)	DOCKET NO.: 2007-CP-40-1125
PLAINTIFF,)	**NOTICE OF MOTION AND MOTION TO AMEND AND SUPPLEMENT COMPLAINT**
vs.)	
GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,)	
DEFENDANTS.)	

FILED
2007 JUN -8 AM 9:47
BARBARA A. SCOTT
C.C.C. & G.S.

TO: RICHARD G. WHITING, ESQUIRE, ATTORNEY FOR DEFENDANT JENNINGS; GARY W. POPWELL, JR, ESQUIRE, ATTORNEY FOR DEFENDANT BROOME; JOHN K. KOON, ESQUIRE, ATTORNEY FOR DEFENDANT COOKE

YOU WILL PLEASE TAKE NOTICE that Plaintiff, by and through the undersigned counsel, hereby Withdraws his Motion for Summary Judgment filed with Court on May 2, 2007, and will move before the Presiding Judge of the Court of Common Pleas for the Fifth Judicial Circuit on the tenth day of service of Notice upon you at 10:00 a.m., or as soon thereafter as the same may be heard, at 1701 Main Street, Columbia, South Carolina, for the issuance of an Order allowing Plaintiff to file, serve, and rely upon the attached Supplemental and Amended Complaint pursuant to Rule 15, S.C. R. Civ. P. This Motion is based upon the following grounds:

1. Plaintiff filed a complaint commencing this action on February 20, 2007 wherein he alleged Defendants intercepted his private electronic communications, his private and personal emails, in violation of S.C. Code Ann. §§ 17-30-10 *et. seq.* and wrongfully intruded into and publicized his private affairs, all while combining and joining together, with malice, for the purpose of injuring Plaintiff.

2. Plaintiff and Defendant Jennings are engaged in litigation in the Family Court for the Fifth Judicial Circuit for Richland County. Complaint for divorce was filed by Defendant Jennings on June 29, 2006.

3. By way of Answer to the February 20, 2007 Complaint, Defendant Jennings admitted viewing printed copies of Plaintiff's emails and admitted that certain copies of the emails were made available to Defendant Cook and others.

4. While Defendant Broome denied illegally accessing Plaintiff's private email without Plaintiff's authorization or permission and passing the information contained in the emails on to others in her Answer, by reply to a Request to Admit dated April 17, 2007, Defendant Broome admitted opening **saved** emails from Plaintiff's yahoo email account .

5. By way of Answer to the February 20, 2007 Complaint, Defendants Cooke and BJR International Detective Agency (BJR) admitted to receiving Plaintiff's emails, and by reply to a Request to admit dated April, 20, 2007 admitted to being provided with copies of emails sent by Plaintiff.

6. When the February 20, 2007 Complaint was filed, Plaintiff believed Defendant Broome intercepted emails as they were sent and received by him through his Yahoo email account.

7. While Plaintiff still believes emails were intercepted in transit, Defendant Broome has since this filing admitted to opening saved emails which were stored in Plaintiff's Yahoo account on Yahoo servers without Plaintiff's persmission.

8. Plaintiff is informed and believes that Defendant Broome's actions, which were done in combination with and with the knowledge and consent of Defendants Jennings, Cooke, and BJR, also violate the South Carolina Computer Crimes Act, S.C. Code Ann. §16-16-10 *et. seq.* and the Federal Stored Communications Act, 18 U.S.C. §§ 2701-2712.

9. Plaintiff's proposed Supplemental Amended Complaint is the same as his February 20, 2007 Complaint with the addition of the aforementioned matters that have either arisen subsequent to the filing of this action, or were learned thereafter.

10. Plaintiff's proposed Amended and Supplemental Complaint arises out of the same events, transactions, and occurrences as set forth in Plaintiff's February 20, 2007 Complaint, would in no way prejudice Defendants, and it would deny substantial justice to Plaintiff if this Motion is not granted.

Based thereon, Plaintiff is entitled to leave of this court to amend/supplement his February 20, 2007 Complaint to conform with the attached proposed Supplemental and Amended Complaint.

The further grounds of this Motion shall be the attached affidavit and such memoranda as may be submitted to the Court and arguments to be made at the time of any such hearing.

Pursuant to S.C. R. Civ. P. 11(a), the undersigned attorney certifies that communication or attempted communication with opposing counsel in order to resolve this matter by agreement would serve no useful purpose.

WARNER, PAYNE, & BLACK, L.L.P.

Jan L. Warner
Matthew E. Steinmetz
Post Office Box 2628 (29202)
1122 Lady Street, Ste 1200
Columbia, South Carolina 29201
Telephone: (803) 799-0554
Facsimile: (803) 799-2517
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
June 8, 2007

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT DOCKET NO.: 2007-CP-40-1125 **AFFIDAVIT OF M. LEE JENNINGS**

PERSONALLY APPEARED BEFORE ME, M. LEE JENNINGS, who, being duly sworn, says:

1. I am the Plaintiff in the above-entitled matter. My e-mail address is leedabeatlefan@yahoo.com.

2. I have never given anyone my password or information with regard to accessing my account, and have never given anyone permission to access my account.

3. Brenda F. Cooke, a licensed private investigator, furnished to my counsel, as a part of the discovery process received on or about January 15, 2007, copies of my private e-mail account.

4. On February 19, 2007, the depositions of my wife, Plaintiff Gail M. Jennings, and Brenda F. Cooke were taken at which time I learned for the first time that, after I left my wife, my wife's daughter-in-law, Holly Broome, had illegally accessed my Yahoo e-mail account, had downloaded and printed my private e-mails, and had disseminated the same not only to my wife, but also to Brenda F. Cooke and potentially others.

5. I further learned at the taking of said depositions that my wife provided a copy of said e-mails to Brenda Cooke on or about June 26, 2006 and to her counsel, Thomas Neal, on the same date, two (2) days before the Complaint was dated, and three (3) days before it was filed.

6. I further learned that Holly Broome had gone into my e-mail account illegally and, without my permission or knowledge, secured additional information during the month of July 2006 and possibly thereafter.

7. I also learned that this information was imparted to Brenda F. Cooke, the investigator, and was used by the investigator in an effort to keep my wife's bill down.

8. At the time of the depositions, I did not know how Holly Broome accessed my email.

9. After this action was commenced, Holly Broome admitted through a response to a Request to Admit dated April 17, 2007 that she accessed my emails which were stored on Yahoo's mail server without my permission and disseminated them. This is the first time I knew exactly what Holly Broome had done to intercept and access my emails.

10. I request to amend the complaint to add additional allegations based upon the admissions of Holly Broome which occurred subsequent to the complaint being filed.

M. LEE JENNINGS

Sworn to and subscribed
Before me this 6th
Day of June, 2007

Notary Public for South Carolina
My Commission Expires: 11/4/11

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT DOCKET NO.: 2007-CP-40-1125 **AMENDED COMPLAINT**

Plaintiff, for a Complaint against Defendants, alleges:

GENERAL ALLEGATIONS AND JURISDICTION

1. Plaintiff is a resident of Richland County, South Carolina. Defendant Gail M. Jennings is a resident of Richland County, South Carolina. Defendant Brenda Cooke ("Cooke" hereafter), individually and shareholder of business as BJR International Detective Agency, Inc. ("BJR" hereafter) does business in Richland County, South Carolina. Defendant Broome, upon information and belief, is a resident of Richland County, South Carolina.

2. Jurisdiction and venue are proper in this Court.

3. Plaintiff and Defendant Jennings are husband and wife who separated on or about June 21, 2006.

4. Defendant Broome ("Broome" hereafter) is the wife of Defendant Jennings' son (Defendant Jennings' daughter-in-law); Defendant Cooke and BJR are

licensed private investigators whom Defendant Jennings hired on or about June 26, 2006.

5. Plaintiff and Defendant Jennings are engaged in litigation in the Family Court for the Fifth Judicial Circuit for Richland County. Complaint for divorce was filed by Defendant Jennings on June 29, 2006.

6. At all times relevant herein, Plaintiff had a private e-mail address at yahoo.com with the identity "leedabeatlefan@yahoo.com". At no time did Plaintiff give anyone the permission to access or use his private e-mail account.

7. Beginning after June 21, 2006, upon information and belief and Broome's admission, Defendant Broome illegally accessed Plaintiff's private e-mail address without his permission, and used a computer located at 309 Vincienne, and possibly other computers, to improperly procure Plaintiff's private electronic mail communications.

8. After intercepting and accessing Plaintiff's private e-mail communications through an electronic communication system and printing the same, Defendant Broome used the improperly obtained communications in an attempt to gain an economic benefit for Defendant Jennings and Cooke and to gain a collateral advantage in the pending Family Court action.

9. The contents of Plaintiff's private electronic messages were disseminated visually and by copies being provided to Defendant Cooke, BJR employees, Defendant Jennings, Defendant Jennings' attorney and employees, the public record for Richland County, and as yet, unidentified third persons.

10. The foregoing acts were accomplished from and including June 21, 2006 through and including an unknown date, and possibly up to February 20, 2007.

FOR A FIRST CAUSE OF ACTION

(Violation of §17-30-10, *et seq*; §§16-16-10, *et seq*; 18 USC §§2510-2522 and 2701-2712)

11. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

12. Plaintiff brings this cause of action pursuant to the South Carolina Homeland Security Act, S.C. Code Ann. §§17-30-10, *et seq.*, South Carolina Computer Crimes Act, S.C. Code Ann. §§16-16-10 *et. seq.*, Title I of the Electronic Communications Privacy Act, 18 U.S.C. §§2510-2522, and the Federal Stored Communications Act, 18 U.S.C. §§ 2701-2712.and 18 U.S.C. and 2701-2712.

13. S.C. Code Ann. § 17-30-10, *et seq.* which is South Carolina's version of Title 1 of the Electronic Communications Act, makes it unlawful for an unauthorized individual to intercept aural and wire communications.

14. S.C. Code Ann. § 16-16-20(4) of the South Carolina Computer Crime Act makes it a crime to "willfully, knowingly, and without authorization or for an unauthorized purpose" engage in computer hacking.

15. S.C. Code Ann. § 16-16-10(j)(5) defines "computer hacking" as "the intentional use of a computer, computer system, or a computer network in a manner that exceeds any right or permission granted by the appropriate principal of the computer, computer system, or computer network."

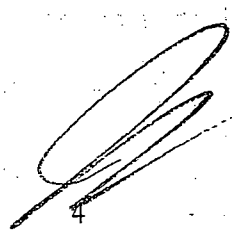
16. 18 U.S.C. § 2701(a) of the Stored Communications Act makes it unlawful for anyone to "intentionally accesses without authorization a facility through which an electronic communication service is provided."

17. Plaintiff alleges that his electronic communications have been intercepted, intentionally accessed, disclosed, and used without his authorization and in violation of the forgoing chapters and brings this civil cause of action against those persons and entities who accessed, intercepted, disclosed, used, and procured Plaintiff's private electronic communications.

18. Based thereon, Plaintiff is entitled to an immediate Order and injunction restraining all Defendants and their agents and employees from any further dissemination of Plaintiff's private electronic mail which was intercepted and used by them.

19. Pursuant to Sections 17-30-10, et seq. and 17-30-135 of the 1976 Code of Law, State of South Carolina, as amended, Plaintiff is further entitled to actual damages of not less than liquidated damages computed at the rate of $500.00 per day for each day in violation or $25,000.00, whichever is greater, alleging that, upon information and belief, from the date of the first interception, disclosure continues upon the public records and elsewhere through this date and Plaintiff is entitled damages at the rate of $500.00 per day for ever day on which the foregoing records continue to be used and disclosed.

20. Plaintiff is also entitled to punitive damages in an amount to be established by a jury, together with reasonable attorneys fees and other litigation costs reasonably incurred and such other legal and equitable relief as the Court deems just and proper.



FOR A SECOND CAUSE OF ACTION
(INVASION OF PRIVACY – Publicizing of Private Affairs)

21. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

22. The Defendants herein gave publicity to matters that are private to the Plaintiff.

23. The disclosure of these communications would be highly offensive to a reasonable person and is not of legitimate public concern.

24. Further, Plaintiff did not consent to the disclosure of this private information.

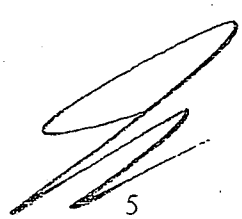
25. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A THIRD CAUSE OF ACTION
(INVASION OF PRIVACY – Wrongful Intrusion)

26. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

27. Defendants' wrongful intrusions consist of watching, spying, and prying into Plaintiff's private affairs.

28. The wrongful intrusions concern those aspects of the Plaintiff, his personal relationships, and communications which one normally expects to be free from exposure to the Defendants.



29. Defendants' conduct is intentional, substantial and unreasonable, and is of a nature that would cause mental injury to a person of ordinary feelings and intelligence in the same circumstances.

30. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A FOURTH CAUSE OF ACTION
(CONSPIRACY)

31. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

32. Defendants combined, with malice, for the purposes of injuring the Plaintiff.

33. By improperly intercepting and disseminating Plaintiff's private electronic communications, Defendants have caused Plaintiff to suffer special damages.

34. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.



WHEREFORE, Plaintiff prays that relief be granted jointly and severally as requested herein above, together with such other legal and equitable relief as the Court may deem just and proper.

WARNER, PAYNE, & BLACK, L.L.P.

Jan L. Warner
Matthew E. Steinmetz
Post Office Box 2628 (29202)
1122 Lady Street, Ste 1200
Columbia, South Carolina 29201
Telephone: (803) 799-0554
Facsimile: (803) 799-2517
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
June 7, 2007

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
M. LEE JENNINGS,	)	DOCKET NO.: 2007-CP-40-1125
	)	
PLAINTIFF,	)	**CERTIFICATE OF SERVICE**
	)	
vs.	)	
	)	
GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,	)	
	)	
DEFENDANTS.	)	

FILED
2007 JUN -8 AM 9:47
BARBARA A. SCOTT
C.C.C. & G.S.

I, Max Pickelsimer, a law clerk for the law firm of Warner, Payne & Black, L.L.P. attorneys for the Plaintiff in the above-entitled action, do hereby certify that on this date I served a copy of **Notice of Motion and Motion to Amend and Supplement Complaint** by depositing a copy in the United States Mail, postage prepaid, addressed to:

Gary W. Popwell, Esquire
Post Office Box 1505
Columbia, South Carolina 29202

Richard G. Whiting, Esquire
Post Office Box 7877
Columbia, South Carolina 29202

John K. Koon, Esquire
2016 Gadsden Street
Columbia, South Carolina 29201

Max N. Pickelsimer

Columbia, South Carolina
June 8, 2007

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

M. LEE JENNINGS,) CIVIL ACTION COVERSHEET
Plaintiff(s))
) 2007 - CP - 40 - 1125
vs.)

GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, individually and BJR INTERNATIONAL DETECTIVE AGENCY, INC.)
Defendant(s))

(Please Print)
Submitted By: Jan L. Warner
Address: P.O. Box 2628, Columbia, SC 29202

SC Bar #: 5947
Telephone #: (803) 799-0554
Fax #: (803) 799-2517
Other:
E-mail: jlw@janwarner.com

2007 JUL 25 P 3:54 RICHLAND COUNTY BARBARA C.C.C.

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply)*

If Action is Judgment/Settlement do not complete

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION *(Check One Box Below)*

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Sexual Predator (510)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture (840)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Administrative Law Judge (980)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☒ Other (699)
  Computer Crime

Submitting Party Signature: _____ Date: July 25, 2007

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Florence, Horry, Lexington, Richland, Greenville**, and Anderson**

** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Case are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Cases which are appellate in nature such as appeals or writs of certiorari;

    c. Post Conviction relief matters;

    d. Contempt of Court proceedings;

    e. Forfeiture proceedings brought by the State;

    f. Cases involving mortgage foreclosures; and

    g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.

4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	DOCKET NO.: 2007-CP-40-1125 **FIRST AMENDED COMPLAINT PURSUANT TO ORDER DATED JULY 12/FILED JULY 13, 2007** **JURY TRIAL DEMANDED**

RICHLAND COUNTY
2007 JUL 25 PM 3:54
BARBARA A. SCOTT
C.C.C. & G.S.

Plaintiff, for a Complaint against Defendants, alleges:

GENERAL ALLEGATIONS AND JURISDICTION

1. Plaintiff is a resident of Richland County, South Carolina. Defendant Gail M. Jennings is a resident of Richland County, South Carolina. Defendant Brenda Cooke ("Cooke" hereafter), individually and shareholder of business as BJR International Detective Agency, Inc. ("BJR" hereafter) does business in Richland County, South Carolina. Defendant Broome, upon information and belief, is a resident of Richland County, South Carolina.

2. Jurisdiction and venue are proper in this Court.

3. Plaintiff and Defendant Jennings are husband and wife who separated on or about June 21, 2006.

4. Defendant Broome ("Broome" hereafter) is the wife of Defendant Jennings' son (Defendant Jennings' daughter-in-law); Defendant Cooke and BJR are

licensed private investigators whom Defendant Jennings hired on or about June 26, 2006.

5. Plaintiff and Defendant Jennings are engaged in litigation in the Family Court for the Fifth Judicial Circuit for Richland County. Complaint for divorce was filed by Defendant Jennings on June 29, 2006.

6. At all times relevant herein, Plaintiff had a private e-mail address at yahoo.com with the identity "leedabeatlefan@yahoo.com". At no time did Plaintiff give anyone the permission to access or use his private e-mail account.

7. Beginning after June 21, 2006, upon information and belief and Broome's admission, Defendant Broome illegally accessed Plaintiff's private e-mail address without his permission, and used a computer located at 309 Vincienne, and possibly other computers, to improperly procure Plaintiff's private electronic mail communications.

8. After intercepting and accessing Plaintiff's private e-mail communications through an electronic communication system and printing the same, Defendant Broome used the improperly obtained communications in an attempt to gain an economic benefit for Defendant Jennings and Cooke and to gain a collateral advantage in the pending Family Court action.

9. The contents of Plaintiff's private electronic messages were disseminated visually and by copies being provided to Defendant Cooke, BJR employees, Defendant Jennings, Defendant Jennings' attorney and employees, the public record for Richland County, and as yet, unidentified third persons.

10. The foregoing acts were accomplished from and including June 21, 2006 through and including an unknown date, and possibly up to February 20, 2007.

FOR A FIRST CAUSE OF ACTION
(Violation of §17-30-10, *et seq*; §§16-16-10, *et seq*; 18 USC §§2510-2522 and 2701-2712)

11. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

12. Plaintiff brings this cause of action pursuant to the South Carolina Homeland Security Act, S.C. Code Ann. §§17-30-10, *et seq.*, South Carolina Computer Crimes Act, S.C. Code Ann. §§16-16-10 *et. seq.*, Title I of the Electronic Communications Privacy Act, 18 U.S.C. §§2510-2522, and the Federal Stored Communications Act, 18 U.S.C. §§ 2701-2712.and 18 U.S.C. and 2701-2712.

13. S.C. Code Ann. § 17-30-10, *et seq.* which is South Carolina's version of Title 1 of the Electronic Communications Act, makes it unlawful for an unauthorized individual to intercept aural and wire communications.

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15. S.C. Code Ann. § 16-16-10(j)(5) defines "computer hacking" as "the intentional use of a computer, computer system, or a computer network in a manner that exceeds any right or permission granted by the appropriate principal of the computer, computer system, or computer network."

16. 18 U.S.C. § 2701(a) of the Stored Communications Act makes it unlawful for anyone to "intentionally accesses without authorization a facility through which an electronic communication service is provided."

ROA000104

17. Plaintiff alleges that his electronic communications have been intercepted, intentionally accessed, disclosed, and used without his authorization and in violation of the forgoing chapters and brings this civil cause of action against those persons and entities who accessed, intercepted, disclosed, used, and procured Plaintiff's private electronic communications.

18. Based thereon, Plaintiff is entitled to an immediate Order and injunction restraining all Defendants and their agents and employees from any further dissemination of Plaintiff's private electronic mail which was intercepted and used by them.

19. Pursuant to Sections 17-30-10, et seq. and 17-30-135 of the 1976 Code of Law, State of South Carolina, as amended, Plaintiff is further entitled to actual damages of not less than liquidated damages computed at the rate of $500.00 per day for each day in violation or $25,000.00, whichever is greater, alleging that, upon information and belief, from the date of the first interception, disclosure continues upon the public records and elsewhere through this date and Plaintiff is entitled damages at the rate of $500.00 per day for ever day on which the foregoing records continue to be used and disclosed.

20. Plaintiff is also entitled to punitive damages in an amount to be established by a jury, together with reasonable attorneys fees and other litigation costs reasonably incurred and such other legal and equitable relief as the Court deems just and proper.

FOR A SECOND CAUSE OF ACTION
(INVASION OF PRIVACY – Publicizing of Private Affairs)

21. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

22. The Defendants herein gave publicity to matters that are private to the Plaintiff.

23. The disclosure of these communications would be highly offensive to a reasonable person and is not of legitimate public concern.

24. Further, Plaintiff did not consent to the disclosure of this private information.

25. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A THIRD CAUSE OF ACTION
(INVASION OF PRIVACY – Wrongful Intrusion)

26. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

27. Defendants' wrongful intrusions consist of watching, spying, and prying into Plaintiff's private affairs.

28. The wrongful intrusions concern those aspects of the Plaintiff, his personal relationships, and communications which one normally expects to be free from exposure to the Defendants.

ROA000106

29. Defendants' conduct is intentional, substantial and unreasonable, and is of a nature that would cause mental injury to a person of ordinary feelings and intelligence in the same circumstances.

30. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A FOURTH CAUSE OF ACTION
(CONSPIRACY)

31. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

32. Defendants combined, with malice, for the purposes of injuring the Plaintiff.

33. By improperly intercepting and disseminating Plaintiff's private electronic communications, Defendants have caused Plaintiff to suffer special damages.

34. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

ROA000107

WHEREFORE, Plaintiff prays that relief be granted jointly and severally as requested herein above, together with such other legal and equitable relief as the Court may deem just and proper.

WARNER, PAYNE, & BLACK, L.L.P.

Jan L. Warner
Matthew E. Steinmetz
Post Office Box 2628 (29202)
1122 Lady Street, Ste 1200
Columbia, South Carolina 29201
Telephone: (803) 799-0554
Facsimile: (803) 799-2517
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
July 25, 2007

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	DOCKET NO.: 2007-CP-40-1125 **CERTIFICATE OF SERVICE**

2007 JUL 25 PM 3:54
BARBARA A. SCOTT
C.C.C. & Q.S.

I, Suzanne Figurski, a paralegal for the law firm of Warner, Payne & Black, L.L.P. attorneys for the Plaintiff in the above-entitled action, do hereby certify that on this date I served a copy of **First Amended Complaint Pursuant to Order Dated July 12/Filed July 13, 2007** by depositing a copy in the United States Mail, postage prepaid, addressed to:

Gary W. Popwell, Esquire
Post Office Box 1505
Columbia, South Carolina 29202

Richard G. Whiting, Esquire
Post Office Box 7877
Columbia, South Carolina 29202

John K. Koon, Esquire
2016 Gadsden Street
Columbia, South Carolina 29201

Suzanne Figurski
Suzanne Figurski

Columbia, South Carolina
July 25, 2007

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

M. LEE JENNINGS,

PLAINTIFF,

vs.

GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,

DEFENDANT.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

DOCKET NO.: 2007-CP-40-1125

MOTION INFORMATION AND MOTION COVERSHEET

RECEIVED
2007 JUL 13 PM 2:51
WYCHE, B. LLP
LEXISNEXIS LAW SERVICES
OF SC, PA

RICHLAND COUNTY
FILED
2007 JUL 13 PM 2:20
BARBARA A. SCOTT
C.C.C. & G.S.

Plaintiff's Attorney: Jan L. Warner
Bar No: 5947
Address: P. O. Box 2628, Cola, SC 29202
Phone: 803-799-0554 Fax: 803-799-2517
E-mail: jlw@janwarner.com

Defendants Jennings' Attorney: Richard G. Whiting
Bar No.: unknown
Address: P.O. Box 7877, Columbia, SC 29202
Phone: (803) 256-9067 Fax: (803) 256-0223
E-Mail: dick.whiting@whitinglawsc.com

Defendant Broome's Attorney: Gary W. Popwell
Bar No: unknown
Address: P. O. Box 1505, Cola, SC 29202
Phone: (803) 799-9811 Fax: (803) 779-8572
E-mail: Gary@leiplaw.com

Defendants Cooke's Attorney: John K. Koon
Bar No.: unknown
Address: 2016 Gadsden Street, Columbia, SC 29201
Phone: (803) 256-4052 Fax: (803) 254-0658
E-Mail:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I & III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed ☐ Yes/☒ No

SECTION II: Motion Type

☐ Written motion attached
☒ Form Motion –
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒Plaintiff /☐Defendant — Date Submitted: 7/13/07

SECTION III: Motion Fee

☒ **PAID** - AMOUNT: $25.00
☐ Exempt:
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency vs. Indigent Party
- ☐ Sexually Violent Predator Act
- ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication
- ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed Order submitted at request of Court or reduced to writing from motion made in open Court per judge's instructions. Name of Court Reporter:_____
- ☐ Other:_____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached Order
☐ Other:_____

_____
JUDGE
Code: _____ Date:_____

CLERK'S VERIFICATION

Collected by: _____ Date Filed:
☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE:_____

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	DOCKET NO.: 2007-CP-40-1125 **CONSENT ORDER TO AMEND**

2007 JUL 13 PM 2:20
BARBARA A. SCOTT
C.C.C. & G.S.
RICHLAND COUNTY, S.C.

This matter was scheduled to come before the Court on July 13, 2007 at 9:30 A.M. for a hearing on Defendants' Motions to Dismiss and a Motion to Quash. The Court is advised that on June 8, 2007 Plaintiff filed and served a Notice of Motion and Motion to Amend and Supplement his Complaint.

As evidenced by their signatures below, counsel for the Defendants consented to allow Plaintiff to file his proposed amended complaint as allowed by Rule 15(a), SCRCivP.

Because the pending Motions to Dismiss and the Motion to Quash were filed with respect to Plaintiff's original Complaint, a hearing on the forgoing is now moot, and Defendants should be given leave to answer or otherwise respond to Plaintiff's amended complaint.

Counsel for Plaintiff and the Defendants have consented to the forgoing and I find that the forgoing is proper.

NOW, THEREFORE, it is accordingly

ORDERED that the hearing scheduled for July 13, 2007 at 9:30 A.M. is not necessary, that Plaintiff be given leave to file his proposed amended complaint, and that Defendants are given leave to answer or otherwise respond to Plaintiff's amended complaint as provided by the Rules of Civil Procedure.

AND IT IS SO ORDERED.

Presiding Judge, Court of Common Pleas
Fifth Judicial Circuit

July 12, 2007

Columbia, South Carolina
At Chambers
July 9, 2007

WE SO CONSENT:

Jan L. Warner
ATTORNEY FOR PLAINTIFF
M. LEE JENNINGS

Richard G. Whiting
ATTORNEY FOR DEFENDANT
GAIL M. JENNINGS

Gary w. Popwell
ATTORNEY FOR DEFENDANT
HOLLY BROOME

John K. Koon
ATTORNEY FOR DEFENDANT
BRENDA COOKE AND BJR
INTERNATIONAL DETECTIVE
AGENCY

Attorneys

LEE, EADON, ISGETT, POPWELL AND REARDON, P.A.

LUTHER M. LEE (1923-1996)
SHEROD H. EADON, JR.
CHRISTOPHER G. ISGETT
GARY W. POPWELL, JR.
GERALD E. REARDON
BRETT A. OWENS - ASSOCIATE

1314 LINCOLN STREET
POST OFFICE BOX 1505
COLUMBIA, SOUTH CAROLINA 29202
TELEPHONE (803) 799-9811
TELECOPIER (803) 779-8572
TOLL FREE (800) 882-0742
www.leiplaw.com

August 7, 2007

VIA HAND DELIVERY
The Honorable Barbara A. Scott
RICHLAND COUNTY CLERK OF COURT
1701 Main Street
Post Office Box 2766
Columbia, South Carolina 29202-2766

Re: M. Lee Jennings -vs- Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and BJR International Detective Agency, Inc.
Case No.: 2007-CP-40-1125

Dear Ms. Scott:

Please find enclosed for filing the original and two (2) copies of Defendant Holly Broome's Answer to Plaintiff's First Amended Complaint, in the above-referenced matter. Please return a clocked copy with my courier.

By copy of this letter, I am serving a copy of Defendant Holly Broome's Answer on Jan L. Warner, Esquire, attorney for the Plaintiff; John K. Koon, Esquire, Attorney for Defendant Cooke; and Richard Whiting, Esquire, Attorney for Defendant Jennings.

Thank you very much for your attention in this matter. Hoping this letter finds you well, I am,

Respectfully yours,

GARY W. POPWELL, JR.

GWPJr/gsr
Enclosures

cc: Jan L. Warner, Esquire *(w/encls.)*
John K. Koon, Esquire *(w/encls.)*
Richard G. Whiting, Esquire *(w/encls.)*

RECEIVED
2007 AUG -9 PM 12:53
CLERK OF COURT
RICHLAND COUNTY, SC
LEGAL SERVICES
OF SC, PA

RECEIVED
2007 AUG -9 PM 12:54
W P & B, LLP
LAW SERVICES
OF SC, PA

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS,	)	CASE NO.: 07-CP-40-1125
PLAINTIFF,	)	
-vs-	)	**DEFENDANT HOLLY BROOME'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT**
GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,	)	
DEFENDANTS.	)	

TO: JAN L. WARNER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Defendant Holly Broome would respectfully answer the First Amended Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE

1. The allegations of paragraphs 1 through 5 referencing Defendant Broome are admitted. The other allegations are admitted upon information and belief.

2. The Defendant is without sufficient information to admit or deny the allegations of paragraph 6 and, therefore, denies same and demands strict proof thereof.

3. The allegations of paragraphs 7 through 34 are denied.

FOR A SECOND DEFENSE

4. The Defendant realleges all allegations of her First Defense where consistent herewith, as if repeated verbatim herein.

5. The allegations of the Complaint failed to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

6. The Defendant realleges all allegations of her First and Second Defenses where consistent herewith, as if repeated verbatim herein.

7. The Plaintiff has acted unfairly in the matter which is the subject of this litigation and the underlying litigation in the Family Court and comes into this Court with unclean hands and the Defendant Broome pleads the defense of unclean hands as a complete and total bar to this action. The Defendant will set forth the specifics of the Plaintiff's conduct which she alleges constitutes unclean hands at Plaintiff's request through discovery or through more particular allegations upon motion to make more definite and certain; however, the Defendant sees no need to make the specifics of Plaintiff's conduct part of the public record at this time.

WHEREFORE, having fully answered, the Defendant Holly Broome prays that the Complaint be dismissed with costs, and for such other and further relief as this Honorable Court may deem just and proper.

GARY W. POPWELL, JR.
Attorney for Defendant Holly Broome

ATTORNEYS LEE, EADON, ISGETT,
POPWELL AND REARDON, P.A.
Post Office Box 1505
Columbia, South Carolina 29202
(803) 799-9811

Columbia, South Carolina

August 7, 2007.

CERTIFICATE OF SERVICE

Re: M. Lee Jennings -vs- Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and BJR International Detective Agency, Inc.
Case No.: 2007-CP-40-1125

I, the undersigned, do hereby certify that a copy of the ***Defendant Holly Broome's Answer to Plaintiff's First Amended Complaint***, in the above-referenced matter, has been served upon the following counsel of record, through the United States Mail with sufficient postage affixed thereto.

Jan L. Warner, Esquire
WARNER, PAYNE & BLACK
Post Office Box 2628
Columbia, South Carolina 29202

John K. Koon, Esquire
KOON & COOK
2016 Gadsden Street
Columbia, S.C. 29201

Richard G. Whiting, Esquire
LAW OFFICES
1515 Lady Street
Columbia, S.C. 29201

Gayle S. Reese

August 7, 2007.

Koon and Cook, P.A.

Attorneys at Law
2016 Gadsden Street
Columbia, South Carolina 29201

Historic Beaty House
229 S. Congress Street
Post Office Box 488
Winnsboro, South Carolina 29180

John K. Koon
Stephen H. Cook
David N. Truitt
M. Paul Swearingen
William Frick

Reply to: COLUMBIA

Columbia
Telephone: (803) 256-4082
Facsimile: (803) 254-0658

Winnsboro
Telephone: (803) 635-5912
Facsimile: (803) 635-4401
Toll Free from Columbia
Telephone: (803) 254-8583

August 13, 2007

Jan L. Warner, Esquire
Warner, Payne, & Black, L.L.P.
Post Office Box 2628
Columbia, South Carolina 29202

Re: M. Jenings v. Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and BJR International Detective Agency, Inc.
Case No.: 2007-CP-40-1125

Dear Mr. Warner,

Enclosed herewith you will find the Defendant Answer To Plaintiffs First Amended Complaint in the above referenced matter. I have enclosed a Certificate of Service in this matter.

Please feel free to contact me with any questions or concerns you may have.

Sincerely,

Cindy Lea Richburg, Legal Assistant

/clr
Enclosure: as stated above
cc: Gary Popwell, Esquire
Richard G. Whiting, Esquire

RECEIVED
2007 AUG 15 PM 2:02
LEXISNEXIS, A.C.S., LLC
-LUERLAW SERVICES
OF SC, PA

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND M. LEE JENNINGS, Plaintiff, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., Defendants.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CIVIL ACTION No: 2007-CP-40-1125 **CERTIFICATE OF SERVICE**

The undersigned, Cindy Lea Richburg, hereby avers that she is the legal assistant of Koon & Cook, P.A., Attorney for the Defendant, and that on the **13th day of August 2007** a true and accurate copy of the attached **DEFENDANT ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT** was placed in an envelope with the first class postage thereon prepaid through the United States Postal Service, and mailed to the attorneys for the Plaintiff and Defendants as follows:

Jan L. Warner, Esquire
Warner, Payne & Black, LLP
PO Box 2628
Columbia, SC 29202

Richard G. Whiting, Esquire
PO Box 7877
Columbia, SC 29202

Gary W. Popwell, Esquire
PO Box 1505
Columbia, SC 29202

Cindy Lea Richburg, Legal Assistant
to John K. Koon

RECEIVED
2007 AUG 15 PM 2:02
W P & S, LLP
LEXERLAW SERVICES
OF SC, PA

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, Plaintiff, Vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., Defendants.	C/A No.: 07-CP-40-1125 **DEFENDANT BRENDA COOKE and BJR INTERNATIONAL DETECTIVE AGENCY, INC.'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT**

TO: THE PLAINTIFF ABOVE-NAMED AND HIS ATTORNEY OF RECORD, JAN L. WARNER, ESQUIRE:

The Defendants, above named, hereby answers the Complaint herein and reserving the right to file a motion under Rule 12 of the South Carolina Rules of Civil Procedure, or any other disposition motion, answers Plaintiff's Complaint as follows:

FOR A FIRST DEFENSE

1. The Defendants specifically deny each and every allegation contained within the Complaint not hereinafter specifically or expressly admitted, qualified or explained.

2. Defendants, Brenda Cooke and BJR International Detective Agency, Inc. denies the allegations of Paragraph 1 on the Complaint and would show unto the court that Defendant Cooke is a resident of Lexington County and that her principal place of business of business is in Lexington County. The fact that these Defendants do business in Richland County is insufficient to confer jurisdiction and venue in Richland County.

3. Brenda Cooke and BJR International Detective Agency, Inc. denies the allegations of Paragraph 2 of the Complaint unless the Plaintiff can establish that jurisdiction and venue is proper through some other named Defendant.

4. Responding to Paragraph 4 of the Complaint, Brenda Cooke admits that she is a licensed private investigator but denies that BJR is a private investigator but would show that it is a corporation for which she is employed. Defendant Cooke and BJR also admit that portion of Paragraph 4 which states that they were retained on or about June 26, 2006. All the rest and remainder of Paragraph 4 are denied.

5. Brenda Cooke and BJR International Detective Agency, Inc. admit the allegations of Paragraphs 3 and 5 of the Complaint.

6. Brenda Cooke and BJR International Detective Agency, Inc. are without sufficient information to admit or deny the allegations of Paragraph 6 of the Complaint and therefore deny same.

7. Paragraph 7 does not relate to these Defendants and no response is necessary.

8. Brenda Cooke and BJR International Detective Agency, Inc. deny the allegations of Paragraph 8 of the Complaint.

9. Brenda Cooke and BJR International Detective Agency, Inc. admits that they received certain e-mails as alleged in Paragraph 9, but they are unable to ascertain where they came from and is without sufficient information to form a belief as to whether they are private.

10. The allegations of Paragraphs 10 through 34 are denied and strict proof of such allegations is demanded.

FOR A SECOND AND AFFIRMATIVE DEFENSE

11. These Defendants reallege all allegations of their First Defense where consistent herewith, as if repeated verbatim herein.

12. The allegations in the Complaint fails to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD AND AFFIRMATIVE DEFENSE

13. These Defendants reallege all allegations of their First and Second Defenses where consistent herewith, as if repeated verbatim herein.

14. These Defendants would show that the Plaintiff has brought this suit in an attempt to gain an unfair advantage. He violated his marital vows by entering into a sexual relationship with another woman while married. The doctrine of unclean hands will preclude a litigant from recovering in equity if that litigant acted unfairly. He comes to this court with unclean hands and if the Court balances the equities between the parties then the Plaintiff is forbidden to recover as a result. A party will have unclean hands if that party behaves unfairly in a matter. It is unfair for the wrongdoer in a marriage to commit adultery and then attempt to gain an unfair advantage by filing suit against all these Defendants.

WHEREFORE, the Defendants, having fully answered pray that the Complaint be dismissed with costs and attorney's fees and for other and further relief the Court may deem just and proper.

KOON & COOK, PA

By: _____

John K. Koon
2016 Gadsden Street
Columbia, S.C. 29201
803-256-4082, telephone
Attorney for Defendants

Columbia, South Carolina
August 13, 2007

LAW OFFICES OF
RICHARD G. WHITING
A PROFESSIONAL ASSOCIATION
1515 LADY STREET
POST OFFICE BOX 7877
COLUMBIA, SOUTH CAROLINA 29202

TELEPHONE (803) 256-9067
FACSIMILE (803) 256-0223
dick.whiting@whitinglawsc.com

September 25, 2007

Jan L. Warner, Esquire
Warner Payne & Black, LLP
Post Office Box 2628
Columbia, SC 29202

RE: M. Lee Jennings v. Gail Jennings, et al
Case No. 2007-CP-40-1125

Dear Mr. Warner:

Enclosed and hereby served upon you this date via U.S. Postal Service, postage prepaid, please find Defendant Jennings' Answer to Plaintiff's First Amended Complaint. I have enclosed a Certificate of Service in this matter.

I appreciate the extension of time that you granted me in which to respond.

Please accept my kindest regards.

I am, very truly yours,

R. G. Whiting

Richard G. Whiting

/kbc KBC
enc: Answer to Plaintiff's First Amended Complaint
Certificate of Service
cc: John K. Koon, Esquire
Gary Popwell, Esquire
Gail Jennings

RECEIVED
2007 SEP 26 PM 12:25
W P & B, LLP
-LUERLAW SERVICES
OF SC, PA

RECEIVED
2007 SEP 26 PM 12:25
W P & B, LLP
LUERLAW SERVICES
OF SC, PA

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. Lee Jennings, Plaintiff, versus Gail M. Jennings, Holly Broome, Brenda Cook, individually and BJR International Detective Agency, Inc. Defendants.	ANSWER OF DEFENDANT GAIL M. JENNINGS Civil Action No. 2007-CP-40-1125

TO THE PLAINTIFF ABOVE-NAMED AND HIS ATTORNEY OF RECORD, JAN L. WARNER, ESQUIRE:

The Defendant, above named, hereby answers the Complaint herein, reserving the right to file a motion under Rule 12 of the South Carolina Rules of Civil Procedure, or any other disposition motion, answers Plaintiff's Complaint as follows:

FOR A FIRST DEFENSE:

1. The Defendant denies each and every allegation contained within the Complaint not hereinafter specifically admitted, qualified, or otherwise addressed.

2. Defendant Jennings admits those allegation of Paragraph 1 as to her, but is informed and believes that the Defendant Brenda Cooke and BJR International Detective Agency, Inc. are residents of and are doing business primarily in Lexington County.

3. Defendant Jennings admits those allegations of Paragraph 2, 3, and based upon information and belief those allegations as set out in Paragraph 4.

4. Defendant Jennings admits those allegations of Paragraph 5.

5. Defendant Jennings is without sufficient information to admit or deny the allegations of Paragraph 6 and therefore deny same.

6. As to those allegations in Paragraph 7, the Defendant Jennings' informs and believes that beginning on or about June 21, 2006, Defendant Broome accessed Plaintiff's E-mail address. Defendant Jennings is uncertain as to whether or not the Defendant Broome's actions are unlawful, or what computers Defendant Broome utilized by accessing Plaintiff's E-mail address and therefore denies same.

6. As to the allegations in Paragraph 8, Defendant Jennings denies.

7. As to the allegations in paragraph 9, Defendant Jennings, based upon information and belief, admits that certain copies of E-mails were disseminated to Defendant Cooke, BJR, and possibly other BJR employees, Defendant Jennings admits receiving same as well.

8. Defendant Jennings is without sufficient information as which to form a belief or opinion as to those allegations of Paragraph 10 and therefore denies.

9. Defendant Jennings is informed and believes that no response is necessary as to allegations in Paragraph 11 and therefore none is made. If the Court deems a response is required, Defendant Jennings denies.

10. As to allegations of Paragraph 12, Defendant Jennings believes that no response is required and therefore none is made. If the allegations of Paragraph 12 are interpreted to require a response then Defendant denies. Defendant Jennings specifically reserves her right to file Motion to Rule 12 of the South Carolina Rules of Civil Procedures, or any other disposition motion, as stated herein and above including, but not limited to, this Court's lack of jurisdiction over Cause of Actions as set out by the Plaintiff in this paragraph.

11. As to allegations of Paragraph 13, 14, 15, and 16, Defendant Jennings is informed and believes that those allegations as the Plaintiff sets out do in fact contain a portion of the code section as set out by the Plaintiff, but is informed and believes that the Court should refer to the Statute itself in its entirety. Accordingly, Defendant Jennings denies that which is set out in Paragraph 13, 14, 15, and 16 in the entire contents of such Statute.

12. As to Paragraph 17 through 34, Defendant Jennings denies.

FOR A SECOND AND AFFIRMATIVE DEFENSE:

13. Defendant Jennings re-alleges all allegations of her First Defense where consistent herewith, as if repeated verbatim herein.

14. The allegations of the Complaint failed to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD AND AFFIRMATIVE DEFENSE:

15. Defendant Jennings re-allege all allegations of her First and Second Defenses where consistent herewith, as if repeated verbatim herein.

16. Defendant Jennings would show that the Plaintiff has brought this suit in an attempt to gain an unfair advantage in the Family Court Action pending between her and the Plaintiff. Plaintiff violated his marital vows by entering into a sexual relationship with another woman while married. The doctrine of unclean hands will preclude a litigant from recovering in equity if that litigant acted unfairly. Plaintiff comes to this Court with unclean hands and if the Court balances the equities between the parties then the Plaintiff is forbidden to recover as a result. A party will have unclean hands if that party behaves unfairly in a matter. It is unfair for the wrongdoer in a marriage to commit

adultery and then attempt to gain an unfair advantage by filing suit against the Defendant.

WHEREFORE, the Defendant, Gail M. Jennings, having fully answered, prays that the Complaint be dismissed with costs and attorney's fees and for such other and further relief as this Honorable Court may deem just and proper.

Richard G. Whiting
Attorney for Defendant Jennings
1515 Lady Street
Post Office Box 7877
Columbia, SC 29202
Telephone (803) 256-9067

September 25, 2007

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. Lee Jennings, Plaintiff, versus Gail M. Jennings, Holly Broome, Brenda Cook, individually and BJR International Detective Agency, Inc. Defendants.	)	CERTIFICATE OF SERVICE Civil Action No. 2007-CP-40-1125

I, Kristin B. Cannon, assistant to Richard G. Whiting, attorney for the Defendant do hereby certify that I have this 25th day of September, 2007, served the Defendant's, Gail M. Jennings', Answer to Plaintiff's First Amended Complaint, via U.S. Postal Service, postage prepaid to the following addresses:

Jan L. Warner, Esquire
Warner Payne & Black, LLP
Post Office Box 2628
Columbia, SC 29202

John K. Koon, Esquire
Koon and Cook, P.A.
2016 Gadsden Street
Columbia, SC 29201

Gary W. Popwell, Jr. Esquire
Lee Eadon Isgett & Popwell
Post Office Box 1505
Columbia, SC 29202

Kristin B. Cannon

Kristin B. Cannon
Assistant to Richard G. Whiting
1515 Lady Street
Post Office Box 7877
Columbia, SC 29202

September 25, 2007

LAW OFFICES OF
RICHARD G. WHITING
A PROFESSIONAL ASSOCIATION
1515 LADY STREET
POST OFFICE BOX 7877
COLUMBIA, SOUTH CAROLINA 29202

TELEPHONE (803) 256-9067
FACSIMILE (803) 256-0223
dick.whiting@whitinglawsc.com

RECEIVED
08 FEB 19 PM 12:52
W P & B, LLP
ELDERLAW SERVICES
OF SC, PA

February 19, 2008

VIA HAND DELIVERY
Honorable Barbara A. Scott
Richland County Clerk of Court
1701 Main Street
Columbia, SC 29201

RE: M. Lee Jennings v. Gail M. Jennings, Holly Broome, Brenda Cooke, Individually, and BJR International Detective Agency, Inc.
Case No. 2007-CP-40-1125

Dear Ms. Scott:

Enclosed please find the original and three (3) copies for our Motion for Summary Judgment in the above referenced matter along with a check for the $25.00 filing fee.

This matter is on the roster scheduled to be sounded on Monday, February 25, 2008. We are asking that the Motions for Summary Judgment be heard prior to the case being called to trial.

I very much appreciate you filing the original and returning the stamped copies with my courier.

Thank you very much.

I am, very truly yours,

Richard G. Whiting

/kbc
enc: Motion Information Form
Notice of Motion and Motion for Summary Judgment
cc: Jan L. Warner, Esquire
John K. Koon, Esquire
Gary W. Popwell, Jr., Esquire

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

M. Lee Jennings,)
)
Plaintiff,)
)
versus)
)
Gail M. Jennings, Holly Broome,)
Brenda Cook, individually and BJR)
International Detective Agency, Inc.)
)
Defendants.)

CERTIFICATE OF SERVICE

Civil Action No. 2007-CP-40-1125

RECEIVED
08 FEB 19 P 12:55
ELDER LAW SERVICES OF GS, PA LLP

I, Kristin B. Cannon, assistant to Richard G. Whiting, attorney for the Defendant do hereby certify that I have this 19th day of February, 2008, served Defendant Jennings' Notice of Motion and Motion for Summary Judgment, via hand-delivery to the following addresses:

Jan L. Warner, Esquire
Warner Payne & Black, LLP
1122 Lady Street, Suite 1200
Columbia, SC 29202

John K. Koon, Esquire
Koon and Cook, P.A.
2016 Gadsden Street
Columbia, SC 29201

Gary W. Popwell, Jr., Esquire
Lee Eadon Isgett & Popwell
1314 Lincoln Street
Columbia, SC 29202

Kristin B. Cannon

Kristin B. Cannon
Assistant to Richard G. Whiting
1515 Lady Street
Post Office Box 7877
Columbia, SC 29202
(803) 256-9067

February 19, 2008

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

M. Lee Jennings,

☐ Plaintiff,

versus

Gail M. Jennings, et al,

☒ Defendant.

IN THE ☒ COURT OF COMMON PLEAS
☐ FAMILY COURT

COPY

CASE NO. 07-CP-40-1125

MOTION INFORMATION FORM AND COVER SHEET

Name, S.C. Bar no. and address of plaintiff's attorney	Name, Sc. Bar no. and address of defendant's attorney
	Richard G. Whiting, Esquire 1515 Lady Street; PO Box 7877 Columbia, SC 29202
Telephone: Fax: e-mail: Other:	Telephone: (803) 256-9067 Fax: (803) 256-0223 e-mail: Other

FILED
08 FEB 19 AM 8:58
RICHLAND COUNTY
CLERK OF COURT
APPEALS

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I AND III)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTION II AND III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment
Estimated Time Needed: 30 minutes Court Reporter Needed: Yes

SECTION II: Motion Type

☒ Written Motion attached
☐ Form Motion –
I hereby move for relief or action by the court as set form in the attached proposed order.

Signature of Attorney for Plaintiff/Defendant — February 19, 2008 Date Submitted

SECTION III: Motion Fee

☒ PAID AMOUNT: 25.00
☐ EXEMPT
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status
☐ State Agency v. Indigent Party
☐ Sexually Violet Predator Act
☐ Post-Conviction Relief
☐ Motion for stay in Bankruptcy
☐ Motion for Publication
☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or reduced to writing for motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other

JUDGE'S SECTION

☐ Motion fee to be paid upon filing of the attached order.
☐ Other

JUDGE CODE: DATE:

CLERK'S VERIFICATION

Collected by: DATE FILED:
☐ MOTION FEE COLLECTED:
☐ CONTESTED-AMOUNT DUE:

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
M. Lee Jennings,	)	
	)	
Plaintiff,	)	DEFENDANT JENNINGS
	)	NOTICE OF MOTION AND MOTION
versus	)	FOR SUMMARY JUDGMENT
	)	
Gail M. Jennings, Holly Broome, Brenda Cook, individually and BJR International Detective Agency, Inc.	)	Civil Action No. 2007-CP-40-1125
	)	
Defendants.	)	

FILED
2008 SEP 19 AM 11:58
RICHLAND COUNTY, S.C.
JEANNETTE W. SCOTT
C.C.P. & G.S.

TO: JAN L. WARNER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF; GARY W. POPWELL,JR., ESQUIRE, ATTORNEY FOR DEFENDANT BROOME; AND JOHN K. KOON, ESQUIRE, ATTORNEY FOR DEFENDANT COOK:

PLEASE TAKE NOTICE that the Defendant Gail M. Jennings shall move on the tenth (10th) day after service of this Notice of Motion and Motion for Summary Judgment upon you, or as soon thereafter as counsel may be heard, for an Order granting Defendant Jennings Summary Judgment against the Plaintiff in regards to all causes of action contained in the Plaintiff's Complaint, the grounds of the Motion being that there is no genuine material issue of fact but that the Plaintiff's cause of actions fail as to the allegations of misconduct as to the Defendant and that the Defendant is entitled to the judgement as a matter of law and fact as to liability.

This Motion is made pursuant to the South Carolina Rules of Civil Procedure, Rule 56, the Pleadings, Statues, case law, and Requests to Admit, and that attached hereto, and sworn testimony heretofore given by deposition with such other grounds and memoranda as may be presented at the hearing in this matter.

Richard G. Whiting
Attorney for Defendant Jennings
1515 Lady Street
Post Office Box 7877
Columbia, SC 29202
Telephone (803) 256-9067

February 19, 2008

EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	DOCKET NO.: 2007-CP-40-1125 **FIRST AMENDED COMPLAINT PURSUANT TO ORDER DATED JULY 12/FILED JULY 13, 2007** **JURY TRIAL DEMANDED**

Plaintiff, for a Complaint against Defendants, alleges:

GENERAL ALLEGATIONS AND JURISDICTION

1. Plaintiff is a resident of Richland County, South Carolina. Defendant Gail M. Jennings is a resident of Richland County, South Carolina. Defendant Brenda Cooke ("Cooke" hereafter), individually and shareholder of business as BJR International Detective Agency, Inc. ("BJR" hereafter) does business in Richland County, South Carolina. Defendant Broome, upon information and belief, is a resident of Richland County, South Carolina.

2. Jurisdiction and venue are proper in this Court.

3. Plaintiff and Defendant Jennings are husband and wife who separated on or about June 21, 2006.

4. Defendant Broome ("Broome" hereafter) is the wife of Defendant Jennings' son (Defendant Jennings' daughter-in-law); Defendant Cooke and BJR are

licensed private investigators whom Defendant Jennings hired on or about June 26, 2006.

5. Plaintiff and Defendant Jennings are engaged in litigation in the Family Court for the Fifth Judicial Circuit for Richland County. Complaint for divorce was filed by Defendant Jennings on June 29, 2006.

6. At all times relevant herein, Plaintiff had a private e-mail address at yahoo.com with the identity "leedabeatlefan@yahoo.com". At no time did Plaintiff give anyone the permission to access or use his private e-mail account.

7. Beginning after June 21, 2006, upon information and belief and Broome's admission, Defendant Broome illegally accessed Plaintiff's private e-mail address without his permission, and used a computer located at 309 Vincienne, and possibly other computers, to improperly procure Plaintiff's private electronic mail communications.

8. After intercepting and accessing Plaintiff's private e-mail communications through an electronic communication system and printing the same, Defendant Broome used the improperly obtained communications in an attempt to gain an economic benefit for Defendant Jennings and Cooke and to gain a collateral advantage in the pending Family Court action.

9. The contents of Plaintiff's private electronic messages were disseminated visually and by copies being provided to Defendant Cooke, BJR employees, Defendant Jennings, Defendant Jennings' attorney and employees, the public record for Richland County, and as yet, unidentified third persons.

10. The foregoing acts were accomplished from and including June 21, 2006 through and including an unknown date, and possibly up to February 20, 2007.

FOR A FIRST CAUSE OF ACTION
(Violation of §17-30-10, *et seq*; §§16-16-10, *et seq*; 18 USC §§2510-2522 and 2701-2712)

11. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

12. Plaintiff brings this cause of action pursuant to the South Carolina Homeland Security Act, S.C. Code Ann. §§17-30-10, *et seq*., South Carolina Computer Crimes Act, S.C. Code Ann. §§16-16-10 *et. seq*., Title I of the Electronic Communications Privacy Act, 18 U.S.C. §§2510-2522, and the Federal Stored Communications Act, 18 U.S.C. §§ 2701-2712.and 18 U.S.C. and 2701-2712.

13. S.C. Code Ann. § 17-30-10, *et seq*. which is South Carolina's version of Title 1 of the Electronic Communications Act, makes it unlawful for an unauthorized individual to intercept aural and wire communications.

14. S.C. Code Ann. § 16-16-20(4) of the South Carolina Computer Crime Act makes it a crime to "willfully, knowingly, and without authorization or for an unauthorized purpose" engage in computer hacking.

15. S.C. Code Ann. § 16-16-10(j)(5) defines "computer hacking" as "the intentional use of a computer, computer system, or a computer network in a manner that exceeds any right or permission granted by the appropriate principal of the computer, computer system, or computer network."

16. 18 U.S.C. § 2701(a) of the Stored Communications Act makes it unlawful for anyone to "intentionally accesses without authorization a facility through which an electronic communication service is provided."

17. Plaintiff alleges that his electronic communications have been intercepted, intentionally accessed, disclosed, and used without his authorization and in violation of the forgoing chapters and brings this civil cause of action against those persons and entities who accessed, intercepted, disclosed, used, and procured Plaintiff's private electronic communications.

18. Based thereon, Plaintiff is entitled to an immediate Order and injunction restraining all Defendants and their agents and employees from any further dissemination of Plaintiff's private electronic mail which was intercepted and used by them.

19. Pursuant to Sections 17-30-10, et seq. and 17-30-135 of the 1976 Code of Law, State of South Carolina, as amended, Plaintiff is further entitled to actual damages of not less than liquidated damages computed at the rate of $500.00 per day for each day in violation or $25,000.00, whichever is greater, alleging that, upon information and belief, from the date of the first interception, disclosure continues upon the public records and elsewhere through this date and Plaintiff is entitled damages at the rate of $500.00 per day for ever day on which the foregoing records continue to be used and disclosed.

20. Plaintiff is also entitled to punitive damages in an amount to be established by a jury, together with reasonable attorneys fees and other litigation costs reasonably incurred and such other legal and equitable relief as the Court deems just and proper.

FOR A SECOND CAUSE OF ACTION
(INVASION OF PRIVACY – Publicizing of Private Affairs)

21. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

22. The Defendants herein gave publicity to matters that are private to the Plaintiff.

23. The disclosure of these communications would be highly offensive to a reasonable person and is not of legitimate public concern.

24. Further, Plaintiff did not consent to the disclosure of this private information.

25. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A THIRD CAUSE OF ACTION
(INVASION OF PRIVACY – Wrongful Intrusion)

26. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

27. Defendants' wrongful intrusions consist of watching, spying, and prying into Plaintiff's private affairs.

28. The wrongful intrusions concern those aspects of the Plaintiff, his personal relationships, and communications which one normally expects to be free from exposure to the Defendants.

29. Defendants' conduct is intentional, substantial and unreasonable, and is of a nature that would cause mental injury to a person of ordinary feelings and intelligence in the same circumstances.

30. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A FOURTH CAUSE OF ACTION
(CONSPIRACY)

31. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

32. Defendants combined, with malice, for the purposes of injuring the Plaintiff.

33. By improperly intercepting and disseminating Plaintiff's private electronic communications, Defendants have caused Plaintiff to suffer special damages.

34. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

WHEREFORE, Plaintiff prays that relief be granted jointly and severally as requested herein above, together with such other legal and equitable relief as the Court may deem just and proper.

WARNER, PAYNE, & BLACK, L.L.P.

Jan L. Warner
Matthew E. Steinmetz
Post Office Box 2628 (29202)
1122 Lady Street, Ste 1200
Columbia, South Carolina 29201
Telephone: (803) 799-0554
Facsimile: (803) 799-2517
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
July 25, 2007

EXHIBIT 2a

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, -vs- GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	)	CASE NO.: 07-CP-40-1125 **DEFENDANT HOLLY BROOME'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT**

TO: JAN L. WARNER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Defendant Holly Broome would respectfully answer the First Amended Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE

1. The allegations of paragraphs 1 through 5 referencing Defendant Broome are admitted. The other allegations are admitted upon information and belief.

2. The Defendant is without sufficient information to admit or deny the allegations of paragraph 6 and, therefore, denies same and demands strict proof thereof.

3. The allegations of paragraphs 7 through 34 are denied.

FOR A SECOND DEFENSE

4. The Defendant realleges all allegations of her First Defense where consistent herewith, as if repeated verbatim herein.

5. The allegations of the Complaint failed to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

6. The Defendant realleges all allegations of her First and Second Defenses where consistent herewith, as if repeated verbatim herein.

7. The Plaintiff has acted unfairly in the matter which is the subject of this litigation and the underlying litigation in the Family Court and comes into this Court with unclean hands and the Defendant Broome pleads the defense of unclean hands as a complete and total bar to this action. The Defendant will set forth the specifics of the Plaintiff's conduct which she alleges constitutes unclean hands at Plaintiff's request through discovery or through more particular allegations upon motion to make more definite and certain; however, the Defendant sees no need to make the specifics of Plaintiff's conduct part of the public record at this time.

WHEREFORE, having fully answered, the Defendant Holly Broome prays that the Complaint be dismissed with costs, and for such other and further relief as this Honorable Court may deem just and proper.

GARY W. POPWELL, JR.
Attorney for Defendant Holly Broome

ATTORNEYS LEE, EADON, ISGETT,
POPWELL AND REARDON, P.A.
Post Office Box 1505
Columbia, South Carolina 29202
(803) 799-9811

Columbia, South Carolina

August 7, 2007.

EXHIBIT 2b

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. Lee Jennings, Plaintiff, versus Gail M. Jennings, Holly Broome, Brenda Cook, individually and BJR International Detective Agency, Inc. Defendants.	)	ANSWER OF DEFENDANT GAIL M. JENNINGS Civil Action No. 2007-CP-40-1125

TO THE PLAINTIFF ABOVE-NAMED AND HIS ATTORNEY OF RECORD, JAN L. WARNER, ESQUIRE:

The Defendant, above named, hereby answers the Complaint herein, reserving the right to file a motion under Rule 12 of the South Carolina Rules of Civil Procedure, or any other disposition motion, answers Plaintiff's Complaint as follows:

FOR A FIRST DEFENSE:

1. The Defendant denies each and every allegation contained within the Complaint not hereinafter specifically admitted, qualified, or otherwise addressed.

2. Defendant Jennings admits those allegation of Paragraph 1 as to her, but is informed and believes that the Defendant Brenda Cooke and BJR International Detective Agency, Inc. are residents of and are doing business primarily in Lexington County.

3. Defendant Jennings admits those allegations of Paragraph 2, 3, and based upon information and belief those allegations as set out in Paragraph 4.

4. Defendant Jennings admits those allegations of Paragraph 5.

5. Defendant Jennings is without sufficient information to admit or deny the allegations of Paragraph 6 and therefore deny same.

6. As to those allegations in Paragraph 7, the Defendant Jennings' informs and believes that beginning on or about June 21, 2006, Defendant Broome accessed Plaintiff's E-mail address. Defendant Jennings is uncertain as to whether or not the Defendant Broome's actions are unlawful, or what computers Defendant Broome utilized by accessing Plaintiff's E-mail address and therefore denies same.

6. As to the allegations in Paragraph 8, Defendant Jennings denies.

7. As to the allegations in paragraph 9, Defendant Jennings, based upon information and belief, admits that certain copies of E-mails were disseminated to Defendant Cooke, BJR, and possibly other BJR employees, Defendant Jennings admits receiving same as well.

8. Defendant Jennings is without sufficient information as which to form a belief or opinion as to those allegations of Paragraph 10 and therefore denies.

9. Defendant Jennings is informed and believes that no response is necessary as to allegations in Paragraph 11 and therefore none is made. If the Court deems a response is required, Defendant Jennings denies.

10. As to allegations of Paragraph 12, Defendant Jennings believes that no response is required and therefore none is made. If the allegations of Paragraph 12 are interpreted to require a response then Defendant denies. Defendant Jennings specifically reserves her right to file Motion to Rule 12 of the South Carolina Rules of Civil Procedures, or any other disposition motion, as stated herein and above including, but not limited to, this Court's lack of jurisdiction over Cause of Actions as set out by the Plaintiff in this paragraph.

11. As to allegations of Paragraph 13, 14, 15, and 16, Defendant Jennings is informed and believes that those allegations as the Plaintiff sets out do in fact contain a portion of the code section as set out by the Plaintiff, but is informed and believes that the Court should refer to the Statute itself in its entirety. Accordingly, Defendant Jennings denies that which is set out in Paragraph 13, 14, 15, and 16 in the entire contents of such Statute.

12. As to Paragraph 17 through 34, Defendant Jennings denies.

FOR A SECOND AND AFFIRMATIVE DEFENSE:

13. Defendant Jennings re-alleges all allegations of her First Defense where consistent herewith, as if repeated verbatim herein.

14. The allegations of the Complaint failed to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD AND AFFIRMATIVE DEFENSE:

15. Defendant Jennings re-allege all allegations of her First and Second Defenses where consistent herewith, as if repeated verbatim herein.

16. Defendant Jennings would show that the Plaintiff has brought this suit in an attempt to gain an unfair advantage in the Family Court Action pending between her and the Plaintiff. Plaintiff violated his marital vows by entering into a sexual relationship with another woman while married. The doctrine of unclean hands will preclude a litigant from recovering in equity if that litigant acted unfairly. Plaintiff comes to this Court with unclean hands and if the Court balances the equities between the parties then the Plaintiff is forbidden to recover as a result. A party will have unclean hands if that party behaves unfairly in a matter. It is unfair for the wrongdoer in a marriage to commit

adultery and then attempt to gain an unfair advantage by filing suit against the Defendant.

WHEREFORE, the Defendant, Gail M. Jennings, having fully answered, prays that the Complaint be dismissed with costs and attorney's fees and for such other and further relief as this Honorable Court may deem just and proper.

Richard G. Whiting
Attorney for Defendant Jennings
1515 Lady Street
Post Office Box 7877
Columbia, SC 29202
Telephone (803) 256-9067

September 25, 2007

EXHIBIT 2c

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND M. LEE JENNINGS, Plaintiff, Vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A No.: 07-CP-40-1125 **DEFENDANT BRENDA COOKE and BJR INTERNATIONAL DETECTIVE AGENCY, INC.'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT**

TO: THE PLAINTIFF ABOVE-NAMED AND HIS ATTORNEY OF RECORD, JAN L. WARNER, ESQUIRE:

The Defendants, above named, hereby answers the Complaint herein and reserving the right to file a motion under Rule 12 of the South Carolina Rules of Civil Procedure, or any other disposition motion, answers Plaintiff's Complaint as follows:

FOR A FIRST DEFENSE

1. The Defendants specifically deny each and every allegation contained within the Complaint not hereinafter specifically or expressly admitted, qualified or explained.

2. Defendants, Brenda Cooke and BJR International Detective Agency, Inc. denies the allegations of Paragraph 1 on the Complaint and would show unto the court that Defendant Cooke is a resident of Lexington County and that her principal place of business of business is in Lexington County. The fact that these Defendants do business in Richland County is insufficient to confer jurisdiction and venue in Richland County.

3. Brenda Cooke and BJR International Detective Agency, Inc. denies the allegations of Paragraph 2 of the Complaint unless the Plaintiff can establish that jurisdiction and venue is proper through some other named Defendant.

4. Responding to Paragraph 4 of the Complaint, Brenda Cooke admits that she is a licensed private investigator but denies that BJR is a private investigator but would show that it is a corporation for which she is employed. Defendant Cooke and BJR also admit that portion of Paragraph 4 which states that they were retained on or about June 26, 2006. All the rest and remainder of Paragraph 4 are denied.

5. Brenda Cooke and BJR International Detective Agency, Inc. admit the allegations of Paragraphs 3 and 5 of the Complaint.

6. Brenda Cooke and BJR International Detective Agency, Inc. are without sufficient information to admit or deny the allegations of Paragraph 6 of the Complaint and therefore deny same.

7. Paragraph 7 does not relate to these Defendants and no response is necessary.

8. Brenda Cooke and BJR International Detective Agency, Inc. deny the allegations of Paragraph 8 of the Complaint.

9. Brenda Cooke and BJR International Detective Agency, Inc. admits that they received certain e-mails as alleged in Paragraph 9, but they are unable to ascertain where they came from and is without sufficient information to form a belief as to whether they are private.

10. The allegations of Paragraphs 10 through 34 are denied and strict proof of such allegations is demanded.

FOR A SECOND AND AFFIRMATIVE DEFENSE

11. These Defendants reallege all allegations of their First Defense where consistent herewith, as if repeated verbatim herein.

12. The allegations in the Complaint fails to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD AND AFFIRMATIVE DEFENSE

13. These Defendants reallege all allegations of their First and Second Defenses where consistent herewith, as if repeated verbatim herein.

14. These Defendants would show that the Plaintiff has brought this suit in an attempt to gain an unfair advantage. He violated his marital vows by entering into a sexual relationship with another woman while married. The doctrine of unclean hands will preclude a litigant from recovering in equity if that litigant acted unfairly. He comes to this court with unclean hands and if the Court balances the equities between the parties then the Plaintiff is forbidden to recover as a result. A party will have unclean hands if that party behaves unfairly in a matter. It is unfair for the wrongdoer in a marriage to commit adultery and then attempt to gain an unfair advantage by filing suit against all these Defendants.

WHEREFORE, the Defendants, having fully answered pray that the Complaint be dismissed with costs and attorney's fees and for other and further relief the Court may deem just and proper.

KOON & COOK, PA

By: _____

John K. Koon
2016 Gadsden Street
Columbia, S.C. 29201
803-256-4082, telephone
Attorney for Defendants

Columbia, South Carolina
August 13, 2007

EXHIBIT 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS,	)	CASE NO.: 07-CP-40-1125
PLAINTIFF,	)	
-vs-	)	**DEFENDANT HOLLY BROOME'S RESPONSES TO PLAINTIFF'S FIRST REQUESTS TO ADMIT**
GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,	)	
DEFENDANTS.	)	

TO: JAN L. WARNER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Defendant Holly Broome would respectfully reply to the Plaintiff's First Requests to Admit as follows:

1. Admit that you accessed and retrieved e-mails from Lee Jennings' yahoo e-mail account after June 21, 2006.

RESPONSE: *Defendant Broome admits that she opened saved e-mails from Lee Jennings' yahoo e-mail account after June 21, 2006 after her mother-in-law, Defendant Jennings, informed her that the Plaintiff had admitted to her that he had been corresponding with a paramour via email.*

2. Admit that you provided two (2) copies of those e-mail to your mother-in-law, Gail Jennings on or about June 25, 2006.

RESPONSE: *Admitted.*

3. Admit that you provided information contained in those e-mails to Brenda Cooke and Gail Jennings after June 26, 2006.

RESPONSE: *Admitted.*

RECEIVED
2007 APR 19 PM 12:20
W P & B, LLP
LEGAL SERVICES
OF SC, PA

4. Admit that you continued monitoring Lee Jennings' e-mail account by accessing the same after June 26, 2006 and provided information contained therein.

RESPONSE: ***Admitted that she opened saved e-mails as aforestated after that date and provided information contained therein.***

GARY W. POPWELL, JR.
Attorney for Defendant Holly Broome

ATTORNEYS LEE, EADON, ISGETT,
POPWELL AND REARDON, P.A.
Post Office Box 1505
Columbia, South Carolina 29202
(803) 799-9811

Columbia, South Carolina

April 17, 2007.

EXHIBIT 4

Excerpts from the Deposition of Gail Jennings
February 19, 2007

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Now, did you have any of his e-mails at that time?
A: No, sir, I did not.
Q: When did you start getting his e-mails?
A: I received the e-mails on Sunday.
Q: How did you get into his e-mail box?
A: I did not.
Q: Who got into it?
A: Holly.
Q: How did she do it?
A: I don't know.
Q: Was she with you; were you with her?
A: No, sir, I was not.
Q: Now, who is Holly?
A: Holly is my daughter in law.
Q: Your daughter in law?
A: In law, yes, sir.

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Okay. There were two copies made and where were they distributed?
A: Tom.
Q: Tom Neal?
A: Yes, sir.
Q: Okay. And where did the other one go?
A: Cookie.
Q: Okay. Did you give them to Cookie on the 26th?
A: The Monday, yes, sir.
Q: Okay. So, you gave out both copies that day?
A: Yes, sir.
Q: Now, did Holly go into ... how did ... did she

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go into his e-mail after that?
A: Yes, sir.
Q: Okay. How many times?
A: I do not know.
Q: Did she give you copies of what was provided?
A: No, sir.
Q: How did Cookie, Ms. Cooke get the e-mails that were after the time of the ...
A: Holly took them by there.

Q: Holly took them by there?
A: Yes, sir.
Q: Did Holly have your husband's permission to go into his e-mail box?
A: No.

Now, when you gave the e-mails to Ms. Cooke, why did you give them to her?
A: I felt the more information she had to background the, you know, the more expediently she could get the information that was needed.
Q: And it would be less costly to you because you might know where you could find him?
A: Yes, sir.
Q: Is that correct?
A: Yes, sir.
Q: On the night that you went to the theater, did you get that information from an e-mail?
A: I do not know.
Q: Did Holly get it off an e-mail?
A: Yes, sir.

Attorneys

LEE, EADON, ISGETT, POPWELL AND REARDON, P.A.

LUTHER M. LEE (1923-1996)
SHEROD H. EADON, JR.
CHRISTOPHER G. ISGETT
GARY W. POPWELL, JR.
GERALD E. REARDON
BRETT A. OWENS - ASSOCIATE

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TELEPHONE (803) 799-9811
TELECOPIER (803) 779-8572
TOLL FREE (800) 882-0742
www.leiplaw.com

February 20, 2008

VIA HAND DELIVERY
The Honorable Barbara A. Scott
RICHLAND COUNTY CLERK OF COURT
1701 Main Street
Post Office Box 2766
Columbia, South Carolina 29202-2766

Re: M. Lee Jennings -vs- Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and BJR International Detective Agency, Inc.
Case No.: 2007-CP-40-1125

Dear Ms. Scott:

Please find enclosed for filing the original and one (1) copy of Defendant Holly Broome's Notice of Motion and Motion for Summary Judgment, in the above-referenced matter.

By copy of this letter, I am serving a copy of the Notice of Motion and Motion for Summary Judgment on Jan L. Warner, Esquire, attorney for the Plaintiff

Thank you very much for your attention in this matter. Hoping this letter finds you well, I am,

Respectfully yours,

GARY W. POPWELL, JR.

GWPJr/gsr
Enclosures

cc: Jan L. Warner, Esquire *(w/encls.)*
John K. Koon, Esquire *(w/encls.)*
Richard G. Whiting, Esquire *(w/encls.)*

STATE OF SOUTH CAROLNA
COUNTY OF RICHLAND

IN THE ☒ COURT OF COMMON PLEAS
☐ FAMILY COURT

M. Lee Jennings,
☐ Plaintiff

-vs-

Holly Broome, et al.
☒ Defendant
check box above indicating submitting party

CASE NO.: 07-CP-40-1125

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Name, S.C. Bar No. and Address – Plaintiff's Attorney	Name, S.C. Bar No. and Address – Defendant's Attorney
	Gary W. Popwell, Jr. #7947 P.O. Box 1505 Columbia, S.C. 29202
phone: fax: e-mail: other:	phone: 803-799-9811 fax: 803-779-8572 email: Gary@leiplaw.com other:

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: ***Defendant Broom's Motion for Summary Judgment***
Estimated Time Needed: ½ Hour Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached.
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant — Date submitted: 2-20-08

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in Open court per judge's instruction
  Name of Court Reporter:
- ☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached Order.
☐ Other:

JUDGE
CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

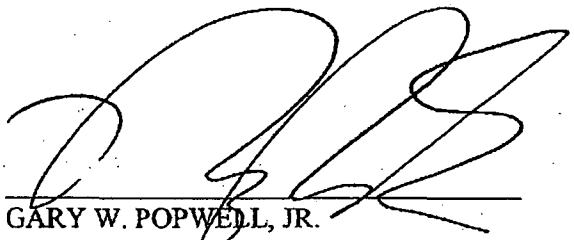
SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS,	)	CASE NO.: 07-CP-40-1125
PLAINTIFF,	)	
-vs-	)	**DEFENDANT BROOME'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**
GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,	)	
DEFENDANTS.	)	

TO: JAN L. WARNER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF; JOHN K. KOON, ESQUIRE, ATTORNEY FOR DEFENDANT COOKE; AND RICHARD G. WHITING, ESQUIRE, ATTORNEY FOR JENNINGS:

PLEASE TAKE NOTICE that the Defendant Holly Broome shall move on the tenth (10th) day after service of this Notice of Motion and Motion upon you, or as soon thereafter as counsel may be heard, for an Order granting her summary judgment against the Plaintiff in regard to all causes of action contained in the Plaintiff's First Amended Complaint. The grounds of this motion are that there is no genuine issue of material fact and that the Plaintiff's causes of action fails to specify the allegations of misconduct as to the Defendant Broome and the Defendant Broome is entitled to summary judgment as a matter of law and fact as to liability.

This Motion is made pursuant to the South Carolina Rules of Civil Procedure, Rule 56, the pleadings, Statutes, case law, and discovery to date, and sworn testimony heretofore given by deposition with such other grounds and memoranda as may be presented at the hearing in this matter.



GARY W. POPWELL, JR.
Attorney for Defendant Holly Broome

ATTORNEYS LEE, EADON, ISGETT,
POPWELL AND REARDON, P.A.
Post Office Box 1505
Columbia, South Carolina 29202
(803) 799-9811

Columbia, South Carolina

February 20, 2008.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
M. LEE JENNINGS)
☒ Plaintiff)
)
v.)
)
Gail M. Jennings, Holly Broome, Brenda Cooke, Individually, And Bjr International Detective Agency, Inc.)
☐ Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2007-CP-40-1125

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

FILED
2008 MAR 25 PM 4:56
BARBARA A. SCOTT
C.C.C. G.S.

Plaintiff's Attorney:	Defendant's Attorney:
Jan L. Warner, Bar No. 5947 Address: P. O. Box 2628, Cola, SC 29202 phone: 803-799-0554 fax: 803-799-2517 e-mail: jlw@janwarner.com other:	Richard G. Whiting, Gary W. Popwell, And John R. Koon, Bar No. Address: phone: fax: e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Amend and Supplement Complaint
Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant — March 25, 2008 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

SCCA/233 (11-03)

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT DOCKET NO.: 2007-CP-40-1125 **NOTICE OF MOTION AND MOTION TO AMEND AND SUPPLEMENT COMPLAINT**

FILED
2008 MAR 25 PM 4:56
BARBARA A. SCOTT
C.C.C. & G.S.

TO: RICHARD G. WHITING, ATTORNEY FOR DEFENDANT GAIL M. JENNINGS, GARY POPWELL, JR., ATTORNEY FOR DEFENDANT HOLLY BROOME, AND JOHN K. KOON, ATTORNEY FOR DEFENDANT BRENDA COOKE:

YOU WILL PLEASE TAKE NOTICE that Plaintiff, by and through his undersigned counsel, will move before this Court on the _____day of _____ at _____ __.m. at the Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina, or at such time and place as may be set by the Court, for the issuance of an Order allowing Plaintiff to file, serve, and rely upon the attached Amended Complaint pursuant to Rule 15, *South Carolina Rules of Civil Procedure*, upon the following grounds:

1. Plaintiff filed a Complaint in this action on February 20, 2007.

2. During discovery, additional evidence was secured with regard to Defendants accessing Plaintiff's private emails, including stored communications, without Plaintiff's permission.

3. Due to Defendants accessing Plaintiff's private emails without permission, including stored communications as recently testified to by Defendant Broome, Plaintiff seeks to add additional bases for recovery, including the Federal Stored Communication Act.

4. In addition, Defendant Broome's husband was employed by Plaintiff, and he seeks to add additional damages for interference with business.

5. Plaintiff attends counseling at his expense and seeks to amend his requests for damages.

6. Plaintiff's proposed Amended Complaint arises out of the same events, transactions, and occurrences as set forth in his original Complaint, and would in no way prejudice Defendants, but would deny substantial justice to Plaintiff if this Motion is not granted.

Based thereon, Plaintiff is entitled to leave of this Court to amend/supplement his Complaint to conform with the attached proposed Amended Complaint.

The further grounds of this Motion shall be attached affidavit and such memoranda as may be submitted to the Court and arguments to be made at the time of any such hearing.

WARNER, PAYNE & BLACK, L.L.P.

Jan L. Warner
Matthew E. Steinmetz
1122 Lady Street, Suite 1200 (29201)
Post Office Box 2628
Columbia, South Carolina 29202
Telephone: (803) 799-0554
Facsimile: (803) 799-2517
ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
March 25, 2008

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)) M. LEE JENNINGS,)) PLAINTIFF,)) vs.)) GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,)) DEFENDANTS.)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT DOCKET NO.: 2007-CP-40-1125 **AFFIDAVIT OF M. LEE JENNINGS IN SUPPORT OF MOTION TO AMEND AND SUPPLEMENT COMPLAINT**

FILED
2008 MAR 25 PM 4:56
BARBARA A. SCOTT
C.C. & G.S.

PERSONALLY APPEARED BEFORE ME M. LEE JENNINGS who, being duly sworn, says:

1. I am the Plaintiff in the above-entitled matter.

2. I incorporate herein by reference each and every allegation in the proposed Amended Complaint as if the same were set forth herein verbatim.

3. During the recent deposition of Defendant Broome and other discovery, additional evidence was secured with regard to Defendants accessing my private emails, including stored communications, without my permission.

4. In light of the additional evidence, I am requesting to amend my Complaint so as to add additional bases for recovery, including the Federal Stored Communication Act.

5. Additionally, upon information and belief, Defendant Broome's husband, who was employed by me, was provided with my customer lists and other information, and I am seeking to add additional damages for interference with business.

6. In that my private personal and business communications have been illegally intercepted and accessed, I am attending counseling for paranoia at my expenses, and I am requesting additional damages regarding these expenses.

7. I request to amend my Complaint to add additional allegations based upon all of the foregoing.

M. Lee Jennings

Sworn to before me this 25th
Day of March 2008

Notary Public for South Carolina
Commission Expires: 11/21/15

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	DOCKET NO.: 2007-CP-40-1125 **AMENDED COMPLAINT**

FILED
2008 MAR 25 PM 4:56
BARBARA A. SCOTT
C.C.C. & G.S.

Plaintiff, by way of Amended Complaint, against Defendants, alleges:

GENERAL ALLEGATIONS AND JURISDICTION

1. Plaintiff is a resident of Richland County, South Carolina. Defendant Gail M. Jennings is a resident of Richland County, South Carolina. Defendant Brenda Cooke ("Cooke" hereafter), individually and shareholder of business as BJR International Detective Agency, Inc. ("BJR" hereafter) does business in Richland County, South Carolina. Defendant Broome, upon information and belief, is a resident of Richland County, South Carolina.

2. Jurisdiction and venue are proper in this Court.

3. Plaintiff and Defendant Jennings are husband and wife who separated on or about June 21, 2006.

4. Defendant Broome ("Broome" hereafter) is the wife of Defendant Jennings' son (Defendant Jennings' daughter-in-law); Defendant Cooke and BJR are

licensed private investigators whom Defendant Jennings hired on or about June 26, 2006. Defendant Broome's husband was previously employed by Plaintiff.

5. Plaintiff and Defendant Jennings are engaged in litigation in the Family Court for the Fifth Judicial Circuit for Richland County. Complaint for divorce was filed by Defendant Jennings on June 29, 2006.

6. At all times relevant herein, Plaintiff had a private e-mail address at Yahoo.com with the identity "leedabeatlefan@yahoo.com". At no time did Plaintiff give anyone permission to access or use his private e-mail account.

7. Beginning after June 21, 2006, Defendant Broome illegally accessed Plaintiff's private e-mail address multiple times without his permission, and used a computer located at 309 Vincienne, and possibly other computers, to improperly procure, download, and print Plaintiff's private electronic mail communications, both stored and otherwise, thereby having access to Plaintiff's personal and business emails without his permission and unknown to Plaintiff.

8. After reading, intercepting, accessing, and downloading Plaintiff's private e-mail communications (both stored and otherwise) through an electronic communication system and printing the same, Defendant Broome used Plaintiff's improperly obtained private communications in an attempt to gain an economic benefit for Defendant Jennings and Cooke and to gain a collateral advantage in the pending Family Court action.

9. In addition, Defendant Broome had access to all of Plaintiff's business emails for years and had the opportunity to provide the same to her husband is a business competitor of Plaintiff.

10. The contents of Plaintiff's private electronic messages (stored and otherwise) were disseminated both visually and by copies being downloaded and printed, and then provided to Defendant Cooke, BJR employees, Defendant Jennings, Defendant Jennings' attorney and employees, the public record for Richland County, as yet, unidentified third persons, and, upon information and belief, Defendant Broome's husband, a business competitor of Plaintiff.

11. The foregoing acts were accomplished from and including June 21, 2006 through and including an unknown date.

FOR A FIRST CAUSE OF ACTION
(Violation of §17-30-10, et seq; §§16-16-10, et seq; 18 USC §§2510-2522 and 2701-2712, and Negligence Per Se - As to All Defendants)

12. Plaintiff incorporates the foregoing allegations as if the same were set forth herein verbatim, and brings this cause of action pursuant to Sections 17-30-10, et seq. and 17-30-135 of the 1976 Code of Law, State of South Carolina, as amended, together with §16-16-10 et seq and 18 USC §§2510-2522 and 2701-2712.

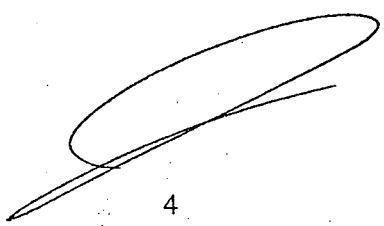
13. Plaintiff alleges that without his permission, his private personal and business email and other communications, stored or otherwise, have been illegally accessed, intercepted, disclosed, and used in violation of the foregoing chapters by all Defendants and others on their behalf. Plaintiff brings this cause of action against those persons who illegally accessed, intercepted, disclosed, used, and procured Plaintiff's private personal and business electronic communications, whether stored or otherwise. During the time periods alleged herein as set forth above, upon information and belief, all of Plaintiff's private personal and business electronic communications, both stored

and otherwise, were illegally accessed, intercepted, disclosed, used, and procured, including interception and use of his password without his permission.

14. Based thereon, Plaintiff is entitled to an immediate Order and injunction restraining all Defendants and their agents, employees, and attorneys from any further dissemination of Plaintiff's private electronic mail and stored communications and from using the same in any manner.

15. Further, Plaintiff is entitled to a finding by this Court that all information discovered and secured by Defendants during the above time period as a result of the illegal interception of his private personal and business communications, together with the fruit of the poisonous tree, are inadmissible as provided by law. Pursuant to law, Plaintiff is further entitled to actual damages of not less than liquidated damages computed at the rate of $500.00 per day for each day in violation or $25,000.00, whichever is greater, alleging that, upon information and belief, from the date of the first interception, illegal and unauthorized disclosure has continued upon the public records and elsewhere through this date, and Plaintiff is entitled damages at the rate of $500.00 per day for everyday that the foregoing records continue to be used and disclosed or such amounts as may be determined by the Court.

16. As a result Defendants' actions which constitute negligence per se and violation of said statute, Plaintiff suffers from ongoing mental distress and paranoia, for which he is receiving treatment, and is entitled to damages. Further, his business is suffering and he believes that Defendant Broome's husband was provided with customer lists and other information that has contributed to his loss.



17. Plaintiff is also entitled to actual and punitive damages in an amount to be established by a jury, together with reasonable attorneys fees and other litigation costs incurred and such other legal and equitable relief as the Court deems just and proper against Defendants and other Defendants who may be added.

FOR A SECOND CAUSE OF ACTION
(INVASION OF PRIVACY – Publicizing of Private Affairs)

18. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

19. Defendants herein gave publicity to matters that are private to the Plaintiff.

20. The disclosure of these private personal and business communications is highly offensive to a reasonable person and is not of legitimate public concern.

21. Further, Plaintiff did not consent to the disclosure of this private information.

22. As a result of Defendants' actions, combining and continuing, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A THIRD CAUSE OF ACTION
(INVASION OF PRIVACY – Wrongful Intrusion)

23. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

24. Defendants' wrongful intrusions consist of accessing, watching, spying, and prying into Plaintiff's private personal and business affairs.

25. The wrongful intrusions concern those aspects of Plaintiff, his personal relationships, his business, and communications which one normally expects to be free from exposure to Defendants.

26. Defendants' conduct is and was intentional, substantial and unreasonable, and is of a nature that would cause mental injury to a person of ordinary feelings and intelligence in the same circumstances.

27. As a result of Defendants' actions, Plaintiff has suffered and continues to suffer damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A FOURTH CAUSE OF ACTION
(CONSPIRACY)

28. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

29. Defendants combined and continued, with malice, for the purposes of injuring the Plaintiff.

30. By improperly intercepting and disseminating Plaintiff's private personal electronic communications, Defendants have caused Plaintiff to suffer special damages.

31. As a result of Defendants' actions, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

WHEREFORE, Plaintiff prays that relief be granted jointly and severally as requested herein above, together with such other legal and equitable relief as the Court may deem just and proper, including actual and punitive damages for (1) statutory

damages; (2) damages for Negligence Per Se; (3) damages for violation of said statute; (4) damages for Public Disclosure of Private Affairs; (5) damages for invasion of privacy; and (6) damages for conspiracy.

WARNER, PAYNE, & BLACK, L.L.P.

Jan L. Warner
Matthew E. Steinmetz
Post Office Box 2628 (29202)
1122 Lady Street, Ste 1200
Columbia, South Carolina 29201
Telephone: (803) 799-0554
Facsimile: (803) 799-2517
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
March 4, 2008

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	DOCKET NO.: 2007-CP-40-1125 **CERTIFICATE OF SERVICE**

FILED
2008 MAR 25 PM 4:56
BARBARA A. SCOTT
C.C.C. & G.S.

I, Israel Stone, a legal assistant for the law firm of Warner, Payne & Black, L.L.P. attorneys for the Plaintiff in the above-entitled action, do hereby certify that on this date I served a copy of **Notice of Motion and Motion to Amend and Supplement Complaint** by depositing a copy in the United States Mail, postage prepaid, addressed to:

Gary W. Popwell, Esquire
Post Office Box 1505
Columbia, South Carolina 29202

Richard G. Whiting, Esquire
Post Office Box 7877
Columbia, South Carolina 29202

John K. Koon, Esquire
2016 Gadsden Street
Columbia, South Carolina 29201

Israel Stone

Columbia, South Carolina
March 25, 2008

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

M. LEE JENNINGS) CASE NO.
☒ Plaintiff) 2007-CP-40-1125

v.) MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually, And Bjr International Detective Agency, Inc.,
☐ Defendant.)

FILED
2008 APR 18 PM 4:32
BARBARA A. SCOTT
C.C.C. & G.S.

Plaintiff's Attorney:	Defendant's Attorney:
Jan L. Warner, Bar No. 5947 Address: P. O. Box 2628, Cola, SC 29202 phone: 803-799-0554 fax: 803-799-2517 e-mail: jlw@janwarner.com other:	Richard G. Whiting, Gary W. Popwell, And John K. Koon, Bar No. Address: phone: fax: e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Amend and Supplement Amended Complaint
Estimated Time Needed:30 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant — April 18, 2008 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

SCCA/233 (11-03)

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT DOCKET NO.: 2007-CP-40-1125 **SUPERSEDING NOTICE OF MOTION AND MOTION TO AMEND AND SUPPLEMENT AMENDED COMPLAINT**

FILED
2008 APR 18 PM 4:32
BARBARA A. SCOTT
C.C.C. & G.S.

TO: RICHARD G. WHITING, ATTORNEY FOR DEFENDANT GAIL M. JENNINGS, GARY POPWELL, JR., ATTORNEY FOR DEFENDANT HOLLY BROOME, AND JOHN K. KOON, ATTORNEY FOR DEFENDANT BRENDA COOKE AND BJR INTERNATIONAL DETECTIVE AGENCY, INC.:

YOU WILL PLEASE TAKE NOTICE that Plaintiff, by and through his undersigned counsel, will move before this Court on the _____day of _____ at _____ __.m. at the Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina, or at such time and place as may be set by the Court, for the issuance of an Order allowing Plaintiff to file, serve, and rely upon the attached Second Amended Complaint pursuant to Rules 15 and 19, *South Carolina Rules of Civil Procedure*, upon the following grounds:

1. Plaintiff commenced this action on February 20, 2007.

2. During discovery, additional evidence was secured which revealed that Thomas M. Neal, III, advised and encouraged Defendant Broome to access Plaintiff's

private emails, including stored communications, without Plaintiff's permission (Exhibit 1: Portions of Deposition of Holly Broome).

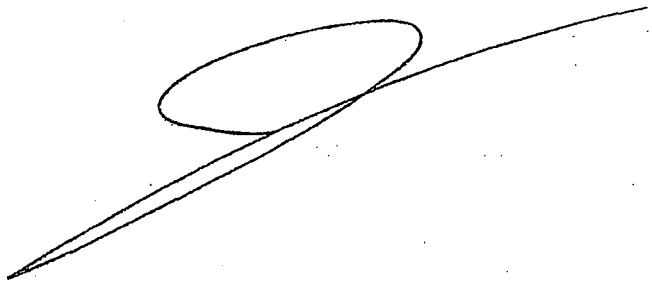
3. Due to Thomas M. Neal, III advising and encouraging Defendant Broome to access Plaintiff's private emails without permission, including stored communications as recently testified to by Defendant Broome, Plaintiff seeks to add Mr. Neal as an Defendant and to add additional grounds for recovery, including the Federal Stored Communication Act against Defendant Neal and the other Defendants.

4. Plaintiff attends counseling at his expense due to the improper interception and obtaining of his private information and has lost business based upon the allegations of the Complaint and seeks to amend his requests for damages.

5. Plaintiff's proposed Second Amended Complaint arises out of the same events, transactions, and occurrences as set forth in his original Complaint, and would in no way prejudice Defendants, but would deny substantial justice to Plaintiff if this Motion is not granted.

Based thereon, Plaintiff is entitled to leave of this Court to amend/supplement his Amended Complaint to conform with the attached proposed Second Amended Complaint.

The further grounds of this Motion shall be attached affidavit, together with such other memoranda as may be submitted to the Court and arguments to be made at the time of any such hearing.



WARNER, PAYNE & BLACK, L.L.P.

Jan L. Warner
Matthew E. Steinmetz
1122 Lady Street, Suite 1200 (29201)
Post Office Box 2628
Columbia, South Carolina 29202
Telephone: (803) 799-0554
Facsimile: (803) 799-2517
ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
April 28, 2008

EXHIBIT 1

Excerpts from Deposition of Holly Broome
(March 13, 2008)

12

Q: Did you go into Mr. Jennings e-mail account?
A: Yes.
Q: Okay. When did you start going into his e-mail account?
A: I did it on Sunday, the very next day.
Q: Sunday the 25th if that's correct?
A: Uh-huh (affirmative response.)

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Q: Of June of 2006?
A: Uh-huh (affirmative response.)
Q: Okay. Did you have permission to go into it?
A: No.
Q: Did you know his e-mail address?
A: Yeah.
Q: How did you know that?
A: Well, working with him. I knew that he had a personal e-mail account.
Q: Okay.
A: Under Yahoo.
Q: Did you know his password?
A: No.
Q: Okay. Did he give you permission to go into his account?
A: No.
Q: Okay. So, tell me what you did?
A: I know that Yahoo is a free account and I also have a Yahoo account and you can sign on to your e-mail address and say that you have forgotten your password.
Q: Okay.
A: You answer a certain amount of questions and they give you a new password.
Q: Okay.

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A: And that's what I did.
Q: All right.
A: And it assigned me a password.
Q: And what did you do then?
A: Then I got on to his e-mail and read the extent

of the e-mails that he had sent to her.

...

16

Q: Okay. What was the purpose of you going into his e-mail account?
A: To find out the truth and if that's how he was corresponding with her, I wanted to see ... we both wanted to see what was being said.

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Q: You both being who?
A: Me and Gail.
Q: Okay. And did you tell her you were going to do that?
A: No, I didn't.
Q: Okay. Did you tell her when you were doing it?
A: Yes. Well, I mean, I had her on the phone. I called her after I had read a few of them.
Q: So, on that Sunday, you called her?
A: Uh-huh (affirmative response.)
Q: Did she come over to your house?
A: Yes.
Q: And did she read them on line?
A: No. She didn't really care to read most of it. It was more of like I would say look what he just said, you know, he said this to her, he said that to her.
Q: And how many copies did you print?
A: Just one at the time.
Q: Okay. And what did you do with the copy that you printed?
A: Well, we made more copies.
Q: Okay. Who made the copies?
A: We .... she and I did.
Q: And where did you make them?

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A: At like an Office Max or something.
Q: Okay. How many copies did you make?
A: Three sets.
Q: Okay.
A: One for the attorney and one for her and then we gave some to Cookie, the private investigator.
Q: Okay. One for the attorney, Mr. Neal?
A: Yes.

Q: And had she retained Mr. Neal at that point?
A: She had already. Actually, she ... I think she did on Monday. She went the very next day and met with him.
Q: Did you print the e-mails on the Sunday or the Monday; do you remember?
A: The Sunday.
Q: Okay. So, you went out, after you did it, you made three sets?
A: Uh-huh (affirmative response.)
Q: Had she already had an appointment with a lawyer on Monday?
A: I believe so, yeah.
Q: Okay. And when did you meet Ms. Cooke?
A: After meeting with Tom Neal.
Q: Did you meet with ...

A: Sometime that week.
Q: Okay, excuse me.
A: Yes. I did go with her to the majority of her appointments just because of distress and she wanted someone else to be there and someone to help listen and follow along. So, yeah, I went to her first appointment with Tom Neal and then also I went to her first appointment with Ms. Cooke.
Q: Okay. And how long were you at the appointment with Tom Neal?
A: A while. It was ...
Q: Was it two hours?
A: Yeah, I would say. I mean, it was definitely

the whole discussion of everything that had happened and what she had found out so far.
Q: And were the e-mails, the copies delivered to Mr. Neal that day?
A: I believe so if I remember correctly, yes.
Q: Did you tell Mr. Neal in Gail Jennings presence where you had gotten the e-mails?
A: Yes.
Q: And did he read them?
A: Yes.
Q: Okay.

A: Some. You know, I mean, he wasn't reading all, no. He would read some.
Q: He read some of them?
A: Uh-huh (affirmative response.)
Q: But he knew the source of them?
A: Yes.
Q: And what else was discussed in that meeting?
A: To get Cookie and to see ... just to get more I guess proof that he was actually out and still seeing her. So, it was under his advice that we go and see her.
Q: So, after you got the e-mails, you printed them, you took the e-mails to Mr. Neal. Mr. Neal made the suggestion in your presence and Ms. Jennings presence to hire Cookie. He made the referral to Cookie?
A: He did.
Q: Ms. Cooke? And did you go with Ms. Jennings to Ms. Cooke?
A: Yes.
Q: All right. What went on at that meeting?
A: She again, you know, we had to hire her and pay her and sign forms and told her basically what we could with pictures and that sort of thing and of course, you just have to go over where

he works and where he lives and what he could be doing and all that sort of stuff. So, yeah.
Q: Where did you ... did you go see Ms. Cooke on the same day after you left Mr. Neal?
A: No. I believe ... well, I don't remember. It could have been the same day. If it was not the same day, it was in that same week. We made an appointment as soon as possible.
Q: Okay. And did you give ... and you said you gave Ms. Cooke the e-mails?
A: We did give her ones that we thought were the most proof.
Q: So, you and Ms. Jennings went through those and made those decisions or did Mr. Neal help you make them?
A: I don't really remember.
Q: Okay. Did Ms. Cooke read them in your presence?
A: A few, yes.

Q: Okay. And was there a discussion about trying to save money on the detective's fees by getting the e-mails, continuing to get the e-mails to know where Mr. Jennings was going to be?
A: What do you mean, to save money? I don't ...

Q: To save in the cost?
A: She has her fee. I mean, I don't know if there was any way to save any money with her. Of course, she is, you know, you use it up.
Q: Right.
A: If she has to work that many hours, then you use it up. It was actually under the advice of Tom Neal that we continue to try to help Cookie.
Q: Okay. So, Mr. Neal's advice was for you to continue to go into his e-mail?
A: Yes, if it was a help.
Q: Okay.
A: Uh-huh (affirmative response.)
Q: Okay. And so, therefore, based on Mr. Neal's advice, you went into the e-mail five or six additional times?
A: Yeah.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, BJR INTERNATIONAL DETECTIVE AGENCY, INC., THOMAS M. NEAL, III, and DEFENDANTS.	DOCKET NO.: 2007-CP-40-1125 **SECOND AMENDED COMPLAINT**

Plaintiff, by way of Second Amended Complaint, against Defendants, alleges:

GENERAL ALLEGATIONS AND JURISDICTION

1. Plaintiff is a resident of Richland County, South Carolina. Defendant Gail M. Jennings is a resident of Richland County, South Carolina. Defendant Brenda Cooke ("Cooke" hereafter), individually and shareholder of business as BJR International Detective Agency, Inc. ("BJR" hereafter) does business in Richland County, South Carolina. Defendant Broome, upon information and belief, is a resident of Richland County, South Carolina. Defendant Thomas M. Neal, III is a resident of Richland County and regularly conducts business in Richland County.

2. Jurisdiction and venue are proper in this Court.

3. Plaintiff and Defendant Jennings are husband and wife who last lived together on or about June 21, 2006.

4. Defendant Broome ("Broome" hereafter) is the married to Defendant Jennings' son by her prior marriage, which son was previously employed by Plaintiff's appraisal company; Defendant Cooke and BJR are licensed private investigators whom Defendant Jennings hired on or about June 26, 2006.

5. Defendant Neal is or was Defendant Jennings' attorney in ongoing proceedings in the Family Court.

6. Plaintiff and Defendant Jennings are engaged in litigation in the Family Court for the Fifth Judicial Circuit for Richland County. A Complaint for divorce was filed by Defendant Jennings on June 29, 2006.

7. At all times relevant herein, Plaintiff had a private e-mail address at Yahoo.com with the identity "leedabeatlefan@yahoo.com". At no time did Plaintiff give anyone permission to access or use his private e-mail account which contained not only private communications, but also customer lists that were proprietary to Plaintiff's business.

8. Beginning after June 21, 2006, Defendant Broome illegally accessed Plaintiff's private e-mail account multiple times without his permission, and used a computer located at 309 Vincienne, and possibly other computers, to improperly procure, download, and print Plaintiff's private electronic mail communications, both stored and otherwise, thereby having access to Plaintiff's personal and business emails and his customer lists and other private and proprietary information without his permission and unknown to Plaintiff.

9. After reading, intercepting, accessing, and downloading Plaintiff's private e-mail communications (both stored and otherwise) and, upon information and belief,

private and proprietary information through an electronic communication system and printing the same, Defendant Broome used Plaintiff's improperly obtained private communications in an attempt to gain an economic benefit for Defendant Jennings and Cooke and to gain a collateral advantage in the pending Family Court action. Upon information and belief, Defendant Broome had access to and accessed, viewed, and utilized proprietary and private customer lists in order to benefit her husband and to detriment Plaintiff.

10. In addition, Defendant Broome had access to all of Plaintiff's private and proprietary business emails for years and had the opportunity to provide the same to her husband, Defendant Broome, Jr., who is a business competitor of Plaintiff.

11. The contents of Plaintiff's private electronic messages (stored and otherwise) were disseminated both visually and by copies being downloaded and printed, and then provided to Defendant Cooke, BJR employees, Defendant Jennings, Defendant Neal and his employees, the public record for Richland County, as yet, unidentified third persons. Defendant Broome's husband (who is Defendant Jennings' son) is now a business competitor of Plaintiff.

12. Defendant Neal met with his client, Defendant Jennings, and Defendant Broome (with whom he had no attorney-client relationship) on at least several occasions and advised and encouraged Defendant Broome to continue to illegally access, retrieve, and distribute Plaintiff's private and confidential stored and other electronic communications when he knew or should have known that to do so was illegal. He also used the information derived from said illegally intercepted, downloaded, and secured Plaintiff's private e-mail messages in bringing an action against Plaintiff which he filed in

late June 2006, but did not serve upon Plaintiff until more than a month later to secure a tactical, strategic, and collateral advantage in the Family Court proceeding. Defendant Neal encouraged Defendant Broome to illegally go into Plaintiff's e-mail which gave her access to Plaintiff's business records, including client lists, when Defendant Broome's husband, who had previously worked for Plaintiff, was in direct competition with Plaintiff to cause Plaintiff economic harm.

13. Upon information and belief, Defendant Broome shared trade secrets, customer lists, and other information retrieved from Plaintiff's e-mail with her husband to give him a competitive advantage, thereby causing a deterioration of Plaintiff's business and a loss of customers.

14. The foregoing acts were accomplished from and including June 21, 2006 through and including an unknown date.

FOR A FIRST CAUSE OF ACTION
(Violation of §17-30-10, et seq; §§16-16-10, et seq; 18 USC §§2510-2522 and 2701-2712, and Negligence Per Se - As to All Defendants)

15. Plaintiff incorporates the foregoing allegations as if the same were set forth herein verbatim, and brings this cause of action pursuant to Sections 17-30-10, et seq. and 17-30-135 of the 1976 Code of Law, State of South Carolina, as amended, together with §16-16-10 et seq and 18 USC §§2510-2522 and 2701-2712.

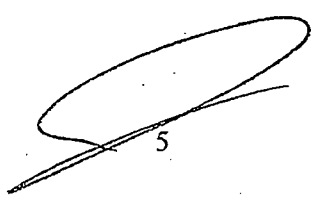
16. Plaintiff alleges that without his permission, his private personal and business email and other communications, stored or otherwise, have been illegally accessed, intercepted, disclosed, and used in violation of the foregoing chapters by all Defendants and others on their behalf. Plaintiff brings this cause of action against those persons who illegally accessed, intercepted, disclosed, used, and procured Plaintiff's

private personal and business electronic communications, whether stored or otherwise. During the time periods alleged herein as set forth above, upon information and belief, all of Plaintiff's private personal and business electronic communications, both stored and otherwise, were illegally accessed, intercepted, disclosed, used, and procured, including interception and use of his password without his permission.

17. Based thereon, Plaintiff is entitled to an immediate Order and injunction restraining all Defendants and their agents, employees, and attorneys from any further dissemination of Plaintiff's private electronic mail and stored communications and from using the same in any manner.

18. Further, Plaintiff is entitled to a finding by this Court that all information discovered and secured by Defendants during the above time period as a result of the illegal interception of his private personal and business communications, together with the fruit of the poisonous tree, are inadmissible as provided by law. Pursuant to law, Plaintiff is further entitled to actual damages of not less than liquidated damages computed at the rate of $500.00 per day for each day in violation or $25,000.00, whichever is greater, alleging that, upon information and belief, from the date of the first interception, illegal and unauthorized disclosure has continued upon the public records and elsewhere through this date, and Plaintiff is entitled damages at the rate of $500.00 per day for everyday that the foregoing records continue to be used and disclosed or such amounts as may be determined by the Court.

19. As a result Defendants' actions which constitute negligence per se and violation of said statute, Plaintiff suffers from ongoing mental distress and paranoia, for which he is receiving treatment and will continue to receive treatment for an



undetermined length of time in the future. Further, his business is and has been suffering, and he believes that Defendant Broome's illegal access to his proprietary business information such as customer lists and other information has contributed to his ongoing losses.

20. Plaintiff is also entitled to actual and punitive damages in an amount to be established by a jury, together with reasonable attorneys fees and other litigation costs incurred and such other legal and equitable relief as the Court deems just and proper against Defendants and other Defendants who may be added.

FOR A SECOND CAUSE OF ACTION
(INVASION OF PRIVACY – Publicizing of Private Affairs)
(All Defendants)

21. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

22. Defendants herein illegally secured and then gave publicity to matters that are private to the Plaintiff.

23. The disclosure of these private personal and business communications is highly offensive to a reasonable person and is not of legitimate public concern.

24. Further, Plaintiff did not consent to the disclosure of this private information.

25. As a result of Defendants' actions, combining and concurring, Plaintiff has suffered damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A THIRD CAUSE OF ACTION
(INVASION OF PRIVACY – Wrongful Intrusion)
(All Defendants)

26. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

27. Defendants' wrongful intrusions consist of illegally accessing, watching, spying, and prying into Plaintiff's private personal and business affairs, directly and indirectly.

28. The wrongful intrusions concern those aspects of Plaintiff, his personal relationships, his business interests, and communications which one normally expects to be free from exposure to Defendants.

29. Defendants' conduct is and was intentional, substantial and unreasonable, and is of a nature that would cause mental injury to a person of ordinary feelings and intelligence in the same circumstances.

30. As a result of Defendants' actions, Plaintiff has suffered and continues to suffer damages physical, emotional, and economic damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A FOURTH CAUSE OF ACTION
(CONSPIRACY)
(All Defendants)

31. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

32. Defendants combined and continued, with deliberate intent to harm and with malice, for the purposes of injuring the Plaintiff.

33. By improperly and illegally intercepting and disseminating Plaintiff's private personal electronic communications and having access to and using his proprietary business information, Defendants have caused Plaintiff to suffer special damages.

34. As a result of Defendants' actions, combining and concurring, Plaintiff has suffered and continues to suffer damages and should be awarded actual and punitive damages against all Defendants, together with such other legal and equitable relief as this Court deems just and proper.

FOR A FIFTH CAUSE OF ACTION
(VIOLATION OF THE SOUTH CAROLINA TRADE SECRETS ACT)
(All Defendants)

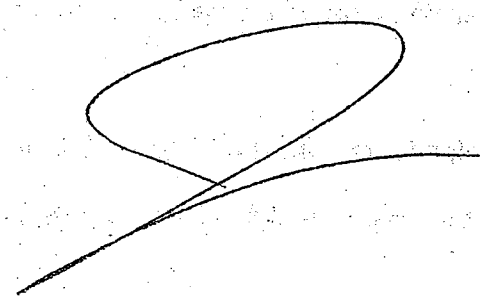
35. Plaintiff incorporates herein the above allegations as if the same were set forth verbatim.

36. Defendant Broome's husband is a former employee of Plaintiff.

37. Defendant Broome illegally and improperly accessed Plaintiff's Yahoo e-mail account which contained private business communications between the Plaintiff and his clients and confidential business information, including client and customer lists.

38. Upon information and belief, Defendant Broome misappropriated Plaintiff's trade secrets that Plaintiff used for his own use and benefit, to the detriment of Plaintiff.

39. Based upon the foregoing, Plaintiff is entitled to actual and punitive damages, together with such other legal, equitable, and injunctive relief as the Court deems just and proper.



WHEREFORE, Plaintiff prays that relief be granted jointly and severally as requested herein above, together with such other legal and equitable relief as the Court may deem just and proper, including actual and punitive damages for (1) statutory damages; (2) damages for Negligence Per Se; (3) damages for violation of said statute; (4) damages for Public Disclosure of Private Affairs; (5) damages for invasion of privacy; (6) damages for conspiracy, and (7) damages and equitable relief for violation of the South Carolina Trade Secrets Act.

WARNER, PAYNE, & BLACK, L.L.P.

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ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
April 10, 2008

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT DOCKET NO.: 2007-CP-40-1125 **CERTIFICATE OF SERVICE**

FILED
2008 APR 18 PM 4:32
BARBARA A. SCOTT
C.C.C. & G.S.

I, Sue Figurski, a paralegal for the law firm of Warner, Payne & Black, L.L.P. attorneys for the Plaintiff in the above-entitled action, do hereby certify that on this date I served a copy of **Notice of Motion and Motion to Amend and Supplement Amended Complaint** by depositing a copy in the United States Mail, postage prepaid, addressed to:

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Sue Figurski

Columbia, South Carolina
April 18, 2008

Rec

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT 6/25/08
M. Lee Jennings, Plaintiff, versus Gail M. Jennings, Holly Broome, Brenda Cook, individually and BJR International Detective Agency, Inc. Defendants.	)	MEMO IN SUPPORT OF DEFENDANT JENNINGS' MOTION FOR SUMMARY JUDGEMENT Civil Action No. 2007-CP-40-1125

FACTS BEARING ON MEMORANDUM

Holly Broome accessed Plaintiff M. Lee Jennings' private email account on June 25, 2006 without Plaintiff's permission, and several subsequent times. Ms. Broome only accessed certain emails in the account which had been previously opened or sent by Plaintiff and which had not been deleted. Ms. Broome printed copies of some of these emails on June 25, 2006 and distributed them to Gail Jennings, but did not print any emails at any other time. Ms. Broome acted independently and did not inform Ms. Jennings that she would be attempting to access Plaintiff's email account.

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ELDER, P & O'DAY & S, LLP
ATTORNEYS AT LAW
SC, SERVICES

ARGUMENT

I. Defendant Jennings did not violate Title I of the Electronic Communications Privacy Act, 18 USC §§2510-2522, or its South Carolina counterpart, SC Code § 17-30-10.

S.C. Code Ann. § 17-30-10, *et seq.* is South Carolina's version of the ECPA Title I, or 18 USC §§ 2510-2522. Plaintiff asserts a violation of both and has not asserted or analyzed the two claims separately. Essentially, the South Carolina statute is a codification of the federal law, and the two statutes are analyzed analogously. *See Fraser v. Nationwide Mutual Insurance Co.*, 352 F.3d 107, 113 (3rd Cir. 2004) ("As noted, Fraser also argues that Nationwide has violated the Pennsylvania counterpart to ECPA Title I, 18 Pa. Cons.Stat. § 5702, *et seq.* Because this statute is interpreted the same way as the ECPA, the analysis and conclusions in the text apply equally to this state-law claim, which Fraser also does not analyze separately.").

Title I of the ECPA creates a cause of action against persons who "intentionally intercept" electronic communications. Courts have consistently applied a strict definition of the term "intercept" in interpreting this statute, and Congress has implicitly approved this definition by revising the ECPA via the PATRIOT Act and retaining the term "intercept" in light of the prevailing interpretation. The Ninth Circuit has recognized that "The Wiretap Act... prohibits only 'interceptions' of electronic communications" as defined in 18 USC

§ 2510(12) *Konop v. Hawaiin Airlines, Inc.*, 302 F.3d 868, 876 (9th Cir. 2002). When the Third Circuit examined what constitutes an interception, it noted that "every circuit court to have considered the matter held that an 'intercept' under the ECPA must occur contemporaneously with transmission." *Fraser v. Nationwide*, 352 F.3d 107, 113 (3rd Cir. 2004). *See United States v. Steiger*, 318 F.3d 1039, 1048-49 (11th Cir.2003); *Konop v. Hawaiin Airlines Inc.*, 302 F.3d 868 (9th Cir.2002); *Steve Jackson Games*, 36 F.3d 457 (5th Cir.1994); In re Pharmtrak, Inc.,329 F.3d 9 (1st Cir.2003); *see also Wesley College v. Pitts*, 974 F.Supp. 375 (D.Del.1997), *summarily aff'd*, 172 F.3d 861 (3d Cir.1998).

In the present action there can be no ECPA Title I violation because the emails in question were not intercepted while they were in transmission; they were accessed only after they had reached their final destination. As the Third Circuit noted, alluding to *Steve Jackson Games, Inc. v. US Secret Service*, 36 F.3d 457, 461-62 (5th Cir. 1994), "the Fifth Circuit reasoned that because 'wire communication' explicitly included electronic storage but 'electronic communication' did not[1], there can be no 'intercept' of an e-mail in storage, as

[1] At the time the Steve Jackson Games decision was handed down, prior to the revision of the ECPA by the PATRIOT Act, Title I of the ECPA distinguished protection granted for electronic storage of wire communications and electronic communications. Title I applied to electronic storage of wire communications (voicemails) but not to electronic storage of electronic communication (emails). The PATRIOT Act revised the ECPA Title I so that both forms of communication were provided the same, lower level of protection: that both stored voicemails and emails were outside the scope of Title I. Although the change in the law signals that electronic storage of wire communications can no longer be analyzed under the prior framework, it is correct to analyze electronic storage of electronic communications under the prior framework since that provision remains unchanged.

an e-mail in storage is by definition not an 'electronic communication.'" *Fraser v. Nationwide*, 352 F.3d 107, at 114. The *Steve Jackson Games* court was asked to look at the narrow issue of "whether the seizure of a computer, used to operate an electronic bulletin board system, and containing private electronic mail which had been sent to (stored on) the bulleting board, but not read (retrieved) by the intended recipients, constitutes an unlawful intercept under [Title I of] the Federal Wiretap Statute." They held that such actions did not violate Title I of the Federal Wiretap Statute because "the E-mail in issue was in 'electronic storage." 36 F.3d 457 (5th Cir.1994). This court's reasoning should apply with equal force in the present action, where not only had transmission of the emails in question been complete, but Plaintiff had actually opened and saved such emails, which were then stored in his personal account.

An explanation of the history of Title I of the ECPA makes Congress' intent of the protection afforded to stored electronic communications clear. 18 USC § 2510(4) defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." At the time of the enactment of the statute, and before the statute was amended by the PATRIOT Act, the statutory language drew a distinction between wire communications and electronic communications in electronic storage for purposes of liability under the Act. Thus, the Fifth Circuit reasoned that:

> Critical to the issue before us is the fact that, unlike the definition of "wire communication," *the definition of "electronic communication" does not include electronic storage of such communications*... The E-mail in issue was in "electronic storage." Congress' use of the word "transfer" in the definition of "electronic communication," and its omission in that definition of the phrase "any electronic storage of such communication" (part of the definition of "wire communication") reflects that Congress did not intend for "intercept" to apply to "electronic communications" when those communications are in "electronic storage." *Steve Jackson Games*, 36 F.3d 457, at 461-62.

The Fifth Circuit further noted that "the ECPA's legislative history makes it crystal clear that Congress did not intend to change the definition of 'intercept' as it existed at the time of the amendment." *Steve Jackson Games*, 36 F.3d 457 (*citing* S.Rep. No. 99-541, 99th Cong., 2d Sess. 13 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3567). The Ninth Circuit acknowledged the Fifth Circuit's endorsement of this reasoning, and stated that:

> In cases concerning "electronic communications" – the definition of which specifically includes "transfers" and specifically excludes "storage" – the "narrow" definition of "intercept" fits like a glove; it is natural to except non-contemporaneous retrievals from the scope of the Wiretap Act. In fact, a number of courts adopting the narrow interpretation of "interception" have specifically premised their decisions to do so on the distinction between § 2510's definitions of

> wire and electronic communications. *Konop v. Hawaiian Airlines*, 302 F.3d 868, at 878, *referencing United States v. Smith*, 155 F.3d 1051, at 1057 (9th Cir.1998).

However, it should be noted that Congress has since amended the Wiretap Act to eliminate reference to "storage" from the definition of wire communication, *see Konop v. Hawaiian Airlines*, 302 F.3d 868, at 878, *citing* USA PATRIOT Act §209, 115 Stat. at 283, thus eliminating the distinction drawn by the *Steve Jackson* and *Smith* courts.

> This change, however, supports the analysis of those cases. By eliminating storage from the definition of wire communication, Congress essentially reinstated the pre-ECPA definition of "intercept" – acquisition contemporaneous with transmission – with respect to wire communications. *See Smith*, 155 F.3d at 1057. The purpose of the recent amendment was to reduce the protection of voice mail messages to the lower level of protection provided other electronically stored communications. *See* H.R. Rep. 107-236(I), at 158-59 (2001). When Congress passed the USA PATRIOT Act, it was aware of the narrow definition courts had given the term "intercept" with respect to electronic communications, but chose not to change or modify that definition. To the contrary, it modified the statute to make that definition applicable to voice mail messages as well. Congress, therefore, accepted and implicitly approved the judicial definition of "intercept" as acquisition contemporaneous with transmission. *Konop*, 302 F.3d 868, at 878.

Defendant Jennings has not intercepted any of Plaintiff's electronic communications within the meaning of SC Code § 17-30-10, *et seq.* or 18 USC §§ 2510-2522. The emails in question were not obtained contemporaneously with their transmission, as this would have been impossible due to the fact they had already been viewed, opened and saved by the Plaintiff. Indeed there is no way an interception could have occurred here, under the ordinary meaning of the word intercept or the statutory interpretation, where the emails had already made it to their final destination. *Webster's Ninth New Collegiate Dictionary,* 630 (1985) (the definition of "intercept" is "to stop, seize, or interrupt in progress or course before arrival"). *See Bohach v. City of Reno*, 932 F.Supp. 1232, 1235-36 (D.Nev. 1996) ("The statutes therefore distinguish the 'interception' of an electronic communication at the time of transmission from the retrieval of such a communication after it has been put into 'electronic storage.' ... An 'electronic communication,' by definition, cannot be 'intercepted' when it is in 'electronic storage,' because only 'communications' can be 'intercepted,' and, as the Fifth Circuit held in *Steve Jackson Games*, the 'electronic storage' of an 'electronic communication' is by definition not part of that communication."); *United States v. Reyes*, 922 F.Supp. 818, at 836 (S.D.N.Y. 1996) ("Therefore, intercepting an electronic communication essentially means acquiring the transfer of data. Taken together, the definitions thus imply a requirement that the acquisition of the data be simultaneous with the original transmission of the data.").

II. Defendant Jennings did not violate the Stored Communications Act, 18 USC §§ 2701-2712

18 USC § 2701 of the Stored Communications Act creates a cause of action against persons whom "intentionally access without authorization a facility through which an electronic communication service is provided... and thereby obtains, alters, or prevents authorized access to a wire or electronic communication *while it is in electronic storage* in such system" [emphasis added]. The term "electronic storage" is defined in the statute. § 2510(17) of the Act clearly defines "electronic storage" to be "(A) any temporary, intermediate storage of a wire or electronic communication *incidental to the electronic transmission thereof*; and (B) any storage of such communication *by an electronic communication service for purposes of backup protection* of such communication" [emphasis added]. In the present action, the emails in questions were not in "electronic storage" for purposes of the statute; thus, they are not protected under the Stored Communications Act. Alternatively, no recovery or relief can be obtained by Plaintiff against Defendant Jennings under this statute because the emails Defendant Jennings received were those obtained by the independent efforts of Defendant Broome, having been received, opened and read by the Plaintiff and then "saved" by the Plaintiff.

The emails in question were in a post-transmission, stored state. These emails were in storage on Plaintiff's personal account where they are kept indefinitely, at Plaintiff's own discretion. Thus, they fall outside the scope of both 18 USC § 2510(17) definitions of "electronic storage." Under § 2510(17)(A) the emails were in neither "temporary" nor "intermediate storage" that is "incidental to the electronic transmission thereof." In fact, the emails had already been transmitted and had reached their final destination, where they would be preserved indefinitely (presumably until Plaintiff decides to delete them). They could not be considered "incidental to the electronic transmission thereof" because they were the principal emails that were actually transmitted.

Furthermore, under § 2510(17)(B) the emails in question were not stored "by an electronic communication service for purposes of backup protection." There is no basis to conclude, nor does Plaintiff assert, that Plaintiff is an "electronic communication service;" thus, his personal storage of the emails is not within the scope of § 2510(17)(B). There is also no basis to conclude, nor does Plaintiff assert, that the emails in question were being stored by an electronic communication service for purposes of backup protection. To the contrary, Plaintiff has asserted that his personal email account has been accessed, not any sort of backup system managed and controlled by the email service provider. Plaintiff has provided no basis by which to conclude that the emails were being stored by the electronic communication service for backup

protection, and there is every reason to believe the emails accessed were the original transmissions and were stored in Plaintiff's own account, not any sort of backup system controlled and managed by the electronic communications service. Since the emails in question were stored on Plaintiff's personal account and could have been deleted by Plaintiff at any time, they can hardly be considered part of any "backup protection" system operated "by an electronic communication service" (in this case, the Internet Service Provider: Yahoo). *Id.*

Respectfully submitted,

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May 7, 2008

West Reporter Image (PDF)

352 F.3d 107, 149 Lab.Cas. P 59,803, 20 IER Cases 1207, 31 Communications Reg. (P&F) 432

Briefs and Other Related Documents

United States Court of Appeals,
Third Circuit.
Richard FRASER a/b/a R.A. Fraser Agency; Deborah Fraser, Appellants
v.
NATIONWIDE MUTUAL INSURANCE CO.; Nationwide Mutual Fire Insurance Co.; Nationwide Life Insurance Co.; Nationwide General Insurance Co.; Nationwide Property & Casualty Insurance Co.; Nationwide Variable Life Insurance Co.; Colonial Insurance Co. of Wisconsin.
No. 01-2921.
Argued June 23, 2003.
Dec. 10, 2003.
As Amended Jan. 20, 2004.

Insurance agent under terminable-at-will contract with insurance company sued company, alleging violations of Electronic Communications Privacy Act (ECPA), breach of contract, wrongful termination, and bad faith. The United States District Court for the Eastern District of Pennsylvania, Anita B. Brody, J., 135 F.Supp.2d 623, granted company's motion for summary judgment. Agent appealed. The Court of Appeals, Ambro, Circuit Judge, held that: (1) agent's termination did not fall under any public policy exception to Pennsylvania's at-will termination rule; (2) company did not "intercept" agent's electronic communications, so as to violate ECPA; (3) addressing an issue of first impression, search of agent's e-mail fell within ECPA's exception for seizures of e-mail by authorized entity providing wire or electronic communications service; (4) company did not breach any implied covenant of good faith and fair dealing with respect to agent's appeal of termination; and (5) District Court did not abuse its discretion in denying agent leave to amend.

Affirmed in part, vacated in part, and remanded.

West Headnotes

[1] KeyCite Notes

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk754 Review Dependent on Whether Questions Are of Law or of Fact
170Bk755 k. Particular Cases. Most Cited Cases

Whether Pennsylvania granted cause of action for wrongful termination to insurance agent under terminable-at-will contract with insurance company was question of law, over which Court of Appeals would exercise plenary review.

[2] KeyCite Notes

217 Insurance
217XI Agents and Agency
217XI(C) Agents for Insurers
217k1627 k. Duration and Termination of Agency. Most Cited Cases

ROA000211

Under Pennsylvania law, as predicted by Court of Appeals, assuming that public policy exception to at-will termination rule applied to independent contractors, and assuming Pennsylvania Supreme Court would adopt *Hennessy* exceptions to such rule, insurance company's termination of agent, after he allegedly filed complaints regarding company's alleged violations of law, criticized company, and attempted to obtain passage of legislation protecting insurance agents, did not fall under any such exception, absent evidence that company directed him to commit crime and absent statutory duty on his part to report alleged violations of law.

[3] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1439 k. Computer Communications. Most Cited Cases
(Formerly 372k494.1)

Insurance company did not "intercept" its agent's electronic communications, so as to violate Electronic Communications Privacy Act (ECPA), when it accessed his e-mail on its central file server without his express permission, inasmuch as company did not access e-mail at initial time of transmission. 18 U.S.C.A. § 2510(4).

[4] KeyCite Notes

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Matters of statutory interpretation are reviewed de novo.

[5] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1439 k. Computer Communications. Most Cited Cases
(Formerly 372k494.1)

Insurance agent's e-mail was not in "temporary, intermediate storage" at time when insurance company intercepted it on its central file server, for purposes of Electronic Communications Privacy Act (ECPA) provision defining "electronic storage" as, inter alia, temporary, intermediate storage of electronic communication incidental to electronic transmission thereof. 18 U.S.C.A. § 2510(17).

[6] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General

372k1435 Acts Constituting Interception or Disclosure
372k1440 k. Persons Concerned; Consent. Most Cited Cases
(Formerly 372k495)

Insurance company's search of its agent's e-mail, allegedly prompted by concerns that agent might be revealing company secrets, fell within exception to protection by Electronic Communications Privacy Act (ECPA) for seizures of e-mail authorized "by the person or entity providing a wire or electronic communications service," where e-mail was stored on company's computer system and company administered such system. 18 U.S.C.A. § 2701(c)(1).

[7] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1440 k. Persons Concerned; Consent. Most Cited Cases
(Formerly 372k495)

The Electronic Communications Privacy Act (ECPA) provision allowing seizures of e-mail authorized "by the person or entity providing a wire or electronic communications service" excepts from the ECPA's protection all searches by communications service providers. 18 U.S.C.A. § 2701(c)(1).

[8] KeyCite Notes

217 Insurance
217XI Agents and Agency
217XI(C) Agents for Insurers
217k1627 k. Duration and Termination of Agency. Most Cited Cases

217 Insurance KeyCite Notes
217XI Agents and Agency
217XI(C) Agents for Insurers
217k1650 Duties and Liabilities of Insurer to Agent
217k1651 k. In General. Most Cited Cases

Under Pennsylvania law, insurance company did not breach any implied covenant of good faith and fair dealing with respect to insurance agent's appeal of termination of his contract to agents' administrative board, absent evidence that it was inappropriate for company employee to act as tiebreaker when board was divided, or that board's decision would be binding on company.

[9] KeyCite Notes

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k115 Restraint of Trade or Competition in Trade
95k116 In General
95k116(1) k. In General. Most Cited Cases

Under Pennsylvania law, in evaluating a forfeiture-for-competition contract provision, a court must balance the employer's protectable business interest against the oppressive effect on the employee's

ability to earn a living in his or her chosen profession, trade, or occupation.

[10] KeyCite Notes

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k115 Restraint of Trade or Competition in Trade
95k116 In General
95k116(2) k. Restriction Necessary for Protection. Most Cited Cases

Under Pennsylvania law, pure financial gain at the expense of restricted competition is insufficient to constitute a protectable business interest, for purposes of evaluating a forfeiture-for-competition contract provision.

[11] KeyCite Notes

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak839 Complaint
170Ak840 k. Time for Amendment. Most Cited Cases

170A Federal Civil Procedure KeyCite Notes
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak839 Complaint
170Ak841 k. New Cause of Action in General. Most Cited Cases

District court did not abuse its discretion in denying insurance agent leave to file third amended complaint against insurance company to add claims for invasion of privacy and conversion, where agent sought leave on day before his opposition to summary judgment motion was due, and company's alleged discovery violations did not affect agent's ability to assert his claims in earlier amendment. Fed.Rules Civ.Proc.Rules 15(a), 56, 28 U.S.C.A.

[12] KeyCite Notes

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk817 k. Parties; Pleading. Most Cited Cases

A district court's denial of leave to amend a complaint is reviewed for abuse of discretion. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[13] KeyCite Notes

170A Federal Civil Procedure
170AVII Pleadings and Motions

170AVII(E) Amendments
170Ak824 k. Time for Amendment in General. Most Cited Cases

170A Federal Civil Procedure KeyCite Notes
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak834 k. Injustice or Prejudice. Most Cited Cases

170A Federal Civil Procedure KeyCite Notes
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak851 k. Form and Sufficiency of Amendment. Most Cited Cases

A district court has discretion to deny a request to amend if it is apparent from the record that: (1) the moving party has demonstrated undue delay, bad faith, or dilatory motives; (2) the amendment would be futile; or (3) the amendment would prejudice the other party. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

***109** James G. Wiles, (Argued), Yardley, PA, for Appellants.

Frederick C. Fletcher, II, Curtis P. Cheyney, III. (Argued), Swartz, Campbell & Detweiler, Philadelphia, PA, for Appellees.

Before SLOVITER, AMBRO and BECKER, Circuit Judges.

OPINION OF THE COURT

AMBRO, Circuit Judge.

Richard Fraser, an independent insurance agent for Nationwide Mutual Insurance Company, was terminated by Nationwide as an agent. We decide whether: he has stated a viable claim for wrongful termination under Pennsylvania law; he is entitled to damages under the Electronic Communications Privacy Act and parallel Pennsylvania law for Nationwide's alleged unauthorized access to his e-mail account; an Agents' Review Board process reviewing his termination was properly conducted; a forfeiture-for-competition provision in his agency agreement is enforceable; and the District Court abused its discretion in refusing to allow Fraser to amend his complaint and in not sanctioning Nationwide for alleged discovery violations. We affirm the District Court on all but the forfeiture-for-competition and discovery violations issues. As to the former, we remand to the District Court for reconsideration in light of new caselaw from the Pennsylvania Supreme Court. We also remand Fraser's discovery sanctions claim, which the District Court did not address.

I. Background

This dispute stems from Nationwide's September 2, 1998 termination of Fraser's Agent's Agreement (the "Agreement"). It provided that Fraser sell insurance policies as an independent contractor for Nationwide on an exclusive basis. The relationship was terminable at will by either party.

The parties disagree on the reason for Fraser's termination. Fraser argues Nationwide terminated him because he filed complaints with the Pennsylvania Attorney General's office regarding Nationwide's allegedly illegal conduct, including its discriminatory refusal to write car insurance for unmarried and new drivers.[FN1] Fraser also contends that he was terminated for criticizing Nationwide while acting as an officer of the Nationwide Insurance Independent Contractors Association (the "Contractors Association")

and for attempting to obtain the passage of legislation in Pennsylvania to ensure that independent insurance agents could be terminated only for "just cause."

FN1. As a result of Fraser's efforts, Nationwide was required to pay fines, entered into a consent order, and the Pennsylvania Attorney General's Office wrote Fraser a "thank you" letter.

Nationwide argues, however, that it terminated Fraser because he was disloyal. It points out that Fraser drafted a letter to two competitors-Erie Insurance Company ("Erie") and Zurich American Insurance ("Zurich")-expressing Contractors Association members' dissatisfaction with Nationwide and seeking to determine whether Erie and Zurich would be interested in acquiring the policyholders of the agents in the Contractors Association. Fraser claims that the letters only were ***110** drafted to get Nationwide's attention and were not sent. (Were the letters sent. however, they would constitute a violation of the "exclusive representation" provision of Fraser's Agreement with Nationwide.)

When Nationwide learned about these letters, it claims that it became concerned that Fraser might also be revealing company secrets to its competitors. It therefore searched its main file server-on which all of Fraser's e-mail was lodged-for any e-mail to or from Fraser that showed similar improper behavior.[FN2] Nationwide's general counsel testified that the e-mail search confirmed Fraser's disloyalty. Therefore, on the basis of the two letters and the e-mail search, Nationwide terminated Fraser's Agreement. It is this search of his e-mail that gives rise to Fraser's claim for damages under the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. § 2510, *et seq.*, and a parallel Pennsylvania statute, 18 Pa. Cons.Stat. § 5702, *et seq.*

FN2. Nationwide's associate general counsel (Randall Orr) testified that he directed a systems expert to perform the search in his (Randall Orr's) presence. The systems expert opened e-mail written to or by Fraser if the e-mail headers (*i.e.*, the to, from, and re: lines) contained relevant information.

After Nationwide terminated Fraser in September 1998, he filed an appeal with the Agents' Administrative Review Board (the "Board"). Fraser's Agreement with Nationwide provides that "the Agent shall have access to the Agents' Administrative Review Board, and its procedures, as it may exist from time to time." The Agreement did not, however, specify any particular procedures that the Board would follow, nor did it guarantee the availability of Board review. Board procedures were laid out in the agents' Compensation and Security Handbook (the "Handbook"), which stated explicitly that the procedures were not part of the Agreement between an agent and Nationwide. In considering Fraser's case, the Board split 2-2, and Nationwide's employee, acting as the tiebreaker, affirmed Fraser's termination. Fraser argues that the review process was a "sham" and contends that Nationwide conducted the review process in bad faith.

Within a year of his termination, Fraser went to work for a competitor of Nationwide, thereby triggering a "forfeiture-for-competition" provision in his Agreement. That provision specifies that an agent will forfeit deferred compensation by becoming employed by another insurance business within a twenty-five mile radius within one year of cancellation of the agent's Agreement. Fraser contends that, because of the provision, he forfeited several hundred thousand dollars of deferred compensation.[FN3] He argues that the provision is invalid under Pennsylvania law because it is unduly restrictive.

FN3. We note, however, that there is no record evidence concerning the amount of deferred compensation Fraser forfeited and the District Court made no findings of fact on this issue.

As a result of these events, Fraser filed suit in the United States District Court for the Eastern District of Pennsylvania to contest: (1) his termination; (2) the alleged violation of his privacy rights under the ECPA and parallel Pennsylvania statute; (3) the Board's review procedure; and (4) the forfeiture-for-competition provision in his Agreement. Events during litigation in the District Court also have spawned issues on appeal. First, Fraser alleges that Nationwide committed numerous discovery violations. He claims that "[i]t is no hyperbole to state that in this case, no discovery was received from Nationwide without a court order compelling discovery, no court order compelling discovery ***111** from

Nationwide went unviolated and more than one Nationwide witness was less than candid." On this basis, Fraser seeks discovery sanctions against Nationwide. Second, the District Court denied Fraser leave to amend his complaint a third time to add two more state-law causes of action: conversion and invasion of privacy. The Court believed that Fraser's third amendment was merely a dilatory tactic because he sought leave to amend the day before Fraser's response to Nationwide's motion for summary judgment was due. The Court granted summary judgment for Nationwide on all counts. Fraser appeals. FN4

FN4. The District Court had jurisdiction under 28 U.S.C. § 1331 and 1332. We exercise appellate jurisdiction pursuant to 28 U.S.C. § 1291. Nationwide asserts that we lack appellate jurisdiction because Fraser's appeal was untimely. A motions panel of this Court has, however, concluded otherwise, and we agree.

II. Discussion

A. Wrongful Termination Claim

[1] [2] Whether Pennsylvania grants a cause of action for wrongful termination in this context is a question of law, over which we exercise plenary review. *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 613 (3d Cir.1992). Fraser argues that, notwithstanding that his agency relationship with Reliance was "at-will," his termination was wrongful (and actionable) because it was motivated by his agitations for just-cause legislation-which Nationwide found undesirable, his reporting of Nationwide's allegedly illegal activities, and his leadership position in the Contractors Association. He notes that, while the general rule is that at-will employees may be terminated for any or no reason, courts have forbidden the firing of at-will employees when doing so would offend Pennsylvania's public policy. *See Geary v. U.S. Steel*, 456 Pa. 171, 319 A.2d 174, 185 (1974). He asserts that his termination fits this exception. Nationwide responds that Fraser was not an employee but rather an independent contractor, and thus the cases prescribing this public policy exception do not apply here.

Because no Pennsylvania case addresses whether there are limitations on a company's ability to terminate an independent contractor (as opposed to an employee), the District Court assumed *arguendo* that the public policy cases apply equally to independent contractors. We too proceed by so assuming without deciding the question.

We begin by noting that Pennsylvania courts have construed the public policy exception to at-will employment narrowly, lest the exception swallow the general rule. *See Clay v. Advanced Computer Applications, Inc.*, 522 Pa. 86, 559 A.2d 917, 918 (1989) ("Exceptions to [the rule that terminations from at-will positions may not be challenged] have been recognized in only the most limited of circumstances, where discharges of at-will employees would threaten clear mandates of public policy."). In *Hennessy v. Santiago*, 708 A.2d 1269 (Pa.Super.1998), a Pennsylvania court recognized three limited circumstances in which public policy will trump employment at-will. "[A]n employer (1) cannot require an employee to commit a crime [and fire the employee for refusing to do so], (2) cannot prevent an employee from complying with a statutorily imposed duty, and (3) cannot discharge an employee when specifically prohibited from doing so by statute." *Id.* at 1273 (internal citation omitted). The Pennsylvania Supreme Court has never formally adopted *Hennessy*'s three exceptions to the at-will employment doctrine. However, in *Shick v. Shirey*, 552 Pa. 590, 716 A.2d 1231 (1998), the Supreme Court ***112** did say that "public policy" is not limited to "that which has been legislatively enacted." *Id.* at 1235. But it also went on to note that a non-legislatively expressed public policy must be extremely clear to be cognizable in this context; indeed acceptance must be virtually universal. Quoting *Mamlin v. Genoe*, 340 Pa. 320, 17 A.2d 407 (1941), it stated:

It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring. There must be a positive, well-defined, universal public sentiment, deeply integrated in the customs of and beliefs of the people and in their conviction of what is just and right and in the interests of the public weal.

Shick, 716 A.2d at 1235-36 (quoting *Mamlin*, 17 A.2d at 409).

Fraser argues that his case fits within *Hennessy*'s first two exceptions: Nationwide fired him for refusing to commit a crime and for his attempt to comply with a statutorily imposed duty. We find these arguments unconvincing. Even assuming that the Pennsylvania Supreme Court would also view these as exceptions to an employer's right to fire an at-will employee, Fraser has presented no evidence that Nationwide directed him to commit any crime, nor has he pointed us to any statutory duty to report Nationwide's violations of the law. *Compare Field v. Philadelphia Electric Co.*, 388 Pa.Super. 400, 565 A.2d 1170 (1989) (holding termination wrongful when employee had a statutory duty to report violations), *with Hennessy v. Santiago*, 708 A.2d 1269 (Pa.Super.1998) (rejecting the argument that a counselor could not be fired because she reported a rape of another to the district attorney because the employee had no statutory duty to report the rape).

Fraser also relies on *Shick*'s pronouncement that public policy may be broader than what is legislatively enacted. He notes that in *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894 (3d Cir.1983), we held that firing an employee for his refusal to participate in a political lobbying effort contravened public policy and therefore was impermissible. In light of *Novosel*, Fraser asserts we should view the First Amendment of the United States Constitution and the Pennsylvania Constitution as limitations on employers' discretion to fire at-will employees. Yet we have declined to read *Novosel* so broadly and, indeed, have previously rejected Fraser's position. In *Borse*, we noted that "the Superior Court has refused to extend constitutional provisions designed to restrict governmental conduct in the absence of state action." *Borse*, 963 F.2d at 619 (citing *Martin v. Capital Cities Media, Inc.*, 354 Pa.Super. 199, 511 A.2d 830, 844 (1986); *Cisco v. United Parcel Servs., Inc.*, 328 Pa.Super. 300, 476 A.2d 1340, 1344 (1984)). We "predict[ed] that if faced with the issue, the Pennsylvania Supreme Court would not look to the First ... Amendment[ ] as [a] source[ ] of public policy when there is no state action." *Id.* at 620. Moreover, we note that Pennsylvania courts "have repeatedly rejected claims that a private employer [as opposed to a public employer] violated public policy by firing an employee for whistleblowing, when the employee was under no legal duty to report the acts at issue." *Donahue v. Fed. Express Corp.*, 753 A.2d 238, 244 (Pa.Super.2000).[FN5] As a result, we have essentially limited *Novosel* ***113** to its facts-a firing based on forced political speech.

FN5. The Pennsylvania Whistleblower's Law, 43 Pa. Cons.Stat. § 1421, *et seq.*, does not apply to private employers.

In this context, we predict that the Pennsylvania Supreme Court would decline to find a cause of action for termination under Fraser's circumstances and hence affirm the District Court on this ground.

B. ECPA Claims and Parallel State Law Claims

1. Title I

[3] Fraser argues that, by accessing his e-mail on its central file server without his express permission, Nationwide violated Title I of the ECPA, which prohibits "intercepts" of electronic communications such as e-mail.[FN6] The statute defines an "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). Nationwide argues that it did not "intercept" Fraser's e-mail within the meaning of Title I because an "intercept" can only occur contemporaneously with transmission and it did not access Fraser's e-mail at the initial time of transmission.

FN6. As noted, Fraser also argues that Nationwide has violated the Pennsylvania counterpart to ECPA Title 1, 18 Pa. Cons.Stat. § 5702, *et seq.* Because this statute is interpreted in the same way as the ECPA, the analysis and conclusions in the text apply equally to this state-law claim, which Fraser also does not analyze separately.

[4] On this matter of statutory interpretation which we review *de novo*, *Moody v. Sec. Pac. Bus.*

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Credit, Inc., 971 F.2d 1056, 1063 (3d Cir.1992), we agree with Nationwide. Every circuit court to have considered the matter has held that an "intercept" under the ECPA must occur contemporaneously with transmission. *See* United States v. Steiger, 318 F.3d 1039, 1048-49 (11th Cir.2003); Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir.2002); Steve Jackson Games, Inc. v. U.S. Secret Serv., 36 F.3d 457 (5th Cir.1994); *see also* Wesley College v. Pitts, 974 F.Supp. 375 (D.Del.1997), *summarily aff'd*, 172 F.3d 861 (3d Cir.1998).

The first case to do so, *Steve Jackson Games,* noted that "intercept" was defined as contemporaneous in the context of an aural communication under the old Wiretap Act,[FN7] *see* United States v. Turk, 526 F.2d 654 (5th Cir.1976), and that when Congress amended the Wiretap Act in 1986 (to create what is now known as the ECPA) to extend protection to electronic communications, it "did not intend to change the definition of 'intercept.' " Steve Jackson Games, 36 F.3d at 462. Moreover, the Fifth Circuit noted that the differences in definition between "wire communication" and "electronic communication" in the ECPA supported its conclusion that stored e-mail could not be intercepted within the meaning of Title I. A "wire communication" under the ECPA was (until recent amendment by the USA Patriot Act, *see* note 8) "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception ... *and such term includes any electronic storage of such communication.*" 18 U.S.C. § 2510(1) (emphasis added) (superseded by USA Patriot Act).[FN8] By contrast, an ***114** "electronic communication" is defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system ... but does *not include ... any wire or oral communication.*" 18 U.S.C. § 2510(12) (emphasis added). Thus, the Fifth Circuit reasoned that because "wire communication" explicitly included electronic storage but "electronic communication" did not, there can be no "intercept" of an e-mail in storage, as an e-mail in storage is by definition not an "electronic communication." Steve Jackson Games, 36 F.3d at 461-62.

FN7. The Wiretap Act was formally known as the 1968 Omnibus Crime Control and Safe Streets Act and was also found at 18 U.S.C. § 2510, *et seq.* As noted in the text *infra,* it was superseded by the ECPA.

FN8. The USA Patriot Act § 209, Pub. L. No. 107-56, § 209(1)(A), 115 Stat. 272, 283 (2001), amended the definition of "wire communication" to eliminate electronic storage from the definition of wire communication.

Subsequent cases, cited above, have agreed with the Fifth Circuit's result. While Congress's definition of "intercept" does not appear to fit with its intent to extend protection to electronic communications, it is for Congress to cover the bases untouched. We adopt the reasoning of our sister circuits and therefore hold that there has been no "intercept" within the meaning of Title I of ECPA.

2. Title II

Fraser also argues that Nationwide's search of his e-mail violated Title II of the ECPA.[FN9] That Title creates civil liability for one who "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system." 18 U.S.C. § 2701(a). The statute defines "electronic storage" as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." *Id.* § 2510(17).

FN9. Fraser contends as well that Nationwide has violated the Pennsylvania counterpart to ECPA Title II, 18 Pa. Cons.Stat. § 5741, *et seq.* The analysis is identical to that of ECPA Title II.

[5] The District Court granted summary judgment in favor of Nationwide, holding that Title II does not apply to the e-mail in question because the transmissions were neither in "temporary, intermediate storage" nor in "backup" storage. Rather, according to the District Court, the e-mail was in a state it described as "post-transmission storage." We agree that Fraser's e-mail was not in temporary, intermediate storage. But to us it seems questionable that the transmissions were not in backup storage-a term that neither the statute nor the legislative history defines. Therefore, while we affirm the District Court, we do so through a different analytical path, assuming without deciding that the e-mail in question was in backup storage.

[6] [7] 18 U.S.C. § 2701(c)(1) excepts from Title II seizures of e-mail authorized "by the person or entity providing a wire or electronic communications service." There is no circuit court case law interpreting this exception. However, in *Bohach v. City of Reno*, 932 F.Supp. 1232 (D.Nev.1996), a district court held that the Reno police department could, without violating Title II, retrieve pager text messages stored on the police department's computer system because the department "is the provider of the 'service' " and "service providers [may] do as they wish when it comes to accessing communications in ***115** electronic storage." *Id.* at 1236. Like the court in *Bohach*, we read § 2701(c) literally to except from Title II's protection all searches by communications service providers. Thus, we hold that, because Fraser's e-mail was stored on Nationwide's system (which Nationwide administered), its search of that e-mail falls within § 2701(c)'s exception to Title II.

C. Bad Faith in Board Review

[8] Fraser next argues that the Board's review of his termination was a "sham." He contends that, when the Board was split 2-2 whether to affirm his termination, Nationwide's employee did not in good faith consider his case but rather was essentially instructed by Nationwide management to affirm his dismissal. Nationwide replies that, because the Board review process was not guaranteed in his Agreement with Nationwide, Fraser had no contractual right to Board review at all. And while it argues that the specifics of the Board review process were discussed in the Handbook, it contends that the Handbook was not incorporated into the Agreement and thus did not contractually bind Nationwide. *See Jacques v. Akzo Int'l Salt, Inc.*, 422 Pa.Super. 419, 619 A.2d 748, 753 (1993) ("An employee handbook only forms the basis of an implied contract if the employee shows that the employer affirmatively intended that it do so."). According to Nationwide, because it did not intend the Handbook to be a contractual right, there can be no breach of any implied covenant of good faith and fair dealing with respect to Board review.

Even assuming that his Agreement with Nationwide entitles Fraser to a review because a Board review procedure currently exists in the Handbook, Fraser has not made the case that Nationwide acted in bad faith. There is no record evidence to suggest that it was inappropriate (albeit counterintuitive) for a Nationwide employee to act as a tiebreaker if the Board was divided. More to the core, there is no evidence that the Board's decision would even be binding-as opposed to merely advisory-on Nationwide. Fraser has failed to meet his burden of proof on this issue and thus the District Court correctly granted summary judgment in favor of Nationwide.

D. Forfeiture-for-Competition Provision

Section 11(f) of the Agent's Agreement contains a forfeiture-for-competition provision, whereby an agent will forfeit deferred compensation by becoming associated with another insurance business in a twenty-five mile radius within one year of cancellation of the Agent's Agreement. Fraser alleges that, because of financial hardship, he was forced to seek work with another insurance company and, as a result, forfeited several hundred thousand dollars of deferred compensation. The District Court held the provision enforceable under the three-part test set out in *Bilec v. Auburn & Associates, Inc. Pension Trust*, 403 Pa.Super. 176, 588 A.2d 538 (1991). Under that test, a Pennsylvania court will uphold a forfeiture-for-competition provision if: (1) it "relate[s] to a contract for employment; (2) [it is] supported by adequate consideration; [and] (3) [its application is] reasonably limited in both time and territory." *Id.* at 541 (citing *Piercing Pagoda, Inc. v. Hoffner*, 465 Pa. 500, 351 A.2d 207, 210 (1976)).

Fraser argues that the provision is void because his termination was involuntary and inequitable and because forfeiture is disfavored in Pennsylvania.

[9] [10] When the District Court issued its opinion, it did not have the benefit of the Pennsylvania Supreme Court's opinion in ***116** Hess v. Gebhard & Co., Inc., 570 Pa. 148, 808 A.2d 912 (2002), in which the Supreme Court held a forfeiture-for-competition provision invalid as applied. While *Hess* involved a quite different situation-an insurance company that had sold its business was attempting to enforce a restrictive covenant not to compete even though it had no ongoing operating interest in the insurance business-the decision was written in broad terms and thus guides our analysis. The Court noted that we must "balance the employer's protectible business interest against the oppressive effect on the employee's ability to earn a living in his or her chosen profession, trade, or occupation." *Id.* at 923. It went on to say that "pure financial gain at the expense of restricted competition is insufficient to constitute a protectible business interest." *Id.* While the Court recognized that goodwill and trade secrets might in some cases justify restrictive covenants, it concluded that, on the facts before it, the selling company "ha[d] not demonstrated that the information it seeks to protect, mainly its prices and customer lists, is particular or unique to its business and deserves protection as a trade secret or confidential information." *Id.* at 923-24. For example, lists of potential customers for an insurance business were available merely by looking in telephone directories. This context therefore could not justify a restrictive covenant. *Id.* at 924.

Because the District Court did not have the benefit of *Hess,* we remand Fraser's forfeiture-for-competition claim to it to apply the *Hess* analysis. On remand, the Court will need to balance the interests Nationwide seeks to protect (if any) against the harm to Fraser. In so doing, because the record is silent as to the precise amount of deferred compensation that the clause would require Fraser to forfeit as well as the nature of Nationwide's protectible business interests, the Court will need to make additional factual findings.

E. Claims for Invasion of Privacy and Conversion

[11] [12] Fraser sought to amend his complaint a third time to assert common law claims for invasion of privacy and conversion. The District Court, however, first granted Nationwide's motion for summary judgment on all of Fraser's other claims, then denied leave to amend. We review the District Court's denial of leave to amend for abuse of discretion. Lake v. Arnold, 232 F.3d 360, 373 (3d Cir.2000).

[13] Under the Federal Rules of Civil Procedure, a plaintiff is entitled to amend his complaint once; courts may grant subsequent amendments "when justice so requires." Fed.R.Civ.P. 15(a). While this Rule also states that leave to amend should be "freely given," a district court has discretion to deny a request to amend if it is apparent from the record that (1) the moving party has demonstrated undue delay, bad faith or dilatory motives, (2) the amendment would be futile, or (3) the amendment would prejudice the other party. *See, e.g.,* Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir.2002) (citing Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). Nationwide contends that Fraser presented no support for its argument that the Court abused its discretion. Moreover, Fraser sought leave to file a third amended complaint to state these two additional causes of action at the eleventh hour-the day before his opposition to Nationwide's summary judgment motion was due.

In this context, we do not believe the District Court abused its discretion. As noted, the Court allowed Fraser to amend his complaint two times previously. This third-and untimely-effort to amend appears dilatory. While Fraser argues that Nationwide committed discovery violations, ***117** mentioned below, it is unclear how these alleged violations adversely affected Fraser's ability to assert his conversion and invasion of privacy claims in an earlier amendment-as all the claims are based on the same facts and events as the federal ECPA claims and parallel state claims he asserted at the outset.

F. Discovery Violations

Finally, Fraser argues that the District Court erred in not adjudicating his motion for discovery sanctions under Fed.R.Civ.P. 37, which has been pending since December 2000. The record reveals that Fraser has submitted a memorandum of law detailing the costs he incurred as a result of Nationwide's alleged discovery violations, which the District Court never addressed. Nationwide submitted a memorandum in opposition. Because we remand for other reasons, and the District Court is more familiar with how the discovery process unfolded in this case than are we, we leave it to the District Court to address the motion for sanctions in the first instance.[FN10]

FN10. In so doing, we take no position on the merits of Fraser's claim for sanctions.

III. Conclusion

We affirm the District Court's grant of summary judgment in favor of Nationwide on Fraser's wrongful termination claim, his ECPA and parallel state claims, and his bad-faith claim. We vacate and remand the forfeiture-for-competition claim for consideration in light of the Pennsylvania Supreme Court's recent decision in *Hess*. Moreover, on remand, the Court should address Fraser's motion for discovery sanctions.

C.A.3 (Pa.),2003.
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352 F.3d 107, 149 Lab.Cas. P 59,803, 20 IER Cases 1207, 31 Communications Reg. (P&F) 432

Briefs and Other Related Documents (Back to top)

• 2003 WL 23336131 (Appellate Brief) Brief of Appellees (Dec. 30, 2003) Original Image of this Document (PDF)
• 2002 WL 32392083 (Appellate Brief) Brief for Appellants (May. 15, 2002) Original Image of this Document with Appendix (PDF)
• 01-2921 (Docket) (Jul. 23, 2001)
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Briefs and Other Related Documents

United States Court of Appeals,
Ninth Circuit.
Robert C. KONOP, Plaintiff-Appellant,
v.
HAWAIIAN AIRLINES, INC., Defendant-Appellee.
No. 99-55106.
Argued and Submitted June 8, 2000.
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Opinion Withdrawn Aug. 28, 2001.
Filed Aug. 23, 2002.

Airline pilot who maintained secure website where he posted bulletins critical of his employer, employer's officers, and his incumbent union brought action against employer, alleging that, when employer's vice president gained unauthorized access to site under false pretenses and disclosed its contents, employer violated Wiretap Act, Stored Communications Act, and Railway Labor Act (RLA), and that employer violated the RLA by suspending him in retaliation for his website activities. The United States District Court for the Central District of California, J. Spencer Letts, J., granted summary judgment against pilot on all claims except retaliation claim and, after bench trial, entered judgment against pilot on that claim as well. Pilot appealed. The Court of Appeals affirmed in part, reversed in part, and remanded, 236 F.3d 1035, and, following withdrawal of such opinion, the Court of Appeals, Boochever, Circuit Judge, held that: (1) employer did not "intercept" website's contents in violation of Wiretap Act; (2) coemployees were required to actually use website, as opposed to merely being eligible to use it, in order to "use" it for purposes of SCA provision excepting from liability conduct authorized by user of service in question; (3) RLA claims that pilot pressed on appeal were not "minor" disputes subject to mandatory arbitration, and District Court thus had subject matter jurisdiction over them; (4) material issue of fact existed as to whether pilot's development and maintenance of website constituted protected activity under RLA; (5) material issue of fact existed as to whether employer interfered with pilot's organizing activity, in violation of RLA, by accessing the website under false pretenses; (6) material issue of fact existed as to whether employer disclosed the contents of pilot's website to opposing labor faction, thereby assisting one union faction over another in violation of the RLA; (7) material issue of fact existed as to whether employer threatened to sue pilot for defamation, thereby engaging in coercion and intimidation in violation of RLA; and (8) pilot was not prejudiced as result of any order quashing subpoenas.

Affirmed in part, reversed in part, and remanded.

Reinhardt, Circuit Judge, concurred in part, dissented in part, and filed opinion.

West Headnotes

[1] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1439 k. Computer Communications. Most Cited Cases
(Formerly 372k493)

Secure website maintained by employee, containing bulletins critical of employer, employer's officers, and employee's incumbent union, was "electronic communication" for purposes of Wiretap Act provision making it an offense to intentionally intercept wire, oral, or electronic communication. 18 U.S.C.A. §§ 2510(12), 2511(1)(a).

[2] KeyCite Notes 

- 372 Telecommunications
  - 372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
    - 372X(A) In General
      - 372k1435 Acts Constituting Interception or Disclosure
        - 372k1439 k. Computer Communications. Most Cited Cases
          (Formerly 372k494.1)

For a secure website to be "intercepted" in violation of the Wiretap Act, it must be acquired during transmission, not while it is in electronic storage. 18 U.S.C.A. § 2511(1)(a).

[3] KeyCite Notes 

- 372 Telecommunications
  - 372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
    - 372X(A) In General
      - 372k1435 Acts Constituting Interception or Disclosure
        - 372k1439 k. Computer Communications. Most Cited Cases
          (Formerly 372k494.1)

No "interception" occurred in violation of Wiretap Act when employer's vice president gained unauthorized access to secure website maintained by employee, which contained bulletins critical of employer, employer's officers, and employee's incumbent union, inasmuch as vice president acquired website's contents in their stored state, not during transmission. 18 U.S.C.A. § 2511(1)(a).

[4] KeyCite Notes 

- 361 Statutes
  - 361VI Construction and Operation
    - 361VI(A) General Rules of Construction
      - 361k187 Meaning of Language
        - 361k190 k. Existence of Ambiguity. Most Cited Cases



- 361 Statutes KeyCite Notes
  - 361VI Construction and Operation
    - 361VI(A) General Rules of Construction
      - 361k213 Extrinsic Aids to Construction
        - 361k217.4 k. Legislative History in General. Most Cited Cases

Where statutory language is unambiguous, it must control construction of the statute, notwithstanding the legislative history.

[5] KeyCite Notes 

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1440 k. Persons Concerned; Consent. Most Cited Cases
(Formerly 372k495)

The term "use," as used in the Stored Communications Act (SCA) provision excepting from liability conduct authorized by a user of the service in question, would be defined as "to put into action or service, avail oneself of, employ." 18 U.S.C.A. § 2701(c)(2).

[6] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1440 k. Persons Concerned; Consent. Most Cited Cases
(Formerly 372k495)

Coemployees were required to actually use employee's secure website, as opposed to merely being eligible to use it, in order to "use" website for purposes of Stored Communications Act (SCA) provision excepting from liability conduct authorized by user of service in question. 18 U.S.C.A. § 2701(c)(2).

[7] KeyCite Notes

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2519 k. Wiretapping and Electronic Surveillance, Cases Involving. Most Cited Cases

Genuine issues of material fact existed as to whether coemployees, who had been authorized by employee to view his secure website containing bulletins critical of employer and others, had actually used website at time when they authorized employer's vice president to view website, precluding summary judgment as to whether employer was exempt from liability under Stored Communications Act (SCA) based upon its conduct being authorized by "user" of website. 18 U.S.C.A. § 2701(c)(2); Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[8] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(I) Labor Relations Boards and Proceedings
231HXII(I)1 In General
231Hk1669 Exclusive, Concurrent, and Conflicting Jurisdiction
231Hk1672 k. Collective Bargaining in General. Most Cited Cases
(Formerly 232Ak511 Labor Relations)

Federal courts lack subject matter jurisdiction over disputes which are grounded in a collective bargaining agreement (CBA) and involve controversies over the meaning of an existing CBA in a particular fact situation.

[9] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)2 Matters Subject to Arbitration
231Hk1522 Carriers; Railway Labor Act
231Hk1524 k. Major and Minor Disputes in General. Most Cited Cases
(Formerly 232Ak416.4 Labor Relations)

Disputes which are grounded in a collective bargaining agreement (CBA) and involve controversies over the meaning of an existing CBA in a particular fact situation, labeled "minor" disputes under the RLA, are subject to mandatory arbitration. Railway Labor Act, § 2, as amended, 45 U.S.C.A. § 152.

[10] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)2 Matters Subject to Arbitration
231Hk1525 Particular Disputes
231Hk1526 k. In General. Most Cited Cases
(Formerly 232Ak416.4 Labor Relations)

RLA claims that pilot pressed on appeal were not "minor" disputes subject to mandatory arbitration, and district court thus had subject matter jurisdiction over them; pilot's allegations, that employer-airline violated the RLA by accessing his secure website under false pretenses, disclosing the website's contents to a rival union faction, and threatening to sue him for defamation based on statements on the website, were independent statutory claims and in no way depended upon a finding that airline, at some later time, violated pilot's contractual rights under parties' collective bargaining agreement (CBA). Railway Labor Act, § 2, as amended, 45 U.S.C.A. § 152.

[11] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(F) Disputes and Concerted Activities
231HXII(F)1 In General
231Hk1350 Activities of Individual Employees
231Hk1352 k. Particular Actions. Most Cited Cases
(Formerly 232Ak281 Labor Relations)

A party forfeits his protection under the NLRA by circulating defamatory or insulting material known to be false. National Labor Relations Act, § 7, as amended, 29 U.S.C.A. § 157.

[12] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(A) In General
231Hk970 k. Construction and Operation of Statutes, Ordinances, and Regulations, in

General. Most Cited Cases
(Formerly 232Ak47 Labor Relations)

While employers covered under the RLA are not subject to the provisions of the NLRA, courts look to the NLRA and the cases interpreting it for guidance. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.; Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.

[13] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(F) Disputes and Concerted Activities
231HXII(F)1 In General
231Hk1350 Activities of Individual Employees
231Hk1352 k. Particular Actions. Most Cited Cases
(Formerly 232Ak281 Labor Relations)

The rule announced by the Supreme Court in *Linn*, that a party forfeits his protection under the NLRA by circulating defamatory or insulting material known to be false, also applies in the context of the RLA. National Labor Relations Act, § 7, as amended, 29 U.S.C.A. § 157; Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.

[14] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(F) Disputes and Concerted Activities
231HXII(F)1 In General
231Hk1350 Activities of Individual Employees
231Hk1352 k. Particular Actions. Most Cited Cases
(Formerly 232Ak281 Labor Relations)

Statements posted on pilot's secure website, that employer-airline's president did his "dirty work like the Nazis during World War II" and that "Soviet Negotiating Style [Was] Essential to [President's] Plan," were not defamatory and knowingly false statements as would forfeit pilot's protection under RLA, but were simply rhetorical hyperbole protected by federal labor laws. Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.

[15] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(F) Disputes and Concerted Activities
231HXII(F)1 In General
231Hk1350 Activities of Individual Employees
231Hk1352 k. Particular Actions. Most Cited Cases
(Formerly 232Ak281 Labor Relations)

Statements posted on pilot's secure website, that employer-airline's president was "one incompetent at the top," that he had "little skill and little ability with people," and that "with as few skills as [the president] possesses, it is difficult to imagine how he got this far," were not defamatory and knowingly false statements as would forfeit pilot's protection under the RLA, but, as comments on president's

competence and people skills, were opinions protected by federal labor laws. Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.

[16] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(F) Disputes and Concerted Activities
231HXII(F)1 In General
231Hk1350 Activities of Individual Employees
231Hk1352 k. Particular Actions. Most Cited Cases
(Formerly 232Ak281 Labor Relations)

Pilot did not forfeit his protection under RLA simply by publishing statements that were critical of and insulting to employer-airline's president. Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.

[17] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1493 Unfair Practices of Employees or Labor Organizations
231Hk1494 k. In General. Most Cited Cases
(Formerly 232Ak395.9 Labor Relations)

Federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty.

[18] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(B) Labor Organizations
231Hk996 Right to Organize, and Legality
231Hk997 k. In General. Most Cited Cases
(Formerly 232Ak86.1 Labor Relations)

Some organizing activity may be so flagrant, violent, or extreme, or so egregious, opprobrious, offensive, obscene, or wholly unjustified that it loses the protection of the RLA. Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.

[19] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(F) Disputes and Concerted Activities
231HXII(F)1 In General
231Hk1350 Activities of Individual Employees
231Hk1352 k. Particular Actions. Most Cited Cases
(Formerly 232Ak281 Labor Relations)

Even if false, statements posted on pilot's secure website, that employer-airline's president was "Suspected in Fraud" and that he was "the prime suspect in an alleged fraud," did not forfeit pilot's protection under RLA, absent evidence that pilot published statements with knowledge of their falsity or with reckless disregard for truth. Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.

[20] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(F) Disputes and Concerted Activities
231HXII(F)1 In General
231Hk1340 k. In General. Most Cited Cases
(Formerly 232Ak281 Labor Relations)

Federal labor law protects even false and defamatory statements unless such statements are made with "actual malice," that is, knowledge of falsity or with reckless disregard for the truth.

[21] KeyCite Notes

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment Discrimination, Actions Involving
170Ak2497.1 k. In General. Most Cited Cases

Genuine issue of material fact existed as to whether pilot's development and maintenance of his website, on which he posted bulletins critical of his employer, its officers, and his incumbent union, constituted protected activity, precluding summary judgment in pilot's RLA action against employer-airline. Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[22] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1464 Espionage or Surveillance
231Hk1465 k. In General. Most Cited Cases
(Formerly 232Ak382.1 Labor Relations)

Absent a legitimate justification, employers generally are prohibited from engaging in surveillance of union organizing activities, because employer surveillance tends to create fear among employees of future reprisal, and so chills an employee's freedom to exercise his rights under federal labor law.

[23] KeyCite Notes

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment Discrimination, Actions Involving

170Ak2497.1 k. In General. Most Cited Cases

Genuine issue of material fact existed as to whether employer-airline used information it obtained from employee's secure website to assist one union faction over another, and to coerce and intimidate employee, precluding summary judgment in pilot's RLA action against airline. Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[24] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1464 Espionage or Surveillance
231Hk1465 k. In General. Most Cited Cases
(Formerly 232Ak382.1 Labor Relations)

It is the tendency to chill protected activities, not the actual chilling of protected activities, that renders eavesdropping and surveillance generally objectionable under federal labor law.

[25] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1464 Espionage or Surveillance
231Hk1465 k. In General. Most Cited Cases
(Formerly 232Ak382.1 Labor Relations)

That a hardy individual might continue his organizing activities undeterred, despite an employer's surveillance, does not render the employer's conduct any less of a violation of federal labor law.

[26] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1462 k. Assistance to Union. Most Cited Cases
(Formerly 232Ak385 Labor Relations)

The Railway Labor Act (RLA) generally prohibits employers from providing assistance to a union or labor faction. Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.

[27] KeyCite Notes

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment Discrimination, Actions Involving
170Ak2497.1 k. In General. Most Cited Cases

Genuine issue of material fact existed as to whether employer-airline disclosed contents of pilot's

secure website to opposing labor faction, thereby assisting one union faction over another, precluding summary judgment in pilot's RLA action against airline. Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[28] KeyCite Notes

231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1441 k. Litigation. Most Cited Cases
(Formerly 232Ak366 Labor Relations)

An employer's filing or threatened filing of a lawsuit against an employee concerning union organizing activities may, under certain circumstances, violate the RLA. Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.

[29] KeyCite Notes

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2497 Employees and Employment Discrimination, Actions Involving
170Ak2497.1 k. In General. Most Cited Cases

Genuine issue of material fact existed as to whether employer-airline threatened to sue pilot for defamation arising from statements posted on pilot's secure website, and thereby engaged in coercion and intimidation, precluding summary judgment in pilot's RLA action against airline. Railway Labor Act, § 1 et seq., as amended, 45 U.S.C.A. § 151 et seq.; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[30] KeyCite Notes

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk820 k. Depositions and Discovery. Most Cited Cases

The Court of Appeals reviews a district court's order quashing subpoenas for an abuse of discretion.

[31] KeyCite Notes

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)6 Harmless Error
170Bk895 k. Pretrial Proceedings; Discovery and Depositions. Most Cited Cases

To obtain relief, a litigant whose subpoenas have been improperly quashed must show prejudice.

[32] KeyCite Notes

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)6 Harmless Error
170Bk895 k. Pretrial Proceedings; Discovery and Depositions. Most Cited Cases

Plaintiff failed to show that he was prejudiced as result of any order by district court quashing subpoenas, and thus was not entitled to relief from such order, where plaintiff did not suggest what relevant evidence subpoenaed witnesses might have introduced had they been compelled to testify.

***872** Robert C. Konop, Pro se, Playa del Rey, CA, plaintiff-appellant.

Marianne Shipp, Gibson, Dunn & Crutcher, Irvine, CA, for the defendant-appellee.

Appeal from the United States District Court for the Central District of California; J. Spencer Letts, District Judge, D.C. No. CV-96-04898-SJL (JGx).

Before BOOCHEVER, REINHARDT, and PAEZ, Circuit Judges.

Opinion by Judge BOOCHEVER; Partial Concurrence and Partial Dissent by Judge REINHARDT.

OPINION

BOOCHEVER, Circuit Judge.

Robert Konop brought suit against his employer, Hawaiian Airlines, Inc. ("Hawaiian"), alleging that Hawaiian viewed Konop's secure website without authorization, disclosed the contents of that website, and took other related actions in violation of the federal Wiretap Act, the Stored Communications Act, and the Railway Labor Act. Konop also alleged several state tort claims. The district court granted summary judgment against Konop on all claims, except his retaliation claim under the Railway Labor Act. On the retaliation claim, the district court entered judgment against Konop following a bench trial. Konop appeals the district court's judgement on all claims, except on those brought under state tort law.

On January 8, 2001, we issued an opinion, reversing the district court's decision on Konop's claims under the Wiretap Act and the Stored Communications Act, and on several of his claims under the Railway Labor Act. *Konop v. Hawaiian Airlines, Inc.*, 236 F.3d 1035 (9th Cir.2001). Hawaiian filed a petition for rehearing, which became moot when we withdrew our previous opinion. *Konop v. Hawaiian Airlines, Inc.*, 262 F.3d 972 (9th Cir.2001). We now affirm the judgment of the district court with respect to Konop's Wiretap Act claims and his retaliation claim under the Railway Labor Act. We reverse the district court's judgment with respect to Konop's claims under the Stored Communications Act and his remaining claims under the Railway Labor Act.

FACTS

Konop, a pilot for Hawaiian, created and maintained a website where he posted bulletins critical of his employer, its officers, and the incumbent union, Air Line Pilots Association ("ALPA"). Many of those criticisms related to Konop's opposition to labor concessions which Hawaiian sought from ALPA. Because ALPA supported the concessions, Konop, via his website, encouraged Hawaiian employees to consider alternative union representation.

Konop controlled access to his website by requiring visitors to log in with a user name and password. He created a list of people, mostly pilots and other employees of Hawaiian, who were eligible to access the website. Pilots Gene Wong and James Gardner were included on this list. Konop programmed the

website to allow access when a person entered the name of an eligible person, created a password, and clicked the "SUBMIT" button on the *873 screen, indicating acceptance of the terms and conditions of use. These terms and conditions prohibited any member of Hawaiian's management from viewing the website and prohibited users from disclosing the website's contents to anyone else.

In December 1995, Hawaiian vice president James Davis asked Wong for permission to use Wong's name to access Konop's website. Wong agreed. Davis claimed he was concerned about untruthful allegations that he believed Konop was making on the website. Wong had not previously logged into the website to create an account. When Davis accessed the website using Wong's name, he presumably typed in Wong's name, created a password, and clicked the "SUBMIT" button indicating acceptance of the terms and conditions.

Later that day, Konop received a call from the union chairman of ALPA, Reno Morella.[FN1] Morella told Konop that Hawaiian president Bruce Nobles had contacted him regarding the contents of Konop's website. Morella related that Nobles was upset by Konop's accusations that Nobles was suspected of fraud and by other disparaging statements published on the website. From this conversation with Morella, Konop believed Nobles had obtained the contents of his website and was threatening to sue Konop for defamation based on statements contained on the website.

FN1. The parties dispute the date and substance of this phone conversation. Because the district court granted summary judgment, we view the facts in the light most favorable to Konop.

After speaking with Morella, Konop took his website offline for the remainder of the day. He placed it back online the next morning, however, without knowing how Nobles had obtained the information discussed in the phone call. Konop claims to have learned only later from the examination of system logs that Davis had accessed the website using Wong's name.

In the meantime, Davis continued to view the website using Wong's name. Later, Davis also logged in with the name of another pilot, Gardner, who had similarly consented to Davis' use of his name. Through April 1996, Konop claims that his records indicate that Davis logged in over twenty times as Wong, and that Gardner or Davis logged in at least fourteen more times as Gardner.

Konop filed suit alleging claims under the federal Wiretap Act, the Stored Communications Act, the Railway Labor Act, and state tort law, arising from Davis' viewing and use of Konop's secure website. Konop also alleged that Hawaiian placed him on medical suspension in retaliation for his opposition to the proposed labor concessions, in violation of the Railway Labor Act. The district court granted summary judgment to Hawaiian on all but the retaliatory suspension claim, and entered judgment against Konop on that claim after a short bench trial.

Konop appeals, arguing that the district court erred in granting summary judgment to Hawaiian on his federal claims under the Wiretap Act, Stored Communications Act, and Railway Labor Act. In addition, Konop urges us to reverse the district court's judgment on the retaliation claim following the bench trial, because he claims the district court improperly quashed subpoenas for witnesses Konop sought to have testify at trial.

DISCUSSION

The district court's grant of summary judgment is reviewed de novo. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir.2000) (en banc). Viewing the evidence in the light most favorable to Konop, we must determine whether there are any genuine *874 issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

I. Electronic Communications Privacy Act Claims

We first turn to the difficult task of determining whether Hawaiian violated either the Wiretap Act, 18 U.S.C. §§ 2510-2522 (2000) or the Stored Communications Act, 18 U.S.C. §§ 2701-2711 (2000),[FN2]

when Davis accessed Konop's secure website. In 1986, Congress passed the Electronic Communications Privacy Act (ECPA), Pub.L. No. 99-508, 100 Stat. 1848, which was intended to afford privacy protection to electronic communications. Title I of the ECPA amended the federal Wiretap Act, which previously addressed only wire and oral communications, to "address[ ] the interception of ... electronic communications." S.Rep. No. 99-541, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557. Title II of the ECPA created the Stored Communications Act (SCA), which was designed to "address[ ] access to stored wire and electronic communications and transactional records." *Id.*

> FN2. The Wiretap Act and SCA have since been amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), Pub.L. No. 107-56, 115 Stat. 272 (October 26, 2001).

As we have previously observed, the intersection of these two statutes "is a complex, often convoluted, area of the law." *United States v. Smith*, 155 F.3d 1051, 1055 (9th Cir.1998). In the present case, the difficulty is compounded by the fact that the ECPA was written prior to the advent of the Internet and the World Wide Web. As a result, the existing statutory framework is ill-suited to address modern forms of communication like Konop's secure website. Courts have struggled to analyze problems involving modern technology within the confines of this statutory framework, often with unsatisfying results. *See. e.g.,* Robert A. Pikowsky, *Legal and Technological Issues Surrounding Privacy of Attorney Client Communication Via Email,* Advocate, Oct. 2000, at 17-19 (discussing the uncertainty over email privacy caused by the ECPA and judicial interpretations thereof); Lieutenant Colonel LeEllen Coacher, *Permitting Systems Protection Monitoring: When the Government Can Look and What It Can See,* 46 A.F. L.Rev. 155, 171-74 (1999) (same); Tatsuya Akamine, Note, *Proposal for a Fair Statutory Interpretation: E-mail Stored in a Service Provider Computer Is Subject to an Interception Under the Federal Wiretap Act,* 7 J.L. Pol'y 519, 521-29, 561-68 (1999) (criticizing the judiciary's interpretation of the ECPA). We observe that until Congress brings the laws in line with modern technology, protection of the Internet and websites such as Konop's will remain a confusing and uncertain area of the law.

A. The Internet and Secure Websites

The Internet is an international network of interconnected computers that allows millions of people to communicate and exchange information. *See Reno v. ACLU,* 521 U.S. 844, 849-50, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997); *In re DoubleClick Inc. Privacy Litig.,* 154 F.Supp.2d 497, 501 (S.D.N.Y.2001). The World Wide Web, the best known category of communication over the Internet, consists of a vast number of electronic documents stored in different computers all over the world. *Reno v. ACLU,* 521 U.S. at 852, 117 S.Ct. 2329. Any person or organization with a computer connected to the Internet can "publish" information on the Web in the form of a "web page" or "website." *See id.* at 853 & n. 9, 95 S.Ct. 2051. A website consists of electronic information stored by a hosting service computer or "server." The owner ***875** of the website may pay a fee for this service. Each website has a unique domain name or web address (*e.g.,* Amazon.com or Lycos.com), which corresponds to a specific location within the server where the electronic information comprising the website is stored. A person who wishes to view the website types the domain name into a computer connected to the Internet. This is essentially a request to the server to make an electronic copy of the website (or at least the first page or "home page") and send it to the user's computer. After this electronic information reaches the user's computer, it is downloaded for viewing on the user's screen. *See generally* Preston Gralla, *How the Internet Works* (1999).

While most websites are public, many, such as Konop's, are restricted. For instance, some websites are password-protected, require a social security number, or require the user to purchase access by entering a credit card number. *See Reno,* 521 U.S. at 852-53, 856, 117 S.Ct. 2329. The legislative history of the ECPA suggests that Congress wanted to protect electronic communications that are configured to be private, such as email and private electronic bulletin boards. *See* S.Rep. No. 99-541, at 35-36, 1986 U.S.C.C.A.N. at 3599 ("This provision [the SCA] addresses the growing problem of unauthorized persons deliberately gaining access to ... electronic or wire communications that are not intended to be available to the public."); H.R.Rep. No. 99-647 at 41, 62-63 (1986) (describing the Committee's understanding that the configuration of the electronic communications system would determine whether or not an electronic communication was readily accessible to the public). The nature of the Internet, however, is such that if a user enters the appropriate information (password, social security number, etc.), it is nearly impossible to verify the true identity of that user. *Cf. Reno,* 521 U.S.

at 855-56, 117 S.Ct. 2329 (discussing the difficulty of verifying the age of a website user by requiring a credit card number or password).

We are confronted with such a situation here. Although Konop took certain steps to restrict the access of Davis and other managers to the website, [FN3] Davis was nevertheless*876 able to access the website by entering the correct information, which was freely provided to Davis by individuals who were eligible to view the website.

FN3. Specifically, Konop configured the website to allow access when a person typed in the correct web address, received the home page of his website, entered the name of an eligible person, created a password, and clicked the "SUBMIT" button indicating acceptance of the terms and conditions of use. In addition, Konop displayed the following language on the home page of his website:This is the gateway for NEWS UPDATES and EDITORIAL COMMENTS directed only toward Hawaiian Air's pilots and other employees, not including HAL management. By entering, you acknowledge and agree to the terms and conditions of use as specified below. You must read this entire page before entry. Others should s imply find *something else* to do with their time.If you are already a registered user, you may fill in your name along with the other information required below, then enter the system. If you want to visit the system, and you belong to the authorized group, you must supply the proper information before you will be allowed to enter. Make note of the password you enter for your first visit, otherwise future visits may be delayed. Visits by others will be strictly prohibited.Beneath this language, Konop provided boxes for a person's name, occupation, email address and password. Below the boxes were two buttons: one said "SUBMIT," the other said "CLEAR." The advisement continued:All name and contact information will be kept strictly confidential. Any effort to defeat, compromise or violate the security of this website will be prosecuted to the fullest extent of the law.WARNING!The information contained herein is CONFIDENTIAL, and it is not intended for public dissemination! By requesting entry in the system, you must agree not to furnish any of the information contained herein to any other person or for any other use. Republication or redistribution of this information to any other person is strictly prohibited. Anyone found to disseminate this information to anyone other than those specifically named and allowed here will be banned from this website and held liable to prosecution for violation of the terms and conditions of use and for violation of this contract.

B. Wiretap Act

Konop argues that Davis' conduct constitutes an interception of an electronic communication in violation of the

Wiretap Act. The Wiretap Act makes it an offense to "intentionally intercept [ ] ... any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). We must therefore determine whether Konop's website is an "electronic communication" and, if so, whether Davis "intercepted" that communication.

[1] An "electronic communication" is defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system." *Id.* § 2510(12). As discussed above, website owners such as Konop transmit electronic documents to servers, where the documents are stored. If a user wishes to view the website, the user requests that the server transmit a copy of the document to the user's computer. When the server sends the document to the user's computer for viewing, a transfer of information from the website owner to the user has occurred. Although the website owner's document does not go directly or immediately to the user, once a user accesses a website, information is transferred from the website owner to the user via one of the specified mediums. We therefore conclude that Konop's website fits the definition of "electronic communication."

The Wiretap Act, however, prohibits only "interceptions" of electronic communications. "Intercept" is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." *Id.* § 2510(4). Standing alone, this

definition would seem to suggest that an individual "intercepts" an electronic communication merely by "acquiring" its contents, regardless of when or under what circumstances the acquisition occurs. Courts, however, have clarified that Congress intended a narrower definition of "intercept" with regard to electronic communications.

In Steve Jackson Games, Inc. v. United States Secret Service, 36 F.3d 457 (5th Cir.1994), the Fifth Circuit held that the government's acquisition of email messages stored on an electronic bulletin board system, but not yet retrieved by the intended recipients, was not an "interception" under the Wiretap Act. The court observed that, prior to the enactment of the ECPA, the word "intercept" had been interpreted to mean the acquisition of a communication contemporaneous with transmission. Id. at 460 (citing United States v. Turk, 526 F.2d 654, 658 (5th Cir.1976)). The court further observed that Congress, in passing the ECPA, intended to retain the previous definition of "intercept" with respect to wire and oral communications, [FN4] while amending the Wiretap Act to cover interceptions of electronic communications. See Steve Jackson Games, 36 F.3d at 462; S.Rep. No. 99-541, at 13; ***877** H.R.Rep. No. 99-647, at 34. The court reasoned, however, that the word "intercept" could not describe the exact same conduct with respect to wire and electronic communications, because wire and electronic communications were defined differently in the statute. Specifically, the term "wire communication" was defined to include storage of the communication, while "electronic communication" was not. [FN5] The court concluded that this textual difference evidenced Congress' understanding that, although one could "intercept" a *wire* communication in storage, one could not "intercept" an *electronic* communication in storage:

> FN4. Congress revised the definition of "intercept" slightly to clarify that non-voice portions of wire communications are also protected. See H.R.Rep. No. 99-647, at 34.
>
> FN5. Until October 2001, "wire communication" was defined as "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception ... and *such term includes any electronic storage of such communication* ...." 18 U.S.C. § 2510(1) (2000) (emphasis added).

Critical to the issue before us is the fact that, unlike the definition of "wire communication," the definition of "electronic communication" does not include electronic storage of such communications.... Congress' use of the word "transfer" in the definition of "electronic communication," and its omission in that definition of the phrase "any electronic storage of such communication" ... reflects that Congress did not intend for "intercept" to apply to "electronic communications" when those communications are in "electronic storage."

Steve Jackson Games, 36 F.3d at 461-62; Wesley Coll. v. Pitts, 974 F.Supp. 375, 386 (D.Del.1997) ("[B]y including the electronic storage of wire communications within the definition of such communications but declining to do the same for electronic communications ... Congress sufficiently evinced its intent to make acquisitions of electronic communications unlawful under the Wiretap Act only if they occur contemporaneously with their transmissions."), *aff'd*, 172 F.3d 861 (3d Cir.1998); United States v. Reyes, 922 F.Supp. 818, 836 (S.D.N.Y.1996) ("Taken together, the definitions thus imply a requirement that the acquisition of[electronic communications] be simultaneous with the original transmission of the data."); Bohach v. City of Reno, 932 F.Supp. 1232, 1236-37 (D.Nev.1996) (requiring acquisition during transmission). The *Steve Jackson* Court further noted that the ECPA was deliberately structured to afford electronic communications *in storage* less protection than other forms of communication. See Steve Jackson Games, 36 F.3d at 462-64.

The Ninth Circuit endorsed the reasoning of *Steve Jackson Games* in United States v. Smith, 155 F.3d at 1051. The question presented in *Smith* was whether the Wiretap Act covered wire communications in storage, such as voice mail messages, or just wire communications in transmission, such as ongoing telephone conversations. Relying on the same textual distinction as the Fifth Circuit in *Steve Jackson Games*, we concluded that wire communications in storage could be "intercepted" under the Wiretap Act. We found that Congress' inclusion of storage in the definition of "wire communication" militated in favor of a broad definition of the term "intercept" with respect to wire communications, one that included acquisition of a communication subsequent to transmission. We further observed that,

with respect to wire communications only, the prior definition of "intercept"-acquisition contemporaneous with transmission-had been overruled by the ECPA. Smith, 155 F.3d at 1057 n. 11. On the other hand, we suggested that the narrower definition of "intercept" was still appropriate with regard to electronic communications:

***878** [I]n cases concerning "electronic communications"-the definition of which specifically includes "transfers" and specifically excludes "storage"-the "narrow" definition of "intercept" fits like a glove; it is natural to except non-contemporaneous retrievals from the scope of the Wiretap Act. In fact, a number of courts adopting the narrow interpretation of "interception" have specifically premised their decisions to do so on the distinction between § 2510's definitions of wire and electronic communications.

Smith, 155 F.3d at 1057 (citations and alterations omitted).

We agree with the *Steve Jackson* and *Smith* courts that the narrow definition of "intercept" applies to electronic communications. Notably, Congress has since amended the Wiretap Act to eliminate storage from the definition of wire communication, *see* USA PATRIOT Act § 209, 115 Stat. at 283, such that the textual distinction relied upon by the *Steve Jackson* and *Smith* courts no longer exists. This change, however, supports the analysis of those cases. By eliminating storage from the definition of wire communication, Congress essentially reinstated the pre-ECPA definition of "intercept"-acquisition contemporaneous with transmission-with respect to wire communications. *See* Smith, 155 F.3d at 1057 n. 11. The purpose of the recent amendment was to reduce protection of voice mail messages to the lower level of protection provided other electronically stored communications. *See* H.R. Rep. 107-236(I), at 158-59 (2001). When Congress passed the USA PATRIOT Act, it was aware of the narrow definition courts had given the term "intercept" with respect to electronic communications, but chose not to change or modify that definition. To the contrary, it modified the statute to make that definition applicable to voice mail messages as well. Congress, therefore, accepted and implicitly approved the judicial definition of "intercept" as acquisition contemporaneous with transmission.

[2] We therefore hold that for a website such as Konop's to be "intercepted" in violation of the Wiretap Act, it must be acquired during transmission, not while it is in electronic storage.[FN6] This conclusion is consistent with the ordinary meaning of "intercept," which is "to stop, seize, or interrupt in progress or course before arrival." *Webster's Ninth New Collegiate Dictionary* 630 (1985). More importantly, it is consistent with the structure of the ECPA, which created the SCA for the ***879** express purpose of addressing "access to *stored* ... electronic communications and transactional records." S.Rep. No. 99-541 at 3 (emphasis added). The level of protection provided stored communications under the SCA is considerably less than that provided communications covered by the Wiretap Act. Section 2703(a) of the SCA details the procedures law enforcement must follow to access the contents of stored electronic communications, but these procedures are considerably less burdensome and less restrictive than those required to obtain a wiretap order under the Wiretap Act. *See Steve Jackson Games,* 36 F.3d at 463. Thus, if Konop's position were correct and acquisition of a stored electronic communication were an interception under the Wiretap Act, the government would have to comply with the more burdensome, more restrictive procedures of the Wiretap Act to do exactly what Congress apparently authorized it to do under the less burdensome procedures of the SCA. Congress could not have intended this result. As the Fifth Circuit recognized in *Steve Jackson Games,* "it is most unlikely that Congress intended to require law enforcement officers to satisfy the more stringent requirements for an intercept in order to gain access to the contents of stored electronic communications." *Id.; see also* Wesley Coll., 974 F.Supp. at 388 (same).

FN6. The dissent, amici, and several law review articles argue that the term "intercept" must apply to electronic communications in storage because storage is a necessary incident to the transmission of electronic communications. *See, e.g.,* Akamine, *supra,* at 561-65; Jarrod J. White, *E-Mail@Work.Com: Employer Monitoring of Employee E-Mail,* 48 Ala. L.Rev. 1079, 1083 (1997). Email and other electronic communications are stored at various junctures in various computers between the time the sender types the message and the recipient reads it. In addition, the transmission time of email is very short because it travels across the wires at the speed of light. It is therefore argued that if the term "intercept" does not apply to the *en route* storage of electronic communications, the Wiretap Act's

prohibition against "intercepting" electronic communications would have virtually no effect. While this argument is not without appeal, the language and structure of the ECPA demonstrate that Congress considered and rejected this argument. Congress defined "electronic storage" as "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof," 18 U.S.C. § 2510(17)(A), indicating that Congress understood that electronic storage was an inherent part of electronic communication. Nevertheless, as discussed above, Congress chose to afford stored electronic communications less protection than other forms of communication.

[3] Because we conclude that Davis' conduct did not constitute an "interception" of an electronic communication in violation of the Wiretap Act, we affirm the district court's grant of summary judgment against Konop on his Wiretap Act claims.[FN7]

FN7. Konop also claims that Hawaiian violated the Wiretap Act when Davis used and disclosed the contents of Konop's website. As there was no interception under the Wiretap Act, this claim also fails.

C. Stored Communications Act

Konop also argues that, by viewing his secure website, Davis accessed a stored electronic communication without authorization in violation of the SCA. The SCA makes it an offense to "intentionally access[ ] without authorization a facility through which an electronic communication service is provided ... and thereby obtain[ ] ... access to a wire or electronic communication while it is in electronic storage in such system." 18 U.S.C. § 2701(a)(1). The SCA excepts from liability, however, "conduct authorized ... by a user of that service with respect to a communication of or intended for that user." 18 U.S.C. § 2701(c)(2). The district court found that the exception in § 2701(c)(2) applied because Wong and Gardner consented to Davis' use of Konop's website. It therefore granted summary judgment to Hawaiian on the SCA claim.

The parties agree that the relevant "electronic communications service" is Konop's website, and that the website was in "electronic storage." In addition, for the purposes of this opinion, we accept the parties' assumption that Davis' conduct constituted "access without authorization" [FN8] ***880** to "a facility through which an electronic communication service is provided."

FN8. The term "without authorization" is not defined in the statute. *Cf. EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577, 581-82 & n. 10 (1st Cir.2001) (explaining, with respect to alleged unauthorized use of a website, Congress' failure to define "without authorization" in the Computer Fraud and Abuse Act, and discussing some possible, practicable definitions of the term). There is some indication in the legislative history that Congress intended the configuration of the electronic communication system to "establish an objective standard [for] determining whether a system receives privacy protection." H.R.Rep. No. 99-647, at 41. Since the issue is not properly before us, however, we express no opinion on how the term "without authorization" should be defined with respect to a non-public website such as Konop's.

We therefore address only the narrow question of whether the district court properly found Hawaiian exempt from liability under § 2701(c)(2). Section 2701(c)(2) allows a person to authorize a third party's access to an electronic communication if the person is 1) a "user" of the "service" and 2) the communication is "of or intended for that user." *See* 18 U.S.C. § 2701(c)(2). A "user" is "any person or entity who-(A) uses an electronic communications service; and (B) is duly authorized by the provider of such service to engage in such use." 18 U.S.C. § 2510(13).

The district court concluded that Wong and Gardner had the authority under § 2701(c)(2) to consent to Davis' use of the website because Konop put Wong and Gardner on the list of eligible users. This conclusion is consistent with other parts of the Wiretap Act and the SCA which allow intended recipients of wire and electronic communications to authorize third parties to access those communications. [FN9] In

addition, there is some indication in the legislative history that Congress believed "addressees" or "intended recipients" of electronic communications would have the authority under the SCA to allow third parties access to those communications. *See* H.R.Rep. No. 99-647, at 66-67 (explaining that "an addressee [of an electronic communication] may consent to the disclosure of a communication to any other person" and that "[a] person may be an 'intended recipient' of a communication ... even if he is not individually identified by name or otherwise").

FN9. For instance, § 2702(b)(1) permits service providers to divulge the contents of stored communications "to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient." *See also id.* § 2702(b)(3) (providing a similar exception with respect to remote computing services). Similarly, the "consent" exception to the Wiretap Act allows one party to a wire communication to authorize a third party to intercept the communication. *See* 18 U.S.C. § 2511(2)(c) & (d).

[4] [5] Nevertheless, the plain language of § 2701(c)(2) indicates that only a "user" of the service can authorize a third party's access to the communication. The statute defines "user" as one who 1) *uses* the service and 2) is duly authorized to do so. Because the statutory language is unambiguous, it must control our construction of the statute, notwithstanding the legislative history. *See United States v. Daas,* 198 F.3d 1167, 1174 (9th Cir.1999). The statute does not define the word "use," so we apply the ordinary definition, which is "to put into action or service, avail oneself of, employ." *Webster's* at 1299; *see Daas,* 198 F.3d at 1174 ("If the statute uses a term which it does not define, the court gives that term its ordinary meaning.").

[6] [7] Based on the common definition of the word "use," we cannot find any evidence in the record that Wong ever used Konop's website. There is some evidence, however, that Gardner may have used the website, but it is unclear when that use occurred. At any rate, the district court did not make any findings on whether Wong and Gardner actually used Konop's website-it simply assumed that Wong and Gardner, by virtue of being eligible to view the website, could authorize Davis' access. The problem with this approach is that it essentially reads the "user" requirement out of § 2701(c)(2). Taking the facts in the light most favorable to Konop, we must assume that neither Wong nor Gardner was a "user" of the website at the time he authorized Davis to view it. We therefore reverse the district court's grant of summary judgment to Hawaiian on Konop's SCA claim.

***881 II. Railway Labor Act Claims**

Konop also appeals the district court's grant of summary judgment to Hawaiian on his claims under the Railway Labor Act, 45 U.S.C. §§ 151-188 ("RLA"). The RLA prohibits "interference, influence, or coercion by either party over the designation of representatives by the other." 45 U.S.C. § 152 (Third). It also declares that "it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining...." *Id.* at § 152 (Fourth).

Konop asserts three claims under 45 U.S.C. § 152 (Third) and (Fourth) of the RLA. First, Konop alleges that Hawaiian interfered with his organizing efforts by accessing his website under false pretenses. Second, Konop alleges that Hawaiian wrongfully assisted a labor group by disclosing the contents of Konop's website to a union leader who supported the concessionary contract. Third, Konop alleges that Hawaiian engaged in coercion and intimidation by threatening to file a defamation suit against Konop based on statements on the website. The district court dismissed these claims on the alternative grounds that it lacked jurisdiction over the RLA claims, and that Konop failed to support them with evidence sufficient to withstand summary judgment.

A. Subject Matter Jurisdiction

[8] [9] [10] Federal courts lack subject matter jurisdiction over disputes which are

"grounded in the [collective bargaining agreement]," *Haw. Airlines, Inc. v. Norris*, 512 U.S. 246, 256, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994), and "involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation," *id.* at 253, 114 S.Ct. 2239 (internal quotation marks omitted). Such disputes, labeled "minor" disputes under the RLA, are subject to mandatory arbitration. *Id.* Hawaiian argues, and the district court agreed, that Konop's RLA claims are grounded in the collective bargaining agreement ("CBA") and are therefore subject to mandatory arbitration. We disagree.

In *Fennessy v. Southwest Airlines*, 91 F.3d 1359 (9th Cir.1996), we addressed whether the district court had jurisdiction over the plaintiff's statutory claim under the RLA. The plaintiff in *Fennessy* alleged that the carrier violated 45 U.S.C. § 152 (Fourth) by terminating his employment in retaliation for his efforts to replace the existing union. *Id.* at 1360-61. We held that "because his claim is based on a statutory provision rather than on the collective bargaining contract, it is not a minor dispute that must be brought to [arbitration]; it is a statutory claim that he may bring directly in district court." *Id.* at 1362. The plaintiff's unsuccessful arbitration of a related contractual claim under the CBA did not alter this conclusion. Because the statutory claims were not "grounded in the collective-bargaining agreement," and the statutory rights were "independent of the CBA," we found the district court had jurisdiction. *Id.*

Hawaiian argues that, unlike the statutory claim in *Fennessy*, Konop's statutory claims are grounded in and dependent on the CBA. To support this position, Hawaiian focuses on conduct which Konop explicitly alleged in his complaint as violating the CBA. Specifically, in the RLA section of the complaint, Konop alleged that Hawaiian violated the CBA by suspending him from work, reducing his employee benefits, requiring him to submit to physical and psychological testing, and giving certain pilots paid opportunities to campaign in favor of the concessionary contract.

***882** On appeal, however, Konop does not challenge the district court's dismissal of these CBA-related claims. Rather, he objects to the district court's dismissal of his independent RLA claims. Konop claims that Hawaiian violated the RLA by (1) accessing his website under false pretenses, (2) disclosing the website's contents to the rival union faction, and (3) threatening to sue Konop for defamation based on statements on the website. Hawaiian never explains how these RLA claims are grounded in the CBA, except to say that Konop merely presents them as a precursor to the alleged CBA violations. Nothing, however, requires such a narrow reading of Konop's allegations. Konop, like the plaintiff in *Fennessy*, presents his statutory claims as independent violations of the RLA. These claims in no way depend upon a finding that Hawaiian, at some later time, violated Konop's contractual rights under the CBA.

Accordingly, we hold that the RLA claims which Konop presses on appeal are not grounded in the CBA, are not subject to mandatory arbitration and, therefore, fall within the court's jurisdiction.

B. Protected Activity

Hawaiian contends that even if Hawaiian managers accessed Konop's website under false pretenses, conveyed this information to a rival union leader, and threatened to sue Konop for defamation, such conduct did not violate the RLA because it did not interfere with any protected organizing activity. The organizing activity in which Konop engaged principally involved the publication of articles on a secure website. As discussed above, Konop limited access to pilots and other employees on the eligible list and prohibited users from disclosing the contents of the website to others. He also categorically excluded managers. Konop's website publication vigorously criticized Hawaiian management and its proposal for wage concessions in the existing collective bargaining agreement. Because the incumbent union, ALPA, supported the concessionary contract, Konop sought to encourage consideration of alternative union representation.

[11] [12] [13] There is no dispute that Konop's website publication would ordinarily constitute protected union organizing activity under the RLA. Hawaiian argues, however, that Konop forfeited any protection he would otherwise enjoy because his articles contained malicious, defamatory and insulting material known to be false. In *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 61, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), the Supreme Court held that a party forfeits his protection

under the National Labor Relations Act (NLRA) by "circulating defamatory or insulting material known to be false." [FN10] *See also* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 282-83, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); San Antonio Comm. Hosp. v. S. Cal. Dist. Council of Carpenters, 125 F.3d 1230, 1237 (9th Cir.1997).

FN10. While employers covered under the RLA are not subject to the provisions of the NLRA, courts look to the NLRA and the cases interpreting it for guidance. *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969). We see no reason why the rule announced in *Linn*, 383 U.S. at 61, 86 S.Ct. 657, regarding protected activities, should not apply in the context of the RLA.

We assume Hawaiian is referring to the alleged defamatory statements contained in the "Facts" section of its brief. There, Hawaiian indicates that Konop published the following false statements: (1) Nobles does his "dirty work ... like the Nazis during World War II"; (2) "Soviet Negotiating Style Essential to Nobles Plan!"; (3) Nobles is "one incompetent at the top"; (4) ***883** Nobles "has little skill and little ability with people.... In fact, with as few skills as Nobles possesses, it is difficult to imagine how he got this far"; and (5) "Nobles Suspected in Fraud!" and "Hawaiian Air president, Bruce Nobles, is the prime suspect in an alleged fraud which took place in 1991."

[14] [15] [16] [17] [18] The first two statements, referencing the Nazis and Soviets, are simply "rhetorical hyperbole" protected by federal labor laws. *See* Letter Carriers, 418 U.S. at 286, 94 S.Ct. 2770. The second two statements, commenting on Nobles' competence and people skills, are opinions also protected by federal labor laws. *See id.* at 284, 94 S.Ct. 2770; San Antonio Comm. Hosp., 125 F.3d at 1237. Konop did not forfeit his protection under the Railway Labor Act, as Hawaiian suggests, simply by publishing statements that were critical of and insulting to Nobles. " '[F]ederal law gives a union license to use intemperate, abusive, or *insulting* language without fear of restraint or penalty....' " San Antonio Comm. Hosp., 125 F.3d at 1235 (quoting Letter Carriers, 418 U.S. at 283, 94 S.Ct. 2770) (emphasis added); *see also* Linn, 383 U.S. at 58, 86 S.Ct. 657 ("[R]epresentation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions."). [FN11]

FN11. We recognize that some organizing activity may be "so flagrant, violent or extreme" or so "egregious," "opprobrious," "offensive," "obscene" or "wholly unjustified" that it loses the protection of the RLA. *See* Reef Indus. v. NLRB, 952 F.2d 830, 837 & n. 19 (5th Cir.1991) (per curiam); Timekeeping Sys., Inc. & Lawrence Leinweber, 323 N.L.R.B. 244, 248-50 (1997). It is not clear whether Hawaiian is contending that Konop's conduct falls within one of these more amorphous standards. Assuming Hawaiian does so contend, we nevertheless find Hawaiian has failed to demonstrate that, as a matter of law, Konop's activities were so intolerable as to lose their protection under the RLA.

[19] [20] With respect to the final challenged statement, indicating that Nobles was suspected of fraud, Hawaiian fails to argue or present any evidence that Konop published the statement with knowledge of its falsity or with reckless disregard for the truth. Federal labor law protects even false and defamatory statements unless such statements are made with actual malice- *i.e.*, knowledge of falsity or with reckless disregard for the truth. *See* Letter Carriers, 418 U.S. at 281, 94 S.Ct. 2770; Linn, 383 U.S. at 61, 86 S.Ct. 657 (protection under labor law existed "even though the statements [were] erroneous and defame[d] one of the parties to the dispute"). With no evidence or argument that Konop acted with actual malice, Hawaiian cannot demonstrate as a matter of law that Konop forfeited his protection under the RLA.

NLRB v. Pincus Bros., Inc.-Maxwell, 620 F.2d 367 (3d Cir.1980) (as amended), upon which Hawaiian principally relies, provides little support for Hawaiian's position. In *Pincus Bros.*, the Third Circuit, in considering whether the NLRB abused its discretion by declining to defer to an arbitration award, merely concluded it was "at least arguable" that the employee published a defamatory statement known to be

false. *Id.* at 376. For Hawaiian to prevail on summary judgment, however, it must do more than show it is "at least arguable" that Konop knew the challenged statement was false. It must demonstrate this as a matter of law. As Hawaiian presents no evidence or argument that Konop acted with the requisite malice, Hawaiian falls short of satisfying this burden.

[21] Accordingly, we find that Konop has raised a triable issue of fact with respect to whether the development and maintenance of his website constituted protected activity under the RLA.

***884 C. Specific Violations**

Konop argues that Hawaiian managers: (1) interfered with Konop's organizing efforts by viewing the website under false pretenses, (2) wrongfully supported one labor group in favor of another by informing the opposing labor faction of the website's contents, and (3) engaged in coercion and intimidation by threatening to sue Konop for defamation, all in violation of the RLA. Hawaiian argues, and the district court agreed, that Konop failed to present sufficient evidence to withstand summary judgment on these claims. We disagree.

1. Access of Website

[22] Konop argues that Davis interfered with Konop's organizing efforts by viewing the website under false pretenses. Absent a legitimate justification, employers are generally prohibited from engaging in surveillance of union organizing activities. Cal. Acrylic Indus. v. NLRB, 150 F.3d 1095, 1099-1100 (9th Cir.1998). The reason for this general proscription is that employer surveillance "tends to create fear among employees of future reprisal" and, thus, "chills an employee's freedom to exercise" his rights under federal labor law. *Id.* at 1099.

In NLRB v. Unbelievable, Inc., 71 F.3d 1434 (9th Cir.1995), we upheld the Board's finding that the employer "engaged in unfair labor practices by eavesdropping on private conversations between employees and [a] Union representative," which occurred in the employee break room. *Id.* at 1438-39. We see no principled distinction between the employer's eavesdropping in *Unbelievable* and Hawaiian's access of Konop's secure website.

[23] Hawaiian suggests that Davis had a legitimate reason to access Konop's website-to identify and correct any false or misleading statements. Assuming such a concern could justify Davis' monitoring of private union organizing activities, Hawaiian has presented little evidence to suggest that any statements on Konop's website were actually defamatory. Moreover, as discussed below, there are triable issues whether Hawaiian used information it obtained from the website to assist one union faction over another, and to coerce and intimidate Konop. Under these circumstances, we conclude that Konop has raised a triable issue that Hawaiian's access of Konop's website was not justified.

[24] [25] Hawaiian also argues that Davis' access did not violate the RLA because it did not appreciably limit Konop's organizing activities. Hawaiian emphasizes that, after learning about Davis' access to the website, Konop restricted access for a mere half-day and declined to temper the language in his articles. Hawaiian, however, presents no authority indicating that employees subject to surveillance or eavesdropping must also demonstrate that they consequently limited their organizing activity. It is the *tendency* to chill protected activities, not the actual chilling of protected activities, that renders eavesdropping and surveillance generally objectionable under federal labor law. *See, e.g.*, Cal. Acrylic, 150 F.3d at 1099-1100. That a hardy individual might continue his organizing activities undeterred, despite an employer's surveillance, does not render the employer's conduct any less of a violation.[FN12]

FN12. Hawaiian also presents this argument to defeat the other two alleged RLA claims

discussed in the following sections. We find it is no more persuasive in the context of those claims.

Accordingly, we find that Konop has raised a triable issue of fact that Hawaiian interfered with Konop's union organizing activity in violation of the RLA by accessing Konop's website.

***885 2. Disclosure to Opposing Union**

[26] [27] Konop argues that Nobles unlawfully assisted Reno Morella, the union leader who supported the concessionary contract, by disclosing the contents of Konop's website. Generally, the RLA prohibits employers from providing assistance to a union or labor faction. *See* Barthelemy v. Air Lines Pilots Ass'n, 897 F.2d 999, 1009 (9th Cir.1990) (per curiam); *see also* NLRB v. Finishline Indus., 451 F.2d 1280, 1281-82 (9th Cir.1971) (NLRA prohibits employer from telling workers to withdraw from one union and join another); NLRB v. L. Ronney & Sons Furniture Mfg. Co., 206 F.2d 730, 734-35 (9th Cir.1953) (NLRA prohibits employer from initiating membership drive among his employees for employer-favored union).

Konop argues that Nobles disclosed useful intelligence to a rival union faction in an effort to ensure that Konop's faction, which opposed the concessionary contract, would not prevail. Hawaiian does not seriously dispute that disclosure of the contents of Konop's website to Morella would constitute improper assistance. Instead, Hawaiian argues that Konop failed to present sufficient evidence that Nobles made any such disclosure or that Nobles was even familiar with the contents of Konop's website when he spoke to Morella.

Morella, however, states in his declaration that Nobles contacted him on December 14, 1995 and informed him "that he had just reviewed information which was posted on an Internet communications system operated by Hawaiian Airlines Pilot Robert Konop." In addition, Morella states that Nobles also "disclosed to me that Konop's Internet communications system contained a third written article concerning Konop's efforts to obtain union representation by a labor organization other than the Air Line Pilots Association." This evidence creates a genuine issue of fact whether Nobles was familiar with the contents of Konop's website and whether Nobles disclosed the contents of the website to Morella.

Moreover, Nobles confirmed in his declaration that he contacted Morella because he "felt that Reno Morella, the Chairman of the ALPA Master Executive Council, should be aware of the newsletter because of its inaccurate attack on the proposed labor agreements and the unfair effect it could have on the ratification process." Nobles thus effectively concedes that he interceded to help ensure that Morella's faction-which favored ratification of the concessionary contract-would prevail over Konop's faction, which opposed the agreement.

Accordingly, we find that Konop has raised a triable issue of fact whether Nobles improperly assisted one union faction over another in violation of the RLA.

3. Threat of Defamation Suit

[28] Konop argues that Nobles engaged in unlawful coercion and intimidation by threatening to file a defamation suit against Konop based on statements on Konop's website. An employer's filing or threatened filing of a lawsuit against an employee concerning union organizing activities may, under certain circumstances, violate the RLA. *See, e.g.,* Diamond Walnut Growers, Inc. v. NLRB, 53 F.3d 1085, 1089-90 (9th Cir.1995) (finding employer's defamation lawsuit against union violated NLRA); GHR Energy Corp., 294 N.L.R.B. 1011, 1014 (1989) (analyzing whether employer's threat to sue employee for defamation violated NLRA), *aff'd,* 924 F.2d 1055 (5th Cir.1991).

[29] Hawaiian does not argue that Nobles would be justified in threatening to sue Konop for defamation. Instead, Hawaiian contends that Konop failed to present sufficient evidence that Nobles ever made such a threat. Nobles stated in his ***886** declaration that he "did mention to Morella that the

gross inaccuracies and lies in the newsletter made by Konop amounted to defamation," but that he "never said that[he] intended to file a lawsuit against Konop."

Morella, however, indicates otherwise. Morella states in his declaration, "Nobles advised me that Konop should be cautioned, or informed, of the possibility of a defamation lawsuit by Nobles." Morella also testified, "[I]t was my impression and conclusion that Nobles intended for me to contact Konop, or take other action, for the purpose of opposing Konop's efforts to seek alternative union representation." Morella then "informed Konop of Mr. Nobles' statements ... regarding caution with respect to a possible lawsuit against Konop for defamation." Konop confirms the same in his declaration. This evidence is sufficient to raise a triable issue of fact whether Nobles threatened to sue Konop for defamation.

Accordingly, we find that Konop has raised a triable issue of fact whether Nobles engaged in coercion and intimidation in violation of the RLA by threatening to sue Konop for defamation.

D. Bench Trial on Retaliation Claim

[30] [31] Konop's retaliation claim under the RLA was tried to the district court. The district court entered judgment against him on this claim, which involved his allegation that Hawaiian violated the RLA when it placed him on sick leave in retaliation for protected labor activities. Konop challenges the district court's judgment on this claim on the ground that his subpoenas for corroborating witnesses were improperly quashed. We review a district court's order quashing subpoenas for an abuse of discretion. *United States v. Berberian*, 767 F.2d 1324, 1324 (9th Cir.1985). A litigant whose subpoenas have been improperly quashed must also show prejudice. *See* *Casino Foods Corp. v. Kraftco Corp.*, 546 F.2d 301, 302 (9th Cir.1976).

[32] There is some dispute whether the district court's remarks in a pretrial hearing constituted an order to quash subpoenas at all. Assuming, however, that the district court did quash Konop's subpoenas, Konop has not suggested what relevant evidence the subpoenaed witnesses might have provided had they been compelled to testify. Konop has consequently failed to show that he was prejudiced. Accordingly, the district court's judgment against Konop on his retaliation claim under the RLA is affirmed.

CONCLUSION

For the foregoing reasons, we affirm the district court's judgment with respect to Konop's Wiretap Act claims and his retaliation claim under the Railway Labor Act. We reverse the district court's judgment on Konop's Stored Communications Act claims and his claims under the Railway Labor Act for interference with organizing activities, wrongful support of a union faction, and coercion and intimidation.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

REINHARDT, Circuit Judge, concurring in part, dissenting in part.

I concur in Part C of Section I of the majority opinion regarding Konop's claims under the Stored Communications Act, and Section II of the majority opinion regarding Konop's claims under the Railway Labor Act. I dissent, however, from Part B of Section I, which holds that the term "intercept" in the Wiretap Act, as applied to electronic communications, refers solely to *contemporaneous* acquisition. I conclude instead that "stored electronic ***887*** communications" are subject to the statute's intercept prohibition as well.

Because I recognize that any reading of the relevant statutory provisions raises some difficulties and introduces some inconsistencies, the question becomes: which reading is more coherent and more consistent with Congressional intent? The majority reasons, and I agree, that stored electronic communications are covered under the definition of "electronic communications" in the Wiretap Act.

However, having made that determination, the majority proceeds to introduce unnecessary confusion and incoherence into the statute by holding that "intercept" encompasses only *contemporaneous* acquisition of electronic communications, and thus that it is not possible to "intercept" a stored electronic communication. We have already rejected just such a contemporaneity requirement with respect to the acquisition of stored wire communications, and there is no justification for reviving it with respect to stored electronic communications. United States v. Smith, 155 F.3d 1051, 1057 n. 11, 1058 (9th Cir.1998).

The contemporaneity requirement for interception first appeared in United States v. Turk, 526 F.2d 654 (5th Cir.1976), in which the Fifth Circuit held that the definition of "intercept" in the statute "require[s] participation by the one charged with an 'interception' in the *contemporaneous* acquisition of the communication through the use of [a] device." 526 F.2d at 658 (emphasis added). In *Turk*, however, the Fifth Circuit was interpreting a version of the Wiretap Act that predates the one at issue in *Smith* and in this case. That version did not cover interception of stored wire communications or of electronic communications at all. The statute was subsequently amended to include electronic communications, stored electronic communications, and stored wire communications in 1986.[FN1] Electronic Communications Privacy Act. Pub.L. No. 99-508. 100 Stat. 1848. Thereafter, in Smith, 155 F.3d 1051, 1057 n. 11, 1058 (9th Cir.1998), this court held, in a case involving the acquisition of stored voicemail messages, that *Turk's* contemporaneity requirement had been "statutorily overruled," at least with respect to wire communications, by the changes in the statute which brought *stored* wire communications within its purview. The *Smith* court reasoned that "intercept" must necessarily include non-contemporaneous acquisition of stored wire communications because Congress had deliberately inserted stored wire communications into the intercept provision despite the fact that contemporaneous acquisition of stored wire communications is, by definition, impossible. 155 F.3d at 1058. To read "intercept" to include only contemporaneous acquisition would, of course, have rendered the intercept prohibition with respect to stored wire communications meaningless. *Id.*

> FN1. The statute was again recently amended, this time to repeal the inclusion of stored wire communications in the definition of wire communication. Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub.L. No. 107-56, § 209, 115 Stat. 272, 283 (enacted October 26, 2001). However we apply here the version that was in effect at the time of the acts in question, Electronic Communications Privacy Act. Pub.L. No. 99-508. 100 Stat. 1848.

Here, the majority's definition of "intercept" renders that prohibition meaningless with respect to stored electronic communications. The majority opinion would result in eliminating stored electronic communications from the purview of the intercept prohibition altogether, because a stored communication cannot be acquired contemporaneously with its transmission-it has already been transmitted. ***888** The majority's reading of the statute simply doesn't work: while explicitly holding that stored electronic communications are within the term "electronic communications" and that the intercept prohibition of the Wiretap Act applies to electronic communications, it also explicitly holds that interception of electronic communications is limited to contemporaneous acquisition, thereby *simultaneously* including and excluding stored electronic communications from the intercept prohibition.

To read a contemporaneity requirement into the definition of "intercept" renders the prohibition against the electronic communication interception largely superfluous, and violates the precept against interpreting one provision of a statute to negate another. *See e.g.*, Sorenson v. Secretary of the Treasury, 475 U.S. 851, 106 S.Ct. 1600, 89 L.Ed.2d 855 (1986) (applying the whole act rule to the Omnibus Budget Reconciliation Act of 1981). Intercept of electronic communications is defined as any "acquisition of the contents of any ... electronic ... communication through the use of any ... device." 18 U.S.C. § 2510(4). The nature of electronic communication is that it spends infinitesmal amounts of time "en route," unlike a phone call. Therefore, in order to "intercept" an electronic communication, one ordinarily obtains one of the copies made en route or at the destination. These copies constitute "stored electronic communications," as acknowledged by the majority. 18 U.S.C. § 2510(17)(A)(" 'electronic storage' means ... any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof"). If intercept is defined as solely contemporaneous acquisition, then in contravention of Congressional intent, at most all acquisitions of the contents of electronic communications would escape the intercept prohibition entirely. Jarrod J. White, Commentary,

E-Mail@Work.Com: Employer Monitoring of Employee E-Mail, 48 *Ala. L.Rev.* 1079, 1083 (1997) ("Following the Fifth Circuit's rationale, [and excluding stored electronic communications from the intercept prohibition] there is only a narrow window during which an E-mail interception may occur-the seconds or milliseconds before which a newly composed message is saved to any temporary location following a send command. Therefore, ... [assuming that stored communications are excluded from the intercept prohibition], interception of E-mail within the prohibition of the ECPA is virtually impossible.").

The majority asserts that it is reasonable that the term "intercept" would describe different conduct with respect to wire communications than with respect to electronic communications because different actions are required to intercept different kinds of communications. This reasoning fails because, although wire communications and electronic communications are quite different, stored wire communications are technologically equivalent to stored electronic communications. Thus it would make little sense to treat them differently. *See* 18 U.S.C. § 2510(1) (defining "wire communication" as including "any *electronic storage* of[wire] communication"). While Congress may not always act sensibly, there is no reason for the majority to presume that it failed to do so in this instance.

The Non-Contemporaneous Acquisition Reading Permits a Coherent Reading of the Wiretap Act and the Stored Communications Act Together, Consistent with Congressional Intent

Congress's clear intent, when amending the statute in 1986, was to regulate *access to* and *acquisition of* stored electronic communications. *See* S.Rep. No. 99-541 at 3-4 (1986), reprinted in 1986 U.S.C.C.A.N. ***889** 3555, 3557-8 (discussing Congressional intent to cover email and computerized recordkeeping systems). The majority's interpretation of the Wiretap Act depends in part on a tortured reading of the Stored Communications Act under which "access to" a communication is equated with "acquisition of" a communication, contrary to clear statutory language. Sections 2701 and 2703 of the Stored Communications Act regulate "access" to facilities where communications are stored and "access" to the communications themselves. The majority, relying on *Steve Jackson Games, Inc. v. United States Secret Serv.*, 36 F.3d 457, 463 (5th Cir.1994) somehow reads these provisions as being analogous to the "intercept" provisions of the Wiretap Act. 236 F.3d at 1044. However, "access" is more properly understood as being *qualitatively* different from "intercept," not *temporally* different, and as constituting a lesser included offense of "intercept." The "access" prohibitions in § 2701, in contrast to those regarding "interception" in § 2511, do not mention at all "acquisition" of the "contents" of any communication, but only "access," authorized and unauthorized, to them. "Access" is not defined in the statute, and therefore courts must apply the ordinary or technical meaning that the word has in the context of electronic communications. "Access" is defined in the Oxford English Dictionary as "[t]he habit or power of getting near or into contact with; entrance, admittance, admission (to the presence or use of) [noun]" and "[t]o gain access to (data, etc., held in a computer or computer-based system, or the system itself) [transitive verb]." As discussed above, "intercept" is defined in the statute as the actual acquisition of the contents of a communication. Given the plain language of the statute, the difference between the prohibition in 18 U.S.C. § 2511 ("intercept") and 18 U.S.C. § 2701 ("access") becomes more than semantic; it indicates that Congress intended that *only* 18 U.S.C. § 2511 prohibit the actual *acquisition* of the contents of a communication.

On the other hand, section 2703 (the structure of which the panel claims supports a "contemporaneous acquisition" reading of the text) sets out the parameters under which governmental authorities can gain "access" to the "contents" of stored electronic communications. That section provides that governmental authorities may obtain a search warrant to compel electronic communication service providers to disclose the contents of stored electronic communications. By its plain terms, it does not provide a judicial means by which government authorities can *independently* intercept or acquire the contents of electronic communications. That is covered under 18 U.S.C. § 2516. Having excluded stored electronic communications from the Wiretap Act, the majority is forced to torture the statutory language of the Stored Communications Act in order to craft a reading of the statutes which accomplishes Congress's intent of establishing procedures by which governmental authorities may directly acquire the contents of stored electronic communications. A reading of the Wiretap Act which includes stored electronic communications under the intercept prohibition provides a plain answer-one that does not require linguistic gymnastics.

Furthermore, contrary to the arguments of Hawaiian Airlines and its amici, the drafting of a separate

act specifically governing the contents of stored electronic communications (Stored Communications Act. 18 U.S.C. §§ 2702-03) was necessary, *even though* stored communications were included in the Wiretap Act. First, the damage caused by computer hackers (also known as "electronic trespassers") was a major concern of Congress in enacting the Electronic Communications Privacy Act and the Stored Communications Act. The ***890** separate provisions prohibiting unauthorized access were found necessary, in addition to the pre-existing prohibitions on interception, because computer hackers often do a great deal of damage to stored communications facilities and stored communications without ever acquiring the contents of those communications. *See United States v. Smith*, 155 F.3d 1051, 1058-59 (9th Cir.1998) (explaining that the Stored Communications Act permits penalties against hackers who put themselves in the position to acquire a communication, but the Wiretap Act penalizes those who go further and acquire the communication); *In re DoubleClick, Inc. Privacy Litigation*, 154 F.Supp.2d 497 at 507(S.D.N.Y. 2001) (finding that Title II of ECPA was aimed at computer hackers); *Sherman & Co. v. Salton Maxim Housewares, Inc.*, 94 F.Supp.2d 817, 820 (E.D.Mich.2000) (explaining that the general purpose of the ECPA was to create a cause of action against computer hackers.); *State Wide Photocopy, Corp. v. Tokai Financial Services, Inc.*, 909 F.Supp. 137, 145 (S.D.N.Y.1995) ("[T]he ECPA was primarily designed to provide a cause of action against computer hackers...."). Hackers often use their unauthorized access to disrupt or prevent authorized access of others to stored communications facilities. *See* 18 U.S.C. § 2701 (prohibiting obtaining, altering or preventing access to wire or electronic communications without authorization). Moreover, the activities of hackers, and the mere potential that they could acquire the contents of electronic or wire communications in storage, create an atmosphere of anxiety in which computer users do not feel confident about the confidentiality of their communications, and productivity is hampered. These were all major concerns of Congress in enacting the Stored Communications Act, concerns which necessitated the drafting of a separate act even though stored electronic communications were already included under the definition of electronic communications.

Second, it is in the nature of electronic communication to be stored (both temporarily and permanently, as Congress indicated in the definition of electronic storage, 18 U.S.C. § 2510(17)), and it is in the nature of the electronic communications industry that electronic communications service providers (defined in 18 U.S.C. § 2510(15)) have possession and control over large amounts of stored electronic communications. Therefore, electronic communications service providers would be an obvious source for law enforcement authorities who seek to obtain the contents of electronic communications. Recognizing that compelling disclosure by these entities would be one means by which government authorities might seek to obtain the contents of communications, Congress added a section setting out the procedures for compelling such disclosure. Michael S. Leib, E Mail and the Wiretap Laws: Why Congress Should Add Electronic Communication to Title III's Statutory Exclusionary Rule and Expressly Reject a "Good Faith" Exception, 34 *Harv. J. on Legis.* 393, 414 (1997). There is no analogous storage of wire communication by wire communication service providers (i.e., telephone companies, also included under 18 U.S.C. § 2510(15)) such that guidelines would be needed on how governmental authorities could compel disclosure of stored wire communications from them.

Third, the Stored Communications Act is necessary to police the unauthorized access to electronic and wire communications facilities that is a necessary antecedent to illegal interception of those communications in storage. Were Congress to prohibit only actual acquisition of the contents of communications in storage, law enforcement would be powerless to do anything about persons who gained unauthorized ***891** access in preparation for interception (i.e., the acquisition of the contents of communications) until such persons had actually accomplished their unlawful mission. Further, because acquisition of the contents of an electronic communication in storage, or a wire communication in electronic storage does not disturb the "original" copy of such communication, actual acquisition of these communications is likely to be much more difficult to detect and prove than unauthorized access to a facility. Therefore it is helpful to law enforcement to have in its arsenal a separate provision governing access.

In sum, a reading of the Wiretap Act that includes stored electronic communications in the statute's "intercept" prohibition is consistent with the nature of the technology at issue, leaves no unexplained statutory gaps, and renders none of the myriad provisions of either the Wiretap Act or the Stored Communications Act superfluous. Under such a reading, the Wiretap Act would prohibit the interception of electronic communications, both stored and en route, and subject violators to serious penalties. It would permit law enforcement to intercept such communications using a court order as indicated in §

2516. (Whether or not it would preserve the use of other less savory techniques is a matter this court is not called upon to decide.) A court order can be obtained by state prosecutors in connection with any one of a number of enumerated crimes, and by any assistant United States attorney for the investigation of any federal felony. Wire communications are treated similarly with only minor exceptions (for example, authorization to intercept wire communications is only available for a finite, though extensive, list of federal crimes); this reading, consistent with Congressional intent as revealed in the legislative history of the statute, rejects the idea that stored electronic communications are afforded a lesser degree of protection from interception than stored wire communications. FN2

FN2. In its interpretation of the term "intercept," the majority relies in part on legislative history from the USA Patriot Act. As the Supreme Court has cautioned, however, " 'the *views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier* one.' " *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980)(quoting *United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 4 L.Ed.2d 334 (1960)). Such subsequent legislative history will "rarely override a *reasonable interpretation* of a statute that can be gleaned from its language and legislative history prior to its enactment." *Id.* at 118 n. 13, 100 S.Ct. 2051 (emphasis added).

Prior Precedent on the Wiretap Act and the Stored Communications Act Does Not Preclude the Non-Contemporaneous Acquisition Reading

This is a case of first impression in this circuit, and there is no binding authority on the regulation of stored electronic communications. There are no Supreme Court cases interpreting the provisions of the Wiretap Act and the Stored Communications Act as they relate to electronic communications, and the court of appeals decisions, in our circuit and others, either do not deal with stored electronic communications, or are superseded by changes in law and technology, or both. *United States v. Turk* predates the addition of the electronic provisions and language to the statute, and therefore is of little relevance. 526 F.2d 654 (5th Cir.1976). More important, its contemporaneity requirement was expressly repudiated in *United States v. Smith*. 155 F.3d 1051, 1057 n. 11, 1058 (9th Cir.1998) ("[T]o the extent that *Turk* stands for a definition of "intercept" that necessarily entails contemporaneity, it has ... been statutorily overruled."). *Steve Jackson Games* is the only circuit court ***892** case that involves stored electronic communications. As discussed above, the Fifth Circuit's reasoning is flawed, as it fails to consider the difference between "access" 18 U.S.C. § 2701 and "intercept" 18 U.S.C. § 2511 and erroneously conflates the terms, reading them both to refer to the acquisition of the contents of a communication. 36 F.3d at 463. Moreover, *Steve Jackson Games* is rendered somewhat obsolete by the growth of the Internet, a phenomenon that the judges deciding that case could not have meaningfully incorporated into their reading of the statute. In particular, it would have been impossible to anticipate the expectations of privacy that people would develop regarding the Internet, expectations that are crucial to interpreting the statutory scheme consistent with Congressional intent to protect privacy interests. The other cases cited by the majority are district court cases, not binding on this court; they also have little persuasive value because they rely on the flawed reasoning of *Steve Jackson Games* and on the contemporaneity requirement that this court has rejected. *See Wesley College v. Pitts*, 974 F.Supp. 375, 386 (D.Del.1997), *aff'd*, 172 F.3d 861 (3d Cir.1998) (affirmed by the Third Circuit in an unpublished disposition, which therefore has no precedential value); *United States v. Reyes*, 922 F.Supp. 818, 836 (S.D.N.Y.1996); *Bohach v. City of Reno*, 932 F.Supp. 1232, 1236-37 (D.Nev.1996). Although this court in *United States v. Smith* correctly recognized the access/intercept distinction, our opinion contained unfortunate dicta regarding electronic communications. 155 F.3d 1051 at 1057. Because the case involved wire, not electronic, communications, those statements are not binding upon us.

Conclusion

In conclusion, because I believe that reading the Wiretap Act to prohibit interception of "stored electronic communications" provides a more coherent construction of the Act and is more consistent with the text of the statute as well as with the Congressional intent underlying both the Wiretap Act and the Stored Communications Act, I respectfully dissent from Part B of Section I of the majority opinion.

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302 F.3d 868, 170 L.R.R.M. (BNA) 2906, 146 Lab.Cas. P 10,096, 19 IER Cases 166, 02 Cal. Daily Op. Serv. 7727, 2002 Daily Journal D.A.R. 9709

Briefs and Other Related Documents (Back to top)

- 2001 WL 34134282 (Appellate Petition, Motion and Filing) Petition for Rehearing En Banc (Aug. 28, 2001)
- 2001 WL 34136723 (Appellate Brief) Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Appellant's Opposition to Petition for Rehearing En Banc (Aug. 28, 2001)
- 2001 WL 34134002 (Trial Motion, Memorandum and Affidavit) Brief in Opposition of Robert C. Konop (Mar. 15, 2001)
- 1999 WL 33631388 (Appellate Brief) Appellant's Reply Brief (May. 06, 1999) Original Image of this Document (PDF)
- 1999 WL 33631394 (Appellate Brief) Brief of Appellant (Mar. 26, 1999) Original Image of this Document (PDF)
- 99-55106 (Docket) (Jan. 20, 1999)

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Briefs and Other Related Documents

United States Court of Appeals,
Fifth Circuit.
STEVE JACKSON GAMES, INCORPORATED, et al., Plaintiffs-Appellants,
v.
UNITED STATES SECRET SERVICE, et al., Defendants,
United States Secret Service and United States of America, Defendants-Appellees.
No. 93-8661.
Oct. 31, 1994.

Operators and users of computer bulletin board brought action against Secret Service and government for violation of federal statutes, arising from Secret Service agents' seizure, pursuant to search warrant, of materials from operator's premises. The United States District Court for the Western District of Texas, Sam Sparks, J., entered judgment in favor of operators and users, 816 F.Supp. 432, and appeal was taken. The Court of Appeals, Rhesa Hawkins Barksdale, Circuit Judge, held that seizure of computer, used to operate electronic bulletin board system, and containing private electronic mail which had been sent to bulletin board, but not read by intended recipients, was not unlawful intercept under Federal Wiretap Act.

Affirmed.

West Headnotes

[1] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1439 k. Computer Communications. Most Cited Cases
(Formerly 372k494.1)

Seizure of computer, used to operate electronic bulletin board system, and containing private electronic mail which had been sent to bulletin board, but not read by intended recipients, was not unlawful intercept under Federal Wiretap Act. 18 U.S.C.A. §§ 2510 et seq., 2511(1)(a).

[2] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1439 k. Computer Communications. Most Cited Cases
(Formerly 372k494.1)

Congress did not intend for "intercept" in Federal Wiretap Act to apply to "electronic communication" when those communications are in "electronic storage." 18 U.S.C.A. § 2510(1, 12, 17).

[3] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases

When construing statute, Court of Appeals does not confine its interpretation to the one portion at issue but, instead, considers statute as a whole.

***458** Peter D. Kennedy, R. James George, Jr., George, Donaldson & Ford, Austin, TX, for appellants.

Sharon Steele, Washington, DC, for amicus curiae Electronic Frontier Foundation.

Scott McIntosh, Barbara Herwig, U.S. Dept. of Justice, Washington, DC, for appellees.

Appeal from the United States District Court for the Western District of Texas.

Before HIGGINBOTHAM, JONES and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

[1] The narrow issue before us is whether the seizure of a computer, used to operate an electronic bulletin board system, and containing private electronic mail which had been sent to (stored on) the bulletin board, but not read (retrieved) by the intended recipients, constitutes an unlawful intercept under the Federal Wiretap Act, 18 U.S.C. § 2510, *et seq.*, as amended by Title I of the Electronic Communications Privacy Act of 1986, Pub.L. No. 99-508, Title I, 100 Stat. 1848 (1986). We hold that it is not, and therefore AFFIRM.

I.

The district court's findings of fact are not in dispute. *See Steve Jackson Games, Inc. v. United States Secret Service*, 816 F.Supp. 432 (W.D.Tex.1993). Appellant Steve Jackson Games, Incorporated (SJG), publishes books, magazines, role-playing games, and related products. Starting in the mid-1980s, SJG operated an electronic bulletin board system, called "Illuminati" (BBS), from one of its computers. SJG used the BBS to post public information about its business, games, publications, and the role-playing hobby; to facilitate play-testing of games being developed; and to communicate with its customers and free-lance writers by electronic mail (E-mail).

Central to the issue before us, the BBS also offered customers the ability to send and receive private E-mail. Private E-mail was stored on the BBS computer's hard disk drive temporarily, until the addressees "called" the BBS (using their computers and modems) and read their mail. After reading their E-mail, the recipients could choose to either store it on the BBS computer's hard drive or delete it. In February 1990, there were 365 BBS users. Among other uses, appellants Steve Jackson, Elizabeth McCoy, William Milliken, and Steffan O'Sullivan used the BBS for communication by private E-mail.

In October 1988, Henry Kluepfel, Director of Network Security Technology (an affiliate Bell Company), began investigating the unauthorized ***459** duplication and distribution of a computerized text file, containing information about Bell's emergency call system. In July 1989, Kluepfel informed Secret Service Agent Foley and an Assistant United States Attorney in Chicago about the unauthorized distribution. In early February 1990, Kluepfel learned that the document was available on the "Phoenix Project" computer bulletin board, which was operated by Loyd Blankenship in Austin, Texas; that Blankenship was an SJG employee; and that, as a co-systems operator of the BBS, Blankenship had the ability to review and, perhaps, delete any data on the BBS.

On February 28, 1990, Agent Foley applied for a warrant to search SJG's premises and Blankenship's residence for evidence of violations of 18 U.S.C. §§ 1030 (proscribes interstate transportation of computer access information) and 2314 (proscribes interstate transportation of stolen property). A search warrant for SJG was issued that same day, authorizing the seizure of, *inter alia,*

[c]omputer hardware ... and computer software ... and ... documents relating to the use of the computer system ..., and financial documents and licensing documentation relative to the computer programs and equipment at ... [SJG] ... which constitute evidence ... of federal crimes.... This warrant is for the seizure of the above described computer and computer data and for the authorization to read information stored and contained on the above described computer and computer data.

The next day, March 1, the warrant was executed by the Secret Service, including Agents Foley and Golden. Among the items seized was the computer which operated the BBS. At the time of the seizure, 162 items of unread, private E-mail were stored on the BBS, including items addressed to the individual appellants. Despite the Secret Service's denial, the district court found that Secret Service personnel or delegates read and deleted the private E-mail stored on the BBS.

Appellants filed suit in May 1991 against, among others, the Secret Service and the United States, claiming, *inter alia,* violations of the Privacy Protection Act, 42 U.S.C. § 2000aa, *et seq.*[FN1]; the Federal Wiretap Act, as amended by Title I of the Electronic Communications Privacy Act (ECPA), 18 U.S.C. §§ 2510- 2521 (proscribes, *inter alia,* the intentional interception of electronic communications); and Title II of the ECPA, 18 U.S.C. §§ 2701- 2711 (proscribes, *inter alia,* intentional access, without authorization, to stored electronic communications).[FN2]

FN1. Section 2000aa(a) provides that it isunlawful for a government officer or employee, in connection with the investigation ... of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication....Among the items seized was a draft of *GURPS Cyberpunk,* a book intended by SJG for immediate publication. It was one of a series of fantasy role-playing game books SJG published. "GURPS" is an acronym for SJG's "Generic Universal Roleplaying System". "Cyberpunk" refers to a science fiction literary genre which became popular in the 1980s, which is characterized by the fictional interaction of humans with technology and the fictional struggle for power between individuals, corporations, and government.

FN2. Kluepfel, the Assistant United States Attorney, and Agents Foley and Golden were also sued. In addition to the statutory claims, appellants also claimed violations of the First and Fourth Amendments to the United States Constitution. And, in September 1992, they added state law claims for conversion and invasion of privacy. Prior to trial, the claims against the individuals were dismissed, and appellants withdrew their constitutional and state law claims.

The district court held that the Secret Service violated the Privacy Protection Act, and awarded actual damages of $51,040 to SJG; and that it violated Title II of the ECPA by seizing stored electronic communications without complying with the statutory provisions, and awarded the statutory damages of $1,000 to each of the individual appellants. And, it awarded appellants $195,000 in attorneys' fees and approximately $57,000 in costs. But, it held that the Secret Service did not "intercept" the E-mail in violation of Title I of the ECPA, 18 U.S.C. § 2511(1)(a), because its acquisition of the contents of the electronic communications was not contemporaneous ***460*** with the transmission of those communications.

II.

As stated, the sole issue is a very narrow one: whether the seizure of a computer on which is stored private E-mail that has been sent to an electronic bulletin board, but not yet read (retrieved) by the recipients, constitutes an "intercept" proscribed by 18 U.S.C. § 2511(1)(a).[FN3]

FN3. Appellants raised two other issues regarding damages, but later advised that they have been settled. And, prior to briefing, the Secret Service dismissed its cross-appeal.

Section 2511 was enacted in 1968 as part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, often referred to as the Federal Wiretap Act. Prior to the 1986 amendment by Title I of the ECPA, it covered only wire and oral communications. Title I of the ECPA extended that coverage to electronic communications.[FN4] In relevant part, § 2511(1)(a) proscribes "intentionally intercept[ing] ... any wire, oral, or electronic communication", unless the intercept is authorized by court order or by other exceptions not relevant here. Section 2520 authorizes, *inter alia*, persons whose electronic communications are intercepted in violation of § 2511 to bring a civil action against the interceptor for actual damages, or for statutory damages of $10,000 per violation or $100 per day of the violation, whichever is greater. 18 U.S.C. § 2520.[FN5]

FN4. An "electronic communication" is defined as:any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include-(A) the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;(B) any wire or oral communication;(C) any communication made through a tone-only paging device; or(D) any communication from a tracking device (as defined in section 3117 of this title)....18 U.S.C. § 2510(12).

FN5. Title I of the ECPA increased the statutory damages for unlawful interception from $1,000 to $10,000. *See Bess v. Bess*, 929 F.2d 1332, 1334 (8th Cir.1991). On the other hand, as noted, Title II authorizes an award of "the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case ... less than the sum of $1000". 18 U.S.C. § 2707(c). As discussed, the individual appellants each received Title II statutory damages of $1,000.

The Act defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). The district court, relying on our court's interpretation of intercept in *United States v. Turk*, 526 F.2d 654 (5th Cir.), *cert. denied*, 429 U.S. 823, 97 S.Ct. 74, 50 L.Ed.2d 84 (1976), held that the Secret Service did not intercept the communications, because its acquisition of the contents of those communications was not contemporaneous with their transmission. In *Turk*, the government seized from a suspect's vehicle an audio tape of a prior conversation between the suspect and Turk. (Restated, when the conversation took place, it was not recorded contemporaneously by the government.) Our court held that replaying the previously recorded conversation was not an "intercept", because an intercept "require[s] participation by the one charged with an 'interception' in the contemporaneous acquisition of the communication through the use of the device". *Id.* at 658.

Appellants agree with *Turk*'s holding, but contend that it is not applicable, because it "says nothing about government action that both *acquires* the communication prior to its delivery, and *prevents* that delivery." (Emphasis by appellants.) Along that line, appellants note correctly that *Turk*'s interpretation of "intercept" predates the ECPA, and assert, in essence, that the information stored on the BBS could still be "intercepted" under the Act, even though it was not in transit. They maintain that to hold otherwise does violence to Congress' purpose in enacting the ECPA, to include providing protection for E-mail and bulletin boards. For the most part, appellants fail to even discuss the pertinent provisions of the Act, much less address their application. Instead, they ***461** point simply to Congress' intent in enacting the ECPA and appeal to logic (i.e., to seize something before it is received is to intercept it).

But, obviously, the language of the Act controls. In that regard, appellees counter that "Title II, not Title I, ... governs the seizure of stored electronic communications such as unread e-mail messages", and note that appellants have recovered damages under Title II. Understanding the Act requires understanding and applying its many technical terms as defined by the Act, as well as engaging in painstaking, methodical analysis. As appellees note, the issue is not whether E-mail can be "intercepted"; it can. Instead, at issue is what constitutes an "intercept".

Prior to the 1986 amendment by the ECPA, the Wiretap Act defined "intercept" as the "aural acquisition" of the contents of wire or oral communications through the use of a device. 18 U.S.C. § 2510(4) (1968). The ECPA amended this definition to include the "aural *or other* acquisition of the contents of ... wire, *electronic,* or oral communications...." 18 U.S.C. § 2510(4) (1986) (emphasis added for new terms). The significance of the addition of the words "or other" in the 1986 amendment to the definition of "intercept" becomes clear when the definitions of "aural" and "electronic communication" are examined; electronic communications (which include the non-voice portions of wire communications), as defined by the Act, cannot be acquired aurally.

Webster's Third New International Dictionary (1986) defines "aural" as "of or relating to the ear" or "of or relating to the sense of hearing". *Id.* at 144. And, the Act defines "aural transfer" as "a transfer containing the human voice at any point between and including the point of origin and the point of reception." 18 U.S.C. § 2510(18). This definition is extremely important for purposes of understanding the definition of a "wire communication", which is defined by the Act as

> any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) ... *and such term includes any electronic storage of such communication.*

18 U.S.C. § 2510(1) (emphasis added). In contrast, as noted, an "electronic communication" is defined as "any *transfer* of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system ... but does not include ... any wire or oral communication...." 18 U.S.C. § 2510(12) (emphasis added).

[2] Critical to the issue before us is the fact that, unlike the definition of "wire communication", *the definition of "electronic communication" does not include electronic storage of such communications. See* 18 U.S.C. § 2510(12). See note 4, *supra.*[FN6] "Electronic storage" is defined as

> FN6. Wire and electronic communications are subject to different treatment under the Wiretap Act. The Act's exclusionary rule, 18 U.S.C. § 2515, applies to the interception of wire communications, including such communications in electronic storage, *see* 18 U.S.C. § 2510(1), but not to the interception of electronic communications. *See* 18 U.S.C. § 2518(10)(a); *United States v. Meriwether,* 917 F.2d 955, 960 (6th Cir.1990); S.Rep. No. 99-541, 99th Cong., 2d Sess. 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3577. And, the types of crimes that may be investigated by means of surveillance directed at electronic communications, 18 U.S.C. § 2516(3) ("any federal felony"), are not as limited as those that may be investigated by means of surveillance directed at wire or oral communications. *See* 18 U.S.C. § 2516(1) (specifically listed felonies).

> (A) any *temporary,* intermediate *storage* of a wire or *electronic communication incidental to the electronic transmission thereof;* and
>
> (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication....

18 U.S.C. § 2510(17) (emphasis added). The E-mail in issue was in "electronic storage". Congress' use of the word "transfer" in the definition of "electronic communication", and its omission in that definition of the phrase "any electronic storage of such communication" ***462** (part of the definition of "wire communication") reflects that Congress did not intend for "intercept" to apply to "electronic communications" when those communications are in "electronic storage".[FN7]

> FN7. Stored wire communications are subject to different treatment than stored electronic communications. Generally, a search warrant, rather than a court order, is required to obtain access to the contents of a stored electronic communication. *See* 18 U.S.C. §

2703(a). But, compliance with the more stringent requirements of § 2518, including obtaining a court order, is necessary to obtain access to a stored wire communication, because § 2703 expressly applies only to stored *electronic* communications, not to stored *wire* communications. *See* James G. Carr, *The Law of Electronic Surveillance,* § 4.10, at 4-126-4-127 (1994) (citing H.R.Rep. No. 99-647, 99th Cong., 2d Sess. 67-68 (1986)).

We could stop here, because "[i]ndisputably, the goal of statutory construction is to ascertain legislative intent through the plain language of a statute-without looking to legislative history or other extraneous sources". *Stone v. Caplan (Matter of Stone),* 10 F.3d 285, 289 (5th Cir.1994). But, when interpreting a statute as complex as the Wiretap Act, which is famous (if not infamous) for its lack of clarity, *see, e.g., Forsyth v. Barr,* 19 F.3d 1527, 1542-43 (5th Cir.), *cert. denied,* 513 U.S. 871, 115 S.Ct. 195, 130 L.Ed.2d 127 (1994), we consider it appropriate to note the legislative history for confirmation of our understanding of Congress' intent. *See id.* at 1544.

As the district court noted, the ECPA's legislative history makes it crystal clear that Congress did not intend to change the definition of "intercept" as it existed at the time of the amendment. *See* 816 F.Supp. at 442 (citing S.Rep. No. 99-541, 99th Cong., 2d Sess. 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3567). The Senate Report explains:

Section 101(a)(3) of the [ECPA] amends the definition of the term "intercept" in current section 2510(4) of title 18 to cover electronic communications. The definition of "intercept" under current law is retained with respect to wire and oral communications except that the term "or other" is inserted after "aural." This amendment clarifies that it is illegal to intercept the nonvoice portion of a wire communication. For example, it is illegal to intercept the data or digitized portion of a voice communication.

1986 U.S.C.C.A.N. at 3567.

[3] Our conclusion is reinforced further by consideration of the fact that Title II of the ECPA clearly applies to the conduct of the Secret Service in this case. Needless to say, when construing a statute, we do not confine our interpretation to the one portion at issue but, instead, consider the statute as a whole. *See, e.g., United States v. McCord,* 33 F.3d 1434, 1444 (5th Cir.1994) (citing N. Singer, 2A *Sutherland Statutory Construction,* § 46.05, at 103 (5th ed. 1992)).

Title II generally proscribes unauthorized access to stored wire or electronic communications. Section 2701(a) provides:

Except as provided in subsection (c) of this section whoever-

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility;

and thereby obtains, alters, or prevents authorized access to a wire or electronic communication *while it is in electronic storage in such system* shall be punished....

18 U.S.C. § 2701(a) (emphasis added).

As stated, the district court found that the Secret Service violated § 2701 when it

intentionally accesse[d] without authorization a facility [the computer] through which an electronic communication service [the BBS] is provided ... and thereby obtain[ed] [and] prevent[ed] authorized access [by appellants] to a [n] ... electronic communication while it is in electronic storage in such system.

18 U.S.C. § 2701(a). The Secret Service does not challenge this ruling. We find no indication in either the Act or its legislative history that Congress intended for conduct ***463** that is clearly prohibited

by Title II to furnish the basis for a civil remedy under Title I as well. Indeed, there are persuasive indications that it had no such intention.

First, the substantive and procedural requirements for authorization to intercept electronic communications are quite different from those for accessing stored electronic communications. For example, a governmental entity may gain access to the contents of electronic communications that have been in electronic storage for less than 180 days by obtaining a warrant. *See* 18 U.S.C. § 2703(a). But there are more stringent, complicated requirements for the interception of electronic communications; a court order is required. *See* 18 U.S.C. § 2518.

Second, other requirements applicable to the interception of electronic communications, such as those governing minimization, duration, and the types of crimes that may be investigated, are not imposed when the communications at issue are not in the process of being transmitted at the moment of seizure, but instead are in electronic storage. For example, a court order authorizing interception of electronic communications is required to include a directive that the order shall be executed "in such a way as to minimize the interception of communications not otherwise subject to interception". 18 U.S.C. § 2518(5). Title II of the ECPA does not contain this requirement for warrants authorizing access to stored electronic communications. The purpose of the minimization requirement is to implement "the constitutional obligation of avoiding, to the greatest possible extent, seizure of conversations which have no relationship to the crimes being investigated or the purpose for which electronic surveillance has been authorized". James G. Carr, *The Law of Electronic Surveillance,* § 5.7(a) at 5-28 (1994).

Obviously, when intercepting electronic communications, law enforcement officers cannot know in advance which, if any, of the intercepted communications will be relevant to the crime under investigation, and often will have to obtain access to the contents of the communications in order to make such a determination. Interception thus poses a significant risk that officers will obtain access to communications which have no relevance to the investigation they are conducting. That risk is present to a lesser degree, and can be controlled more easily, in the context of stored electronic communications, because, as the Secret Service advised the district court, technology exists by which relevant communications can be located without the necessity of reviewing the entire contents of all of the stored communications. For example, the Secret Service claimed (although the district court found otherwise) that it reviewed the private E-mail on the BBS by use of key word searches.

Next, as noted, court orders authorizing an intercept of electronic communications are subject to strict requirements as to duration. An intercept may not be authorized "for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days". 18 U.S.C. § 2518(5). There is no such requirement for access to stored communications.

Finally, as also noted, the limitations as to the types of crimes that may be investigated through an intercept, *see* 18 U.S.C. § 2516, have no counterpart in Title II of the ECPA. *See, e.g.,* 18 U.S.C. § 2703(d) (court may order a provider of electronic communication service or remote computing service to disclose to a governmental entity the contents of a stored electronic communication on a showing that the information sought is "relevant to a legitimate law enforcement inquiry").

In light of the substantial differences between the statutory procedures and requirements for obtaining authorization to intercept electronic communications, on the one hand, and to gain access to the contents of stored electronic communications, on the other, it is most unlikely that Congress intended to require law enforcement officers to satisfy the more stringent requirements for an intercept in order to gain access to the contents of stored electronic communications. FN8

FN8. The ECPA legislative history's explanation of the prohibitions regarding disclosure also persuades us of the soundness of *Turk*'s interpretation of "intercept" and our understanding of the distinctions Congress intended to draw between communications being transmitted and communications in electronic storage. In describing Title II's prohibitions against disclosure of the contents of stored communications, the Senate Report points out that § 2702(a) (part of Title II) "generally prohibits the provider of a wire or electronic communication service to the public from knowingly divulging the contents of any communication *while in electronic storage* by that service to any person other than the

addressee or intended recipient." S.Rep. No. 99-541, 97th Cong. 2nd Sess. 37, 1986 U.S.C.C.A.N. 3555, 3591 (emphasis added). It then goes on to state that § 2511(3) of the Wiretap Act, as amended by Title I of the ECPA, "prohibits such a provider from divulging the contents of a communication *while it is in transmission*". *Id.* (emphasis added).

***464** At oral argument, appellants contended (for the first time) that Title II's reference in § 2701(c) to § 2518 (which sets forth the procedures for the authorized interception of wire, oral, or electronic communications) reflects that Congress intended considerable overlap between Titles I and II of the ECPA.[FN9] As stated, § 2701(a) prohibits unauthorized access to stored wire or electronic communications. Subsection (c) of § 2701 sets forth the exceptions to liability under subsection (a), which include conduct authorized:

FN9. It goes without saying that we generally will not consider issues raised for the first time at oral argument. For this rare exception, the parties, as ordered, filed supplemental briefs on this point.

(1) by the person or entity providing a wire or electronic communications service;

(2) by a user of that service with respect to a communication of or intended for that user; or

(3) in section 2703, 2704 or *2518* of this title.

18 U.S.C. § 2701(c) (emphasis added).[FN10]

FN10. Section 2703 sets forth the requirements for governmental access to the contents of *electronic* (but not wire) communications. For electronic communications that have been in electronic storage for 180 days or less, the government can gain access to the contents pursuant to a federal or state warrant. 18 U.S.C. § 2703(a). For communications that are maintained by a remote computing service and that have been in storage for more than 180 days, the government can gain access by obtaining a warrant, by administrative or grand jury subpoena, or by obtaining a court order pursuant to § 2703(d). 18 U.S.C. § 2703(b).Section 2704 also deals only with *electronic* communications; it provides, *inter alia*, that a governmental entity may include in its subpoena or court order a requirement that the service provider create and maintain a duplicate of the contents of the electronic communications sought. 18 U.S.C. § 2704.

Appellants overemphasize the significance of this reference to § 2518. As discussed in notes 6-7, *supra*, it is clear that Congress intended to treat wire communications differently from electronic communications. Access to stored electronic communications may be obtained pursuant to a search warrant, 18 U.S.C. § 2703; but, access to stored wire communications requires a court order pursuant to § 2518. Because § 2701 covers both stored wire and electronic communications, it was necessary in subsection (c) to refer to the different provisions authorizing access to each.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

C.A.5 (Tex.),1994.
Steve Jackson Games, Inc. v. U.S. Secret Service
36 F.3d 457

Briefs and Other Related Documents (Back to top)

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• 1994 WL 16125534 (Appellate Brief) Brief for the Appellees (Apr. 13, 1994) Original Image of this Document (PDF)

• 1994 WL 16125532 (Appellate Brief) Brief for Amicus Curiae Electronic Frontier Foundation, Inc. the Society for Electronic Access Intercon Systems Corporation (Mar. 11, 1994) Original Image of this Document (PDF)

• 1993 WL 13098799 (Appellate Brief) Brief for Appellants (Feb. 16, 1993) Original Image of this Document (PDF)

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932 F.Supp. 1232, 65 USLW 2159, 11 IER Cases 1707

United States District Court,
D. Nevada.
John BOHACH and Jon Catalano, Plaintiffs,
v.
The CITY OF RENO, Jim Weston, Kim Gibson and Robert McDonald, Defendants.
No. CV-N-96-403-ECR.
July 23, 1996.

Claiming violations of Fourth Amendment and wiretap statutes, police officers sought to halt investigation into their alleged misuse of department's computerized paging system. The District Court, Edward C. Reed, Jr., J., held that: (1) officers had no reasonable expectation of privacy; (2) no interception occurred; and (3) city was provider of service and thus could do as it wished with respect to access to messages stored on computer.

Preliminary injunction denied.

West Headnotes

[1] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1440 k. Persons Concerned; Consent. Most Cited Cases
(Formerly 372k495)

Police officers did not have reasonable expectation of privacy in their use of the computerized paging system; all messages were recorded and stored, not because anyone was "tapping" the system, but simply because that was integral part of the technology, which stored messages in central computer until they were retrieved by, or sent to, the intended recipient, transmission from user's keyboard to computer was essentially electronic mail, chief had notified all users that their messages would be "logged on the network" and that certain types of messages were banned from the system, and police stations often record all outgoing and incoming telephone calls. U.S.C.A. Const.Amend. 4.

[2] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1434 k. Wiretapping in General. Most Cited Cases
(Formerly 372k493)

Messages sent on police departments computerized paging system were "electronic communications" rather than "wire communications" or "oral communications" for purposes of wiretap statutes. 18 U.S.C.A. § 2510(1, 2, 12, 18).

[3] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1436 k. In General. Most Cited Cases
(Formerly 372k494.1)

Electronic communication may be put into electronic storage, but storage is not itself part of the communication; and wiretap statutes distinguish "interception" of electronic communication at time of transmission from the retrieval of communication after it has been put into electronic storage. 18 U.S.C.A. §§ 2510-2522, 2701-2711.

[4] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1437 k. Telephone Communications. Most Cited Cases
(Formerly 372k494.1)

372 Telecommunications KeyCite Notes
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1439 k. Computer Communications. Most Cited Cases
(Formerly 372k494.1)

No computer or telephone lines were tapped, no conversations were picked up by hidden microphones, and no duplicate pager was "cloned" to tap into messages intended for another recipient, so that there was no "interception" when messages sent on police department's computerized paging system were stored in computer and later retrieved.

[5] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1440 k. Persons Concerned; Consent. Most Cited Cases
(Formerly 372k495)

City acted lawfully when, months after messages were sent over police department's computerized paging system, it accessed and retrieved them from storage in the computer, as city was "provider" of the electronic communications service where department's terminals, computer and software, and pagers it issued to its personnel were what provided those users with ability to send or receive electronic communications; providers can do as they wish with respect to access. 18 U.S.C.A. § 2701(c)(1).

*1233 Robert R. Hager, Reno, NV, Everett L. Bobbitt, San Diego, CA, for plaintiffs.

Carolyn Cramer and Karen Fraley, Deputy City Attorneys, Police Department, Reno, NV, for defendants.

ORDER

EDWARD C. REED, Jr., District Judge.

Mr. Bohach and Mr. Catalano are officers of the Reno Police Department. In early 1996, they sent messages to one another, and to another member of the Department, over the Department's "Alphapage" message system. Faced with an internal affairs investigation based on the contents of those messages, they filed this lawsuit, claiming that both the storage of the messages by the Department's computer network, and their subsequent retrieval from the computer's files, were violations of the federal wiretapping statutes and of their constitutional right to privacy. They sought to stop the investigation and to bar any disclosure of the contents of the messages. Doc. # 1. As they were to be interrogated almost immediately, we issued a temporary restraining order. Doc. # 4. After a hearing, we dissolved the restraining order and refused to issue a preliminary injunction. Doc. # 18.

Officers Bohach and Catalano have taken an interlocutory appeal and ask that the court's decision denying the injunction be suspended under Rule 62(c). That amounts to a request that their motion for an injunction, having been denied, in effect be granted pending resolution of the appeal. Doc. # 19. This would bar the Reno Police Department from conducting an internal affairs investigation, and interference by a federal court in the internal operations of a state or local government is an exceptional matter. We therefore gave the City an opportunity to respond to the plaintiffs' Rule 62 motion, and it has done so. Doc. # 28.

I. *Facts*

According to Patricia Marcuerquiaga, the Reno Police Department's computer administrator, "Alphapage" is a software program, installed on the Reno Police Department's Local Area Network ("LAN") computer system, which allows the transmission of brief alphanumeric messages to visual display pagers. *See* Doc. # 13, Exh. A. (Such pagers thus differ from the more familiar "tone-only" variety, which merely emit a " 'beep' or other signal to inform the user that a message ***1234** is waiting." 1 Clifford S. Fishman & Anne T. McKenna, *Wiretapping and Eavesdropping* § 3:23 (2d ed. 1995).) The software, formally styled the "Alphapage Media Notification System," was installed on the system in mid-1994. According to a standing order issued at that time by Richard Kirkland, who was then Chief of the Reno Police Department, Doc. # 13 Exh. E, the purpose was to allow the broadcast of "mini news releases" and other "timely information" to the media by means of the pagers (between 40 and 70 pagers were then held by members of the press) and thus to free up the Department's regular telephone lines. The order warned all users that "[e]very Alphapage message is logged on the network," and prohibited some types of messages (e.g., those containing comment on Department policy, and those whose contents violated the Department's anti-discrimination policy).

The system's mechanical details are fairly simple, at least from the user's standpoint. Alphanumeric or voice messages can be sent on the Alphapage system by telephone, by "stand-alone" keyboard, or by means of the LAN computer system. We pass over the first two methods of transmission and the matter of voice messages. All the messages at issue in this case were alphanumeric (no human voice was involved). And all, it seems, were sent to the recipient's pager from a computer terminal, rather than by telephone or "stand-alone" keyboard; we assume that this is so because the latter methods of transmission, according to the City's expert, would have left no permanent record in the computer.

Use of the Alphapage system by means of the computer system proceeds roughly as follows. The user logs on to any Reno Police Department computer terminal and selects Alphapage from the menu of available functions, and then selects, from a list of all persons to whom pagers have been issued, the name of the person to whom the message is to be sent. The user then types the message and hits the "send" key. The message is sent to the computer system's "Inforad Message Directory," where it is stored in a server file, and the user receives a message on the computer screen indicating that the page is being processed. The computer then dials the commercial paging company, sends the message to the company by modem, and disconnects. The user receives a "page sent" message on the computer

screen, and the paging company takes over, sending the message to the recipient pager by radio broadcast.

II. *Fourth amendment*

[1] Officers Bohach and Catalano can succeed on their § 1983 fourth amendment claim only if, at a minimum, they demonstrate that they had a reasonable expectation of privacy in their use of the Alphapage system. We assume that they did indeed have a subjective expectation of privacy, if only because we cannot believe that, had they thought otherwise, they would ever have sent over the system the sorts of messages they did send. The question is whether their expectation was objectively reasonable. Based on the evidence now available, we think that is most unlikely.

To begin with, all messages are recorded and stored not because anyone is "tapping" the system, but simply because that's how the system works. It is an integral part of the technology, and in this respect Alphapage is like most pager systems, which store messages in a central computer until they are retrieved by, or sent to, the intended recipient.[FN1] Moreover, while one phase of an Alphapage transmission (from the pager company to the recipient pager) may involve a radio broadcast, the earlier phase at issue here (from the user's keyboard to the computer) is essentially electronic mail-and e-mail messages are, by definition, stored in a routing computer.[FN2]

FN1. *See* Fishman, *Wiretapping, supra,* § 3:23 at 3-30 (" '[d]isplay' pagers are equipped with screens that can display visual messages.... The person seeking to make contact with the user is instructed to provide a message ...; this message is stored by the paging company's computer until it can be read directly by the user").

FN2. How many employees understand that this is so is unclear. *See* Larry O. Natt Gantt II, *An Affront to Human Dignity: Electronic Mail Monitoring in the Private Sector Workplace,* 8 Harv.J.L. & Tech. 345, 349 (1995) ("[m]any employees remain unaware that ... the central computer routing the messages stores the transmission in unencrypted plain text files, available to the service provider whether that be a third-party common carrier or the employer itself"); *but see* Laurie Thomas Lee, *Watch Your E-Mail! Employee E-Mail Monitoring and Privacy Law in the Age of the "Electronic Sweatshop",* 28 J. Marshall L.Rev. 139, 148 (1994) ("an employee's privacy interest in E-mail messages" would likely "fail the 'expectation of privacy' test since most users probably realize that a system administrator could have access to their E-mail").

***1235** That only a diminished expectation of privacy would be reasonable in this case is also suggested by then-Chief of Police Kirkland's order, issued when Alphapage was first installed and long before the messages in this case were sent, notifying all users that their messages would be "logged on the network" and that certain types of messages (e.g., those violating the Department's antidiscrimination policy) were banned from the system. Now, that is not the same thing as saying that the contents of all messages will be recorded and retained, but it suggests that one should expect less privacy on Alphapage than on, say, a private telephone line. We note, also, that Alphapage is accessible to anyone with access to, and a working knowledge of, the Department's computer system. No special password or clearance is needed. The current Chief of the Reno Police Department, James Weston, testified that the Department's janitor, if he had general access to the computer system, could roam at will through Alphapage.

Finally, and more generally, we note that police stations often record all outgoing and incoming phone calls, "for a variety of reasons: to make sure that their dispatches are accurate, to verify information, and to keep a log of emergency and nonemergency calls." Fishman, *supra,* § 2:38 & n. 28 (collecting cases); *see In re State Police Litigation,* 888 F.Supp. 1235, 1262-66 (D.Conn.1995); *George v. Carusone,* 849 F.Supp. 159, 164 (D.Conn.1994). This may or may not violate the wiretapping statutes, depending upon how it is done. For fourth amendment purposes, however, the point is that the practice is part of the "ordinary course of business" for police departments, and it is all the more reasonable in this case in light of Alphapage's purpose and limitations. Unlike a telephone, the system is not designed to communicate with the public generally. It was installed to allow communications among

police personnel, and between police personnel and the press, about police matters; that it can be used to send private communications between police personnel is incidental to its primary function. Further, unlike a telephone line, Alphapage can be used to communicate only with a recipient who has an Alphapage pager, i.e., a member of the Department or the press. So, while officers Bohach and Catalano attempt liken their communications to private telephone calls, we think that some aspects of the system (its primary though not exclusive purpose, the restrictions placed on the contents of messages, the limited number of persons with whom one can communicate using it, and the fact that police departments routinely and properly record their communications with the public) suggest that one should expect, when using it, less privacy than one might expect when, say, making a private telephone call, even from a police station.

III. *Statutory claims*

[2] [3] The federal wiretapping statutes cover "wire," "oral" and "electronic" communications. The messages at issue here were "electronic" communications within the meaning of 18 U.S.C. § 2510(12). (They did not involve a human voice and thus were not "wire" or "oral" communications. *See* § 2510(1), (2), (18).) An "electronic communication" consists of the "transfer" of the signals, data, and other items listed at § 2510(12), but does not include their "electronic storage." An electronic communication may be put into electronic storage, but the storage is not itself a part of the communication. *Steve Jackson Games, Inc. v. United States Secret Service,* 36 F.3d 457, 461-62 (5th Cir.1994); *compare* § 2510(1) (a "wire communication" is both a transfer *and* electronic storage of the communication). The statutes therefore distinguish the "interception" of an electronic communication at the time of transmission from the retrieval of ***1236** such a communication after it has been put into "electronic storage." Interceptions are covered by §§ 2510-22, and access to information in electronic storage by §§ 2701-11.[FN3]

FN3. *See* Thomas R. Greenberg, Comment, *E-Mail and Voice Mail: Employee Privacy and the Federal Wiretap Statute,* 44 Am.U.L.Rev. 219, 247-48 (1994) ("the distinction between the terms 'intercept' and 'access' ... is critical when a transmitted communication is later electronically stored.... This is the case with both E-mail and voice mail messages, both of which have a transmission phase and a storage phase. During the transmission phase, any protection against unlawful interception ... is governed by § 2511. On arrival in storage, the same messages are subject to § 2701"); *see also* Gantt, *supra,* at 355; Julia Turner Baumhart, *An Employer's Right to Read Employee E-Mail: Protecting Property or Personal Prying?,* 8 Lab.Law. 923, 929 (1992).

[4] Section 2511(1)(a) forbids, among other things, the interception of electronic communications. An "interception" is the "acquisition of the contents of any ... electronic ... communication through the use of any electronic, mechanical or other device." § 2510(4). One might ask how any "interception," as the word is usually understood, could be thought to have occurred here. After all, no computer or phone lines have been tapped, no conversations picked up by hidden microphones, no duplicate pager "cloned" to tap into messages intended for another recipient. *Compare Brown v. Waddell,* 50 F.3d 285 (4th Cir.1995) (clone pagers); *Jackson v. State,* 636 So.2d 1372 (Fla.Dist.Ct.App.1994), *aff'd* 650 So.2d 24 (Fla.1995) (same).

This view is supported by both the statute and the nature of the pager system's operation. To begin with, we think no one would object if the computer were just a passive conduit for a communication, on its way from the sender's keyboard to the pager company and on to recipient's pager. After all, if the computer received an electronic communication from a terminal and passed it on to the pager company, but did *not* store or otherwise record its contents, it would not have acquired "information concerning the [communication's] substance, purport, or meaning," and therefore no "intercept" would have taken place. (And if there were an intercept, consent would likely be implied under § 2511(2)(c), for one who sends a message using a computer surely must understand that the message will pass through the computer.)

Indeed, we do not understand the plaintiffs to object to the mere passage of their messages through the computer. Their complaint, as we understand it, is that the computer stored (or recorded, or downloaded) the contents of those messages. And that, we think, is where their argument breaks down. The computer's storage of an electronic communication, whether that storage was "temporary" and "intermediate" and "incidental to" its impending "electronic transmission," or more permanent storage for backup purposes, was "electronic storage." An "electronic communication," by definition, cannot be "intercepted" when it is in "electronic storage," because only "communications" can be "intercepted," and, as the Fifth Circuit held in *Steve Jackson Games*, the "electronic storage" of an "electronic communication" is by definition not part of the communication. The treatment of messages in "electronic storage" is governed by §§ 2701-11, not by the restrictions on "interception" set out at §§ 2501-22.

[5] This leads us to the plaintiffs' claim that the City acted unlawfully when, months after the messages were sent, it accessed and retrieved them from storage in the computer. The problem with the claim is simple. The City is the "provider" of the "electronic communications service" at issue here: the Reno Police Department's terminals, computer and software, and the pagers it issues to its personnel, are, after all, what provide those users with "the ability to send or receive" electronic communications. But § 2701(c)(1) allows service providers to do as they wish when it comes to accessing communications in electronic storage. Because the City is the provider of the "service," neither it nor its employees can be liable under § 2701.

IV. *Conclusion*

The plaintiffs have not established that they had an objectively reasonable expectation of privacy in the messages at issue. To the extent that the computer acted as a mere ***1237*** conduit of their messages to one another, we do not understand the plaintiffs to complain, and in any event we that think no "interception" occurred; even if there had been an interception, we would likely find implied consent in light of the plaintiffs' decision to send those messages via the computer. We understand the plaintiffs' real complaint to be that their messages were recorded and stored in, and later retrieved from, the computer. But the initial act of storage was "electronic storage," and the applicable statutes are therefore §§ 2701-11 rather than §§ 2501-22. Under those statutes, the City, as the system provider, was free to access the stored messages as it pleased. The injunction was properly denied, and there is no reason to suspend that denial pending resolution of the plaintiffs' appeal.

IT IS THEREFORE HEREBY ORDERED that the plaintiffs' **motion (Doc. # 19)** pursuant to Fed.R.Civ.P. 62 is **DENIED.**

IT IS FURTHER ORDERED that the court's prior **order (Doc. # 21),** enjoining the City's actions pending further order of this court, is **VACATED,** and the City is free to proceed.

D.Nev.,1996.
Bohach v. City of Reno
932 F.Supp. 1232, 65 USLW 2159, 11 IER Cases 1707

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922 F.Supp. 818, 64 USLW 2484

Motions, Pleadings and Filings

United States District Court,
S.D. New York.
UNITED STATES of America, Plaintiff,
v.
Jose REYES, Francisco Medina, and Thomas Rodriguez, Defendants.
No. S2 94 CR 872 (SAS).
Jan. 3, 1996.

Defendant filed pretrial motions seeking various forms of relief, and codefendant joined in motions to the extent that they affected him. The District Court, Scheindlin, J., held that: (1) entry into defendant's hotel room by agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) was unlawful; (2) information in affidavits that supported issuance of search warrant was stale and misleading, so there was no probable cause to support the warrant; (3) good faith exception to exclusionary rule did not apply; (4) memory of pagers that were lawfully seized could be accessed to obtain numbers and messages; (5) turning on pager that was not lawfully seized was unlawful seizure; (6) pressing button on pager to access its memory is not an "interception" within meaning of Electronic Communications Privacy Act (ECPA); (7) exclusion of evidence is not remedy for ECPA violation; (8) defendant's statements, which were made after being held in custody for 43 hours while awaiting arraignment, were voluntary; (9) statute providing harsher sentence for crack cocaine than for powder cocaine was not unconstitutionally vague; (10) indictment reference to defendant's "crew" was inadmissible; (11) defendants were not yet entitled to *Wade* hearing; (12) indictment would not be consolidated with related case; and (13) defendant's case would not be severed from codefendant's case.

Motions to suppress granted in part and denied in part; motion for consolidation or severance denied.

West Headnotes

[1] KeyCite Notes

⇦349 Searches and Seizures
⇦349V Waiver and Consent
⇦349k173 Persons Giving Consent
⇦349k176 k. Hotels and Motels. Most Cited Cases

Hotel employee may not provide lawful consent to police entry into hotel room of guest.

[2] KeyCite Notes

⇦349 Searches and Seizures
⇦349III Execution and Return of Warrants
⇦349k143 Manner of Entry; Warning and Announcement
⇦349k143.1 k. In General. Most Cited Cases

Statutory requirement that law enforcement agents with search warrant be refused admittance before they can force an entry does not require an affirmative refusal, but is satisfied when circumstances permit agents to reasonably infer that they have been refused admittance. 18 U.S.C.A. §

3109.

[3] KeyCite Notes

⇦349 Searches and Seizures
⇦349III Execution and Return of Warrants
⇦349k143 Manner of Entry; Warning and Announcement
⇦349k143.1 k. In General. Most Cited Cases

Agents of Bureau of Alcohol, Tobacco, and Firearms (ATF) could not have reasonably believed that they had been refused admittance to defendant's hotel room, and thus their entry was illegal and fruits of search had to be suppressed, where one agent testified that she screamed her announcement at hotel room door and also telephoned room and did not receive response, but there was conflicting testimony about whether television in room was on, about how loud television was if it was on, and about time of day that search was conducted. 18 U.S.C.A. § 3109.

[4] KeyCite Notes

⇦349 Searches and Seizures
⇦349II Warrants
⇦349k121 Time for Application or Issuance; Staleness
⇦349k121.1 k. In General. Most Cited Cases

In determining whether probable cause exists, magistrate judge is required to assess whether information adduced in application appears to be current, or true at the time of application, or whether instead it has become stale.

[5] KeyCite Notes

⇦349 Searches and Seizures
⇦349II Warrants
⇦349k121 Time for Application or Issuance; Staleness
⇦349k121.1 k. In General. Most Cited Cases

Information that was more than 18 months old at time search warrants were issued was stale information and should not have been used as basis for finding probable cause for issuance of search warrant.

[6] KeyCite Notes

⇦349 Searches and Seizures
⇦349II Warrants
⇦349k121 Time for Application or Issuance; Staleness
⇦349k121.1 k. In General. Most Cited Cases

While there is no bright line for defining staleness of information used to establish probable cause for issuance of search warrant, information necessary to support finding of probable cause should generally be no older than one year.

[7] KeyCite Notes

349 Searches and Seizures
349II Warrants
349k115 Competency of Information; Hearsay
349k120 k. Legality of Information. Most Cited Cases

In determining whether probable cause exists to believe that evidence of crime is presently to be found in certain place, for purposes of deciding whether to issue search warrant, court must consider totality of circumstances and court's independent determination must not rely on information gained from illegal search.

[8] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k394 Evidence Wrongfully Obtained
110k394.4 Unlawful Search or Seizure
110k394.4(5) Search Under Warrant
110k394.4(6) k. Affidavit or Complaint; Probable Cause. Most Cited Cases

Under good faith exception to exclusionary rule, if law enforcement agents executed search warrants in good faith reliance as to their validity, then suppression of evidence gleaned from illegal searches would not be required.

[9] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k394 Evidence Wrongfully Obtained
110k394.4 Unlawful Search or Seizure
110k394.4(5) Search Under Warrant
110k394.4(6) k. Affidavit or Complaint; Probable Cause. Most Cited Cases

Exclusionary rule should be narrowly confined to situations in which its application is necessary to deter official misconduct; thus, remedy of suppression should not be applied where evidence is obtained in objectively reasonable reliance on subsequently invalidated search warrant.

[10] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k394 Evidence Wrongfully Obtained
110k394.5 Objections to Evidence
110k394.5(4) k. Presumptions and Burden of Proof. Most Cited Cases

Government seeking to establish good faith exception to exclusionary rule bears burden of demonstrating the objective reasonableness of law enforcement officer's good faith reliance on validity of search warrant.

[11] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k394 Evidence Wrongfully Obtained
110k394.4 Unlawful Search or Seizure
110k394.4(5) Search Under Warrant
110k394.4(6) k. Affidavit or Complaint; Probable Cause. Most Cited Cases

Good faith exception to exclusionary rule would not be applied to allow agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) to rely on search warrants that were issued in part based on fruits of illegal search of defendant's hotel room; agents knew or should have known information in affidavits supporting issuance of search warrant was stale, affidavits contained false or misleading information, and agents' search of hotel room was not in good faith.

[12] KeyCite Notes

35 Arrest
35II On Criminal Charges
35k71.1 Search
35k71.1(4) Scope of Search
35k71.1(4.1) k. In General. Most Cited Cases

When making lawful arrest, police may conduct warrantless search of area within arrestee's immediate control.

[13] KeyCite Notes

35 Arrest
35II On Criminal Charges
35k71.1 Search
35k71.1(4) Scope of Search
35k71.1(5) k. Particular Places or Objects. Most Cited Cases

When searching container that is seized incident to arrest, general requirement for search warrant prior to search of container generally does not apply.

[14] KeyCite Notes

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k394 Evidence Wrongfully Obtained
110k394.4 Unlawful Search or Seizure
110k394.4(9) k. Arrest or Stop, Search Incidental To; Validity of Stop or Arrest. Most Cited Cases

Numbers and messages obtained from pager that was seized from bag attached to defendant's wheelchair, incident to valid arrest of defendant, did not have to be suppressed where probably no more than 20 minutes elapsed between time of arrest and time that law enforcement agent accessed memory of pager.

[15] KeyCite Notes

349 Searches and Seizures
349V Waiver and Consent
349k186 k. Scope and Duration of Consent; Withdrawal. Most Cited Cases

Scope of driver's consent to search of car encompassed law enforcement officer's warrantless search of memory of pager found in back seat of vehicle; there was no evidence that officers told driver what they were looking for when driver gave his consent to search.

[16] KeyCite Notes

349 Searches and Seizures
349I In General
349k13 What Constitutes Search or Seizure
349k21 k. Use of Electronic Devices; Tracking Devices or "Beepers.". Most Cited Cases

Turning on and accessing memory of pager that was found among items that had been taken from defendant's hotel room to hotel's basement storage department was unlawful warrantless search by law enforcement agent where search was warrantless, and any exigency created by fact that pager would refuse to accept more messages if its storage capacity was full was created by agent when he turned pager on.

[17] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1436 k. In General. Most Cited Cases
(Formerly 372k494.1)

Under Electronic Communications Privacy Act (ECPA), commonly known as the Federal Wiretap Act, "interception" of electronic communication essentially means acquiring the transfer of data; acquisition of data must be simultaneous with original transmission of data. 18 U.S.C.A. § 2510(4).

[18] KeyCite Notes

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1437 k. Telephone Communications. Most Cited Cases
(Formerly 372k494.1)

Under Electronic Communications Privacy Act (ECPA), which is commonly known as the Federal Wiretap Act and which concerns the interception of electronic communication, retrieving numbers from memory of pager does not constitute "interception" within meaning of ECPA, but is merely accessing stored electronic communications, which requires search warrant rather than court order to obtain. 18 U.S.C.A. §§ 2510(4), 2703(a).

[19] KeyCite Notes

⇦372 Telecommunications
⇦372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
⇦372X(A) In General
⇦372k1442 Actions
⇦372k1443 k. In General. Most Cited Cases
(Formerly 372k493)

If search violates the Electronic Communications Privacy Act (ECPA), commonly known as the Federal Wiretap Act, exclusion of evidence is not available remedy; rather, remedy lies in civil action against person or entity who violated statute. 18 U.S.C.A. §§ 2515, 2708.

[20] KeyCite Notes

⇦35 Arrest
⇦35II On Criminal Charges
⇦35k70 Custody and Disposition of Prisoner
⇦35k70(2) k. Presentation to Magistrate, Etc.; Arraignment. Most Cited Cases

Delay of approximately 43 hours before bringing defendant, who was confined to wheelchair, to magistrate judge for arraignment was reasonable where defendant was taken into custody at 11:45 p.m. on Friday night, courts were closed over weekend, arraignment could not be conducted in magistrate's home, and defendant was difficult to transport given his physical difficulties; thus, defendant's statements while in custody were voluntary and did not have to be suppressed. 18 U.S.C.A. § 3501.

[21] KeyCite Notes

⇦96H Controlled Substances
⇦96HI In General
⇦96Hk4 Statutes and Other Regulations
⇦96Hk6 k. Validity. Most Cited Cases
(Formerly 138k43.1 Drugs and Narcotics)

Statute imposing mandatory life sentence for offenses involving large quantity of crack cocaine or cocaine base was not unconstitutionally vague merely because same sentence was not imposed for same amount of powder cocaine. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 407(b)(2)(A), 21 U.S.C.A. § 848(b)(2)(A).

[22] KeyCite Notes

⇦210 Indictment and Information
⇦210V Requisites and Sufficiency of Accusation
⇦210k118 Surplusage and Unnecessary Matter
⇦210k119 k. In General. Most Cited Cases

⇦210 Indictment and Information KeyCite Notes
⇦210VIII Motion to Quash or Set Aside
⇦210k137 Grounds

⇦210k137(1) k. In General. Most Cited Cases

Motions to strike surplusage from indictment will be granted only where challenged allegations are not relevant to crime charged and are inflammatory and prejudicial.

[23] KeyCite Notes

⇦210 Indictment and Information
⇦210V Requisites and Sufficiency of Accusation
⇦210k118 Surplusage and Unnecessary Matter
⇦210k119 k. In General. Most Cited Cases

References in indictment to the "Reyes Crew," apparently referring to a crew of the defendant, was prejudicial and inflammatory, and thus inadmissible, where if Racketeer Influenced and Corrupt Organizations (RICO) enterprise or RICO conspiracy were established at trial, defendant would have insurmountable task in convincing jury that he was not member of enterprise or conspiracy bearing his name, and term was not used by members of the enterprise.

[24] KeyCite Notes

⇦110 Criminal Law
⇦110XVII Evidence
⇦110XVII(D) Facts in Issue and Relevance
⇦110k339.5 Identity of Accused
⇦110k339.11 Determination of Admissibility
⇦110k339.11(2) k. Hearing, Necessity and Conduct; Findings. Most Cited Cases

Defendants' request for *Wade* hearing with respect to identification procedures used by government had to be denied where disclosure of information regarding pretrial identification procedures at time the request was made would have been equivalent to disclosing list of government's witnesses; however, government would be required to make such disclosures prior to witness' actual testimony.

[25] KeyCite Notes

⇦110 Criminal Law
⇦110XX Trial
⇦110XX(A) Preliminary Proceedings
⇦110k620 Joint or Separate Trial of Separate Charges
⇦110k620(3) Severance, Relief from Joinder, and Separate Trial in General
⇦110k620(6) k. Particular Cases. Most Cited Cases

Indictment would not be consolidated with another case where other case involved narcotics conspiracy and firearms counts but no murders, and indictment at issue charged narcotics conspiracy and Racketeer Influenced and Corrupt Organizations (RICO) enterprise that was responsible for seven murders, so consolidation of indictments would create extremely long and possibly confusing trial.

[26] KeyCite Notes

⇦110 Criminal Law
⇦110XX Trial
⇦110XX(A) Preliminary Proceedings
⇦110k622 Joint or Separate Trials of Codefendants

⇐110k622.7 Grounds for Severance or Joinder
⇐110k622.7(1) k. In General. Most Cited Cases
(Formerly 110k622.2(1))

Severance request would be denied, where severance would require substantial duplication of effort.

***820** Bruce G. Ohr and Thomas A. Arena, Assistant U.S. Attorneys, United States Attorney's Office, Southern District of New York, New York City, for Plaintiff U.S.

Diarmuid White, New York City and Don D. Buchwald, Buchwald & Kaufman, New York City, for Defendant Jose Reyes.

Lee Ginsberg, Freeman, Nooter & Ginsberg, New York City, for Defendant Thomas Rodriguez.

OPINION AND ORDER

SCHEINDLIN, District Judge.

INTRODUCTION

Defendant Jose Reyes ("Reyes") has filed pretrial motions seeking various forms of ***821** relief. Defendant Thomas Rodriguez ("Rodriguez") has joined in these motions to the extent they affect him and has also asked that his case be consolidated with a different pending case, or, in the alternative, that he be granted a severance.[FN1] After the submission of extensive briefs on the issues raised, a number of the motions were resolved. *See generally* Transcript of Proceedings, September 1, 1995. An evidentiary hearing was then held with respect to several of the remaining issues on October 5, 6, and 20, 1995. Post-trial briefs were submitted following the hearing. Before addressing the motions, I shall list the remaining issues and set forth the relevant facts.

FN1. Defendant Francisco Medina is a fugitive. As a result, he has not made or joined in any motions.

Reyes first moves to suppress the fruits of four searches made pursuant to search warrants issued by a Magistrate Judge in Florida.[FN2] The heart of that motion is that probable cause to search was lacking because the information in the affidavits was stale. Reyes also challenges the initial entry into his hotel room, pursuant to a duly issued arrest warrant; that entry provided some of the material included in the search warrant affidavits. This challenge is based on Reyes' contention that the entry into the room was illegal because the agents could not reasonably have believed that Reyes was in the room and/or that they failed to announce their presence when they knocked on the door. Reyes next moves to suppress the fruits of the "search" of three electronic paging devices, found in various locations. With respect to two of those pagers, Reyes asserts that the pagers were wrongfully seized and/or should not have been accessed. The third pager was seized from the hotel lost and found pursuant to one of the allegedly defective warrants. Finally, Reyes seeks to suppress statements he made during questioning by law enforcement agents following his arrest. Reyes argues that while the waiver of his rights was knowing, it was not voluntary given the lapse of time between arrest and arraignment and his deteriorating medical condition.[FN3]

FN2. Three warrants, issued on December 4, 1994, permitted searches of the Sharp Wizard computer seized from Reyes at the time of his arrest; the hotel's lost and found storage vault, where the contents of Reyes' room were moved by the hotel; and a unit of a mini-storage facility in Miami. The fourth warrant, issued several days later, authorized an additional search of the mini-storage facility.

FN3. The other points raised by Reyes merit only brief discussion. Reyes seeks to strike certain language in the Indictment as prejudicial surplusage. He also challenges 21 U.S.C. §

848(b)(2)(A) as being unconstitutionally vague. Finally, Reyes and Rodriguez both seek a *Wade* hearing with respect to certain identification procedures employed by the Government. *See* pp. 839-840, *infra.*

FACTUAL BACKGROUND

On November 16, 1994, Reyes was indicted for narcotics-related offenses by a grand jury sitting in the Southern District of New York. An arrest warrant was contemporaneously issued. On Friday, December 2, 1994, the Bureau of Alcohol, Tobacco and Firearms ("ATF") received information that Reyes might be staying in the Airport Hilton Hotel in Miami, Florida. *See* Transcript of Hearing ("Tr.") at 202. A copy of the arrest warrant and a picture of Reyes were faxed to ATF agents in Miami. Tr. at 203. The Miami agents knew that Reyes was a paraplegic confined to a wheelchair. Tr. at 90.

I. *The Entry into Reyes' Hotel Room*

On the evening of December 2, 1994, four ATF agents (Davis, O'Keefe, Foster and Lawrence) proceeded to the Airport Hilton. Tr. at 33-34. The record is not clear as to when they arrived, but it would appear to be after 6 p.m. on Friday evening. *See generally* Tr. at 30. They learned from a desk clerk that Reyes was a guest at the hotel staying in Room 609. Tr. at 33. The record is unclear as to whether the agents knew or should have known that Reyes was not in his room at the time. In any event, after the agents knocked on the door and phoned the room, with no response to either, a hotel security guard opened the door to the room. The four agents entered the room and conducted a security sweep. Tr. at 16, 80, 93. They observed clothes, books, magazines, ***822*** and medical accessories. Tr. at 15, 93-94. No one was inside the room. Tr. at 16, 93-94. The agents removed nothing from the room. However, the agents' observation of *Soldier of Fortune* magazine and a book entitled *Hitman* in Reyes' hotel room was included in the subsequent affidavits for search warrants.

II. *Reyes' Arrest and the Search of the Car*

Later on the evening of December 2, 1994, Reyes returned to the hotel in a Lincoln Town Car driven by Victor Salazar. Salazar helped Reyes into his wheelchair and pushed him into the hotel. Reyes was then arrested in the hotel lobby. Tr. at 94. Reyes identified himself as Benjamin Polanco, not Jose Reyes. *Id.* The agents recovered a bag attached to Reyes' wheelchair containing a Sharp Wizard computer and a pager. Tr. at 95. A search warrant was later obtained to search the files of the Sharp Wizard computer. As noted earlier, Reyes challenges the warrantless retrieval of information contained in the pager seized from the bag on his wheelchair.

Two other ATF agents, Murphy and Coad, separated Salazar from Reyes. Salazar gave the agents permission to search the car. Tr. at 117-118. A pager was found in the back seat of the car and two receipts were found in the glove compartment-one for the car rental and one for ABC Mini Storage. Both receipts were in the name of Alejandra Posada. Tr. at 119, 144. When asked to whom the receipts belonged, Salazar responded that "[t]hose receipts belong to him [Reyes]. You'll have to ask him." Tr. at 119, 145. After the seizure, Agent Murphy may have informed Agent Davis that he thought Alejandra Posada might be an alias used by Reyes. Tr. at 133. Once again, Reyes challenges the warrantless retrieval of information contained in the pager seized from the car.

Agents Davis and O'Keefe then transported Reyes to the Metropolitan Correction Center ("MCC") outside Miami. When Agent Davis filled out a personal history form for Reyes she listed the name "Alejandro Posada" as an alias. Reyes was lodged at the MCC. Tr. at 20-22.

III. *The Search Warrants*

On Sunday, December 4, 1994, Agent Davis, together with case Agent Horne and two investigators from New York, went to the Miami U.S. Attorney's office where search warrants were being drafted. The drafting began with an e-mailed draft prepared in New York by Assistant U.S. Attorney ("AUSA") Tom Clark. Tr. at 25, 207, 313-14. This draft was then revised by local AUSA Jose Boneau. Tr. at 318. The agents spoke with both AUSAs. Both Agents Horne and Davis reviewed the draft warrants before they were presented to the Magistrate Judge. Tr. at 25-27, 207-11. The warrants were issued later that

evening. The agents searched the ABC Mini-Storage and the hotel lost and found that same night. The search of the Sharp computer was conducted the next day. Several days later, on December 7, a fourth warrant was issued. That warrant authorized a second search of the ABC Mini-Storage locker.

IV. *The Interview of Reyes*

After the warrants were signed, Agent Horne and two New York investigators went to the MCC to interview Reyes. Tr. at 180, 213. When Reyes entered the visitors room, the agents identified themselves and Agent Horne read Reyes his *Miranda* rights. Reyes signed a piece of paper to which the card containing the *Miranda* rights had been stapled, acknowledging that he had received and understood his rights. Government Exhibit ("GX") 5 (waiver of rights); Tr. at 182, 214, 354. Reyes then spoke with the agents.

V. *The Recovery of the Third Pager and Reyes' Arraignment*

A third pager was recovered from the search of Reyes' belongings that had been moved to the hotel lost and found. Tr. at 159, 219. The parties dispute whether the pager was on or off when it was found. In any event, Agent Horne kept the pager in her room overnight. Tr. at 160, 219. The next morning, during a meeting with the other agents in her hotel room, the pager went off, and the investigators recovered the messages from the pager over the course of ***823** the next four days. Tr. at 161, 168. Later that morning (Monday), Reyes was arraigned in federal court in Miami. A woman identified as Alejandra Posada attended the arraignment. Tr. at 162, 220, 221.

DISCUSSION

I. *The Entry into Reyes' Hotel Room*

Reyes asserts that the ATF agents acted unlawfully when they entered his room at the Miami Hilton to execute an arrest warrant. Because facts observed by the agents while in the room were used in the affidavits supporting four search warrants, Reyes argues that the evidence seized pursuant to those warrants must be suppressed.

[1] Section 3109 of Title 18, United States Code, states in part:

> The officer may break open any outer or inner door or window of a house or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance....

The restrictions which § 3109 imposes on law enforcement officers are of constitutional dimension. *Wilson v. Arkansas*, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995). Section 3109 has been held to apply to arrest warrants, *Sabbath v. United States*, 391 U.S. 585, 588, 88 S.Ct. 1755, 1757, 20 L.Ed.2d 828 (1968), and to hotel or motel rooms, *United States v. Nolan*, 530 F.Supp. 386, 392-93 (W.D.Pa.1981), *aff'd*, 718 F.2d 589 (3d Cir.1983). Finally, a hotel employee may not provide lawful consent to police entry into the hotel room of a guest. *Stoner v. California*, 376 U.S. 483, 490, 84 S.Ct. 889, 893, 11 L.Ed.2d 856 (1964).

[2] [3] The statutory requirement that agents be "refused admittance" before forcing an entry does not require an affirmative refusal, but is satisfied when the circumstances permit the agents to reasonably infer that they have been refused admittance. *See, e.g., United States v. Ramos*, 923 F.2d 1346, 1356 (9th Cir.1991); *United States v. Bonner*, 874 F.2d 822, 824 (D.C.Cir.1989); *United States v. Williams*, 573 F.2d 348, 350 (5th Cir.1978); *United States v. James*, 528 F.2d 999, 1017 (5th Cir.), *cert. denied*, 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed.2d 326 (1976); *Masiello v. United States*, 317 F.2d 121, 122 (D.C.Cir.1963). Thus, the question here is whether the ATF agents reasonably inferred that they had been refused admittance when they entered Reyes' hotel room. If such an inference was unreasonable, then the entry was illegal, and the fruits of the search must be suppressed.

Agent Davis testified that she knocked on the door of Room 609 at approximately 9 or 9:30 p.m. and announced that she was a federal agent with an arrest warrant. She further testified that she heard a TV on in the room, and that its volume was so loud that she had to scream when she made her announcement. After receiving no response, she telephoned the room from a house phone. Again she received no response. She then went to the lobby and got a security guard to accompany her back to the room with a set of keys. The guard then knocked on the door and identified himself. When nobody answered, he opened the door with a key. The television set was on, but no one was in the room. *See generally* Tr. at 15-16, 38-40.

There is significant evidence in the record contradicting Agent Davis' account. Agent O'Keefe, who accompanied Agent Davis, testified that when they first came to the room, they knocked but did not announce themselves. When Agent Davis placed the phone call to the room, Agent O'Keefe could hear the phone ring, raising an issue as to the volume of the TV. Tr. at 92, 102, 105-06. In addition, although Agent Davis testified that she screamed her announcement at the door of Reyes' hotel room, and although there were other hotel room doors across the hall and 5-10 feet to the right of the door to Reyes' room, no one in any other rooms in the area came to his or her door. Tr. at 38-39. Mr. Iadanza, the hotel security officer, testified that at about 9:30 p.m., two officers came to the lobby with a picture of Reyes. Mr. Iadanza recognized Reyes as a guest and told the officers that he had not seen Reyes that day. The agents asked if they could gain access to the room to see if Reyes was there. Mr. Iadanza then accompanied them to the room, knocked, identified himself as security and opened the door. Mr. Iadanza ***824** could not recall whether the TV was on. Tr. at 79-81.

Agent Murphy testified that within 15 minutes of his arrival at the hotel, Agent Davis told him that Reyes was not at the hotel. Tr. at 115, 127. While Agent Murphy was unsure of the time of his arrival at the hotel, he did state that it was just starting to get dark. Tr. at 126. The testimony of Agent Davis reveals that on December 2, 1994, it started to get dark at approximately 6:30 p.m. Tr. at 43. Finally, Reyes testified that he had turned the TV off when he left the room (he left at approximately 1 p.m., and did not intend to return until 10 p.m.). He further testified that it was his usual habit to turn off the TV when he was leaving the hotel room, and that he acted in accordance with that practice. Tr. at 346-348.

I credit the testimony of Agent O'Keefe that the first time the agents went to the door, they merely knocked. There is no reason for a hotel guest not to respond to a knock. There is even less reason for a hotel guest not to answer a phone call. It further appears that Agent Davis told Agent Murphy that Reyes was not in the hotel before she entered the room. According to both Agent Davis and Mr. Iadanza, the agents entered the hotel room at 9 or 9:30 p.m. On the other hand, Agent Murphy appears to have arrived at the hotel at about 6:30 p.m. The sequence of these events is confusing.

Finally, the only neutral witness, Mr. Iadanza, testified that it was approximately 9:30 p.m. when the agents came to the lobby and asked if he had seen the person depicted in a photograph of Reyes. Tr. at 79. Mr. Iadanza could not recall whether the TV was on either when he was in the hall knocking at the door or when he entered the room. Tr. at 81, 87. When combined with Agent O'Keefe's testimony that he heard the phone ringing through the closed door, with Reyes' testimony that the TV was off and that he planned to be out for close to nine hours, and with the equivocal wording of the search warrant "[h]earing a television set they believed to be on inside the room," I find it more likely than not that the TV set was not on. The inference to be drawn from this finding is that the agents did not reasonably believe that they had been refused admittance to the room. FN4

> FN4. Courts have sustained officers who interpreted ambiguous noises from within the place to be searched as evidence that they were being refused entry. *See, e.g., United States v. Allende*, 486 F.2d 1351, 1353 (9th Cir.1973), *cert. denied*, 416 U.S. 958, 94 S.Ct. 1973, 40 L.Ed.2d 308 (1974) (officers heard scampering sounds); *Masiello*, 317 F.2d at 122 (officer heard rustling or other commotion inside the room).

This case is easily distinguishable from the many cases cited by the parties in which a failure to answer a knock and announce may be deemed a constructive refusal to admit. *See, e.g., United States v. Bonner*, 874 F.2d 822, 824-25 (D.C.Cir.1989) (refusal where police knew suspects were inside

apartment, twice knocked and announced, and heard footsteps running from door as well as thumping or bumping); *United States v. Williams,* 573 F.2d 348, 350 (5th Cir.1978) (refusal where no response to knock, but defendant's cars were parked outside the house); *United States v. James,* 528 F.2d 999, 1017 (5th Cir.), *cert. denied,* 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed.2d 326 (1976) (where reliable informant advised that fugitive was at premises, and police, in plain view, announced purpose over bullhorn, failure to respond was tantamount to refusal); *cf. United States v. Nolan,* 718 F.2d 589, 597 (3d Cir.1983) (where marshals heard sound of TV or radio inside motel room *and* motel manager told them suspect had returned to room after re-registering an hour and a half earlier, it was reasonable to conclude that defendant was in the room and might escape, and exigent circumstances existed; however, agents violated § 3109 by failing to knock and announce). The case is similar, however, to *United States v. Watson,* 307 F.Supp. 173, 175-76 (D.D.C.1969), where the court held that if an officer knocks on the door of a house he has reason to believe is unoccupied, he cannot reasonably conclude from the non-response that he has been refused admittance.

Thus, the entry into Reyes' hotel room was unlawful. As a result, the fruits of that search must be suppressed. The reference to the evidence illegally obtained from Reyes' ***825*** hotel room will be addressed in the next section.

II. *Validity of the Search Warrants*

A. Summary of Information in Search Warrant Affidavits

The affidavits in support of the three warrants issued on December 4 [FN5] contained essentially identical information.[FN6] For convenience, I will cite to the Affidavit of Agent Laurie Horne in Support of Application for Search Warrant for ABC Mini-Storage, Dec. 4, 1994 (hereinafter "Horne Aff."). The content of the affidavits can be divided into two categories-information related to narcotics trafficking at a location designated as 1770 Andrews Avenue in the Bronx ("1770") (Horne Aff. ¶¶ 3-18) and information related to Jose Reyes (*id.* ¶¶ 19-30). The following is my summary of the information in the first category:

FN5. In Section III, *infra,* I address the validity of the fourth warrant, which permitted a second search of the ABC Mini-Storage locker.

FN6. The affidavit in support of the warrant to search the computer indicated that it had been seized from a bag attached to Reyes' wheelchair at the time of his arrest and that drug traffickers can store drug-related information in such computers. The affidavit in support of the warrant to search the hotel lost and found alleged that Salazar and a person who identified herself as Alejandra Posada had unsuccessfully asked the hotel to release the property which had been in the room rented in Salazar's name.

Two confidential informants had been providing information to the ATF since December 1992. On four occasions in June and July 1992, undercover agents bought heroin in the vicinity of 1770. In July 1992, crack cocaine and heroin were seized from 1770, together with notebooks and a handgun. On August 31, 1992, Ambiore Perez was arrested near 1770 with a large amount of crack. CI-2 identified Perez as a "former manager" of crack distribution from 1770. On January 29, 1993, two people were arrested near 1770 with 5 kilograms of cocaine. CI-2 identified these two as "members of the organization distributing drugs from this location." Horne Aff. ¶ 15. CI-2 stated that the organization began distributing drugs as early as 1989 and is still doing so. As recently as November 15, 1994, agents observed persons (identified by CI-2 as members of the organization) engaging in hand to hand transfers with other people. On November 16 and 18, 1994, agents bought heroin in the vicinity of 1770.

The following is my summary of the information contained in the second category:

CI-1 and CI-2 have identified Reyes "as the person they *knew* to be the overall 'boss' of the drug distribution organization dealing from 1770...." Horne Aff. ¶ 19 (emphasis added). A third informant, CI-3, believed that he was employed by a drug distribution group led by Jose Llaca. CI-3 distributed drugs with Llaca from 1991 until June 1993 in quantities ranging from 3 to 4 kilograms of crack per

week. CI-3 saw Llaca meet "Jay," a crippled person who had another person drive a van for him. CI-3 saw Llaca retrieve kilograms of cocaine from that van on many occasions. Reyes is paralyzed, having been shot in 1992. In October 1992, agents surveilled Reyes to a New Jersey hotel, where he stayed in a room rented by his driver. The driver's credit card reflected at least two airline tickets purchased in Reyes' name and rentals of many handicapped equipped hotel rooms in various locations. Hotel records also reflected phone calls to a store in New York identified by various persons (not named) as a place out of which Reyes had distributed drugs. Cash Transaction Report records revealed that Reyes' driver deposited $33,000 one day with a New Jersey bank and purchased a handicapped-equipped Volvo in New Jersey on the same date (no date was supplied for this transaction). Agent Horne believed that Reyes' driver used his credit card "since August, 1991" to charge thousands of dollars of Reyes' expenses. Horne Aff. ¶ 26. Reyes was found in Miami through phone records showing a call from the hotel to "a telephone number of an associate believed to be in communication with Reyes." *Id.* ¶ 27. While Reyes admitted he was the person in a prior arrest photo of Jose Reyes, he identified ***826** himself as Benjamin Polanco and later as Alejandro Posada. The room at the Miami Hilton was rented since November 15, 1994 in the name of Victor Salazar, Reyes' driver, who had paid for the room with $1,000 in cash. Before arresting Reyes, the agents found *Soldier of Fortune* magazine and a book entitled *Hitman* in that room. "NYPD has developed evidence it believes to be credible" that Reyes will pay thousands of dollars for the murder of witnesses against Llaca (then on trial in New York). *Id.* ¶ 29. Llaca had allegedly given this information to "various persons, both inside and outside prison...." *Id.* Salazar said he was driving a car rented by Alejandro Posada and consented to a search of that car. A current receipt in that name for rental of a mini-storage unit was found in the car. According to interviews with unidentified persons involved in narcotics trafficking, Reyes is not employed. Finally, Agent Horne has "not received any information indicating that Reyes has ceased his association with the organization that operates from the vicinity of 1770...." *Id.* ¶ 31. Based on her review of all information available to her, Agent Horne concluded that Reyes has access to substantial sums of cash.

B. Some of the Information in the Affidavits Was Old

[4] The first issue to be addressed is whether the information contained in these affidavits was stale. "In determining whether probable cause exists, the magistrate is required to assess whether the information adduced in the application appears to be current, *i.e.*, true at the time of the application, or whether instead it has become stale." Rivera v. United States, 928 F.2d 592, 602 (2d Cir.1991).

[5] Informants identified Reyes "as the person they *knew* to be the overall 'boss' of the drug distribution organization." Horne Aff. ¶ 19 (emphasis added). The time frame of this past knowledge is not provided, although the affidavit states that they began to provide information in December 1992. CI-3 saw Llaca meet with "Jay," a crippled individual, and retrieve kilograms of cocaine from his van during the period 1991 until June 1993. Thus, the informant information was 18 months old at the time the search warrants were issued. The agents' surveillance of Reyes to New Jersey occurred in October 1992. His driver's credit card records reveal substantial sums spent by Reyes since August 1991, but the affidavit does not state how current those records are. The same is true of the records of phone calls from hotel rooms to stores in New York. The allegation concerning the cash transfer for the purpose of purchasing the Volvo provides no date. Testimony provided at the hearing revealed that the date of this transaction was October 1992, and that Agent Horne knew this date some time before she signed the affidavits in support of the search warrants. Tr. at 210.

C. Defining Staleness

The next question, then, is when does information become stale. In United States v. Rowell, 903 F.2d 899, 903 (2d Cir.1990), the court held that even an 18-month delay between information provided by informants and the application for a wiretap did not make the information too stale to be relied upon. However, in that case, the defendant had made statements to an undercover officer about his *ongoing* marijuana distribution operation, thereby corroborating the information from the informants. *Id.*

In United States v. Benevento, 649 F.Supp. 1379, 1382-84 (S.D.N.Y.1986), *aff'd in part, vacated in part,* 836 F.2d 60 (2d Cir.1987), *cert. denied,* 486 U.S. 1043, 108 S.Ct. 2035, 100 L.Ed.2d 620 (1988),

the court held that there was probable cause to search the defendant's home despite a one-year gap between the date of the information in the affidavit and the date of the warrant application. This decision is noteworthy in two respects. First, it may be read to hold that no more than one year may elapse if information is to be considered current rather than stale. Second, the warrant was to search a home, a place in which evidence of past criminal activity is likely to be found. Finally, and most importantly, the warrant application identified the date of the criminal activity as occurring prior to June 1985, thereby ***827** attempting to demonstrate probable cause to believe that certain specified items relating to past crimes were still at the home. *Benevento,* 649 F.Supp. at 1383-84.

In *United States v. Perry,* 643 F.2d 38, 49-50 (2d Cir.), *cert. denied,* 454 U.S. 835, 102 S.Ct. 138, 70 L.Ed.2d 115 (1981), the court upheld a warrant based on an affidavit revealing a three-year gap between evidence of narcotics activity on both sides of the gap. There, the court held that the earlier activity was not stale because of the proof of the later (current) activity. The later evidence included statements of identified witnesses to the effect that the defendant conducted business from an unoccupied location, as well as pictures from surveillance cameras revealing automobiles (which would leave whenever the police arrived) linked to drug traffickers in the driveway.

In *Rivera,* the court noted that "intervals of *weeks or months* ... [do] not necessarily make the information stale." 928 F.2d at 602 (emphasis added). *See also United States v. Ponce,* 947 F.2d 646, 650 (2d Cir.1991), *cert. denied,* 503 U.S. 943, 112 S.Ct. 1492, 117 L.Ed.2d 633 (1992) (information two weeks old not stale); *United States v. Fama,* 758 F.2d 834, 838 (2d Cir.1985) (five weeks not stale); *United States v. Martino,* 664 F.2d 860, 867 (2d Cir.1981), *cert. denied,* 458 U.S. 1110, 102 S.Ct. 3493, 73 L.Ed.2d 1373 (1982) (22 days not stale).

[6] Thus, while there is no bright line for defining staleness, the information necessary to support a finding of probable cause should be no older than one year (assuming that one year is the outer limit for a reasonable interpretation of the *Rivera* court's designation of "weeks or months," and assuming that there are no allegations of current activity that would corroborate or update information older than one year).

D. Information in the Reyes Affidavits Was Stale

It is axiomatic that once a neutral and detached Magistrate has issued a warrant, generally that "finding of probable cause is entitled to substantial deference." *United States v. Travisano,* 724 F.2d 341, 345 (2d Cir.1983); *see also United States v. Ventresca,* 380 U.S. 102, 105-09, 85 S.Ct. 741, 744-46, 13 L.Ed.2d 684 (1965); *Aguilar v. Texas,* 378 U.S. 108, 110-11, 84 S.Ct. 1509, 1511-12, 12 L.Ed.2d 723 (1964). Nonetheless, in this case, I conclude that the information in these search warrant affidavits was stale as to Reyes' involvement in the alleged criminal activity.

E. Some of the Information in the Affidavits Is Unreliable

As neither the allegations based on the statements of the confidential informants nor the information resulting from the agents' surveillance and review of records provides any evidence of criminal activity by Reyes during the past 18 months, the only remaining sources for current information are the allegations concerning the information obtained at or around the time of Reyes' arrest. Several of those allegations have no indicia of reliability and cannot support a finding of probable cause. That Reyes was located by phone records showing a call from the hotel to a telephone number of an "associate" has no meaning. The "associate" is never identified, and there is no information establishing that the "associate" is involved in criminal activity. Thus "associate" is merely a loaded word. Similarly, references to persons who are allegedly involved in the narcotics trade with Reyes, and who stated that he is not employed, cannot be credited, as no such persons are identified and no dates provided with respect to their statements. Such allegations amount to no more than unsubstantiated rumor. *See Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Finally, the information concerning Reyes' current offer to pay money for the murder of witnesses against Llaca is not credible for the same reason. The evidence believed to be credible by the NYPD is never identified, nor are the persons (both inside and outside prison) identified who provided such information. This again is unsubstantiated rumor.

F. Some of the Information in the Affidavits Is Tainted

Moreover, the affidavits presented to the Magistrate Judge contained information ***828** gained from an illegal search. *See* pp. 822-25, 826, *supra*. Paragraph 28 of each affidavit details the search of Reyes' hotel room and the observation in that room of *Soldier of Fortune* and *Hitman*.

G. Remaining Information in the Affidavits Provides No Current Evidence of Criminal Activity and Thus Does Not Support a Finding of Probable Cause

The remaining allegations from the time of the arrest are (1) that Reyes identified himself as Benjamin Polanco and then as Alejandro Posada (though it is now conceded that Reyes never identified himself as Alejandro Posada); and (2) that the room at the hotel had been rented for two weeks with a $1,000 cash payment. Neither of these allegations, viewed separately or in combination, provides current evidence of narcotics trafficking or other criminal activity by Reyes, nor do they corroborate the earlier information of such activity. Finally, Horne's statement that she had "not received any information indicating that Reyes has *ceased* his association with the organization that operates from the vicinity of 1770 Andrews Avenue" (Horne Aff. ¶ 31 (emphasis added)) appears to be added to imply continuity where none exists for the sole purpose of bringing the older allegations up to date.

H. There Was No Substantial Basis for a Finding of Probable Cause

[7] In determining whether probable cause exists to believe that evidence of a crime is presently to be found in a certain place, a court must consider the totality of the circumstances. *See* Gates, 462 U.S. at 238, 103 S.Ct. at 2332. Where an issuing "magistrate relied in part on improper information," a reviewing court must decide independently whether probable cause existed to issue a search warrant. *United States v. Thomas*, 757 F.2d 1359, 1368 (2d Cir.), *cert. denied*, 474 U.S. 819, 106 S.Ct. 66, 88 L.Ed.2d 54 (1985). Further, this court's independent determination must rely only on the information in the affidavits which was not gained from an illegal search. [FN7] "When an application for a search warrant includes both tainted and untainted evidence, the warrant may be upheld if the untainted evidence, standing alone, establishes probable cause." *Laaman v. United States*, 973 F.2d 107, 115 (2d Cir.1992), *cert. denied*, 507 U.S. 954, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993). *See also United States v. Vasey*, 834 F.2d 782, 788 (9th Cir.1987); *United States v. Whitehorn*, 829 F.2d 1225, 1231 (2d Cir.1987); *United States v. Levasseur*, 816 F.2d 37, 43 (2d Cir.1987); *United States v. Taborda*, 635 F.2d 131, 140 (2d Cir.1980). Because most of the remaining, untainted information in these search warrants was stale as to Reyes' involvement in narcotics trafficking or other criminal activity (*see* p. 827, *supra*), I find that the issuing judicial officer did not have a substantial basis to find that there was a "fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238, 103 S.Ct. at 2332. In short, there was no substantial basis for the Magistrate's finding of probable cause. *See United States v. Wagner*, 989 F.2d 69, 72 (2d Cir.1993) (citing *Gates*, 462 U.S. at 236, 103 S.Ct. at 2331). The court's inquiry, however, is not yet concluded.

FN7. I am mindful of the fact that the information about *Soldier of Fortune* and *Hitman* constituted just half a page in affidavits ranging from 15 to 17 pages.

I. The Good Faith Exception

[8] Despite the staleness of the affidavits presented to the Magistrate, and the presence in the supporting affidavits of information gained through an illegal search of Reyes' hotel room, if the agents executed the warrants in good faith reliance as to their validity, then suppression of the evidence gleaned from the searches would not be required. *United States v. Cancelmo*, 64 F.3d 804, 807 (2d Cir.1995); *United States v. Smith*, 9 F.3d 1007, 1015 (2d Cir.1993); *see also United States v. Londono*, 659 F.Supp. 758, 764 (E.D.N.Y.1987), *aff'd sub nom. United States v. Carmona*, 858 F.2d 66 (2d Cir.1988).

In creating a good faith exception to the exclusionary rule, the Supreme Court has identified

circumstances that would not justify reliance on a warrant. In particular, the Court has noted that an executing officer's ***829*** reliance on a warrant could not be in good faith (1) where the affiant knowingly or recklessly misled the issuing magistrate; "(2) where the issuing magistrate wholly abandoned his or her judicial role; (3) where the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and (4) where the warrant is so facially deficient that reliance upon it is unreasonable." *United States v. Moore*, 968 F.2d 216, 222 (2d Cir.), *cert. denied*, 506 U.S. 980, 113 S.Ct. 480, 121 L.Ed.2d 385 (1992) (citing *United States v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405, 3420, 82 L.Ed.2d 677 (1984)).

[9] [10] The exclusionary rule should be narrowly confined to situations in which its application is necessary to deter official misconduct. Thus, the harsh remedy of suppression should not be applied where evidence is "obtained in objectively reasonable reliance on a subsequently invalidated search warrant." *Leon*, 468 U.S. at 922, 104 S.Ct. at 3420. The Government bears the burden of demonstrating the objective reasonableness of the officer's good faith reliance on the validity of the warrant. *United States v. George*, 975 F.2d 72, 77 (2d Cir.1992).

1. The Lack of Probable Cause

[11] The testimony at the suppression hearing demonstrates that Agent Horne and her colleagues knew or should have known that the information in the affidavits was stale. That is, they knew or should have known that the affidavits did not establish probable cause to believe that the evidence to be seized (narcotics, records of narcotics transactions, etc.) was presently at any of the specified locations. Although Agent Horne had been involved in the 1770 investigation since April 1992, she did not learn of Reyes' role before July 1994. Tr. at 243. Reyes' criminal activity in connection with narcotics trafficking was alleged to have occurred in 1992 and the early half of 1993. The only "evidence" of current illegal activity by Reyes was patently unreliable. *See* p. 827, *supra*. Agent Horne's conclusion that the information in the warrant was not stale was not objectively reasonable.

2. False or Misleading Information

In what appears to be a lame attempt to beef up stale information, the affidavits contained one false statement and one misleading statement. The false statement is conceded-Reyes never identified himself as Alejandra (or Alejandro) Posada. The Government argues, however, that this false statement was made accidentally, as opposed to intentionally or recklessly. The misleading statement concerns the omission of the date on which the Volvo was purchased for $33,000 in cash. This omission might have caused the Magistrate to conclude that this large cash transaction had occurred at some time proximate to the application for the warrants.

a. *The False Information*

ATF agents found two receipts in the name Alejandra Posada (a female name) in the Town Car on December 2, the night of the arrest. One receipt was for the rental of the car and the other was for the rental of a locker at the ABC Mini-Storage. Salazar, Reyes' driver, told the agents that the receipts belonged to Reyes and they would have to ask Reyes about these receipts. Tr. at 119. Salazar never identified Reyes as Alejandra or Alejandro Posada, nor did Reyes ever identify himself with either of those names. Indeed, he identified himself as Benjamin Polanco. Tr. at 365. Nonetheless, when Agent Davis prepared the personal history form to lodge Reyes at the MCC, she listed Alejandro Posada as an alias. Tr. at 21. Curiously, she did not list Benjamin Polanco as an additional alias. *See* GX 2. On December 3 or 4, prior to obtaining the warrants, Agent Davis learned that Alejandra Posada had come to the hotel to retrieve Reyes' property. Tr. at 70. Agent Davis informed the AUSA in New York of this fact and he instructed her to tell the hotel employees not to return any property until a warrant was issued. Tr. at 312. Thus, there is no doubt that the agents and both AUSAs knew, prior to submitting the warrant applications, that a woman named Alejandra Posada existed and that she was a friend or associate of Reyes. Under those circumstances, the statements in paragraphs 27 and ***830*** 30 of the affidavits were at best made with reckless disregard for the facts.

b. *The Misleading Information*

Both Agent Horne and the AUSA who originally drafted the warrant applications explained that the date of the Volvo purchase was simply not available, because Agent Horne's file was in New York, Agent Horne was in Florida, and the AUSA was not entirely familiar with all of the evidence accumulated in the investigation. Tr. at 210-11, 305. However, the allegation as presented in the final draft of the affidavit does leave the impression that the information is recent, if not current. As Agent Horne testified, although she could not recall the date at the time the affidavits were drafted, she knew the actual date at some time prior to December 1994. Tr. at 210. I conclude, under all the circumstances, that the omission was misleading.

3. The Hotel Room Search

I have already found that the agents had no reasonable basis to conclude that they had been refused admittance in response to their knock and announcement at the hotel room door. Based on this finding, it is apparent that the agents "knowingly or recklessly" misled the issuing Magistrate by placing tainted evidence in the affidavits. At least two decisions from this circuit address situations in which law enforcement agents sought the benefit of the good faith exception where the fruits of illegal searches were used in affidavits in support of warrant applications. However, as described below, in neither of those cases did the courts find that the agents knowingly or recklessly misled the issuing Magistrate.

In *United States v. Thomas,* 757 F.2d 1359 (2d Cir.), *cert. denied,* 474 U.S. 819, 106 S.Ct. 66, 88 L.Ed.2d 54 (1985), the defendant's apartment was searched pursuant to a warrant issued by a Magistrate who found probable cause based on an affidavit stating the results of a "dog sniff" outside the apartment. *Id.* at 1366. The Second Circuit held that the dog sniff violated the Fourth Amendment, and that the result of the sniff should therefore not have been included in the affidavit in support of the warrant application. Without the dog's alert, the court found that there was insufficient basis for issuing the warrant. *Id.* at 1367. However, the court then considered "whether the agent who conducted the search acted in good faith reliance on the search warrant," as *Leon* requires in order for the good faith exception to apply. *Id.* at 1368. Because the DEA agent brought his evidence to a neutral and detached Magistrate, who determined that probable cause existed and who issued a search warrant, there was "nothing more the officer could have or should have done under these circumstances to be sure his search would be legal." *Id.* at 1368.

Thomas is easily distinguishable from the instant case. In *Thomas,* the agents who initiated the dog sniff were not unreasonable in thinking the sniff was constitutional. For one thing, the Supreme Court has held that dog sniffs at airports do not constitute a search. *United States v. Place,* 462 U.S. 696, 707, 103 S.Ct. 2637, 2644, 77 L.Ed.2d 110 (1983). Moreover, the agents in *Thomas* used a dog outside the defendant's apartment, rather than inside it. Although the court ultimately decided that the sniff infringed the defendant's reasonable expectation of privacy in his dwelling, the agents nonetheless did not act in bad faith when they nosed around outside the apartment. By contrast, as I have described above, the agents in this case could not reasonably have believed that Reyes was in his hotel room when they entered the room. Consequently, their search of the hotel room was not in good faith, and they may not now claim good faith reliance on the fruits of that search in order to obtain search warrants.

Another case from this circuit, *United States v. Londono,* 659 F.Supp. 758 (E.D.N.Y.1987), *aff'd sub nom. United States v. Carmona,* 858 F.2d 66 (2d Cir.1988), addressed the good faith exception in the context of a search warrant application containing information gained through an illegal search. In that case, officers arrested the defendant inside his home and legitimately conducted a security sweep to ensure that no one else was present. *Id.* at 760, 762. During that sweep, an officer noticed a block-shaped object in a gap above a door. The ***831** officer flicked it with his finger, the object fell to the ground, and the officer determined that the object was a package of currency totaling $10,300. *Id.* at 760. In applying for a warrant to search the house, the officer included the finding of cash in his affidavit. *Id.* at 761.

In light of a subsequent Supreme Court case, the court found that the seizure of the $10,300 could

not be justified by the plain view doctrine. [FN8] *Id.* at 762. Without considering the cash, the court further found that the warrant application did not support probable cause. *Id.* at 763. However, the court went on to apply the good faith exception, determining that "the officers acted in an objectively reasonable manner" in seizing the cash, and that their actions were "probably legal under the law of this Circuit as it stood at the time." *Id.* at 764.

FN8. In *Arizona v. Hicks*, 480 U.S. 321, 324-35, 107 S.Ct. 1149, 1152-58, 94 L.Ed.2d 347 (1987), the Court held that merely moving an object is itself a search and requires probable cause. Seizures cannot be justified under the plain view doctrine "if the item must be moved even slightly in order to discern its incriminatory nature." *Londono*, 659 F.Supp. at 762 (citing *Hicks*).

Because I have found that the agents who entered and searched Reyes' hotel room did not act in an objectively reasonable manner, I decline to apply the good faith exception that would allow the agents to rely on search warrants that were issued in part based on the fruits of the hotel room search. *See United States v. Vasey*, 834 F.2d 782, 789 (9th Cir.1987) (declining to apply good faith exception where warrant application was based on items found during warrantless search of vehicle that could not be justified as a search incident to arrest). Accordingly, Reyes' motion to suppress the fruits of the searches based on Horne's affidavits must be granted.[FN9]

FN9. To be clear, I determine that the good faith exception is inapplicable only under the first circumstance enumerated in *Leon:* the affiants knowingly or recklessly misled the Magistrate. There is no evidence that the Magistrate abandoned his neutral role, that the affidavit was so lacking in indicia of probable cause as to render reliance upon it unreasonable, or that the warrant was facially invalid.

III. *Validity of the Fourth Warrant*

On December 7, 1994, the Magistrate issued a warrant permitting a second search of the ABC Mini-Storage locker. The application for this warrant incorporated the December 4 affidavits by reference and added two additional paragraphs. The first, paragraph 4, recited the results of the first search of the locker pursuant to the warrant issued on December 4. The second, paragraph 6, declared that the affiant was present in court when Reyes stated he had no assets. Thus, the affiant concluded that items viewed in the storage facility (but not seized), such as fancy clothes and shoes, were in fact evidence of Reyes' criminal activity.

Given this Court's finding that the December 4 warrant failed to state probable cause and that the warrant was not obtained in good faith, the fruits of that search must be suppressed. Thus, the only new untainted allegation in the second affidavit is that Reyes stated in court that he had no assets. This allegation does not state sufficient probable cause to believe that the items in the storage facility rented by Alejandra Posada, viewed by the agents during the first search, are evidence of Reyes' alleged criminal activity. The evidence seized in this subsequent search of the storage facility must also be suppressed.

IV. *Numbers/Messages Obtained from the Pagers*

A. Facts Surrounding Seizure of Pagers and Accessing of Pagers' Memory

At the time of Reyes' arrest, the agents seized from Reyes' wheelchair a bag containing (among other things) a telephone paging device (hereinafter "pager"). Tr. at 18, 95. This pager shall be referred to as Pager # 1. The search of the car in which Reyes arrived at the hotel on the night of his arrest yielded, among other things, another pager. Tr. at 144. This pager shall be referred to as Pager # 2. When Agents Murphy and Coad finished searching the car, Pager # 1 sounded (with a beeping noise). Tr. at 122, 135, 145. Murphy handed the pagers to Coad. Tr. at 122. Coad, who testified that both **832* pagers were on, pressed a button on each pager. Tr. at 149. Coad then read the numbers revealed on each pager, and Murphy wrote down the numbers. Tr. at 122, 145, 149. Eight numbers were retrieved from one pager, while six numbers were retrieved from the other pager. Affirmation of

Diarmuid White, Attorney for Reyes, June 29, 1995 ("White Aff."), Ex. F. FN10 The agents then returned the pagers to Salazar, and Salazar left. Tr. at 124, 146.

FN10. It is not clear from the exhibit which pager was retrieved from the car and which pager was retrieved from the bag attached to Reyes' wheelchair.

On Sunday, December 4 at around 10:30 p.m., pursuant to a search warrant, two ATF agents (Horne and Dugan) searched a box of items in the basement storage department of the Miami Hilton Hotel. Tr. at 157, 166, 206, 218-19. This box contained items found in Reyes' hotel room on the night he was arrested. Tr. at 159. During that search, Agent Dugan found another pager (Pager # 3). Tr. at 159, 167. Agent Horne testified that she did not remember whether that pager was turned on when Dugan found it. Tr. at 219. Dugan testified that the pager *was* on, as evidenced by a series of lines across the video display. Tr. at 159, 167. After finding the pager, Dugan "put the side button in the vibrational mode" and attempted to retrieve messages from it. Tr. at 160, 167. There were no messages in the pager at that time. Tr. at 160, 168. Horne kept Pager # 3 in her hotel room overnight. Tr. at 219.

The next morning, Dugan and two others met with Horne in Horne's hotel room to examine what they had found the night before. Tr. at 160-161. Dugan placed Pager # 3 on a coffee table. Tr. at 161. At around 9:30 a.m., the pager (still in vibrational mode) went off. Tr. at 161, 168. When it began vibrating, Dugan "recorded the telephone number that was indicated on the" pager. Tr. at 161, 219. In order to record the number, Dugan pressed an access button. Tr. at 161. Dugan continued to record messages that came across the pager over the next four days, while the pager was in his possession. Tr. at 161, 168. Dugan recorded approximately 97 messages from the pager during that time. Tr. at 169-70; *see also* White Aff., Ex. G. FN11

FN11. Reyes states (Def.Reply Mem. at 18) that 78 messages were retrieved from Pager # 3. However, the evidence in the record suggests that closer to 100 messages were retrieved.

B. How Pagers Work

According to Agent Murphy, pagers usually have a black button. When the pager is turned on, pushing that button either reveals a signal that there are no pages or displays the last number. Pushing the button again reveals the next to last number, and so on. Tr. at 123, 345. Turning off the pager erases the pager's memory. Pagers have a limited storage capacity. Murphy testified that the storage capacity of Reyes' pagers was probably ten numbers. Tr. at 123-24. In addition to telephone numbers, the pagers were used to store numerical codes that could be interpreted as coded messages. Tr. at 150; Def.Mem. at 27. These numbers/messages could contain up to 16 digits. Def.Mem. at 27; *see also* White Aff., Ex. F.

C. Reyes' Pagers

Defendant Reyes moves for suppression of the numbers that the ATF agents obtained from the pagers they seized from Reyes at the time of (and two days after) his arrest. Reyes argues that both the Fourth Amendment and the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq.* compel the granting of his motion.

As an initial matter, the seizure of two of the pagers was constitutional. Pager # 1 was seized incident to a valid arrest, and Pager # 2 was seized in the course of a vehicle search to which the car's driver had consented. By contrast, for the reasons set forth above, Pager # 3 was illegally seized. However, in order to provide an alternative holding, I shall assume, for this purpose only, that the seizure of Pager # 3 was proper. Even though the seizures were proper, "an officer's authority to possess a package is distinct from his authority to examine its contents." *Walter v. United States,* 447 U.S. 649, 654, 100 S.Ct. 2395, 2400, 65 L.Ed.2d 410 (1980). Moreover, the Court accepts Reyes' ***833** assertion, unopposed by the Government, that he had a reasonable expectation of privacy in the contents of his pagers' memories. *United States v. Chan,* 830 F.Supp. 531, 535 (N.D.Cal.1993); *United States v. Blas,* 1990 WL 265179, No. 90-CR-162, at *21 (E. D.Wis.1990).

1. Fourth Amendment

a. *Pager # 1*

[12] [13] As stated above, the seizure of Pager # 1 resulted from a search incident to Reyes' lawful arrest. Tr. at 12, 17. Under *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969), when making a lawful arrest, police may conduct a warrantless search of the area within the arrestee's immediate control. When searching a container that is seized incident to arrest, "the general requirement for a warrant prior to the search of a container does not apply." *Chan*, 830 F.Supp. at 536 (citing *New York v. Belton*, 453 U.S. 454, 460-61, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981)). However, in some instances, law enforcement agents may require a separate warrant to search a container seized incident to a lawful arrest. *United States v. Chadwick*, 433 U.S. 1, 12-13, 97 S.Ct. 2476, 2484, 53 L.Ed.2d 538 (1977). In *Chadwick*, the defendant was arrested with a large footlocker by federal narcotics agents at a train station. While some agents took Chadwick to a federal building, other agents followed with the footlocker. From the moment of Chadwick's arrest, "the footlocker remained under the exclusive control of law enforcement officers at all times." *Id.* at 3-4, 97 S.Ct. at 2479. Ninety minutes after the arrest, and without a warrant, the agents opened the footlocker. *Id.* at 4, 97 S.Ct. at 2479. The Court ruled that under these circumstances, the search of the footlocker could not be considered incident to Chadwick's arrest and that the agents were therefore required to obtain a search warrant. *Id.* at 15, 97 S.Ct. at 2485. The *Chan* court summarized this holding by declaring that the *Chadwick* Court "adopted a narrow exception to the incident to arrest doctrine, holding that a warrantless search of seized property cannot be justified when the search is remote in time or place from the arrest." *Chan*, 830 F.Supp. at 535 (citing *Chadwick*, 433 U.S. at 13-15, 97 S.Ct. at 2484-85).

[14] In the instant case, Agent Coad accessed the memory of Pager # 1 soon after another agent seized the pager from the bag attached to Reyes' wheelchair. While no witness testified as to the precise time of Reyes' arrest and the time that Agent Coad accessed the memory of Pager # 1, given the events described as taking place during that period, it is hard to imagine that more than twenty minutes elapsed. The search of Pager # 1's memory was not at all remote in time or place from Reyes' arrest. Therefore the narrow *Chadwick* exception does not apply, and the search of the memory of Pager # 1 was a valid search incident to Reyes' arrest. The Fourth Amendment does not require the suppression of numbers retrieved from that pager.[FN12]

FN12. Because the Court holds that the accessing of Pager # 1's memory was a valid search incident to arrest, the Court need not decide whether exigent circumstances justified Coad's retrieval of the numbers from Pager # 1 under the Fourth Amendment.

b. *Pager # 2*

[15] As stated above, Pager # 2 was lawfully seized in the course of a vehicle search to which the driver of the car consented. Agent Murphy testified that he asked Salazar if Salazar minded if he [Murphy] looked in the car. Tr. at 118. Agent Coad similarly testified that he and Murphy asked Salazar if they could look inside the car. Both Murphy and Coad testified that Salazar allowed them to search the car. Tr. at 118, 132, 144. Coad found Pager # 2 in the back seat of the car. Tr. at 121, 144. The issue presented here is whether the scope of Salazar's consent to search the car encompassed Coad's warrantless search of the memory of Pager # 2.

The only case to address this issue in the context of pagers or similar devices is *United States v. Galante*, 1995 WL 507249, 94 CR 633 (S.D.N.Y. Aug. 25, 1995). In *Galante*, three agents were led to a car containing a driver and a passenger. One agent asked the occupants to get out of the car, asked the ***834** driver if the car was his, and asked if the agents could search the car. The driver said that the car

was his and consented to the search. The search yielded a cellular telephone and a pager. One of the agents extracted a telephone number from both the pager and the telephone. FN13 *Id.* at *2.

FN13. The agent extracted the number from the cellular telephone by pressing a recall key. The opinion does not specify whether the agent obtained the number from the pager by observing it already on the display screen or by pressing a button to retrieve the number. The opinion refers once to the number as being *in* the pager, thus implying that the number was not already observable on the pager's display screen; once to the number as being *on* the pager; and once to "the extraction of information from [the pager]." *Id.* at *2-3. Whether or not the agent had to press a button in order to read the number from the pager, the pressing of a button to access the memory of Pager # 2 in Reyes' case is analogous to the pressing of the recall key on the cellular telephone in *Galante.*

In arguing that the consent of the car owner to the search did not include consent to search the contents of the cellular telephone and pager, the defendant in *Galante* relied on *Florida v. Jimeno,* 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). That case involved a police officer who stopped a car, told the driver (Jimeno) that he had reason to believe there were narcotics in the car, and asked Jimeno for permission to search the car. *Jimeno,* 500 U.S. at 249, 111 S.Ct. at 1802. Jimeno consented, and the officer's search yielded a kilogram of cocaine. *Id.* at 249-50, 111 S.Ct. at 1802-03. The Supreme Court held that where Jimeno granted permission to search without placing "any explicit limitation on the scope of the search," and where the officer had told Jimeno that he would be looking for narcotics, "it was objectively reasonable for the police to conclude that the general consent to search [Jimeno's] car included consent to search containers within that car which might bear drugs." *Id.* at 251, 111 S.Ct. at 1803. The Court thus allowed the cocaine to be admitted as evidence against Jimeno.

The defendant in *Galante* cited *Jimeno* for the proposition that because there was no evidence that the agents told any of the occupants of the car what they were searching for, general consent to search did not include consent to search the memory of the cellular telephone and pager. The *Galante* court refused to interpret *Jimeno* in this manner. *Galante,* 1995 WL 507249, at *3. Rather, the *Galante* court looked to *United States v. Snow,* 44 F.3d 133 (2d Cir.1995), in which the Second Circuit interpreted *Jimeno* to mean "that a defendant's lack of knowledge of what the searching officer is searching for does not change the effect of a general consent." *Id.* (citing *Snow,* 44 F.3d at 135). The *Snow* court held that one who consents to a search of a car "should reasonably expect that readily-opened, closed containers discovered inside the car will be opened and examined." *Snow,* 44 F.3d at 135. The *Galante* court thus declined to suppress the number obtained from the search of the pager and the cellular telephone, citing the absence of any testimony that those items could not be readily "opened." *Galante,* 1995 WL 507249, at *3, *3 n. 4.

Here, as in *Galante,* there is no evidence to suggest that either Coad or Murphy told Salazar what they were looking for. Therefore, according to *Snow,* Salazar's general consent must be taken to include consent to search the memory of Pager # 2. The Fourth Amendment does not require the suppression of numbers retrieved from that pager. FN14

FN14. As with Pager # 1, the Court need not reach the issue of exigent circumstances. The accessing of Pager # 2's memory was constitutional as part of the consent search of the Town Car.

c. *Pager # 3*

[16] The third pager was found among the items taken from Reyes' hotel room to the basement storage department of the Miami Hilton Hotel. Tr. at 167, 219. Agents Dugan and Horne testified that they found the pager late Sunday night, that the pager was on when they found it, that Horne kept the pager in her hotel room overnight, that the pager began to sound at 9:30 a.m. Monday, and that they retrieved approximately 97 numeric messages from the pager over the course of four days. Tr. at 168, 219, 277. Reyes testified that he left the third pager turned off. Tr. at 346.

*835 The Government argues that exigent circumstances justified the agents' retrieval of numeric messages from Pager # 3. Gov't Mem. at 21-22 (citing *United States v. MacDonald*, 916 F.2d 766, 769 (2d Cir.1990) (en banc), *cert. denied*, 498 U.S. 1119, 111 S.Ct. 1071, 112 L.Ed.2d 1177 (1991); *United States v. Zabare*, 871 F.2d 282, 289-92 (2d Cir.), *cert. denied*, 493 U.S. 856, 110 S.Ct. 161, 107 L.Ed.2d 119 (1989)). Specifically, the Government notes that pagers have a limited memory, and that Pager # 3 "would refuse to accept incoming messages if its storage capacity was full." Affirmation of Laurie Horne in Support of Government's Response to Defendants' Pretrial Motions, Aug. 1, 1995, ¶ 6. In pointing out that "confederates and co-conspirators of [drug] traffickers" frequently leave messages on the pagers of suspects following an arrest, the Government implicitly argues that the pager messages could provide critical evidence or investigatory leads. *Id.*

In response, Reyes emphasizes his testimony that he left Pager # 3 turned off. Tr. at 346. Reyes then argues that because the agents turned on the pager, they themselves created any exigency. Therefore, Reyes argues, the Government cannot claim the benefit of the exception to the warrant requirement for exigent circumstances. The Eighth Circuit has held that

[u]nder the exigent circumstances exception, the warrant requirement is suspended "when-in the press of circumstances beyond a police officer's control-lives are threatened, a suspect's escape looms, or evidence is about to be destroyed ... The police themselves, however, cannot create the exigency."

United States v. Johnson, 12 F.3d 760, 764 (8th Cir.1993), *cert. denied*, 512 U.S. 1211, 114 S.Ct. 2689, 129 L.Ed.2d 821 (1994) (citing *United States v. Duchi*, 906 F.2d 1278, 1282 (8th Cir.1990)). The Second Circuit initially took this view in *United States v. Segura*, 663 F.2d 411, 415 (2d Cir.1981), but later circumscribed its position, deciding that "when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances." *MacDonald*, 916 F.2d at 772. The issue then becomes whether Dugan's act of turning on Pager # 3 (assuming, as Reyes argues, that Dugan did so) was a lawful act. The search warrant for the storage department at the Miami Hilton did not authorize the agents to access the memory of Reyes' pager. *See* White Aff., Ex. B. Because no exception to the warrant requirement was applicable under these circumstances (for example, the search was not incident to Reyes' arrest, nor was it a consent search), if Dugan turned the pager on, that act was unlawful.

If Dugan was accurate in testifying that Pager # 3 was on when he found it at 10:30 p.m. Sunday, then the following would also be true: despite the fact that the pager had received *no* messages from 1 p.m. Friday afternoon (when Reyes left his hotel room; Tr. at 343) [FN15] until 9:30 a.m. Monday morning (Tr. at 219)-a span of more than 68 hours-starting on Monday morning, the pager received approximately 100 messages over the next four days (Tr. at 170). This is a rate of approximately 25 pages per day.

FN15. No witness testified as to the means by which the contents of Reyes' hotel room were transported from the room to the hotel storage department. Nonetheless, the Government bears the burden of proving the existence of exigent circumstances, *Welsh v. Wisconsin*, 466 U.S. 740, 749-50, 104 S.Ct. 2091, 2097, 80 L.Ed.2d 732 (1984), and I find it more probable than not that no hotel personnel adjusted the pager in the course of transporting the contents of Reyes' hotel room. Therefore, I conclude that if Dugan's testimony that the pager was already on when he found it Sunday evening is to be credited, then I must also find that the pager was on when Reyes left his room on Friday afternoon.

Such a scenario is highly improbable. I therefore conclude that Dugan's testimony is not credible. Dugan must have turned on the pager on Monday morning, while handling the pager (*see* Tr. at 278) before he placed it on the coffee table in Horne's room.[FN16] Consequently, Dugan himself created *836 the exigency through the unlawful act of turning on Pager # 3. Dugan "creat[ed], or at least greatly increas[ed] the risk that evidence would be destroyed." *Johnson*, 12 F.3d at 765. Therefore, the agents cannot claim the benefit of the exigent circumstances exception, and the retrieval of numeric messages from Pager # 3 was unconstitutional.[FN17] *See MacDonald*, 916 F.2d at 772. Reyes' motion to suppress those numbers is granted.

FN16. Reyes testified that Pager # 3 was a duplicate (*i.e.* had the same phone number) of one of the pagers seized at the time of his arrest. Tr. at 344. I find this implausible, given that Reyes brought both (ostensibly duplicate) pagers with him to Miami, rather than leaving one in New York. Tr. at 344-45. In any event, a finding that the pagers were duplicates is unnecessary to my finding that Pager # 3 was turned on when Dugan and Horne found it.

FN17. The Court further observes that at no point during the four days that the agents retrieved numbers from Pager # 3 did the agents attempt to obtain a warrant authorizing them to access the pager's memory.

2. Electronic Communications Privacy Act

In addition to the Fourth Amendment challenges to the retrieval of numbers from Reyes' pagers, Reyes also asserts that such retrieval violated the Electronic Communications Privacy Act ("ECPA"). In 1986, the ECPA amended the Omnibus Crime Control and Safe Streets Act of 1968, commonly referred to as the Federal Wiretap Act.[FN18] *Steve Jackson Games, Inc. v. United States Secret Service,* 36 F.3d 457, 460 (5th Cir.1994). Title I of the ECPA proscribes " 'intentionally intercept[ing] ... any wire, oral, or electronic communication', unless the intercept is authorized by court order." *Id.* (citing 18 U.S.C. § 2511(1)(a)). By contrast, Title II of the ECPA "generally proscribes unauthorized access to stored wire or electronic communications." *Steve Jackson,* 36 F.3d at 462. The first question, is whether the conduct of the ATF agents amounted to intercepting electronic communications or to accessing stored electronic communications.

FN18. Specifically, the ECPA amended Title III of the Federal Wiretap Act. Court orders described by and issued under the Federal Wiretap Act are known as Title III warrants.

Only one case has addressed precisely this distinction. In *Steve Jackson,* the Fifth Circuit analyzed the language of the ECPA as follows. In order to understand what it means to intercept an electronic communication, one must first examine the relevant statutory definitions. Interception means "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). An electronic communication is "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system ... but does not include ... any wire or oral communication...." [FN19] 18 U.S.C. § 2510(12). Electronic storage means "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof...." 18 U.S.C. § 2510(17).

FN19. Unlike the definition of wire communications, electronic communications do not include "any electronic storage of such communication [s]." *See* 18 U.S.C. § 2510(1) (definition of wire communication).

[17] [18] Therefore, intercepting an electronic communication essentially means acquiring the *transfer* of data. Taken together, the definitions thus imply a requirement that the acquisition of the data be simultaneous with the original transmission of the data. As the *Steve Jackson* court stated,

Congress' use of the word "transfer" in the definition of "electronic communication" and its omission in that definition of the phrase "any electronic storage of such communication" (part of the definition of "wire communication") reflects that Congress did not intend for "intercept" to apply to "electronic communications" when those communications are in "electronic storage."

36 F.3d at 461-62. To be sure, the *Steve Jackson* decision was issued in the context of the seizure of a computer on which were stored e-mail messages that had been sent to an electronic bulletin board but not yet read (retrieved) by the intended recipients. 33 F.3d at 460. However, the court's reasoning applies with equal force to the instant case, in that agents seized pagers and accessed the pagers' memories, which contained numeric messages not yet read (retrieved) by the intended recipient.

Retrieving numbers from the memory of a pager, then, is more ***837** accurately described as accessing electronic communications that are in electronic storage than intercepting electronic communications. The Sixth Circuit, which is the only court yet to address precisely whether pressing a button on a pager to access the pager's memory constitutes an interception within the meaning of the ECPA, has decided that such action is not an interception. *United States v. Meriwether,* 917 F.2d 955, 960 (6th Cir.1990).[FN20]

FN20. Reyes correctly points out what may be perceived as flaws in the reasoning of the *Meriwether* court. For one thing, the court enumerates several rationales for deciding that pressing a pager button is not an interception under the ECPA, but does not specify which rationale it adopts. The reasons the court gives include that: (i) retrieval of a number from a pager's memory is not an interception because the transmission of the number to the pager had ceased; (ii) the agent who pressed the pager button became a party to the communication, and there can be no interception when a party to a communication records that communication; and (iii) the agent did not acquire the contents of the communication by a proscribed method, that is, by electronic, mechanical or other device as proscribed by the definition of "intercept" (simply pressing the digital display button and then visually observing the telephone numbers, the court stated, did not constitute the use of an electronic, mechanical or other device). *Meriwether,* 917 F.2d at 960. With regard to the third rationale, this Court agrees with Reyes that in fact pressing a button on the pager does constitute the use of an electronic or mechanical device. However, the Court is constrained by the use of the word "transfer" in the definition of "electronic communication," and is persuaded by the reasoning of the *Steve Jackson* court on this issue.Another flaw that Reyes observes is that the *Meriwether* court began its opinion by stating that a "digital display pager, by its very nature, is nothing more than a contemporary receptacle for telephone numbers." 917 F.2d at 958. This Court explicitly disagrees with this proposition (*see* page 832, *supra*); numerical codes may be transmitted to a pager that impart messages to the recipient. Nonetheless, this Court does not think that the above-described flaws render unsound the basic holding of *Meriwether*-that pressing a button on a pager to access its memory is not an "interception" within the meaning of the ECPA.Both Reyes and the Government also cite *Brown v. Waddell,* 50 F.3d 285 (4th Cir.1995). The facts of that case differ from those at issue here. In *Brown,* investigators used a duplicate (clone) digital display pager, which allowed them "to receive any numeric messages sent to [the suspect's] pagers at the same time that they were received and displayed on [the suspect's] pagers." 50 F.3d at 287, 294. The *Brown* court held that such a technique "cannot be considered the use of a 'pen register' within the meaning of the ECPA," and consequently decided that the use of clone pagers is an interception under the ECPA. *Id.* While not directly applicable to the instant case, the *Brown* holding reinforces this Court's conclusion that for purposes of the ECPA, an "interception" must acquire data simultaneously with the transmission of the data.

Consequently, in retrieving numbers from the pagers' memories, the agents in this case accessed stored electronic communications. The accessing of stored electronic communications is governed by Title II of the ECPA, 18 U.S.C. § 2701 *et seq.*[FN21] *Steve Jackson,* 36 F.3d at 462. "Generally, a search warrant, rather than a court order, is required to obtain access to the contents of a stored electronic communication." *Id.* at 462 n. 7; *see also* 18 U.S.C. § 2703(a). As a result, the same exceptions to the warrant requirement apply to this section as apply to any other warrantless search. Therefore, since this Court has already determined that the agents legally accessed the memories of Pagers # 1 and # 2 under exceptions to the warrant requirement, neither of those searches violated the ECPA. Because neither the Fourth Amendment nor the ECPA makes illegal the retrieval of numbers from the memories of Pager # 1 and Pager # 2, the numbers retrieved from those pagers are admissible against Reyes.

FN21. Section 2701 of the ECPA states thatExcept as provided in subsection (c) of this section whoever (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or(2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be

punished....18 U.S.C. § 2701(a).

[19] However, because the agents were not justified under the Fourth Amendment in retrieving numbers from the memory of Pager # 3, that search did violate the ECPA. Exclusion of the evidence is not an available remedy for this violation of the ECPA, *see* 18 U.S.C. §§ 2515, 2708, but the evidence from Pager # 3 is being suppressed in any event ***838** because the warrant authorizing the search of the hotel lost and found department was not supported by probable cause, and because the memory of Pager #3 was accessed in violation of the Fourth Amendment. The remedy for violation of Title II of the ECPA, set forth in 18 U.S.C. § 2707, lies in a civil action against the person or entity who violated the statute.[FN22]

FN22. The statute authorizes an award of "the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case ... less than the sum of $1,000." 18 U.S.C. § 2707(c); *see also Steve Jackson*, 36 F.3d at 460 n. 5. If he wishes to sue, Reyes must commence an action no "later than two years after the date upon which [he] first discovered or had a reasonable opportunity to discover the violation." 18 U.S.C. § 2707(e).

V. *Reyes' Post-Arrest Statements*

[20] Reyes concedes that on the evening of December 4, prior to his interrogation at the MCC, Agent Horne read the *Miranda* warnings to him, he signed an acknowledgment to this effect and he agreed to be questioned. Tr. at 354. Nonetheless, Reyes contends that while his waiver of rights and his statements were knowingly made, they were involuntary due to the circumstances of his confinement. By the time he was interrogated, Reyes had been in custody for approximately 43 hours without being arraigned. During that time, he received no medical attention, despite complaining to the prison authorities that he believed he had a urinary tract infection. Tr. at 351-352. Because of his physical condition (paraplegia), he was unable to shower or use the facilities. Tr. at 355. Reyes testified that he agreed to be questioned because he wanted to get out of the MCC as soon as possible and be sent to a place better suited to accommodate someone in his condition. Tr. at 355.

On the other hand, Reyes does not claim that he informed Agent Horne and the New York investigators of his urinary tract infection. Tr. at 354-55, 366. In fact, Agent Horne testified that Reyes stated that he wasn't sick and didn't want to be in a hospital with sick people, in response to Agent Horne's statement that the New York prisons have hospitals. Tr. at 218. And while Reyes testified that he was "drained" (Tr. at 355), he does not claim that he was confused or unable to think clearly during his questioning by the agents. Tr. at 354-55, 366. Under the circumstances, the credible evidence does not establish that Reyes was so exhausted and confused that his statements were involuntary.

Section 3501 of Title 18 requires a court to consider five factors in assessing voluntariness: (1) the time lapse between arrest and arraignment of the defendant making the statement; (2) whether the defendant knew the nature of the offense with which he was charged or of which he was suspected; (3) whether the defendant was advised or knew that he was not required to make any statement and that any statement could be used against him; (4) whether the defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether the defendant was without the assistance of counsel when questioned. Reyes concedes that factors 2, 3, and 4 must be decided in the Government's favor. With respect to factor 5, while Reyes did not have counsel at the interview, he was clearly advised of his right to counsel and chose not to request an attorney.

The only factor requiring any discussion is the first factor, namely the length of time between arrest and arraignment. Here, the delay in arraignment was caused by the fact that the federal courts in Miami were closed for the weekend. Reyes was not taken to the MCC until 11:45 p.m. on Friday night. *See* Gov't Mem. at 28. This Circuit has held that a prearraignment delay due to the unavailability of a Magistrate Judge over a weekend may be reasonable. *United States v. Rubio*, 709 F.2d 146, 153-54 (2d Cir.1983) (defendant's statement held admissible although it was made nearly two days after weekend arrest where, except for quite reasonable periods of time actually spent in processing and routine

questioning, the hours between arrest and arraignment were spent mainly in lodging at the MCC while awaiting arraignment).

I find that in this instance the delay in bringing Reyes to a Magistrate was reasonable considering all of the circumstances. ***839** The courts were closed for the weekend, the arraignment could not be conducted at the Magistrate's home and Reyes was a particularly difficult prisoner to transport given his physical disabilities. Because I do not believe the delay was unreasonable, I conclude that Reyes' statements were voluntary and should not be suppressed.

VI. *Reyes' Remaining Arguments*

A. Constitutionality of 21 U.S.C. § 848(b)(2)(A)

[21] Defendant Reyes challenges the validity of 21 U.S.C. § 848(b)(2)(A) on the ground that the statute is unconstitutionally vague. This statute must be read in conjunction with 21 U.S.C. § 841(b)(1)(B), which imposes a five-year minimum jail sentence for offenses involving five grams or more of cocaine base (that is, crack cocaine), while not imposing the same five-year minimum sentence for offenses involving powder cocaine unless the offense involves 500 grams or more. Section 848(b)(2)(A) takes the amounts designated in § 841(b)(1)(B) and imposes a mandatory life sentence if the violation "involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B)." FN23

FN23. The indictment of Reyes charges him with engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848, and alleges that the underlying violation "involved in excess of 300 times the quantity of a substance described in Section 841(b)(1)(B) of Title 21, United States Code, to wit, in excess of 1500 grams of mixtures and substances containing detectable amounts of cocaine base." Second Superseding Indictment, 1/25/95, ¶ 57. Therefore, if convicted of this charge, Reyes would face a mandatory sentence of life imprisonment under § 848(b)(2)(A).

As the Government points out, every circuit court (including the Second Circuit) "that has considered a constitutional vagueness challenge to the distinction between 'cocaine' and 'cocaine base' has rejected that challenge." Gov't Mem. at 50. *See United States v. Jackson,* 968 F.2d 158, 161 (2d Cir.), *cert. denied,* 506 U.S. 1024, 113 S.Ct. 664, 121 L.Ed.2d 589 (1992); *see also United States v. Jackson,* 64 F.3d 1213, 1219 (8th Cir.1995); *United States v. Thomas,* 932 F.2d 1085, 1090 (5th Cir.), *cert. denied,* 502 U.S. 895, 112 S.Ct. 264, 116 L.Ed.2d 217 (1991); *United States v. Turner,* 928 F.2d 956, 960 (10th Cir.), *cert. denied,* 502 U.S. 881, 112 S.Ct. 230, 116 L.Ed.2d 187 (1991); *United States v. Avant,* 907 F.2d 623, 625-27 (6th Cir.1990); *United States v. Van Hawkins,* 899 F.2d 852, 854 (9th Cir.1990); *United States v. Barnes,* 890 F.2d 545, 552-53 (1st Cir.1989), *cert. denied,* 494 U.S. 1019, 110 S.Ct. 1326, 108 L.Ed.2d 501 (1990); *United States v. Williams,* 876 F.2d 1521, 1525 (11th Cir.1989); *United States v. Brown,* 859 F.2d 974, 975-77 (D.C.Cir.1988). This Court is bound by the voluminous precedent established by this Circuit and others, and rejects Reyes' challenge to the sentencing provisions that distinguish between crack cocaine and powder cocaine.

B. The Indictment's References to the "Reyes Crew"

[22] Reyes seeks redaction of the term "Reyes Crew" from the indictment pursuant to Fed.R.Crim.P. 7(d), asserting that the term is surplusage and unduly prejudicial. It is well-settled in this Circuit that "[m]otions to strike surplusage from an indictment will be granted only where the challenged allegations are 'not relevant to the crime charged and are inflammatory and prejudicial.' " *United States v. Scarpa,* 913 F.2d 993, 1013 (2d Cir.1990) (quoting *United States v. Napolitano,* 552 F.Supp. 465, 480 (S.D.N.Y.1982)). *Scarpa* sets forth a two-pronged test that a defendant must meet to prevail in striking an allegation: (1) evidence of the challenged allegation must be inadmissible and irrelevant to the charge, and (2) the allegation must be prejudicial and inflammatory.

[23] Here, the references to the "Reyes Crew" are both prejudicial and inflammatory. If a RICO enterprise or RICO conspiracy were established at trial, Reyes would face an insurmountable task in convincing the jury that he was not a member of the enterprise or conspiracy bearing his name. Similarly, the challenged allegation is neither admissible nor relevant. In its Memorandum, the Government states that it intends to prove that Reyes was the organizer and undisputed leader of a criminal enterprise engaged in large-scale narcotics trafficking, the murder of perceived rivals and other acts of violence. Gov't Mem. at 31. However, the ***840** Government appears to concede that the term "Reyes Crew" was not used by the members of the enterprise. *Id.* Thus, while the Government may prove that Reyes was an organizer and leader of the enterprise, the made-up term "Reyes Crew" is neither admissible nor relevant.

C. Reyes' and Rodriguez' Request for a Wade Hearing

[24] Both Reyes and Rodriguez seek a *Wade* hearing with respect to certain identification procedures employed by the Government. The disclosure of information regarding pretrial identification procedures at this stage would be tantamount to the disclosure of a list of the Government's witnesses. The defendants are not entitled to such discovery at this stage. Prior to a witness' testimony, the Government must disclose whether the witness made a pretrial identification of any of the defendants and the circumstances under which the identification was made. The defendants may then request that the Court conduct an inquiry outside the presence of the jury as to whether such identification testimony should be suppressed.

VII. *Rodriguez' Request for Consolidation or Severance*

[25] Rodriguez asks that this indictment be consolidated with the indictment in *United States v. Garcia*, 94 Cr. 1003 (LMM), 1996 WL 51197. Failing that, he asks that his trial be severed from that of his co-defendants. The consolidation motion must be denied. As disclosed by the Government in its Memorandum, the *Garcia* case charges a narcotics conspiracy and two firearms counts, but no murders. The *Reyes* case, by contrast, charges a narcotics conspiracy and a RICO enterprise responsible for seven murders. The *Garcia* case, involving 23 defendants, will require proof with respect to the day-to-day operation of the narcotics conspiracy in which all of the 23 defendants were involved. The *Reyes* case, involving three defendants, will require proof of the details of seven murders. Under the circumstances, these indictments should not be consolidated as it would create an extremely long and possibly confusing trial.

[26] By the same token, judicial economy requires that Rodriguez be tried together with his co-defendants. Rodriguez is charged with the commission of two murders in furtherance of the racketeering enterprise charged in Count One of the indictment. The Government intends to prove that Rodriguez was a trusted member of the enterprise. Much of the proof of the existence and operations of the enterprise will be relevant to Rodriguez. Severing his case would require a substantial duplication of effort. Thus, a severance is denied. *See United States v. Werner*, 620 F.2d 922, 929 (2d Cir.1980) (requirement of substantial prejudice to justify severance arises from policy underlying Rule 8 that prejudice to defendant is outweighed by gains in trial economy when requirements of rule are met).

CONCLUSION

In sum, all of Reyes' motions to suppress are granted with the exception of the motions to suppress the numbers retrieved from Pagers # 1 and # 2 and his post-arrest statements; those are denied. The remainder of Reyes' motions are denied, with the exception of his motion to strike the term "Reyes Crew" from the indictment, which is granted. Rodriguez' motion for consolidation or a severance is denied.

SO ORDERED.

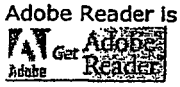
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TITLE 18 - CRIMES AND CRIMINAL PROCEDURE

PART I - CRIMES

CHAPTER 119 - WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.[1]

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof,

(i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or

(ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications;

(10) "communication common carrier" has the meaning given that term in section 3 of the Communications Act of 1934;

(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed;

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;

(13) "user" means any person or entity who—

(A) uses an electronic communication service; and

(B) is duly authorized by the provider of such service to engage in such use;

(14) "electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;

(16) "readily accessible to the general public" means, with respect to a radio communication, that such communication is not—

(A) scrambled or encrypted;

(B) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;

(C) carried on a subcarrier or other signal subsidiary to a radio transmission;

(D) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or

(E) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio;

(17) "electronic storage" means—

(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication;

(18) "aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception;

(19) "foreign intelligence information", for purposes of section 2517 (6) of this title, means—

(A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—

(i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(B) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—

(i) the national defense or the security of the United States; or

(ii) the conduct of the foreign affairs of the United States;

(20) "protected computer" has the meaning set forth in section 1030; and

(21) "computer trespasser"—

(A) means a person who accesses a protected computer without authorization and thus has no reasonable expectation of privacy in any communication transmitted to, through, or from the protected computer; and

(B) does not include a person known by the owner or operator of the protected computer to have an existing contractual relationship with the owner or operator of the protected computer for access to all or part of the protected computer.

Footnotes

[1] So in original. The period probably should be a semicolon.

(Added Pub. L. 90–351, title III, § 802, June 19, 1968, 82 Stat. 212; amended Pub. L. 99–508, title I, § 101(a), (c)(1)(A), (4), Oct. 21, 1986, 100 Stat. 1848, 1851; Pub. L. 103–414, title II, §§ 202(a), 203, Oct. 25, 1994, 108 Stat. 4290, 4291; Pub. L. 104–132, title VII, § 731, Apr. 24, 1996, 110 Stat. 1303; Pub. L. 107–56, title II, §§ 203(b)(2), 209 (1), 217 (1), Oct. 26, 2001, 115 Stat. 280, 283, 290; Pub. L. 107–108, title III, § 314(b), Dec. 28, 2001, 115 Stat. 1402; Pub. L. 107–273, div. B, title IV, § 4002(e)(10), Nov. 2, 2002, 116 Stat. 1810.)

Amendment of Section

For termination of amendment by Pub. L. 107–56, see Termination Date of 2001 Amendment note below.

References in Text

Section 3 of the Communications Act of 1934, referred to in par. (10), is classified to section 153 of Title 47, Telegraphs, Telephones, and Radiotelegraphs.

Amendments

2002—Par. (10). Pub. L. 107–273 substituted "has the meaning given that term in section 3 of the Communications Act of 1934;" for "shall have the same meaning which is given the term 'common carrier' by section 153 (h) of title 47 of the United States Code;".

2001—Par. (1). Pub. L. 107–56, §§ 209(1)(A), 224, temporarily struck out "and such term includes any electronic storage of such communication" before semicolon at end. See Termination Date of 2001 Amendment note below.

Par. (14). Pub. L. 107–56, §§ 209(1)(B), 224, temporarily inserted "wire or" after "transmission of". See Termination Date of 2001 Amendment note below.

Par. (19). Pub. L. 107–108 inserted ", for purposes of section 2517 (6) of this title," before "means" in introductory provisions.

Pub. L. 107–56, §§ 203(b)(2), 224, temporarily added par. (19). See Termination Date of 2001 Amendment note below.

Pars. (20), (21). Pub. L. 107–56, §§ 217(1), 224, temporarily added pars. (20) and (21). See Termination Date of 2001 Amendment note below.

1996—Par. (12)(D). Pub. L. 104–132, § 731(1), added subpar. (D).

Par. (16)(F). Pub. L. 104–132, § 731(2), struck out subpar. (F) which read as follows: "an electronic communication;".

1994—Par. (1). Pub. L. 103–414, § 202(a)(1), struck out before semicolon at end ", but such term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit".

Par. (12). Pub. L. 103–414, § 202(a)(2), redesignated subpars. (B) to (D) as (A) to (C), respectively, and struck out former subpar. (A) which read as follows: "the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;".

Par. (16)(F). Pub. L. 103–414, § 203, added subpar. (F).

1986—Par. (1). Pub. L. 99–508, § 101(a)(1), substituted "any aural transfer" for "any communication", inserted "(including the use of such connection in a switching station)" after "reception", struck out "as a common carrier" after "person engaged", and inserted "or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication, but such term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit" before the semicolon at end.

Par. (2). Pub. L. 99–508, § 101(a)(2), inserted ", but such term does not include any electronic communication" before the semicolon at end.

Par. (4). Pub. L. 99–508, § 101(a)(3), inserted "or other" after "aural" and ", electronic," after "wire".

Par. (5). Pub. L. 99–508, § 101(a)(4), (c)(1)(A), (4), substituted "wire, oral, or electronic" for "wire or oral" in introductory provisions, substituted "provider of wire or electronic communication service" for "communications common carrier" in subpars. (a)(i) and (ii), and inserted "or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business" before the semicolon in subpar. (a)(i).

Par. (8). Pub. L. 99–508, § 101(a)(5), (c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral" and struck out "identity of the parties to such communication or the existence," after "concerning the".

Pars. (9)(b), (11). Pub. L. 99–508, § 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral".

Pars. (12) to (18). Pub. L. 99–508, § 101(a)(6), added pars. (12) to (18).

Termination Date of 2001 Amendment

Pub. L. 107–56, title II, § 224, Oct. 26, 2001, 115 Stat. 295, as amended by Pub. L. 109–160, § 1, Dec. 30, 2005, 119 Stat. 2957, provided that:

"(a) In General.—Except as provided in subsection (b), this title [enacting section 2712 of this title, section 7210 of Title 22, Foreign Relations and Intercourse, and sections 403–5d, 1861, and 1862 of Title 50, War and National Defense, amending this section, sections 2511, 2516, 2517, 2520, 2702, 2703, 2707, 2711, 3103a, 3121, 3123, 3124, and 3127 of this title, sections 7203 and 7205 of Title 22, section 551 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, sections 1803 to 1805, 1823, 1824, 1842, and 1843 of Title 50, and Rules 6 and 41 of the Federal Rules of Criminal Procedure, repealing sections 1861 to 1863 of Title 50, and enacting provisions set out as notes under sections 2517, and 3124 of this title and section 532 of Title 28, Judiciary and Judicial Procedure] and the amendments made by this title (other than sections 203 (a), 203 (c), 205, 208, 210, 211, 213, 216, 219, 221, and 222 [amending sections 2703, 3103a, 3121, 3123, 3124, 3127 of this title, sections 7203 and 7205 of Title 22, section 551 of Title 47, section 1803 of Title 50, and Rules 6 and 41 of the Federal Rules of Criminal Procedure], and the amendments made by those sections) shall cease to have effect on February 3, 2006.

"(b) Exception.—With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect."

Effective Date of 1986 Amendment

Section 111 of title I of Pub. L. 99–508 provided that:

"(a) In General.—Except as provided in subsection (b) or (c), this title and the amendments made by this title [enacting sections 2521 and 3117 of this title, amending this section and sections 2232, 2511 to 2513, and 2516 to 2520 of this title, and enacting provisions set out as notes under this section] shall take effect 90 days after the date of the enactment of this Act [Oct. 21, 1986] and shall, in the case of conduct pursuant to a court order or extension, apply only with respect to court orders or extensions made after this title takes effect.

"(b) Special Rule for State Authorizations of Interceptions.—Any interception pursuant to section 2516 (2) of title 18 of the United States Code which would be valid and lawful without regard to the amendments made by this title shall be valid and lawful notwithstanding such amendments if such interception occurs during the period beginning on the date such amendments take effect and ending on the earlier of—

"(1) the day before the date of the taking effect of State law conforming the applicable State statute with chapter 119 of title 18, United States Code, as so amended; or

"(2) the date two years after the date of the enactment of this Act [Oct. 21, 1986].

"(c) Effective Date for Certain Approvals by Justice Department Officials.—Section 104 of this Act [amending section 2516 of this title] shall take effect on the date of enactment of this Act [Oct. 21, 1986]."

Short Title of 1997 Amendment

Pub. L. 105–112, § 1, Nov. 21, 1997, 111 Stat. 2273, provided that: "This Act [amending section 2512 of this title] may be cited as the 'Law Enforcement Technology Advertisement Clarification Act of 1997'."

Short Title of 1986 Amendment

Section 1 of Pub. L. 99–508 provided that: "This Act [enacting sections 1367, 2521, 2701 to 2710, 3117, and 3121 to 3126 of this title, amending sections 2232, 2511 to 2513, and 2516 to 2520 of this title, and enacting provisions set out as notes under this section and sections 2701 and 3121 of this title] may be cited as the 'Electronic Communications Privacy Act of 1986'."

Intelligence Activities

Section 107 of Pub. L. 99–508 provided that:

"(a) In General.—Nothing in this Act or the amendments made by this Act [see Short Title of 1986 Amendment note above] constitutes authority for the conduct of any intelligence activity.

"(b) Certain Activities Under Procedures Approved by the Attorney General.—Nothing in chapter 119 or chapter 121 of title 18, United States Code, shall affect the conduct, by officers or employees of the United States Government in accordance with other applicable Federal law, under procedures approved by the Attorney General of activities intended to—

"(1) intercept encrypted or other official communications of United States executive branch entities or United States Government contractors for communications security purposes;

"(2) intercept radio communications transmitted between or among foreign powers or agents of a foreign power as defined by the Foreign Intelligence Surveillance Act of 1978 [50 U.S.C. 1801 et seq.]; or

"(3) access an electronic communication system used exclusively by a foreign power or agent of a foreign power as defined by the Foreign Intelligence Surveillance Act of 1978."

Congressional Findings

Section 801 of Pub. L. 90–351 provided that: "On the basis of its own investigations and of published studies, the Congress makes the following findings:

"(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications. There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications. The contents of these communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce. The possession, manufacture, distribution, advertising, and use of these devices are facilitated by interstate commerce.

"(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

"(c) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

"(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused."

National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance

Section 804 of Pub. L. 90–351, as amended by Pub. L. 91–452, title XII, § 1212, Oct. 15, 1970, 84 Stat. 961; Pub. L. 91–644, title VI, § 20, Jan. 2, 1971, 84 Stat. 1892; Pub. L. 93–609, §§ 1–4, Jan. 2, 1975, 88 Stat. 1972, 1973; Pub. L. 94–176, Dec. 23, 1975, 89 Stat. 1031, established a National Commission for the Review of Federal and State Laws

Relating to Wiretapping and Electronic Surveillance, provided for its membership, Chairman, powers and functions, compensation and allowances, required the Commission to study and review the operation of the provisions of this chapter to determine their effectiveness and to submit interim reports and a final report to the President and to the Congress of its findings and recommendations on or before Apr. 30, 1976, and also provided for its termination sixty days after submission of the final report.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 119 - WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e) (i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511 (2)(a)(ii), 2511 (2)(b)–(c), 2511(2)(e), 2516, and 2518 of this chapter,

(ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation,

(iii) having obtained or received the information in connection with a criminal investigation, and

(iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service

to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518 (7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order, statutory authorization, or certification under this chapter.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978

shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.

(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person—

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted—

(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) by any marine or aeronautical communications system;

(iii) to engage in any conduct which—

(I) is prohibited by section 633 of the Communications Act of 1934; or

(II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act;

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(h) It shall not be unlawful under this chapter—

(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title); or

(ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(i) It shall not be unlawful under this chapter for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser transmitted to, through, or from the protected computer, if—

(I) the owner or operator of the protected computer authorizes the interception of the computer trespasser's communications on the protected computer;

(II) the person acting under color of law is lawfully engaged in an investigation;

(III) the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser's communications will be relevant to the investigation; and

(IV) such interception does not acquire communications other than those transmitted to or from the computer trespasser.

(3) (a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication—

(i) as otherwise authorized in section 2511 (2)(a) or 2517 of this title;

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4) (a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted—

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(5) (a) (i) If the communication is—

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection—

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

(Added Pub. L. 90–351, title III, § 802, June 19, 1968, 82 Stat. 213; amended Pub. L. 91–358, title II, § 211(a), July 29, 1970, 84 Stat. 654; Pub. L. 95–511, title II, § 201(a)–(c), Oct. 25, 1978, 92 Stat. 1796, 1797; Pub. L. 98–549, § 6(b)(2), Oct. 30, 1984, 98 Stat. 2804; Pub. L. 99–508, title I, §§ 101(b), (c)(1), (5), (6), (d), (f)[(1)], 102, Oct. 21, 1986, 100 Stat. 1849, 1851–1853; Pub. L. 103–322, title XXXII, § 320901, title XXXIII, § 330016(1)(G), Sept. 13, 1994, 108 Stat. 2123, 2147; Pub. L. 103–414, title II, §§

202(b), 204, 205, Oct. 25, 1994, 108 Stat. 4290, 4291; Pub. L. 104–294, title VI, § 604(b)(42), Oct. 11, 1996, 110 Stat. 3509; Pub. L. 107–56, title II, §§ 204, 217 (2), Oct. 26, 2001, 115 Stat. 281, 291; Pub. L. 107–296, title II, § 225(h)(2), (j)(1), Nov. 25, 2002, 116 Stat. 2158.)

Amendment of Section

For termination of amendment by Pub. L. 107–56, see Termination Date of 2001 Amendment note below.

References in Text

The Foreign Intelligence Surveillance Act of 1978, referred to in par. (2)(e), (f), is Pub. L. 95–511, Oct. 25, 1978, 92 Stat. 1783, which is classified principally to chapter 36 (§ 1801 et seq.) of Title 50, War and National Defense. Section 101 of the Foreign Intelligence Surveillance Act of 1978, referred to in par. (2)(a)(ii), (e), and (f), is classified to section 1801 of Title 50. For complete classification of this Act to the Code, see Short Title note set out under section 1801 of Title 50 and Tables.

Sections 633, 705, and 706 of the Communications Act of 1934, referred to in par. (2)(e), (f), (g)(iii), are classified to sections 553, 605, and 606 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, respectively.

Amendments

2002—Par. (2)(a)(ii). Pub. L. 107–296, § 225(h)(2), inserted ", statutory authorization," after "terms of a court order" in concluding provisions.

Par. (4)(b), (c). Pub. L. 107–296, § 225(j)(1), redesignated subpar. (c) as (b) and struck out former subpar. (b) which read as follows: "If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) is a radio communication that is not scrambled, encrypted, or transmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then—

"(i) if the communication is not the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and

"(ii) if the communication is the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, the offender shall be fined under this title."

2001—Par. (2)(f). Pub. L. 107–56, §§ 204, 224, temporarily substituted "this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934" for "this chapter or chapter 121, or section 705 of the Communications Act of 1934" and "wire, oral, and electronic communications" for "wire and oral communications". See Termination Date of 2001 Amendment note below.

Par. (2)(i). Pub. L. 107–56, §§ 217(2), 224, temporarily added subpar. (i). See Termination Date of 2001 Amendment note below.

1996—Par. (1)(e)(i). Pub. L. 104–294 substituted "sections 2511 (2)(a)(ii), 2511 (2)(b)–(c), 2511(2)(e), 2516, and 2518 of this chapter" for "sections 2511 (2)(A)(ii), 2511 (b)–(c), 2511(e), 2516, and 2518 of this subchapter".

1994—Par. (1)(e). Pub. L. 103–322, § 320901, added par. (1)(e).

Par. (2)(a)(i). Pub. L. 103–414, § 205, inserted "or electronic" after "transmission of a wire".

Par. (4)(b). Pub. L. 103–414, § 204, in introductory provisions substituted ", encrypted, or transmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then" for "or encrypted, then".

Par. (4)(b)(i). Pub. L. 103–414, § 202(b)(1), inserted "a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit," after "cellular telephone communication,".

Par. (4)(b)(ii). Pub. L. 103–414, § 202(b)(2), inserted "a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit," after "cellular telephone communication,".

Pub. L. 103–322, § 330016(1)(G), substituted "fined under this title" for "fined not more than $500".

1986—Pub. L. 99–508, § 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral" in section catchline.

Par. (1). Pub. L. 99–508, § 101(c)(1)(A), (d)(1), (f)[(1)], substituted "intentionally" for "willfully" in subpars. (a) to (d) and "wire, oral, or electronic' for "wire or oral" wherever appearing in subpars. (a), (c), and (d), and in concluding provisions substituted "shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5)" for "shall be fined not more than $10,000 or imprisoned not more than five years, or both".

Par. (2)(a)(i). Pub. L. 99–508, § 101(c)(5), substituted "a provider of wire or electronic communication service" for "any communication common carrier" and "of the provider of that service, except that a provider of wire communication service to the public" for "of the carrier of such communication: Provided, That said communication common carriers".

Par. (2)(a)(ii). Pub. L. 99–508, § 101(b)(1), (c)(1)(A), (6), substituted "providers of wire or electronic communication service" for "communication common carriers", "wire, oral, or electronic" for "wire or oral", "if such provider" for "if the common carrier", "provider of wire or electronic communication service" for "communication common carrier" wherever appearing, "such disclosure" for "violation of this subparagraph by a communication common carrier or an officer, employee, or agent thereof", "render such person liable" for "render the carrier liable", and "a court order or certification under this chapter" for "an order or certification under this subparagraph" in two places.

Par. (2)(b). Pub. L. 99–508, § 101(c)(1)(B), inserted "or electronic" after "wire".

Par. (2)(c). Pub. L. 99–508, § 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral".

Par. (2)(d). Pub. L. 99–508, § 101(b)(2), (c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral" and struck out "or for the purpose of committing any other injurious act" after "of any State".

Par. (2)(f). Pub. L. 99–508, § 101(b)(3), inserted "or chapter 121" in two places and substituted "foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means" for "foreign communications by a means".

Par. (2)(g), (h). Pub. L. 99–508, § 101(b)(4), added subpars. (g) and (h).

Par. (3). Pub. L. 99–508, § 102, added par. (3).

Pars. (4), (5). Pub. L. 99–508, § 101(d)(2), added pars. (4) and (5).

1984—Par. (2)(e). Pub. L. 98–549, § 6(b)(2)(A), substituted "section 705 or 706" for "section 605 or 606".

Par. (2)(f). Pub. L. 98–549, § 6(b)(2)(B), substituted "section 705" for "section 605".

1978—Par. (2)(a)(ii). Pub. L. 95–511, § 201(a), substituted provisions authorizing communication common carriers etc., to provide information to designated persons, prohibiting disclosure of intercepted information, and rendering violators civilly liable for provision exempting communication common carriers from criminality for giving information to designated officers.

Par. (2)(e), (f). Pub. L. 95–511, § 201(b), added par. (2)(e) and (f).

Par. (3). Pub. L. 95–511, § 201(c), struck out par. (3) which provided that nothing in this chapter or section 605 of title 47 limited the President's constitutional power to gather necessary intelligence to protect the national security and stated the conditions necessary for the reception into evidence and disclosure of communications intercepted by the President.

1970—Par. (2)(a). Pub. L. 91–358 designated existing provisions as cl. (i) and added cl. (ii).

Effective Date of 2002 Amendment

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

Termination Date of 2001 Amendment

Amendment by Pub. L. 107–56 to cease to have effect Feb. 3, 2006, except amendment to continue in effect with respect to any particular foreign intelligence investigation that began before Feb. 3, 2006, or with respect to any particular offense or potential offense that began or occurred before Feb. 3, 2006, see section 224 of Pub. L. 107–56, set out as a note under section 2510 of this title.

Effective Date of 1996 Amendment

Amendment by Pub. L. 104–294 effective Sept. 13, 1994, see section 604(d) of Pub. L. 104–294, set out as a note under section 13 of this title.

Effective Date of 1986 Amendment

Amendment by Pub. L. 99–508 effective 90 days after Oct. 21, 1986, and, in case of conduct pursuant to court order or extension, applicable only with respect to court orders and extensions made after such date, with special rule for State authorizations of interceptions, see section 111 of Pub. L. 99–508, set out as a note under section 2510 of this title.

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–549 effective 60 days after Oct. 30, 1984, see section 9(a) of Pub. L. 98–549, set out as an Effective Date note under section 521 of Title 47, Telegraphs, Telephones, and Radiotelegraphs.

Effective Date of 1978 Amendment

Amendment by Pub. L. 95–511 effective Oct. 25, 1978, except as specifically provided, see section 401 of Pub. L. 95–511, set out as an Effective Date note under section 1801 of Title 50, War and National Defense.

Effective Date of 1970 Amendment

Amendment by Pub. L. 91–358 effective on first day of seventh calendar month which begins after July 29, 1970, see section 901(a) of Pub. L. 91–358.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 119 - WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

§ 2512. Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who intentionally—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication or disseminates by electronic means any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire, oral, or electronic communications,

knowing the content of the advertisement and knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined under this title or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a provider of wire or electronic communication service or an officer, agent, or employee of, or a person under contract with, such a provider, in the normal course of the business of providing that wire or electronic communication service, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof,

to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications.

(3) It shall not be unlawful under this section to advertise for sale a device described in subsection (1) of this section if the advertisement is mailed, sent, or carried in interstate or foreign commerce solely to a domestic provider of wire or electronic communication service or to an agency of the United States, a State, or a political subdivision thereof which is duly authorized to use such device.

(Added Pub. L. 90–351, title III, § 802, June 19, 1968, 82 Stat. 214; amended Pub. L. 99–508, title I, § 101(c)(1)(A), (7), (f)(2), Oct. 21, 1986, 100 Stat. 1851, 1853; Pub. L. 103–322, title XXXIII, §§ 330016(1)(L), 330022, Sept. 13, 1994, 108 Stat. 2147, 2150; Pub. L. 104–294, title VI, § 604(b)(45), Oct. 11, 1996, 110 Stat. 3509; Pub. L. 105–112, § 2, Nov. 21, 1997, 111 Stat. 2273; Pub. L. 107–296, title II, § 225(f), Nov. 25, 2002, 116 Stat. 2158.)

Amendments

2002—Par. (1)(c). Pub. L. 107–296, in introductory provisions, inserted "or disseminates by electronic means" after "or other publication" and, in concluding provisions, inserted "knowing the content of the advertisement and" before "knowing or having reason to know".

1997—Par. (3). Pub. L. 105–112 added par. (3).

1996—Par. (2). Pub. L. 104–294 amended directory language of Pub. L. 103–322, § 330022. See 1994 Amendment note below.

1994—Par. (1). Pub. L. 103–322, § 330016(1)(L), substituted "fined under this title" for "fined not more than $10,000" in concluding provisions.

Par. (2). Pub. L. 103–322, § 330022, as amended by Pub. L. 104–294, realigned margins of concluding provisions.

1986—Pub. L. 99–508, § 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral" in section catchline.

Par. (1). Pub. L. 99–508, § 101(c)(1)(A), (f)(2), substituted "intentionally" for "willfully" in introductory provision and "wire, oral, or electronic" for "wire or oral" in subpars. (a), (b), and (c)(i), (ii).

Par. (2)(a). Pub. L. 99–508, § 101(c)(7), substituted "a provider of wire or electronic communication service or" for "a communications common carrier or", "such a provider, in" for "a communications common carrier, in", and "business of providing that wire or electronic communication service" for "communications common carrier's business".

Par. (2)(b). Pub. L. 99–508, § 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral".

Effective Date of 2002 Amendment

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

Effective Date of 1996 Amendment

Amendment by Pub. L. 104–294 effective Sept. 13, 1994, see section 604(d) of Pub. L. 104–294, set out as a note under section 13 of this title.

Effective Date of 1986 Amendment

Amendment by Pub. L. 99–508 effective 90 days after Oct. 21, 1986, and, in case of conduct pursuant to court order or extension, applicable only with respect to court orders and extensions made after such date, with special rule for State authorizations of interceptions, see section 111 of Pub. L. 99–508, set out as a note under section 2510 of this title.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 119 - WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

§ 2513. Confiscation of wire, oral, or electronic communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to

(1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code,

(2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof,

(3) the remission or mitigation of such forfeiture,

(4) the compromise of claims, and

(5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

(Added Pub. L. 90–351, title III, § 802, June 19, 1968, 82 Stat. 215; amended Pub. L. 99–508, title I, § 101(c)(1)(A), Oct. 21, 1986, 100 Stat. 1851.)

Amendments

1986—Pub. L. 99–508 substituted "wire, oral, or electronic" for "wire or oral" in section catchline.

Effective Date of 1986 Amendment

Amendment by Pub. L. 99–508 effective 90 days after Oct. 21, 1986, and, in case of conduct pursuant to court order or extension, applicable only with respect to court orders and extensions made after such date, with special rule for State authorizations of interceptions, see section 111 of Pub. L. 99–508, set out as a note under section 2510 of this title.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
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§ 2514. Repealed. Pub. L. 91–452, title II, § 227(a), Oct. 15, 1970, 84 Stat. 930]

Section, Pub. L. 90–351, title II, § 802, June 19, 1968, 82 Stat. 216, provided for immunity of witnesses giving testimony or producing evidence under compulsion in Federal grand jury or court proceedings. Subject matter is covered in sections 6002 and 6003 of this title.

Effective Date of Repeal

Sections 227(a) and 260 of Pub. L. 91–452 provided for repeal of this section effective four years following sixtieth day after date of enactment of Pub. L. 91–452, which was approved Oct. 15, 1970, such repeal not affecting any immunity to which any individual was entitled under this section by reason of any testimony or other information given before such date. See section 260 of Pub. L. 91–452, set out as an Effective Date; Savings Provision note under section 6001 of this title.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
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§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

(Added Pub. L. 90–351, title III, § 802, June 19, 1968, 82 Stat. 216.)

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

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§ 2516. Authorization for interception of wire, oral, or electronic communications

(1) The Attorney General, Deputy Attorney General, Associate Attorney General,[1] or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2122 and 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), section 2284 of title 42 of the United States Code (relating to sabotage of nuclear facilities or fuel), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 55 (relating to kidnapping), chapter 90 (relating to protection of trade secrets), chapter 105 (relating to sabotage), chapter 115 (relating to treason), chapter 102 (relating to riots), chapter 65 (relating to malicious mischief), chapter 111 (relating to destruction of vessels), or chapter 81 (relating to piracy);

(b) a violation of section 186 or section 501 (c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 215 (relating to bribery of bank officials), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1032 (relating to concealment of assets), section 1084 (transmission of wagering information), section 751 (relating to escape), section 1014 (relating to loans and credit applications generally; renewals and discounts), sections 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1591 (sex trafficking of children by force, fraud, or coercion), section 1751 (Presidential and Presidential staff assassination, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1958 (relating to use of interstate commerce facilities in the commission of murder for hire), section 1959 (relating to violent crimes in aid of racketeering activity), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 1956 (laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), section 1343 (fraud by wire, radio, or television), section 1344 (relating to bank fraud), sections 2251 and 2252 (sexual exploitation of children), section 2251A (selling or buying of children), section 2252A (relating to material constituting or containing child pornography), section 1466A (relating to child obscenity), section 2260 (production of sexually explicit depictions of a minor for importation into the United States), sections 2421, 2422, 2423, and 2425 (relating to transportation for illegal sexual activity and related crimes), sections 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), section

1203 (relating to hostage taking), section 1029 (relating to fraud and related activity in connection with access devices), section 3146 (relating to penalty for failure to appear), section 3521 (b)(3) (relating to witness relocation and assistance), section 32 (relating to destruction of aircraft or aircraft facilities), section 38 (relating to aircraft parts fraud), section 1963 (violations with respect to racketeer influenced and corrupt organizations), section 115 (relating to threatening or retaliating against a Federal official), section 1341 (relating to mail fraud), a felony violation of section 1030 (relating to computer fraud and abuse), section 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, and assault), section 831 (relating to prohibited transactions involving nuclear materials), section 33 (relating to destruction of motor vehicles or motor vehicle facilities), section 175 (relating to biological weapons), section 175c (relating to variola virus), section 1992 (relating to wrecking trains), a felony violation of section 1028 (relating to production of false identification documentation), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), section 1541 (relating to passport issuance without authority), section 1542 (relating to false statements in passport applications), section 1543 (relating to forgery or false use of passports), section 1544 (relating to misuse of passports), or section 1546 (relating to fraud and misuse of visas, permits, and other documents);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title;

(g) a violation of section 5322 of title 31, United States Code (dealing with the reporting of currency transactions);

(h) any felony violation of sections 2511 and 2512 (relating to interception and disclosure of certain communications and to certain intercepting devices) of this title;

(i) any felony violation of chapter 71 (relating to obscenity) of this title;

(j) any violation of section 60123 (b) (relating to destruction of a natural gas pipeline) or section 46502 (relating to aircraft piracy) of title 49;

(k) any criminal violation of section 2778 of title 22 (relating to the Arms Export Control Act);

(l) the location of any fugitive from justice from an offense described in this section;

(m) a violation of section 274, 277, or 278 of the Immigration and Nationality Act (8 U.S.C. 1324, 1327, or 1328) (relating to the smuggling of aliens);

(n) any felony violation of sections 922 and 924 of title 18, United States Code (relating to firearms);

(o) any violation of section 5861 of the Internal Revenue Code of 1986 (relating to firearms);

(p) a felony violation of section 1028 (relating to production of false identification documents), section 1542 (relating to false statements in passport applications), section 1546 (relating to fraud and misuse of visas, permits, and other documents) of this title or a violation of section 274, 277, or 278 of the Immigration and Nationality Act (relating to the smuggling of aliens); or [2]

(q) any criminal violation of section 229 (relating to chemical weapons) or section 2332, 2332a, 2332b, 2332d, 2332f, 2332g, 2332h, 2339A, 2339B, or 2339C of this title (relating to terrorism); or

(r) any conspiracy to commit any offense described in any subparagraph of this paragraph.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity

with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

(3) Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title, an order authorizing or approving the interception of electronic communications by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of any Federal felony.

Footnotes

[1] See 1984 Amendment note below.

[2] So in original. The word "or" probably should not appear.

(Added Pub. L. 90–351, title III, § 802, June 19, 1968, 82 Stat. 216; amended Pub. L. 91–452, title VIII, § 810, title IX, § 902(a), title XI, § 1103, Oct. 15, 1970, 84 Stat. 940, 947, 959; Pub. L. 91–644, title IV, § 16, Jan. 2, 1971, 84 Stat. 1891; Pub. L. 95–598, title III, § 314(h), Nov. 6, 1978, 92 Stat. 2677; Pub. L. 97–285, §§ 2(e), 4 (e), Oct. 6, 1982, 96 Stat. 1220, 1221; Pub. L. 98–292, § 8, May 21, 1984, 98 Stat. 206; Pub. L. 98–473, title II, § 1203(c), Oct. 12, 1984, 98 Stat. 2152; Pub. L. 99–508, title I, §§ 101(c)(1)(A), 104, 105, Oct. 21, 1986, 100 Stat. 1851, 1855; Pub. L. 99–570, title I, § 1365(c), Oct. 27, 1986, 100 Stat. 3207–35; Pub. L. 100–690, title VI, § 6461, title VII, §§ 7036, 7053 (d), 7525, Nov. 18, 1988, 102 Stat. 4374, 4399, 4402, 4502; Pub. L. 101–298, § 3(b), May 22, 1990, 104 Stat. 203; Pub. L. 101–647, title XXV, § 2531, title XXXV, § 3568, Nov. 29, 1990, 104 Stat. 4879, 4928; Pub. L. 103–272, § 5(e)(11), July 5, 1994, 108 Stat. 1374; Pub. L. 103–322, title XXXIII, §§ 330011(c)(1), (q)(1), (r), 330021 (1), Sept. 13, 1994, 108 Stat. 2144, 2145, 2150; Pub. L. 103–414, title II, § 208, Oct. 25, 1994, 108 Stat. 4292; Pub. L. 103–429, § 7(a)(4)(A), Oct. 31, 1994, 108 Stat. 4389; Pub. L. 104–132, title IV, § 434, Apr. 24, 1996, 110 Stat. 1274; Pub. L. 104–208, div. C, title II, § 201, Sept. 30, 1996, 110 Stat. 3009–564; Pub. L. 104–287, § 6(a)(2), Oct. 11, 1996, 110 Stat. 3398; Pub. L. 104–294, title I, § 102, title VI, § 601(d), Oct. 11, 1996, 110 Stat. 3491, 3499; Pub. L. 105–318, § 6(b), Oct. 30, 1998, 112 Stat. 3011; Pub. L. 106–181, title V, § 506(c)(2)(B), Apr. 5, 2000, 114 Stat. 139; Pub. L. 107–56, title II, §§ 201, 202, Oct. 26, 2001, 115 Stat. 278; Pub. L. 107–197, title III, § 301(a), June 25, 2002, 116 Stat. 728; Pub. L. 107–273, div. B, title IV, §§ 4002(c)(1), 4005 (a)(1), Nov. 2, 2002, 116 Stat. 1808, 1812; Pub. L. 108–21, title II, § 201, Apr. 30, 2003, 117 Stat. 659; Pub. L. 108–458, title VI, § 6907, Dec. 17, 2004, 118 Stat. 3774; Pub. L. 109–162, title XI, § 1171(b), Jan. 5, 2006, 119 Stat. 3123.)

Amendment of Section

For termination of amendment by Pub. L. 107–56, see Termination Date of 2001 Amendment note below.

References in Text

The Atomic Energy Act of 1954, referred to in par. (1)(a), is act Aug. 1, 1946, ch. 724, as added by act Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 921, and amended, which is classified generally to chapter 23 (§ 2011 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of Title 42 and Tables.

The Arms Export Control Act, referred to in par. (1)(k), is Pub. L. 90–269, Oct. 22, 1968, 82 Stat. 1320, as amended, which is classified principally to chapter 39 (§ 2751 et seq.) of Title 22, Foreign Relations and Intercourse. For complete classification of this Act to the Code, see Short Title note set out under section 2751 of Title 22 and Tables.

Section 5861 of the Internal Revenue Code of 1986, referred to in par. (1)(o), is classified to section 5861 of Title 26, Internal Revenue Code.

The Federal Rules of Criminal Procedure, referred to in par. (3), are set out in the Appendix to this title.

Amendments

2006—Par. (1)(q). Pub. L. 109–162 struck out semicolon after "(relating to chemical weapons)" and substituted "section 2332" for "sections 2332".

2004—Par. (1)(a). Pub. L. 108–458, § 6907(1), inserted "2122 and" after "sections".

Par. (1)(c). Pub. L. 108–458, § 6907(2), inserted "section 175c (relating to variola virus)," after "section 175 (relating to biological weapons),".

Par. (1)(q). Pub. L. 108–458, § 6907(3), inserted "2332g, 2332h," after "2332f,".

2003—Par. (1)(a). Pub. L. 108–21, § 201(1), inserted "chapter 55 (relating to kidnapping)," after "chapter 37 (relating to espionage),".

Par. (1)(c). Pub. L. 108–21, § 201(2), inserted "section 1591 (sex trafficking of children by force, fraud, or coercion)," after "section 1511 (obstruction of State or local law enforcement)," and "section 2251A (selling or buying of children), section 2252A (relating to material constituting or containing child pornography), section 1466A (relating to child obscenity), section 2260 (production of sexually explicit depictions of a minor for importation into the United States), sections 2421, 2422, 2423, and 2425 (relating to transportation for illegal sexual activity and related crimes)," after "sections 2251 and 2252 (sexual exploitation of children),".

2002—Par. (1)(n). Pub. L. 107–273, § 4002(c)(1), repealed Pub. L. 104–294, § 601(d)(2). See 1996 Amendment note below.

Par. (1)(q). Pub. L. 107–273, § 4005(a)(1), realigned margins.

Pub. L. 107–197 inserted "2332f," after "2332d," and substituted "2339B, or 2339C" for "or 2339B".

2001—Par. (1)(c). Pub. L. 107–56, §§ 202, 224, temporarily substituted "section 1341 (relating to mail fraud), a felony violation of section 1030 (relating to computer fraud and abuse)," for "and section 1341 (relating to mail fraud),". See Termination Date of 2001 Amendment note below.

Par. (1)(p). Pub. L. 107–56, §§ 201(1), 224, temporarily redesignated subpar. (p), relating to conspiracy, as (r). See Termination Date of 2001 Amendment note below.

Par. (1)(q). Pub. L. 107–56, §§ 201(2), 224, temporarily added subpar. (q). See Termination Date of 2001 Amendment note below.

Par. (1)(r). Pub. L. 107–56, §§ 201(1), 224, temporarily redesignated subpar. (p), relating to conspiracy, as (r). See Termination Date of 2001 Amendment note below.

2000—Par. (1)(c). Pub. L. 106–181 inserted "section 38 (relating to aircraft parts fraud)," after "section 32 (relating to destruction of aircraft or aircraft facilities),".

1998—Par. (1)(a). Pub. L. 105–318 inserted "chapter 90 (relating to protection of trade secrets)," after "chapter 37 (relating to espionage),".

1996—Par. (1)(c). Pub. L. 104–294, § 102, which directed amendment of par. 1(c) by inserting "chapter 90 (relating to protection of trade secrets)," after "chapter 37 (relating to espionage),", could not be executed because phrase "chapter 37 (relating to espionage)," did not appear.

Pub. L. 104–208, § 201(1), substituted "section 1992 (relating to wrecking trains), a felony violation of section 1028 (relating to production of false identification documentation), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), section 1541 (relating to passport issuance without authority), section 1542 (relating to false statements in passport applications), section 1543 (relating to forgery or false use of passports), section 1544 (relating to misuse of passports), or section 1546 (relating to fraud and misuse of visas, permits, and other documents)" for "or section 1992 (relating to wrecking trains)" before semicolon at end.

Par. (1)(j). Pub. L. 104–287, § 6(a)(2), amended directory language of Pub. L. 103–272, § 5(e)(11) as amended by Pub. L. 103–429, § 7(a)(4)(A). See 1994 Amendment note below.

Par. (1)(l). Pub. L. 104–208, § 201(2), and Pub. L. 104–294, § 601(d)(1), amended subpar. (l) identically, striking out "or" after semicolon at end.

Par. (1)(m). Pub. L. 104–208, § 201(3), (4), added subpar. (m). Former subpar. (m) redesignated (n).

Par. (1)(n). Pub. L. 104–294, § 601(d)(2), which could not be executed because of prior amendments by Pub. L. 104–132, § 434(1) and Pub. L. 104–208, § 201(3), was repealed by Pub. L. 107–273, § 4002(c)(1). See below.

Pub. L. 104–208, § 201(3), redesignated subpar. (m) as (n). Former subpar. (n) redesignated (o).

Pub. L. 104–132, § 434(1), struck out "and" at end.

Par. (1)(o). Pub. L. 104–208, § 201(3), redesignated subpar. (n) as (o). Former subpar. (o) redesignated (p).

Pub. L. 104–132 added subpar. (o) and redesignated former subpar. (o) as (p).

Par. (1)(p). Pub. L. 104–208, § 201(3), redesignated subpar. (o), relating to felony violation of section 1028, etc., as (p).

Pub. L. 104–132, § 434(2), redesignated subpar. (o), relating to conspiracy, as (p).

1994—Par. (1). Pub. L. 103–414 in introductory provisions inserted "or acting Deputy Assistant Attorney General" after "Deputy Assistant Attorney General".

Par. (1)(c). Pub. L. 103–322, § 330021(1), substituted "kidnapping" for "kidnaping" in two places.

Pub. L. 103–322, § 330011(c)(1), amended directory language of Pub. L. 101–298, § 3(b). See 1990 Amendment note below.

Par. (1)(j). Pub. L. 103–322, § 330011(r), amended directory language of Pub. L. 101–647, § 2531(3). See 1990 Amendment note below.

Pub. L. 103–322, § 330011(q)(1), repealed Pub. L. 101–647, § 3568. See 1990 Amendment note below.

Pub. L. 103–272, § 5(e)(11), as amended by Pub. L. 103–429, § 7(a)(4)(A); Pub. L. 104–287, § 6(a)(2), substituted "section 60123 (b) (relating to destruction of a natural gas pipeline) or section 46502 (relating to aircraft piracy) of title 49;" for "section 11(c)(2) of the Natural Gas Pipeline Safety Act of 1968 (relating to destruction of a natural gas pipeline) or subsection (i) or (n) of section 902 of the Federal Aviation Act of 1958 (relating to aircraft piracy);".

1990—Par. (1)(c). Pub. L. 101–647, § 2531(1), inserted "section 215 (relating to bribery of bank officials)," before "section 224", "section 1032 (relating to concealment of assets)," before section 1084, "section 1014 (relating to loans and credit applications generally; renewals and discounts)," before "sections 1503," and "section 1344 (relating to bank fraud)," before "sections 2251 and 2252" and struck out "the section in chapter 65 relating to destruction of an energy facility," after "retaliating against a Federal official),".

Pub. L. 101–298, § 3(b), as amended by Pub. L. 103–322, § 330011(c)(1), inserted "section 175 (relating to biological weapons)," after "section 33 (relating to destruction of motor vehicles or motor vehicle facilities),".

Par. (1)(j). Pub. L. 101–647, § 3568, which directed amendment of subsec. (j) by substituting "any violation of section 11(c)(2) of the Natural Gas Pipeline Safety Act of 1968 (relating to destruction of a natural gas pipeline) or section 902(i) or (n) of the Federal Aviation Act of 1958 (relating to aircraft piracy)" for "any violation of section 1679a (c)(2) (relating to destruction of a natural gas pipeline) or subsection (i) or (n) of section 1472 (relating to aircraft piracy) of title 49, of the United States Code", and which was probably intended as an amendment to par. (1)(j), was repealed by Pub. L. 103–322, § 330011(q)(1).

Pub. L. 101–647, § 2531(3), as amended by Pub. L. 103–322, § 330011(r), substituted "any violation of section 11(c)(2) of the Natural Gas Pipeline Safety Act of 1968 (relating to destruction of a natural gas pipeline) or subsection (i) or (n) of section 902 of the Federal Aviation Act of 1958 (relating to aircraft piracy)" for "any violation of section 1679a (c)(2) (relating to destruction of a natural gas pipeline) or subsection (i) or (n) of section 1472 (relating to aircraft piracy) of title 49, of the United States Code".

Par. (1)(m). Pub. L. 101–647, § 2531(2)(A), struck out subpar. (m) relating to conspiracy which read as follows: "any conspiracy to commit any of the foregoing offenses."

Par. (1)(o). Pub. L. 101–647, § 2531(2)(B)–(D), added subpar. (o).

1988—Par. (1). Pub. L. 100–690, § 7036(a)(1), inserted "or" after "Associate Attorney General," in introductory provisions.

Par. (1)(a). Pub. L. 100–690, § 7036(c)(1), which directed the amendment of subpar. (a) by substituting "(relating to riots)," for "(relating to riots);" was executed by substituting "(relating to riots)," for "(relating to riots)" as the probable intent of Congress.

Par. (1)(c). Pub. L. 100–690, § 7053(d), which directed the amendment of section 2516 (c) by substituting "1958" for "1952A" and "1959" for "1952B" was executed by making the substitutions in par. (1)(c) as the probable intent of Congress.

Pub. L. 100–690, § 7036(b), struck out "section 2252 or 2253 (sexual exploitation of children)," after "wire, radio, or television)," and substituted "section 2321" for "the second section 2320".

Pub. L. 100–690, § 7036(a)(2), which directed the amendment of par. (1) by striking the comma that follows a comma was executed to subpar. (c) by striking out the second comma after "to mail fraud)".

Par. (1)(i). Pub. L. 100–690, § 7525, added subpar. (i) and redesignated former subpar. (i) as (j).

Par. (1)(j). Pub. L. 100–690, § 7525, redesignated former subpar. (i) as (j). Former subpar. (j) redesignated (k).

Pub. L. 100–690, § 7036(c)(2), which directed amendment of subpar. (j) by striking "or;" was executed by striking "or" after "Export Control Act);" to reflect the probable intent of Congress.

Par. (1)(k). Pub. L. 100–690, § 7525, redesignated former subpar. (j) as (k). Former subpar. (k) redesignated (l).

Pub. L. 100–690, § 7036(c)(3), struck out "or" at end.

Par. (1)(l). Pub. L. 100–690, § 7525, redesignated former subpar. (k) as (l). Former subpar. (l) redesignated (m).

Par. (1)(m). Pub. L. 100–690, § 7525, redesignated former subpar. (l) relating to conspiracy as (m).

Pub. L. 100–690, § 6461, added subpar. (m) relating to sections 922 and 924.

Par. (1)(n). Pub. L. 100–690, § 6461, added subpar. (n).

1986—Pub. L. 99–508, § 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral" in section catchline.

Par. (1). Pub. L. 99–508, § 104, substituted "any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General in the Criminal Division" for "or any Assistant Attorney General" in introductory provisions.

Par. (1)(a). Pub. L. 99–508, § 105(a)(5), inserted "section 2284 of title 42 of the United States Code (relating to sabotage of nuclear facilities or fuel)," struck out "or" after "(relating to treason)," and inserted "chapter 65 (relating to malicious mischief), chapter 111 (relating to destruction of vessels), or chapter 81 (relating to piracy)".

Par. (1)(c). Pub. L. 99–570, which directed the amendment of subpar. (c) by inserting "section 1956 (laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity)," after "section 1955 (prohibition of relating to business enterprises of gambling)," was executed by inserting this phrase after "section 1955 (prohibition of business enterprises of gambling)," as the probable intent of Congress.

Pub. L. 99–508, § 105(a)(1), inserted "section 751 (relating to escape)," "the second section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), section 1203 (relating to hostage taking), section 1029 (relating to fraud and related activity in connection with access devices), section 3146 (relating to penalty for failure to appear), section 3521 (b)(3) (relating to witness relocation and assistance), section 32 (relating to destruction of aircraft or aircraft facilities)," and "section 1952A (relating to use of interstate commerce facilities in the commission of murder for hire), section 1952B (relating to violent crimes in aid of racketeering activity)," substituted "2312, 2313, 2314," for "2314", inserted ", section 115 (relating to threatening or retaliating against a Federal official), the section in chapter 65 relating to destruction of an energy facility, and section 1341 (relating to mail fraud)," substituted ", section 351" for "or section 351", and inserted ", section 831 (relating to prohibited transactions involving nuclear materials), section 33 (relating to destruction of motor vehicles or motor vehicle facilities), or section 1992 (relating to wrecking trains)".

Par. (1)(h) to (l). Pub. L. 99–508, § 105(a)(2)–(4), added subpars. (h) to (k) and redesignated former subpar. (h) as (l).

Par. (2). Pub. L. 99–508, § 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral" in two places.

Par. (3). Pub. L. 99–508, § 105(b), added par. (3).

1984—Par. (1). Pub. L. 98–473, § 1203(c)(4), which directed the amendment of the first par. of par. (1) by inserting "Deputy Attorney General, Associate Attorney General," after "Attorney General." was executed by making the insertion after the first reference to "Attorney General," to reflect the probable intent of Congress.

Par. (1)(c). Pub. L. 98–473, § 1203(c)(2), inserted references to sections 1512 and 1513 after "1503".

Pub. L. 98–473, § 1203(c)(1), inserted "section 1343 (fraud by wire, radio, or television), section 2252 or 2253 (sexual exploitation of children)," after "section 664 (embezzlement from pension and welfare funds),".

Pub. L. 98–292 inserted "sections 2251 and 2252 (sexual exploitation of children)," after "section 664 (embezzlement from pension and welfare funds),".

Par. (1)(g), (h). Pub. L. 98–473, § 1203(c)(3), added par. (g) and redesignated former par. (g) as (h).

1982—Par. (1)(c). Pub. L. 97–285 substituted "(Presidential and Presidential staff assassination, kidnaping, and assault)" for "(Presidential assassinations, kidnapping, and assault)" after "section 1751" and substituted "(violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, and assault)" for "(violations with respect to congressional assassination, kidnapping, and assault)" after "section 351".

1978—Par. (1)(e). Pub. L. 95–598 substituted "fraud connected with a case under title 11" for "bankruptcy fraud".

1971—Par. (1)(c). Pub. L. 91–644 inserted reference to section 351 offense (violations with respect to congressional assassination, kidnaping, and assault).

1970—Par. (1)(c). Pub. L. 91–452 inserted reference to sections 844 (d), (e), (f), (g), (h), or (i), 1511, 1955, and 1963 of this title.

Effective Date of 2002 Amendment

Pub. L. 107–273, div. B, title IV, § 4002(c)(1), Nov. 2, 2002, 116 Stat. 1808, provided that the amendment made by section 4002 (c)(1) is effective Oct. 11, 1996.

Termination Date of 2001 Amendment

Amendment by Pub. L. 107–56 to cease to have effect Feb. 3, 2006, except amendment to continue in effect with respect to any particular foreign intelligence investigation that began before Feb. 3, 2006, or with respect to any particular offense or potential offense that began or occurred before Feb. 3, 2006, see section 224 of Pub. L. 107–56, set out as a note under section 2510 of this title.

Effective Date of 2000 Amendment

Amendment by Pub. L. 106–181 applicable only to fiscal years beginning after Sept. 30, 1999, see section 3 of Pub. L. 106–181, set out as a note under section 106 of Title 49, Transportation.

Effective Date of 1996 Amendment

Section 6(a) of Pub. L. 104–287 provided that the amendment made by that section is effective July 5, 1994.

Effective Date of 1994 Amendments

Section 7(a) of Pub. L. 103–429 provided that the amendment made by section 7(a)(4)(A) of Pub. L. 103–429 is effective July 5, 1994.

Section 330011(c)(1) of Pub. L. 103–322 provided that the amendment made by that section is effective as of the date on which section 3(b) of Pub. L. 101–298 took effect.

Section 330011(q)(1) of Pub. L. 103–322 provided that the amendment made by that section is effective as of the date on which section 3568 of Pub. L. 101–647 took effect.

Section 330011(r) of Pub. L. 103–322 provided that the amendment made by that section is effective as of the date on which section 2531(3) of Pub. L. 101–647 took effect.

Effective Date of 1986 Amendment

Amendment by sections 101(c)(1)(A) and 105 of Pub. L. 99–508 effective 90 days after Oct. 21, 1986, and, in case of conduct pursuant to court order or extension, applicable only with respect to court orders and extensions made after such date, with special rule for State authorizations of interceptions pursuant to section 2516 (2) of this title, and amendment by section 104 of Pub. L. 99–508 effective Oct. 21, 1986, see section 111 of Pub. L. 99–508, set out as a note under section 2510 of this title.

Effective Date of 1978 Amendment

Amendment by Pub. L. 95–598 effective Oct. 1, 1979, see section 402(a) of Pub. L. 95–598, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

Savings Provision

Amendment by section 314 of Pub. L. 95–598 not to affect the application of chapter 9 (§ 151 et seq.), chapter 96 (§ 1961 et seq.), or section 2516, 3057, or 3284 of this title to any act of any person (1) committed before Oct. 1, 1979, or (2) committed after Oct. 1, 1979, in connection with a case commenced before such date, see section 403(d) of Pub. L. 95–598, set out as a note preceding section 101 of Title 11, Bankruptcy.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2. 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 119 - WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

§ 2517. Authorization for disclosure and use of intercepted wire, oral, or electronic communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

(6) Any investigative or law enforcement officer, or attorney for the Government, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official to the extent that such contents include foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in subsection (19) of section 2510 of this title), to assist the official who is to receive that information in the performance of his official duties. Any Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.

(7) Any investigative or law enforcement officer, or other Federal official in carrying out official duties as such Federal official, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents or derivative evidence to a foreign investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure, and foreign investigative or law enforcement officers may use or disclose such contents or derivative evidence to the extent such use or disclosure is appropriate to the proper performance of their official duties.

(8) Any investigative or law enforcement officer, or other Federal official in carrying out official duties as such Federal official, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents or derivative evidence to any appropriate Federal, State, local, or foreign government official to the extent that such contents or derivative evidence reveals a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, domestic or international sabotage, domestic or international terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by an agent of a foreign power, within the United States or elsewhere, for the purpose of preventing or responding to such a threat. Any official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information, and any State, local, or foreign official who receives information pursuant to this provision may use that information only consistent with such guidelines as the Attorney General and Director of Central Intelligence shall jointly issue.

(Added Pub. L. 90–351, title III, § 802, June 19, 1968, 82 Stat. 217; amended Pub. L. 91–452, title IX, § 902(b), Oct. 15, 1970, 84 Stat. 947; Pub. L. 99–508, title I, § 101(c)(1)(A), Oct. 21, 1986, 100 Stat. 1851; Pub. L. 107–56, title II, § 203(b)(1), Oct. 26, 2001, 115 Stat. 280; Pub. L. 107–296, title VIII, § 896, Nov. 25, 2002, 116 Stat. 2257.)

Amendment of Section

For termination of amendment by Pub. L. 107–56, see Termination Date of 2001 Amendment note below.

Amendments

2002—Pars. (7), (8). Pub. L. 107–296 added pars. (7) and (8).

2001—Par. (6). Pub. L. 107–56, §§ 203(b)(1), 224, temporarily added par. (6). See Termination Date of 2001 Amendment note below.

1986—Pub. L. 99–508 substituted "wire, oral, or electronic" for "wire or oral" in section catchline and wherever appearing in text.

1970—Par. (3). Pub. L. 91–452 substituted "proceeding held under the authority of the United States or of any State or political subdivision thereof" for "criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding".

Change of Name

Reference to the Director of Central Intelligence or the Director of the Central Intelligence Agency in the Director's capacity as the head of the intelligence community deemed to be a reference to the Director of National Intelligence. Reference to the Director of Central Intelligence or the Director of the Central Intelligence Agency in the Director's capacity as the head of the Central Intelligence Agency deemed to be a reference to the Director of the Central Intelligence Agency. See section 1081(a), (b) of Pub. L. 108–458, set out as a note under section 401 of Title 50, War and National Defense.

Effective Date of 2002 Amendment

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

Termination Date of 2001 Amendment

Amendment by Pub. L. 107–56 to cease to have effect Feb. 3, 2006, except amendment to continue in effect with respect to any particular foreign intelligence investigation that began before Feb. 3, 2006, or with respect to any particular offense or potential offense that began or occurred before Feb. 3, 2006, see section 224 of Pub. L. 107–56, set out as a note under section 2510 of this title.

Effective Date of 1986 Amendment

Amendment by Pub. L. 99–508 effective 90 days after Oct. 21, 1986, and, in case of conduct pursuant to court order or extension, applicable only with respect to court orders and extensions made after such date, with special rule for State authorizations of interceptions, see section 111 of Pub. L. 99–508, set out as a note under section 2510 of this title.

Procedures for Disclosure of Information

Pub. L. 107–56, title II, § 203(c), Oct. 26, 2001, 115 Stat. 280, as amended by Pub. L. 107–296, title VIII, § 897(b), Nov. 25, 2002, 116 Stat. 2258; Pub. L. 108–458, title VI, § 6501(b), Dec. 17, 2004, 118 Stat. 3760, provided that: "The Attorney General shall establish procedures for the disclosure of information pursuant to paragraphs (6) and (8) of section 2517 of title 18, United States Code, and Rule 6(e)(3)(D) of the Federal Rules of Criminal Procedure [18 App. U.S.C.] that identifies a United States person, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801)) [sic]."

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE

PART I - CRIMES

CHAPTER 119 - WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

§ 2518. Procedure for interception of wire, oral, or electronic communications

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including

(i) details as to the particular offense that has been, is being, or is about to be committed,

(ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted,

(iii) a particular description of the type of communications sought to be intercepted,

(iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

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(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire, oral, or electronic communication under this chapter shall, upon request of the applicant, direct that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian, or person is according the person whose communications are to be intercepted. Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance. Pursuant to section 2522 of this chapter, an order may also be issued to enforce the assistance capability and capacity requirements under the Communications Assistance for Law Enforcement Act.

(5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney

General, or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists that involves—

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interest, or

(iii) conspiratorial activities characteristic of organized crime,

that requires a wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire, oral, or electronic communications were or were not intercepted.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

(c) The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications.

(11) The requirements of subsections (1)(b)(ii) and (3)(d) of this section relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply if—

(a) in the case of an application with respect to the interception of an oral communication—

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and

(iii) the judge finds that such specification is not practical; and

(b) in the case of an application with respect to a wire or electronic communication—

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing that there is probable cause to believe that the person's actions could have the effect of thwarting interception from a specified facility;

(iii) the judge finds that such showing has been adequately made; and

(iv) the order authorizing or approving the interception is limited to interception only for such time as it is reasonable to presume that the person identified in the application is or was reasonably proximate to the instrument through which such communication will be or was transmitted.

(12) An interception of a communication under an order with respect to which the requirements of subsections (1)(b)(ii) and (3)(d) of this section do not apply by reason of subsection (11)(a) shall not begin until the place where the communication is to be intercepted is ascertained by the person implementing the interception order. A provider of wire or electronic communications service that has received an order as provided for in subsection (11)(b) may move the court to modify or quash the order on the ground that its assistance with respect to the interception cannot be performed in a timely or reasonable fashion. The court, upon notice to the government, shall decide such a motion expeditiously.

(Added Pub. L. 90–351, title III, § 802, June 19, 1968, 82 Stat. 218; amended Pub. L. 91–358, title II, § 211(b), July 29, 1970, 84 Stat. 654; Pub. L. 95–511, title II, § 201(d)–(g), Oct. 25, 1978, 92 Stat. 1797, 1798; Pub. L. 98–473, title II, § 1203(a), (b), Oct. 12, 1984, 98 Stat. 2152; Pub. L. 99–508, title I, §§ 101(c)(1)(A), (8), (e), 106 (a)–(d)(3), Oct. 21, 1986, 100 Stat. 1851–1853, 1856, 1857; Pub. L. 103–414, title II, § 201(b)(1), Oct. 25, 1994, 108 Stat. 4290; Pub. L. 105–272, title VI, § 604, Oct. 20, 1998, 112 Stat. 2413.)

References in Text

The Communications Assistance for Law Enforcement Act, referred to in par. (4), is title I of Pub. L. 103–414, Oct. 25, 1994, 108 Stat. 4279, which is classified generally to subchapter I (§ 1001 et seq.) of chapter 9 of Title 47, Telegraphs, Telephones, and Radiotelegraphs. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of Title 47 and Tables.

Amendments

1998—Par. (11)(b)(ii). Pub. L. 105–272, § 604(a)(1), substituted "that there is probable cause to believe that the person's actions could have the effect of thwarting interception from a specified facility;" for "of a purpose, on the part of that person, to thwart interception by changing facilities; and".

Par. (11)(b)(iii). Pub. L. 105–272, § 604(a)(2), substituted "such showing has been adequately made; and" for "such purpose has been adequately shown."

Par. (11)(b)(iv). Pub. L. 105–272, § 604(a)(3), added cl. (iv).

Par. (12). Pub. L. 105–272, § 604(b), substituted "by reason of subsection (11)(a)" for "by reason of subsection (11)", struck out "the facilities from which, or" after "shall not begin until", and struck out comma after "the place where".

1994—Par. (4). Pub. L. 103–414 inserted at end of concluding provisions "Pursuant to section 2522 of this chapter, an order may also be issued to enforce the assistance capability and capacity requirements under the Communications Assistance for Law Enforcement Act."

1986—Pub. L. 99–508, § 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral" in section catchline.

Par. (1). Pub. L. 99–508, § 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral" in introductory provisions.

Par. (1)(b)(ii). Pub. L. 99–508, § 106(d)(1), inserted "except as provided in subsection (11),".

Par. (1)(e). Pub. L. 99–508, § 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral".

Par. (3). Pub. L. 99–508, §§ 101(c)(1)(A), 106 (a), in introductory provisions, substituted "wire, oral, or electronic" for "wire or oral" and inserted "(and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction)".

Par. (3)(d). Pub. L. 99–508, §§ 101(c)(1)(A), 106 (d)(2), inserted "except as provided in subsection (11)," and substituted "wire, oral, or electronic" for "wire or oral".

Par. (4). Pub. L. 99–508, §§ 101(c)(1)(A), (8), 106 (b), substituted "wire, oral, or electronic" for "wire or oral" wherever appearing and, in closing provisions, substituted "provider of wire or electronic communication service" for "communication common carrier" wherever appearing, "such service provider" for "such carrier", and "for reasonable expenses incurred in providing such facilities or assistance" for "at the prevailing rates".

Par. (5). Pub. L. 99–508, §§ 101(c)(1)(A), 106 (c), substituted "wire, oral, or electronic" for "wire or oral" and inserted provisions which related to beginning of thirty-day period, minimization where intercepted communication is in code or foreign language and expert in that code or foreign language is not immediately available, and conduct of interception by Government personnel or by individual operating under Government contract, acting under supervision of investigative or law enforcement officer authorized to conduct interception.

Pars. (7), (8)(a), (d)(3), (9). Pub. L. 99–508, § 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral" wherever appearing.

Par. (10)(c). Pub. L. 99–508, § 101(e), added subpar. (c).

Pars. (11), (12). Pub. L. 99–508, § 106(d)(3), added pars. (11) and (12).

1984—Par. (7). Pub. L. 98–473, § 1203(a), inserted ", the Deputy Attorney General, the Associate Attorney General," after "Attorney General" in provisions preceding subpar. (a).

Par. (7)(a). Pub. L. 98–473, § 1203(b), amended subpar. (a) generally, adding cl. (i) and designated existing provisions as cls. (ii) and (iii).

1978—Par. (1). Pub. L. 95–511, § 201(d), inserted "under this chapter" after "communication".

Par. (4). Pub. L. 95–511, § 201(e), inserted "under this chapter" after "wire or oral communication" wherever appearing.

Par. (9). Pub. L. 95–511, § 201(e), substituted "any wire or oral communication intercepted pursuant to this chapter" for "any intercepted wire or oral communication".

Par. (10). Pub. L. 95–511, § 201(g), substituted "any wire or oral communication intercepted pursuant to this chapter," for "any intercepted wire or oral communication,".

1970—Par. (4). Pub. L. 91–358 inserted the provision that, upon the request of the applicant, an order authorizing the interception of a wire or oral communication direct that a communication common carrier, landlord, custodian, or other person furnish the applicant with all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services provided.

Effective Date of 1986 Amendment

Amendment by Pub. L. 99–508 effective 90 days after Oct. 21, 1986, and, in case of conduct pursuant to court order or extension, applicable only with respect to court orders and extensions made after such date, with special rule for State authorizations of interceptions, see section 111 of Pub. L. 99–508, set out as a note under section 2510 of this title.

Effective Date of 1978 Amendment

Amendment by Pub. L. 95–511 effective Oct. 25, 1978, except as specifically provided, see section 401 of Pub. L. 95–511, set out as an Effective Date note under section 1801 of Title 50, War and National Defense.

Effective Date of 1970 Amendment

Amendment by Pub. L. 91–358 effective on first day of seventh calendar month which begins after July 29, 1970, see section 901(a) of Pub. L. 91–358.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 119 - WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

§ 2519. Reports concerning intercepted wire, oral, or electronic communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for (including whether or not the order was an order with respect to which the requirements of sections 2518 (1)(b)(ii) and 2518 (3)(d) of this title did not apply by reason of section 2518 (11) of this title);

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including

(i) the approximate nature and frequency of incriminating communications intercepted,

(ii) the approximate nature and frequency of other communications intercepted,

(iii) the approximate number of persons whose communications were intercepted,

(iv) the number of orders in which encryption was encountered and whether such encryption prevented law enforcement from obtaining the plain text of communications intercepted pursuant to such order, and

(v) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire, oral, or electronic communications pursuant to this

chapter and the number of orders and extensions granted or denied pursuant to this chapter during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

(Added Pub. L. 90–351, title III, § 802, June 19, 1968, 82 Stat. 222; amended Pub. L. 95–511, title II, § 201(h), Oct. 25, 1978, 92 Stat. 1798; Pub. L. 99–508, title I, §§ 101(c)(1)(A), 106 (d)(4), Oct. 21, 1986, 100 Stat. 1851, 1857; Pub. L. 106–197, § 2(a), May 2, 2000, 114 Stat. 247.)

Amendments

2000—Par. (2)(b)(iv), (v). Pub. L. 106–197 added cl. (iv) and redesignated former cl. (iv) as (v).

1986—Pub. L. 99–508, § 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral" in section catchline.

Par. (1)(b). Pub. L. 99–508, § 106(d)(4), inserted "(including whether or not the order was an order with respect to which the requirements of sections 2518 (1)(b)(ii) and 2518 (3)(d) of this title did not apply by reason of section 2518 (11) of this title)".

Par. (3). Pub. L. 99–508, § 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral".

1978—Par. (3). Pub. L. 95–511 inserted "pursuant to this chapter" after "wire or oral communications" and "granted or denied".

Effective Date of 1986 Amendment

Amendment by Pub. L. 99–508 effective 90 days after Oct. 21, 1986, and, in case of conduct pursuant to court order or extension, applicable only with respect to court orders and extensions made after such date, with special rule for State authorizations of interceptions, see section 111 of Pub. L. 99–508, set out as a note under section 2510 of this title.

Effective Date of 1978 Amendment

Amendment by Pub. L. 95–511 effective Oct. 25, 1978, except as specifically provided, see section 401 of Pub. L. 95–511, set out as an Effective Date note under section 1801 of Title 50, War and National Defense.

Report on Use of DCS 1000 (Carnivore) To Implement Orders Under Section 2518

Pub. L. 107–273, div. A, title III, § 305(b), Nov. 2, 2002, 116 Stat. 1782, provided that: "At the same time that the Attorney General, or Assistant Attorney General specially designated by the Attorney General, submits to the Administrative Office of the United States Courts the annual report required by section 2519 (2) of title 18, United States Code, that is respectively next due after the end of each of the fiscal years 2002 and 2003, the Attorney General shall also submit to the Chairmen and ranking minority members of the Committees on the Judiciary of the Senate and of the House of Representatives a report, covering the same respective time period, that contains the following information with respect to those orders described in that annual report that were applied for by law enforcement agencies of the Department of Justice and whose implementation involved the use of the DCS 1000 program (or any subsequent version of such program)—

"(1) the kind of order or extension applied for (including whether or not the order was an order with respect to which the requirements of sections 2518 (1)(b)(ii) and 2518 (3)(d) of title 18, United States Code, did not apply by reason of section 2518 (11) of title 18);

"(2) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

"(3) the offense specified in the order or application, or extension of an order;

"(4) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application;

"(5) the nature of the facilities from which or place where communications were to be intercepted;

"(6) a general description of the interceptions made under such order or extension, including—

"(A) the approximate nature and frequency of incriminating communications intercepted;

"(B) the approximate nature and frequency of other communications intercepted;

"(C) the approximate number of persons whose communications were intercepted;

"(D) the number of orders in which encryption was encountered and whether such encryption prevented law enforcement from obtaining the plain text of communications intercepted pursuant to such order; and

"(E) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

"(7) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

"(8) the number of trials resulting from such interceptions;

"(9) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

"(10) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

"(11) the specific persons authorizing the use of the DCS 1000 program (or any subsequent version of such program) in the implementation of such order."

Encryption Reporting Requirements

Pub. L. 106–197, § 2(b), May 2, 2000, 114 Stat. 247, provided that: "The encryption reporting requirement in subsection (a) [amending this section] shall be effective for the report transmitted by the Director of the Administrative Office of the Courts for calendar year 2000 and in subsequent reports."

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 119 - WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

§ 2520. Recovery of civil damages authorized

(a) **In General.**— Except as provided in section 2511 (2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) **Relief.**— In an action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) **Computation of Damages.**—

(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511 (5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511 (5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) **Defense.**— A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518 (7) of this title; or

(3) a good faith determination that section 2511 (3) or 2511 (2)(i) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) **Limitation.**— A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

(f) **Administrative Discipline.**— If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or

intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

(g) **Improper Disclosure Is Violation.**— Any willful disclosure or use by an investigative or law enforcement officer or governmental entity of information beyond the extent permitted by section 2517 is a violation of this chapter for purposes of section 2520 (a).

(Added Pub. L. 90–351, title III, § 802, June 19, 1968, 82 Stat. 223; amended Pub. L. 91–358, title II, § 211(c), July 29, 1970, 84 Stat. 654; Pub. L. 99–508, title I, § 103, Oct. 21, 1986, 100 Stat. 1853; Pub. L. 107–56, title II, § 223(a), Oct. 26, 2001, 115 Stat. 293; Pub. L. 107–296, title II, § 225(e), Nov. 25, 2002, 116 Stat. 2157.)

Amendment of Section

For termination of amendment by Pub. L. 107–56, see Termination Date of 2001 Amendment note below.

Amendments

2002—Subsec. (d)(3). Pub. L. 107–296 inserted "or 2511(2)(i)" after "2511(3)".

2001—Subsec. (a). Pub. L. 107–56, §§ 223(a)(1), 224, temporarily inserted ", other than the United States," after "person or entity". See Termination Date of 2001 Amendment note below.

Subsecs. (f), (g). Pub. L. 107–56, §§ 223(a)(2), (3), 224, temporarily added subsecs. (f) and (g). See Termination Date of 2001 Amendment note below.

1986—Pub. L. 99–508 amended section generally. Prior to amendment, section read as follows: "Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

"(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

"(b) punitive damages; and

"(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law."

1970—Pub. L. 91–358 substituted provisions that a good faith reliance on a court order or legislative authorization constitute a complete defense to any civil or criminal action brought under this chapter or under any other law, for provisions that a good faith reliance on a court order or on the provisions of section 2518 (7) of this chapter constitute a complete defense to any civil or criminal action brought under this chapter.

Effective Date of 2002 Amendment

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

Termination Date of 2001 Amendment

Amendment by Pub. L. 107–56 to cease to have effect Feb. 3, 2006, except amendment to continue in effect with respect to any particular foreign intelligence investigation that began before Feb. 3, 2006, or with respect to any particular offense or potential offense that began or occurred before Feb. 3, 2006, see section 224 of Pub. L. 107–56, set out as a note under section 2510 of this title.

Effective Date of 1986 Amendment

Amendment by Pub. L. 99–508 effective 90 days after Oct. 21, 1986, and, in case of conduct pursuant to court order or extension, applicable only with respect to court orders and extensions made after such date, with special rule for State authorizations of interceptions, see section 111 of Pub. L. 99–508, set out as a note under section 2510 of this title.

Effective Date of 1970 Amendment

Amendment by Pub. L. 91–358 effective on first day of seventh calendar month which begins after July 29, 1970, see section 901(a) of Pub. L. 91–358.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 119 - WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

§ 2521. Injunction against illegal interception

Whenever it shall appear that any person is engaged or is about to engage in any act which constitutes or will constitute a felony violation of this chapter, the Attorney General may initiate a civil action in a district court of the United States to enjoin such violation. The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

(Added Pub. L. 99–508, title I, § 110(a), Oct. 21, 1986, 100 Stat. 1859.)

References in Text

The Federal Rules of Civil Procedure, referred to in text, are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

The Federal Rules of Criminal Procedure, referred to in text, are set out in the Appendix to this title.

Effective Date

Section effective 90 days after Oct. 21, 1986, and, in case of conduct pursuant to court order or extension, applicable only with respect to court orders and extensions made after such date, with special rule for State authorizations of interceptions, see section 111 of Pub. L. 99–508, set out as an Effective Date of 1986 Amendment note under section 2510 of this title.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 121 - STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

§ 2701. Unlawful access to stored communications

(a) **Offense.**— Except as provided in subsection (c) of this section whoever—

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility;

and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

(b) **Punishment.**— The punishment for an offense under subsection (a) of this section is—

(1) if the offense is committed for purposes of commercial advantage, malicious destruction or damage, or private commercial gain, or in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or any State—

(A) a fine under this title or imprisonment for not more than 5 years, or both, in the case of a first offense under this subparagraph; and

(B) a fine under this title or imprisonment for not more than 10 years, or both, for any subsequent offense under this subparagraph; and

(2) in any other case—

(A) a fine under this title or imprisonment for not more than 1 year or both, in the case of a first offense under this paragraph; and

(B) a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under this subparagraph that occurs after a conviction of another offense under this section.

(c) **Exceptions.**— Subsection (a) of this section does not apply with respect to conduct authorized—

(1) by the person or entity providing a wire or electronic communications service;

(2) by a user of that service with respect to a communication of or intended for that user; or

(3) in section 2703, 2704 or 2518 of this title.

(Added Pub. L. 99–508, title II, § 201[(a)], Oct. 21, 1986, 100 Stat. 1860; amended Pub. L. 103–322, title XXXIII, § 330016(1)(K), (U), Sept. 13, 1994, 108 Stat. 2147, 2148; Pub. L. 104–294, title VI, § 601(a)(3), Oct. 11, 1996, 110 Stat. 3498; Pub. L. 107–296, title II, § 225(j)(2), Nov. 25, 2002, 116 Stat. 2158.)

Amendments

2002—Subsec. (b)(1). Pub. L. 107–296, § 225(j)(2)(A), in introductory provisions, inserted ", or in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or any State" after "commercial gain".

Subsec. (b)(1)(A). Pub. L. 107–296, § 225(j)(2)(B), substituted "5 years" for "one year".

Subsec. (b)(1)(B). Pub. L. 107–296, § 225(j)(2)(C), substituted "10 years" for "two years".

Subsec. (b)(2). Pub. L. 107–296, § 225(j)(2)(D), added par. (2) and struck out former par. (2) which read as follows: "a fine under this title or imprisonment for not more than six months, or both, in any other case."

1996—Subsec. (b)(1)(A), (2). Pub. L. 104–294 substituted "fine under this title" for "fine of under this title".

1994—Subsec. (b)(1)(A). Pub. L. 103–322, § 330016(1)(U), substituted "under this title" for "not more than $250,000".

Subsec. (b)(2). Pub. L. 103–322, § 330016(1)(K), substituted "under this title" for "not more than $5,000".

ROA000334

Effective Date of 2002 Amendment

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

Effective Date

Section 202 of title II of Pub. L. 99–508 provided that: "This title and the amendments made by this title [enacting this chapter] shall take effect ninety days after the date of the enactment of this Act [Oct. 21, 1986] and shall, in the case of conduct pursuant to a court order or extension, apply only with respect to court orders or extensions made after this title takes effect."

Short Title of 1988 Amendment

Pub. L. 100–618, § 1, Nov. 5, 1988, 102 Stat. 3195, provided that: "This Act [enacting section 2710 of this title and renumbering former section 2710 as 2711 of this title] may be cited as the 'Video Privacy Protection Act of 1988'."

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 121 - STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

§ 2702. Voluntary disclosure of customer communications or records

(a) **Prohibitions.**— Except as provided in subsection (b)—

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and

(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

(b) **Exceptions for disclosure of communications.**— A provider described in subsection (a) may divulge the contents of a communication—

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

(2) as otherwise authorized in section 2517, 2511 (2)(a), or 2703 of this title;

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;

(4) to a person employed or authorized or whose facilities are used to forward such communication to its destination;

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(6) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032);

(7) to a law enforcement agency—

(A) if the contents—

(i) were inadvertently obtained by the service provider; and

(ii) appear to pertain to the commission of a crime; or

[(B) Repealed. Pub. L. 108–21, title V, § 508(b)(1)(A), Apr. 30, 2003, 117 Stat. 684]

(8) to a Federal, State, or local governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency.

(c) **Exceptions for Disclosure of Customer Records.**— A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))—

(1) as otherwise authorized in section 2703;

(2) with the lawful consent of the customer or subscriber;

(3) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(4) to a governmental entity, if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of the information;

(5) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032); or

(6) to any person other than a governmental entity.

(Added Pub. L. 99–508, title II, § 201[(a)], Oct. 21, 1986, 100 Stat. 1860; amended Pub. L. 100–690, title VII, § 7037, Nov. 18, 1988, 102 Stat. 4399; Pub. L. 105–314, title VI, § 604(b), Oct. 30, 1998, 112 Stat. 2984; Pub. L. 107–56, title II, § 212(a)(1), Oct. 26, 2001, 115 Stat. 284; Pub. L. 107–296, title II, § 225(d)(1), Nov. 25, 2002, 116 Stat. 2157; Pub. L. 108–21, title V, § 508(b), Apr. 30, 2003, 117 Stat. 684.)

Amendment of Section

For termination of amendment by Pub. L. 107–56, see Termination Date of 2001 Amendment note below.

Amendments

2003—Subsec. (b)(5). Pub. L. 108–21, § 508(b)(1)(C), which directed amendment of par. (5) by striking "or" at the end, could not be executed because "or" did not appear at the end. See 2002 Amendment note below.

Subsec. (b)(6). Pub. L. 108–21, § 508(b)(1)(D), added par. (6). Former par. (6) redesignated (7).

Subsec. (b)(6)(B). Pub. L. 108–21, § 508(b)(1)(A), struck out subpar. (B) which read as follows: "if required by section 227 of the Crime Control Act of 1990; or".

Subsec. (b)(7), (8). Pub. L. 108–21, § 508(b)(1)(B), redesignated pars. (6) and (7) as (7) and (8), respectively.

Subsec. (c)(5), (6). Pub. L. 108–21, § 508(b)(2), added par. (5) and redesignated former par. (5) as (6).

2002—Subsec. (b)(5). Pub. L. 107–296, § 225(d)(1)(A), struck out "or" at end.

Subsec. (b)(6)(A). Pub. L. 107–296, § 225(d)(1)(B), inserted "or" at end.

Subsec. (b)(6)(C). Pub. L. 107–296, § 225(d)(1)(C), struck out subpar. (C) which read as follows: "if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay."

Subsec. (b)(7). Pub. L. 107–296, § 225(d)(1)(D), added par. (7).

2001—Pub. L. 107–56, §§ 212(a)(1)(A), 224, temporarily substituted "Voluntary disclosure of customer communications or records" for "Disclosure of contents" in section catchline. See Termination Date of 2001 Amendment note below.

Subsec. (a)(3). Pub. L. 107–56, §§ 212(a)(1)(B), 224, temporarily added par. (3). See Termination Date of 2001 Amendment note below.

Subsec. (b). Pub. L. 107–56, §§ 212(a)(1)(C), 224, temporarily substituted "Exceptions for disclosure of communications" for "Exceptions" in heading and "A provider described in subsection (a)" for "A person or entity" in introductory provisions. See Termination Date of 2001 Amendment note below.

Subsec. (b)(6)(C). Pub. L. 107–56, §§ 212(a)(1)(D), 224, temporarily added subpar. (C). See Termination Date of 2001 Amendment note below.

Subsec. (c). Pub. L. 107–56, §§ 212(a)(1)(E), 224, temporarily added subsec. (c). See Termination Date of 2001 Amendment note below.

1998—Subsec. (b)(6). Pub. L. 105–314 amended par. (6) generally. Prior to amendment, par. (6) read as follows: "to a law enforcement agency, if such contents—

"(A) were inadvertently obtained by the service provider; and

"(B) appear to pertain to the commission of a crime."

1988—Subsec. (b)(2). Pub. L. 100–690 substituted "2517" for "2516".

Effective Date of 2002 Amendment

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

Termination Date of 2001 Amendment

Amendment by Pub. L. 107–56 to cease to have effect Feb. 3, 2006, except amendment to continue in effect with respect to any particular foreign intelligence investigation that began before Feb. 3, 2006, or with respect to any particular offense or potential offense that began or occurred before Feb. 3, 2006, see section 224 of Pub. L. 107–56, set out as a note under section 2510 of this title.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 121 - STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

§ 2703. Required disclosure of customer communications or records

(a) **Contents of Wire or Electronic Communications in Electronic Storage.**— A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) **Contents of Wire or Electronic Communications in a Remote Computing Service.**—

(1) A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection—

(A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant; or

(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity—

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

(ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.

(2) Paragraph (1) is applicable with respect to any wire or electronic communication that is held or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.

(c) **Records Concerning Electronic Communication Service or Remote Computing Service.**—

(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—

(A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant;

(B) obtains a court order for such disclosure under subsection (d) of this section;

(C) has the consent of the subscriber or customer to such disclosure;

(D) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing (as such term is defined in section 2325 of this title); or

(E) seeks information under paragraph (2).

(2) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the—

(A) name;

(B) address;

(C) local and long distance telephone connection records, or records of session times and durations;

(D) length of service (including start date) and types of service utilized;

(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) means and source of payment for such service (including any credit card or bank account number),

of a subscriber to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1).

(3) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

(d) **Requirements for Court Order.**— A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

(e) **No Cause of Action Against a Provider Disclosing Information Under This Chapter.**— No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter.

(f) **Requirement To Preserve Evidence.**—

(1) **In general.**— A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.

(2) **Period of retention.**— Records referred to in paragraph (1) shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

(g) **Presence of Officer Not Required.**— Notwithstanding section 3105 of this title, the presence of an officer shall not be required for service or execution of a search warrant issued in accordance with this chapter requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service.

(Added Pub. L. 99–508, title II, § 201[(a)], Oct. 21, 1986, 100 Stat. 1861; amended Pub. L. 100–690, title VII, §§ 7038, 7039, Nov. 18, 1988, 102 Stat. 4399; Pub. L. 103–322, title XXXIII, § 330003(b), Sept. 13, 1994, 108 Stat. 2140; Pub. L. 103–414, title II, § 207(a), Oct. 25, 1994, 108 Stat. 4292; Pub. L. 104–132, title VIII, § 804, Apr. 24, 1996, 110 Stat. 1305; Pub. L. 104–293, title VI, § 601(b), Oct. 11, 1996, 110 Stat. 3469; Pub. L. 104–294, title VI, § 605(f), Oct. 11, 1996, 110 Stat. 3510; Pub. L. 105–184, § 8, June 23, 1998, 112 Stat. 522; Pub. L. 107–56, title II, §§ 209(2), 210, 212 (b)(1), 220 (a)(1), (b), Oct. 26, 2001, 115 Stat. 283, 285, 291, 292; Pub. L. 107–273, div. B, title IV, § 4005(a)(2), div. C, title I, § 11010, Nov. 2, 2002, 116 Stat. 1812, 1822; Pub. L. 107–296, title II, § 225(h)(1), Nov. 25, 2002, 116 Stat. 2158; Pub. L. 109–162, title XI, § 1171(a)(1), Jan. 5, 2006, 119 Stat. 3123.)

Amendment of Section

For termination of amendment by sections 209(2), 212(b)(1), 220(a)(1), (b) of Pub. L. 107–56, see Termination Date of 2001 Amendment note below.

References in Text

The Federal Rules of Criminal Procedure, referred to in subsecs. (a), (b)(1)(A), and (c)(1)(B)(i), are set out in the Appendix to this title.

Amendments

2006—Subsec. (c)(1)(C). Pub. L. 109–162 struck out "or" at end.

2002—Subsec. (c)(1)(E). Pub. L. 107–273, § 4005(a)(2), realigned margins.

Subsec. (e). Pub. L. 107–296 inserted ", statutory authorization" after "subpoena".

Subsec. (g). Pub. L. 107–273, § 11010, added subsec. (g).

2001—Pub. L. 107–56, §§ 212(b)(1)(A), 224, temporarily substituted "Required disclosure of customer communications or records" for "Requirements for governmental access" in section catchline. See Termination Date of 2001 Amendment note below.

Subsec. (a). Pub. L. 107–56, §§ 209(2)(A), (B), 220 (a)(1), 224, temporarily substituted "Contents of Wire or Electronic" for "Contents of Electronic" in heading and "contents of a wire or electronic" for "contents of an electronic" in two places and "using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation" for "under the Federal Rules of Criminal Procedure" in text. See Termination Date of 2001 Amendment note below.

Subsec. (b). Pub. L. 107–56, §§ 209(2)(A), 224, temporarily substituted "Contents of Wire or Electronic" for "Contents of Electronic" in heading. See Termination Date of 2001 Amendment note below.

Subsec. (b)(1). Pub. L. 107–56, §§ 209(2)(C), 220 (a)(1), 224, temporarily substituted "any wire or electronic communication" for "any electronic communication" in introductory provisions and "using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation" for "under the Federal Rules of Criminal Procedure" in subpar. (A). See Termination Date of 2001 Amendment note below.

Subsec. (b)(2). Pub. L. 107–56, §§ 209(2)(C), 224, temporarily substituted "any wire or electronic communication" for "any electronic communication" in introductory provisions. See Termination Date of 2001 Amendment note below.

Subsec. (c)(1). Pub. L. 107–56, §§ 212(b)(1)(C), 220 (a)(1), 224, temporarily designated subpar. (A) and introductory provisions of subpar. (B) as par. (1), substituted "A governmental entity may require a provider of electronic communication service or remote computing service to" for "(A) Except as provided in subparagraph (B), a provider of electronic communication service or remote computing service may" and a closing parenthesis for provisions which began with "covered by subsection (a) or (b) of this section) to any person other than a governmental entity." in former subpar. (A) and ended with "(B) A provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a) or (b) of this section) to a governmental entity", redesignated clauses (i) to (iv) of former subpar. (B) as subpars. (A) to (D), respectively, substituted "using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation" for "under the Federal Rules of Criminal Procedure" in subpar. (A) and "; or" for period at end of subpar. (D), added subpar. (E), and redesignated former subpar. (C) as par. (2). See Termination Date of 2001 Amendment note below.

Subsec. (c)(2). Pub. L. 107–56, § 210, amended par. (2), as redesignated by section 212 of Pub. L. 107–56, by substituting "entity the—" for "entity the name, address, local and long distance telephone toll billing records,

telephone number or other subscriber number or identity, and length of service of a subscriber" in introductory provisions, inserting subpars. (A) to (F), striking out "and the types of services the subscriber or customer utilized," before "when the governmental entity uses an administrative subpoena", inserting "of a subscriber" at beginning of concluding provisions and designating "to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1)." as remainder of concluding provisions.

Pub. L. 107–56, §§ 212(b)(1)(C)(iii), (D), 224, temporarily redesignated subpar. (C) of par. (1) as par. (2) and temporarily substituted "paragraph (1)" for "subparagraph (B)". See Termination Date of 2001 Amendment note below.

Pub. L. 107–56, §§ 212(b)(1)(B), 224, temporarily redesignated par. (2) as (3). See Termination Date of 2001 Amendment note below.

Subsec. (c)(3). Pub. L. 107–56, §§ 212(b)(1)(B), 224, temporarily redesignated par. (2) as (3). See Termination Date of 2001 Amendment note below.

Subsec. (d). Pub. L. 107–56, §§ 220(b), 224, temporarily struck out "described in section 3127 (2)(A)" after "court of competent jurisdiction". See Termination Date of 2001 Amendment note below.

1998—Subsec. (c)(1)(B)(iv). Pub. L. 105–184 added cl. (iv).

1996—Subsec. (c)(1)(C). Pub. L. 104–293 inserted "local and long distance" after "address,".

Subsec. (d). Pub. L. 104–294 substituted "in section 3127 (2)(A)" for "in section 3126 (2)(A)".

Subsec. (f). Pub. L. 104–132 added subsec. (f).

1994—Subsec. (c)(1)(B). Pub. L. 103–414, § 207(a)(1)(A), redesignated cls. (ii) to (iv) as (i) to (iii), respectively, and struck out former cl. (i) which read as follows: "uses an administrative subpoena authorized by a Federal or State statute, or a Federal or State grand jury or trial subpoena;".

Subsec. (c)(1)(C). Pub. L. 103–414, § 207(a)(1)(B), added subpar. (C).

Subsec. (d). Pub. L. 103–414, § 207(a)(2), amended first sentence generally. Prior to amendment, first sentence read as follows: "A court order for disclosure under subsection (b) or (c) of this section may be issued by any court that is a court of competent jurisdiction set forth in section 3127 (2)(A) of this title and shall issue only if the governmental entity shows that there is reason to believe the contents of a wire or electronic communication, or the records or other information sought, are relevant to a legitimate law enforcement inquiry."

Pub. L. 103–322 substituted "section 3127 (2)(A)" for "section 3126 (2)(A)".

1988—Subsecs. (b)(1)(B)(i), (c)(1)(B)(i). Pub. L. 100–690, § 7038, inserted "or trial" after "grand jury".

Subsec. (d). Pub. L. 100–690, § 7039, inserted "may be issued by any court that is a court of competent jurisdiction set forth in section 3126 (2)(A) of this title and" before "shall issue".

Effective Date of 2002 Amendment

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

Termination Date of 2001 Amendment

Amendment by sections 209(2), 212(b)(1), 220(a)(1), (b) of Pub. L. 107–56 to cease to have effect Feb. 3, 2006, except amendment to continue in effect with respect to any particular foreign intelligence investigation that began before Feb. 3, 2006, or with respect to any particular offense or potential offense that began or occurred before Feb. 3, 2006, see section 224 of Pub. L. 107–56, set out as a note under section 2510 of this title.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 121 - STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

§ 2704. Backup preservation

(a) Backup Preservation.—

(1) A governmental entity acting under section 2703 (b)(2) may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communications. Without notifying the subscriber or customer of such subpoena or court order, such service provider shall create such backup copy as soon as practicable consistent with its regular business practices and shall confirm to the governmental entity that such backup copy has been made. Such backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order.

(2) Notice to the subscriber or customer shall be made by the governmental entity within three days after receipt of such confirmation, unless such notice is delayed pursuant to section 2705 (a).

(3) The service provider shall not destroy such backup copy until the later of—

(A) the delivery of the information; or

(B) the resolution of any proceedings (including appeals of any proceeding) concerning the government's subpoena or court order.

(4) The service provider shall release such backup copy to the requesting governmental entity no sooner than fourteen days after the governmental entity's notice to the subscriber or customer if such service provider—

(A) has not received notice from the subscriber or customer that the subscriber or customer has challenged the governmental entity's request; and

(B) has not initiated proceedings to challenge the request of the governmental entity.

(5) A governmental entity may seek to require the creation of a backup copy under subsection (a)(1) of this section if in its sole discretion such entity determines that there is reason to believe that notification under section 2703 of this title of the existence of the subpoena or court order may result in destruction of or tampering with evidence. This determination is not subject to challenge by the subscriber or customer or service provider.

(b) Customer Challenges.—

(1) Within fourteen days after notice by the governmental entity to the subscriber or customer under subsection (a)(2) of this section, such subscriber or customer may file a motion to quash such subpoena or vacate such court order, with copies served upon the governmental entity and with written notice of such challenge to the service provider. A motion to vacate a court order shall be filed in the court which issued such order. A motion to quash a subpoena shall be filed in the appropriate United States district court or State court. Such motion or application shall contain an affidavit or sworn statement—

(A) stating that the applicant is a customer or subscriber to the service from which the contents of electronic communications maintained for him have been sought; and

(B) stating the applicant's reasons for believing that the records sought are not relevant to a legitimate law enforcement inquiry or that there has not been substantial compliance with the provisions of this chapter in some other respect.

(2) Service shall be made under this section upon a governmental entity by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice which the customer has received pursuant to this chapter. For the purposes of this section, the term "delivery" has the meaning given that term in the Federal Rules of Civil Procedure.

(3) If the court finds that the customer has complied with paragraphs (1) and (2) of this subsection, the court shall order the governmental entity to file a sworn response, which may be filed in camera if the governmental entity includes in its response the reasons which make in camera review appropriate. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and response, the court may conduct such additional proceedings as it deems appropriate. All such proceedings shall be completed and the motion or application decided as soon as practicable after the filing of the governmental entity's response.

(4) If the court finds that the applicant is not the subscriber or customer for whom the communications sought by the governmental entity are maintained, or that there is a reason to believe that the law enforcement inquiry is legitimate and that the communications sought are relevant to that inquiry, it shall deny the motion or application and order such process enforced. If the court finds that the applicant is the subscriber or customer for whom the communications sought by the governmental entity are maintained, and that there is not a reason to believe that the communications sought are relevant to a legitimate law enforcement inquiry, or that there has not been substantial compliance with the provisions of this chapter, it shall order the process quashed.

(5) A court order denying a motion or application under this section shall not be deemed a final order and no interlocutory appeal may be taken therefrom by the customer.

(Added Pub. L. 99–508, title II, § 201[(a)], Oct. 21, 1986, 100 Stat. 1863.)

References in Text

The Federal Rules of Civil Procedure, referred to in subsec. (b)(2), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

NB: This unofficial compilation of the U.S. Code is current as of Jun. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 121 - STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

§ 2705. Delayed notice

(a) **Delay of Notification.**—

(1) A governmental entity acting under section 2703 (b) of this title may—

(A) where a court order is sought, include in the application a request, which the court shall grant, for an order delaying the notification required under section 2703 (b) of this title for a period not to exceed ninety days, if the court determines that there is reason to believe that notification of the existence of the court order may have an adverse result described in paragraph (2) of this subsection; or

(B) where an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury subpoena is obtained, delay the notification required under section 2703 (b) of this title for a period not to exceed ninety days upon the execution of a written certification of a supervisory official that there is reason to believe that notification of the existence of the subpoena may have an adverse result described in paragraph (2) of this subsection.

(2) An adverse result for the purposes of paragraph (1) of this subsection is—

(A) endangering the life or physical safety of an individual;

(B) flight from prosecution;

(C) destruction of or tampering with evidence;

(D) intimidation of potential witnesses; or

(E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(3) The governmental entity shall maintain a true copy of certification under paragraph (1)(B).

(4) Extensions of the delay of notification provided in section 2703 of up to ninety days each may be granted by the court upon application, or by certification by a governmental entity, but only in accordance with subsection (b) of this section.

(5) Upon expiration of the period of delay of notification under paragraph (1) or (4) of this subsection, the governmental entity shall serve upon, or deliver by registered or first-class mail to, the customer or subscriber a copy of the process or request together with notice that—

(A) states with reasonable specificity the nature of the law enforcement inquiry; and

(B) informs such customer or subscriber—

(i) that information maintained for such customer or subscriber by the service provider named in such process or request was supplied to or requested by that governmental authority and the date on which the supplying or request took place;

(ii) that notification of such customer or subscriber was delayed;

(iii) what governmental entity or court made the certification or determination pursuant to which that delay was made; and

(iv) which provision of this chapter allowed such delay.

(6) As used in this subsection, the term "supervisory official" means the investigative agent in charge or assistant investigative agent in charge or an equivalent of an investigating agency's headquarters or regional office, or the chief prosecuting attorney or the first assistant prosecuting attorney or an equivalent of a prosecuting attorney's headquarters or regional office.

(b) **Preclusion of Notice to Subject of Governmental Access.**— A governmental entity acting under section 2703, when it is not required to notify the subscriber or customer under section 2703 (b)(1), or to the extent that it may delay such notice pursuant to subsection (a) of this section, may apply to a court for an order commanding a provider of electronic communications service or remote computing

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service to whom a warrant, subpoena, or court order is directed, for such period as the court deems appropriate, not to notify any other person of the existence of the warrant, subpoena, or court order. The court shall enter such an order if it determines that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result in—

(1) endangering the life or physical safety of an individual;

(2) flight from prosecution;

(3) destruction of or tampering with evidence;

(4) intimidation of potential witnesses; or

(5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(Added Pub. L. 99–508, title II, § 201[(a)], Oct. 21, 1986, 100 Stat. 1864.)

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§ 2706. Cost reimbursement

(a) **Payment.**— Except as otherwise provided in subsection (c), a governmental entity obtaining the contents of communications, records, or other information under section 2702, 2703, or 2704 of this title shall pay to the person or entity assembling or providing such information a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching for, assembling, reproducing, or otherwise providing such information. Such reimbursable costs shall include any costs due to necessary disruption of normal operations of any electronic communication service or remote computing service in which such information may be stored.

(b) **Amount.**— The amount of the fee provided by subsection (a) shall be as mutually agreed by the governmental entity and the person or entity providing the information, or, in the absence of agreement, shall be as determined by the court which issued the order for production of such information (or the court before which a criminal prosecution relating to such information would be brought, if no court order was issued for production of the information).

(c) **Exception.**— The requirement of subsection (a) of this section does not apply with respect to records or other information maintained by a communications common carrier that relate to telephone toll records and telephone listings obtained under section 2703 of this title. The court may, however, order a payment as described in subsection (a) if the court determines the information required is unusually voluminous in nature or otherwise caused an undue burden on the provider.

(Added Pub. L. 99–508, title II, § 201[(a)], Oct. 21, 1986, 100 Stat. 1866; amended Pub. L. 100–690, title VII, § 7061, Nov. 18, 1988, 102 Stat. 4404.)

Amendments

1988—Subsec. (c). Pub. L. 100–690 inserted heading.

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§ 2707. Civil action

(a) **Cause of Action.**— Except as provided in section 2703 (e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) **Relief.**— In a civil action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c); and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) **Damages.**— The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.

(d) **Administrative Discipline.**— If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

(e) **Defense.**— A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization (including a request of a governmental entity under section 2703 (f) of this title);

(2) a request of an investigative or law enforcement officer under section 2518 (7) of this title; or

(3) a good faith determination that section 2511 (3) of this title permitted the conduct complained of;

is a complete defense to any civil or criminal action brought under this chapter or any other law.

(f) **Limitation.**— A civil action under this section may not be commenced later than two years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation.

(g) **Improper Disclosure.**— Any willful disclosure of a "record", as that term is defined in section 552a (a) of title 5, United States Code, obtained by an investigative or law enforcement officer, or a governmental entity, pursuant to section 2703 of this title, or from a device installed pursuant to section 3123 or 3125 of this title, that is not a disclosure made in the proper performance of the official functions of the officer or governmental entity making the disclosure, is a violation of this chapter. This provision shall not apply to information previously lawfully disclosed (prior to the commencement of any civil or administrative proceeding under this chapter) to the public by a Federal, State, or local governmental entity or by the plaintiff in a civil action under this chapter.

(Added Pub. L. 99–508, title II, § 201[(a)], Oct. 21, 1986, 100 Stat. 1866; amended Pub. L. 104–293, title VI, § 601(c), Oct. 11, 1996, 110 Stat. 3469; Pub. L. 107–56, title II, §§ 223(b), title VIII, § 815, Oct. 26, 2001, 115 Stat. 293, 384; Pub. L. 107–273, div. B, title IV, § 4005(f)(2), Nov. 2, 2002, 116 Stat. 1813.)

Amendment of Section

For termination of amendment by section 223(b) of Pub. L. 107–56, see Termination Date of 2001 Amendment note below.

Amendments

2002—Subsec. (e)(1). Pub. L. 107–273 made technical correction to directory language of Pub. L. 107–56, § 815. See 2001 Amendment note below.

2001—Subsec. (a). Pub. L. 107–56, §§ 223(b)(1), 224, temporarily inserted ", other than the United States," after "person or entity". See Termination Date of 2001 Amendment note below.

Subsec. (d). Pub. L. 107–56, §§ 223(b)(2), 224, temporarily added subsec. (d) and temporarily struck out heading and text of former subsec. (d). Text read as follows: "If a court determines that any agency or department of the United States has violated this chapter and the court finds that the circumstances surrounding the violation raise the question whether or not an officer or employee of the agency or department acted willfully or intentionally with respect to the violation, the agency or department concerned shall promptly initiate a proceeding to determine whether or not disciplinary action is warranted against the officer or employee." See Termination Date of 2001 Amendment note below.

Subsec. (e)(1). Pub. L. 107–56, § 815, as amended by Pub. L. 107–273, inserted "(including a request of a governmental entity under section 2703 (f) of this title)" after "or a statutory authorization".

Subsec. (g). Pub. L. 107–56, §§ 223(b)(3), 224, temporarily added subsec. (g). See Termination Date of 2001 Amendment note below.

1996—Subsec. (a). Pub. L. 104–293, § 601(c)(1), substituted "other person" for "customer".

Subsec. (c). Pub. L. 104–293, § 601(c)(2), inserted at end "If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court."

Subsecs. (d) to (f). Pub. L. 104–293, § 601(c)(3), (4), added subsec. (d) and redesignated former subsecs. (d) and (e) as (e) and (f), respectively.

Effective Date of 2002 Amendment

Pub. L. 107–273, div. B, title IV, § 4005(f)(2), Nov. 2, 2002, 116 Stat. 1813, provided that the amendment made by section 4005 (f)(2) is effective Oct. 26, 2001.

Termination Date of 2001 Amendment

Amendment by section 223(b) of Pub. L. 107–56 to cease to have effect Feb. 3, 2006, except amendment to continue in effect with respect to any particular foreign intelligence investigation that began before Feb. 3, 2006, or with respect to any particular offense or potential offense that began or occurred before Feb. 3, 2006, see section 224 of Pub. L. 107–56, set out as a note under section 2510 of this title.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

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§ 2708. Exclusivity of remedies

The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter.

(Added Pub. L. 99–508, title II, § 201[(a)], Oct. 21, 1986, 100 Stat. 1867.)

NB: This unofficial compilation of the U.S. Code is current as of Jan. 2, 2006 (see http://www.law.cornell.edu/uscode/uscprint.html).

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§ 2709. Counterintelligence access to telephone toll and transactional records

(a) **Duty to Provide.**— A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.

(b) **Required Certification.**— The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, may—

(1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and

(2) request the name, address, and length of service of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(c) **Prohibition of Certain Disclosure.**— No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.

(d) **Dissemination by Bureau.**— The Federal Bureau of Investigation may disseminate information and records obtained under this section only as provided in guidelines approved by the Attorney General for foreign intelligence collection and foreign counterintelligence investigations conducted by the Federal Bureau of Investigation, and, with respect to dissemination to an agency of the United States, only if such information is clearly relevant to the authorized responsibilities of such agency.

(e) **Requirement That Certain Congressional Bodies Be Informed.**— On a semiannual basis the Director of the Federal Bureau of Investigation shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, and the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate, concerning all requests made under subsection (b) of this section.

(Added Pub. L. 99–508, title II, § 201[(a)], Oct. 21, 1986, 100 Stat. 1867; amended Pub. L. 103–142, Nov. 17, 1993, 107 Stat. 1491; Pub. L. 104–293, title VI, § 601(a), Oct. 11, 1996, 110 Stat. 3469; Pub. L. 107–56, title V, § 505(a), Oct. 26, 2001, 115 Stat. 365.)

Amendments

2001—Subsec. (b). Pub. L. 107–56, § 505(a)(1), inserted "at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director" after "Deputy Assistant Director" in introductory provisions.

Subsec. (b)(1). Pub. L. 107–56, § 505(a)(2), struck out "in a position not lower than Deputy Assistant Director" after "(or his designee" and substituted "made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities.

provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and" for "made that—

"(A) the name, address, length of service, and toll billing records sought are relevant to an authorized foreign counterintelligence investigation; and

"(B) there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is a foreign power or an agent of a foreign power as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801); and".

Subsec. (b)(2). Pub. L. 107–56, § 505(a)(3), struck out "in a position not lower than Deputy Assistant Director" after "(or his designee" and substituted "made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States." for "made that—

"(A) the information sought is relevant to an authorized foreign counterintelligence investigation; and

"(B) there are specific and articulable facts giving reason to believe that communication facilities registered in the name of the person or entity have been used, through the services of such provider, in communication with—

"(i) an individual who is engaging or has engaged in international terrorism as defined in section 101(c) of the Foreign Intelligence Surveillance Act or clandestine intelligence activities that involve or may involve a violation of the criminal statutes of the United States; or

"(ii) a foreign power or an agent of a foreign power under circumstances giving reason to believe that the communication concerned international terrorism as defined in section 101(c) of the Foreign Intelligence Surveillance Act or clandestine intelligence activities that involve or may involve a violation of the criminal statutes of the United States."

1996—Subsec. (b)(1). Pub. L. 104–293 inserted "local and long distance" before "toll billing records".

1993—Subsec. (b). Pub. L. 103–142, § 1, amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "Required Certification.—The Director of the Federal Bureau of Investigation (or an individual within the Federal Bureau of Investigation designated for this purpose by the Director) may request any such information and records if the Director (or the Director's designee) certifies in writing to the wire or electronic communication service provider to which the request is made that—

"(1) the information sought is relevant to an authorized foreign counterintelligence investigation; and

"(2) there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is a foreign power or an agent of a foreign power as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801)."

Subsec. (e). Pub. L. 103–142, § 2, inserted ", and the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate," after "Senate".

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§ 2710. Wrongful disclosure of video tape rental or sale records

(a) **Definitions.**— For purposes of this section—

(1) the term "consumer" means any renter, purchaser, or subscriber of goods or services from a video tape service provider;

(2) the term "ordinary course of business" means only debt collection activities, order fulfillment, request processing, and the transfer of ownership;

(3) the term "personally identifiable information" includes information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider; and

(4) the term "video tape service provider" means any person, engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials, or any person or other entity to whom a disclosure is made under subparagraph (D) or (E) of subsection (b)(2), but only with respect to the information contained in the disclosure.

(b) **Video Tape Rental and Sale Records.**—

(1) A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d).

(2) A video tape service provider may disclose personally identifiable information concerning any consumer—

(A) to the consumer;

(B) to any person with the informed, written consent of the consumer given at the time the disclosure is sought;

(C) to a law enforcement agency pursuant to a warrant issued under the Federal Rules of Criminal Procedure, an equivalent State warrant, a grand jury subpoena, or a court order;

(D) to any person if the disclosure is solely of the names and addresses of consumers and if—

(i) the video tape service provider has provided the consumer with the opportunity, in a clear and conspicuous manner, to prohibit such disclosure; and

(ii) the disclosure does not identify the title, description, or subject matter of any video tapes or other audio visual material; however, the subject matter of such materials may be disclosed if the disclosure is for the exclusive use of marketing goods and services directly to the consumer;

(E) to any person if the disclosure is incident to the ordinary course of business of the video tape service provider; or

(F) pursuant to a court order, in a civil proceeding upon a showing of compelling need for the information that cannot be accommodated by any other means, if—

(i) the consumer is given reasonable notice, by the person seeking the disclosure, of the court proceeding relevant to the issuance of the court order; and

(ii) the consumer is afforded the opportunity to appear and contest the claim of the person seeking the disclosure.

If an order is granted pursuant to subparagraph (C) or (F), the court shall impose appropriate safeguards against unauthorized disclosure.

(3) Court orders authorizing disclosure under subparagraph (C) shall issue only with prior notice to the consumer and only if the law enforcement agency shows that there is probable cause to believe that the records or other information sought are relevant to a legitimate law enforcement inquiry. In the case of a State government authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the video tape service provider, may quash or modify such order if the information or records requested are unreasonably voluminous in nature or if compliance with such order otherwise would cause an unreasonable burden on such provider.

(c) **Civil Action.—**

(1) Any person aggrieved by any act of a person in violation of this section may bring a civil action in a United States district court.

(2) The court may award—

(A) actual damages but not less than liquidated damages in an amount of $2,500;

(B) punitive damages;

(C) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(D) such other preliminary and equitable relief as the court determines to be appropriate.

(3) No action may be brought under this subsection unless such action is begun within 2 years from the date of the act complained of or the date of discovery.

(4) No liability shall result from lawful disclosure permitted by this section.

(d) **Personally Identifiable Information.—** Personally identifiable information obtained in any manner other than as provided in this section shall not be received in evidence in any trial, hearing, arbitration, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State.

(e) **Destruction of Old Records.—** A person subject to this section shall destroy personally identifiable information as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (b)(2) or (c)(2) or pursuant to a court order.

(f) **Preemption.—** The provisions of this section preempt only the provisions of State or local law that require disclosure prohibited by this section.

(Added Pub. L. 100–618, § 2(a)(2), Nov. 5, 1988, 102 Stat. 3195.)

References in Text

The Federal Rules of Criminal Procedure, referred to in subsec. (b)(2)(C), are set out in the Appendix to this title.

Prior Provisions

A prior section 2710 was renumbered section 2711 of this title.

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§ 2711. Definitions for chapter

As used in this chapter—

(1) the terms defined in section 2510 of this title have, respectively, the definitions given such terms in that section;

(2) the term "remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system; and

(3) the term "court of competent jurisdiction" has the meaning assigned by section 3127, and includes any Federal court within that definition, without geographic limitation.

(Added Pub. L. 99–508, title II, § 201[(a)], Oct. 21, 1986, 100 Stat. 1868, § 2710; renumbered § 2711, Pub. L. 100–618, § 2(a)(1), Nov. 5, 1988, 102 Stat. 3195; amended Pub. L. 107–56, title II, § 220(a)(2), Oct. 26, 2001, 115 Stat. 292.)

Amendment of Section

For termination of amendment by Pub. L. 107–56, see Termination Date of 2001 Amendment note below.

Amendments

2001—Par. (3). Pub. L. 107–56, §§ 220(a)(2), 224, temporarily added par. (3). See Termination Date of 2001 Amendment note below.

1988—Pub. L. 100–618 renumbered section 2710 of this title as this section.

Termination Date of 2001 Amendment

Amendment by Pub. L. 107–56 to cease to have effect Feb. 3, 2006, except amendment to continue in effect with respect to any particular foreign intelligence investigation that began before Feb. 3, 2006, or with respect to any particular offense or potential offense that began or occurred before Feb. 3, 2006, see section 224 of Pub. L. 107–56, set out as a note under section 2510 of this title.

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§ 2712. Civil actions against the United States

(a) **In General.**— Any person who is aggrieved by any willful violation of this chapter or of chapter 119 of this title or of sections 106(a), 305(a), or 405(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) may commence an action in United States District Court against the United States to recover money damages. In any such action, if a person who is aggrieved successfully establishes such a violation of this chapter or of chapter 119 of this title or of the above specific provisions of title 50, the Court may assess as damages—

(1) actual damages, but not less than $10,000, whichever amount is greater; and

(2) litigation costs, reasonably incurred.

(b) **Procedures.**—

(1) Any action against the United States under this section may be commenced only after a claim is presented to the appropriate department or agency under the procedures of the Federal Tort Claims Act, as set forth in title 28, United States Code.

(2) Any action against the United States under this section shall be forever barred unless it is presented in writing to the appropriate Federal agency within 2 years after such claim accrues or unless action is begun within 6 months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented. The claim shall accrue on the date upon which the claimant first has a reasonable opportunity to discover the violation.

(3) Any action under this section shall be tried to the court without a jury.

(4) Notwithstanding any other provision of law, the procedures set forth in section 106(f), 305(g), or 405(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) shall be the exclusive means by which materials governed by those sections may be reviewed.

(5) An amount equal to any award against the United States under this section shall be reimbursed by the department or agency concerned to the fund described in section 1304 of title 31, United States Code, out of any appropriation, fund, or other account (excluding any part of such appropriation, fund, or account that is available for the enforcement of any Federal law) that is available for the operating expenses of the department or agency concerned.

(c) **Administrative Discipline.**— If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

(d) **Exclusive Remedy.**— Any action against the United States under this subsection shall be the exclusive remedy against the United States for any claims within the purview of this section.

(e) **Stay of Proceedings.**—

(1) Upon the motion of the United States, the court shall stay any action commenced under this section if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related investigation or the prosecution of a related criminal case. Such a stay shall toll the limitations periods of paragraph (2) of subsection (b).

(2) In this subsection, the terms "related criminal case" and "related investigation" mean an actual prosecution or investigation in progress at the time at which the request for the stay or any subsequent motion to lift the stay is made. In determining whether an investigation or a criminal case is related to an action commenced under this section, the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in the 2 proceedings, without requiring that any one or more factors be identical.

(3) In requesting a stay under paragraph (1), the Government may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter that may adversely affect a related investigation or a related criminal case. If the Government makes such an ex parte submission, the plaintiff shall be given an opportunity to make a submission to the court, not ex parte, and the court may, in its discretion, request further information from either party.

(Added Pub. L. 107–56, title II, § 223(c)(1), Oct. 26, 2001, 115 Stat. 294.)

Termination of Section

For termination of section by section 224 of Pub. L. 107–56, see Termination Date of 2001 Amendment note set out under section 2510 of this title.

References in Text

Sections 106, 305, and 405 of the Foreign Intelligence Surveillance Act of 1978, referred to in subsecs. (a) and (b)(4), are classified to sections 1806, 1825, and 1845, respectively, of Title 50, War and National Defense.

The Federal Tort Claims Act, referred to in subsec. (b)(1), is classified generally to section 1346 (b) and chapter 171section 1346 (b) and chapter 171 (§ 2671 et seq.) of Title 28, Judiciary and Judicial Procedure.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEASE FOR THE FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	DOCKET NO.: 2007-CP-40-1125 **PLAINTIFF'S MEMORANDUM IN OPPOSITION OF MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF MOTION TO AMEND**

RECEIVED
2008 MAY -8 AM 10: 36
BARBARA A. SCOTT
C.C.C. & G.S.

FACTUAL BACKGROUND

On February 20, 2007, Plaintiff filed this action against his wife (Defendant Jennings); Holly Broome (his Wife's daughter-in-law), Brenda Cooke and BJR International Detective Agency, Inc. (his wife's detective agency) for invasion of privacy, conspiracy, and violation of various South Carolina statutes concerning the wrongful interception of electronic communications for wrongful interception, use, and dissemination of his private electronic communications in violation of the Chapter 30 of Title 17 of SC Code Ann. and related statutes.

The factual basis of this Complaint was that Plaintiff had a private e-mail address at yahoo.com, and at no time did he give anyone the permission to access or use his private e-mail account.

By way of Consent Order dated July 13, 2007, Plaintiff filed and served an Amended Complaint which included, among other things, additional causes of

action for violation of the Federal Stored Communications Act and the South Carolina Computer Crimes Act.

Relevant facts and circumstances giving rise to Plaintiff's causes of action are as follows:

After Plaintiff left his wife, beginning June 21, 2006, Defendant Broome illegally accessed Plaintiff's private e-mail address without his permission, and otherwise improperly procured his private electronic mail communications. Defendant Broome then used the improperly obtained communications in an attempt to gain an economic benefit and to gain a collateral advantage for Defendant Jennings in her pending Family Court action against Plaintiff herein by providing the same to Jennings, Cook, and Jennings' attorney on an ongoing basis (Docket Number: 2006-DR-40-2461).

Defendant Jennings commenced her Family Court action by filing a Summons and Complaint dated June 28, 2006 on June 29, 2006 wherein she sought a divorce against Plaintiff upon the ground of adultery along with alimony, equitable division, exclusive use and possession of the marital home, and related relief, but did not serve the same until shortly before the hearing in August 2006 so as to allow the continuing unauthorized access to and use of Plaintiff's private email.

In mid-January 2007, pursuant to production subpoena, Plaintiff's counsel received from Defendant Brenda Cooke what was represented to be her entire file. Included were her initial information sheet dated June 26, 2006 containing two handwritten pages (**Exhibit 1 – Detective Intake Form**). On the first page under

"S17", the investigator states that she received a photograph of the alleged paramour as follows: **"picture on E-mail."** On the second page, under "S78" the alternate contact is shown to be "Holly" who is actually Plaintiff's daughter in law, Defendant Holly Broome.

Also provided by the private investigator were 46 pages of emails that had been surreptitiously removed from Plaintiff's private email address **(Exhibit 2 – Investigator's January 15, 2007 list of responses to production subpoena. Since the emails and their contents were secured in violation of federal law, neither the emails nor their contents nor information secured by reliance thereon are admissible as fruits of the poisonous tree)**

At the time of her sworn deposition taken on February 19, 2007, Defendant Jennings admitted that on the Sunday after Plaintiff left the home, her daughter-in-law, Holly Broom, without Plaintiff's permission, entered his private and personal email account, retrieved messages therefrom, printed the copies, and distributed copies to Defendant Jenning's attorney and the investigator, Defendant Cooke.

Defendant Jennings also admitted that her daughter in law continued to surreptitiously enter and retrieve Plaintiff's private and personal emails and gave them to the investigator on a continuing basis during the time of surveillance.

Defendant Jennings' sworn testimony at her February 19, 2007 deposition in this regard is as follows:

17

12 Q: When did you start getting his e-mails?
13 A: I received the e-mails on Sunday.
14 Q: How did you get into his e-mail box?
15 A: I did not.
16 Q: Who got into it?

A: Holly.

18

Q: Okay. When did Holly start going into Lee Jennings e-mail?
A: Whatever that Sunday was.
Q: The Sunday after he left?
A: Yes.

19

Q: It would have been the 27th of June?
A: Yes.
Q: Okay. Did she do it at your house or at her house?
A: Her house.
Q: And then what did she do; she printed them out?
A: Yes, sir.
Q: And gave them to you?
A: No, sir.
Q: What did she do with them?
A: Made Tom a copy, well, at the time, there were two copies made because I was going to seek the advice of an attorney.
Q: Okay. There were two copies made and where were they distributed?
A: Tom.
Q: Tom Neal?
A: Yes, sir.
Q: Okay. And where did the other one go?
A: Cookie.
Q: Okay. Did you give them to Cookie on the 26th?
A: The Monday, yes, sir.
Q: Okay. So, you gave out both copies that day?
A: Yes, sir.
Q: Now, did Holly go into ... how did ... did she

20

go into his e-mail after that?
A: Yes, sir.
Q: Okay. How many times?
A: I do not know.
Q: Did she give you copies of what was provided?
A: No, sir.
Q: How did Cookie, Ms. Cooke get the e-mails that were after the time of the ...
A: Holly took them by there.
Q: Holly took them by there?
A: Yes, sir.
Q: Did Holly have your husband's permission to go

into his e-mail box?
A: No.
*****
Q: On a free account? Did you get any information or check it out before you took these e-mails from your daughter?
A: No, sir.
Q: Did you seek any advice, and I don't want to

21

get into what anybody told you from any lawyer, about the use of these e-mail messages?
A: No, sir.
Q: Now, when you gave the e-mails to Ms. Cooke, why did you give them to her?
A: I felt the more information she had to background the, you know, the more expediently she could get the information that was needed.
Q: And it would be less costly to you because you might know where you could find him?
A: Yes, sir.
Q: Is that correct?
A: Yes, sir.

22

Q: I understand. Now, did you ask the investigator to give copies of these e-mails to Mr. XXXXX? (Name redacted)
A: No, sir.
****
Q: So, she did not do that on your instruction at all; true?

23

A: Not on instruction, no.
Q: Did you at any time tell her it might be a good idea for her to give that information to him?
A: No, sir.
Q: Okay. Did your daughter tell her that?
A: No, sir, daughter in law.
****
Q: Okay. So, you don't know why she went out and stood by the stop sign and waited for him?
A: There was a conversation that she said that she felt like he should be informed and I said, ... I recall just saying, you know, that's, I, you know, I've got to take care of my life. And she said, do you think that Lee would want to know if you ... and I said, yeah. I said, you

17 know, whatever you feel you want to do, do.

****

21 Q: You didn't tell her to go?
22 A: I didn't say, Cookie, go tell him, no. But
23 after she pointed out that if I were doing the
24 same thing, ...
25 Q: Okay.

24

1 A: ... that wouldn't Lee want to know and I said,
2 yeah. I don't care what you do.

On February 19, 2007, Plaintiff's counsel deposed Brenda Cooke, the private investigator, who testified under oath that both Plaintiff and Holly Broome had given to her emails on June 26, 2006 and thereafter during her surveillance. She admitted that she had received 46 pages of emails from Defendant's private email account, some of which predated her hiring date of June 26, 2006; and that she was aware of the content of these emails at the time she was hired as private investigator by Plaintiff.

Specifically, Brenda Cooke testified under oath as follows (Names of third parties have been redacted in the interests of privacy):

22

14 Q: Okay. Now, let me ask you to go back a minute
15 to page ... to the first page of your intake
16 form. S-17 description says picture on e-mail.
17 What does that mean?
18 A: Where is it?
19 Q: Right down here, (indicating), at the bottom.
20 It's on that first page.
21 A: Oh. I was told that they had a picture on e-
22 mail and I don't know if that was (picture-and)
23 or (picture-or) e-mail.
24 Q: S-17, which would be Ms. XXXXX (name redacted), you were told
25 by Ms. Jennings that there was a picture on e-

23

1 mail?
2 A: Picture on ... I don't know if that's on or and
3 e-mail. It's cold now.

Q: Okay. Picture on e-mail and did you find anything else about that?
A: I'm assuming that's what this is, (indicating).
Q: Okay. So, you're assuming she brought that with her?
A: I don't know if it was brought then or later, I'm not sure.

Q: Okay. So, your report then, it does not contain everything you did; is that correct?

24

A: Not unless it was pertinent to the case.
Q: Okay. When you went to Ms. XXXXX house to look at her car, that's not in your report?
A: No.
Q: Is that correct?
A: That's right.

*****

Q: Okay. It says on the first page of this, pursuant to client's request, BJR will document the activities of M. Lee Jennings. The suspected paramour is XXXXX XXXXXX. So, the first report that you made was Friday, the 6th, at 6:30 in the morning or the afternoon?
A: That's Friday the 7th.

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: All right. Where did you get the e-mails that are shown in the next Exhibit?
A: They were given to me.
Q: By whom?
A: Different people.
Q: Ma'am?
A: Different people.
Q: This is Exhibit Number Three. Would you pick

49

up Exhibit Number Three?
A: Sure.
Q: All right. Now, who are the different people that gave you these e-mails?
A: The two people that came to see me.
Q: And those are?
A: Ms. Jennings and Holly.
Q: So, Holly gave you Mr. Jennings e-mails?
A: This is what was given to me right.
Q: Right. Did you read them?
A: A couple of them and then just threw it to the side.

Q: Were these given to you, the ones that predate June 28th, were they given to you on June the 26th?
A: No.
Q: And did you say that they came to you at different times?
A: Yes.

53

Q: Did you ask Ms. Jennings where ... and Holly where they got these e-mails?
A: No.
Q: Did it concern you that a client would give you e-mails from a spouse's e-mail box?
A: No.
Q: Why?
A: Because I don't care. I didn't care anything about the e-mails.
Q: You didn't?
A: No. The e-mails just showed me that there was an affair going on.
Q: Okay.
A: And it's my job to go out and find it.
Q: Okay. So, you knew about the e-mails when you started your case; you knew there was an affair going on?

54

A: I knew there was some e-mails. I did not know, no.
Q: And you never read them?
A: I read a couple of them and they were just garbage, I mean, excuse me. It's just not something that entertained me.
Q: Okay. Are you familiar with Title 17 of the South Carolina Code?
A: No.
Q: Are you familiar with the Stored Communications Act?
A: No.

54

Q: Now, you gave a set of these e-mails to Mr. XXXXXXX; did you not?
A: No, I did not.
Q: What did you give him?
A: Nothing.
Q: Did you not ...
A: Absolutely nothing. He left my house with

MS

nothing, my office with nothing.
Q: Did you show Mr. XXXXXXX these e-mails?
A: No.
Q: So, you deny that you either gave or showed Mr. XXXXXXX these e-mails?
A: That's right.

55

Q: Now, how did he get to your place; did you call him?
A: I talked with him.
Q: Did you call him?
A: No, I didn't call him. I talked with him.
*****
Q: So, he came to your ...
A: And he asked me to keep him informed which I haven't done, but he did ask me to keep him informed.
Q: So, he came to your office?
A: That's correct.
Q: Unsolicited?
A: What do you mean, unsolicited?
Q: You didn't call him?
A: I didn't call him.
Q: Did you e-mail him?
A: No.

56

Q: Okay. Now, how did you first get in touch with Mr. XXXXX? (name redacted)
A: I talked to him.
Q: You called him?
A: No. I went and talked with him, face to face talked to him.
Q: You went to his house?
A: No.
Q: Did you go to his place of employment?
A: No.
Q: Where did you meet him?
A: At the stop sign.
Q: At the stop sign? You went out and followed his car?
A: I didn't follow him, no.
Q: Well, how did you find him?
A: Ms. Jennings asked me to get in touch with him. I tried to get in touch with him and I could not get in touch with him because I did not have his phone numbers.

25 Q: Okay.

57

1 A: When he left the house one morning, he pulled
2 up to the stop sign and I was standing there
3 and I asked ... I said can I talk to you a
4 minute and he said, sure. Get in.
5 Q: Okay. So, that's when you wrote down and got
6 his work number and his ...
7 A: No, absolutely not, no.
8 Q: Okay.
9 A: He came ... he called me back.
10 Q: Okay.
11 A: He told me he wanted to come talk to me. He
12 came there and then he gave me these phone
13 numbers.
14 Q: Okay. And you deny that you gave him a copy of
15 these e-mails?
16 A: I certainly do.
17 Q: Okay. You deny that you told him about the e-
18 mails?
19 A: Oh, no. I didn't say that now.
20 Q: You did tell him about him about them?
21 A: Sure.
22 Q: What did you tell him?
23 A: I just said there were e-mails back and forth.
24 Q: And how did you know that?
25 A: I had them in my possession. What do you

58

1 mean, how did I know?
2 Q: And you still have them in your files?
3 A: I sent you a copy of them.
*****

59

22 Q: Okay. How many times did you talk to Holly?
23 A: I have no clue. I answer the telephone and if
24 she's there, I talk to her.
25 Q: Okay. How many times did Holly bring you e-

60

1 mails?
2 A: I don't know.
3 Q: How many times did Ms. Jennings bring you e-
4 mails?
5 A: I don't know that, but I gave you what I have.
6 Q: Ma'am?
7 A: I gave you what I have.

On April 19, 2007, Defendant's counsel received Broome's Responses to Requests to Admit in which she admits "opening and saving emails from (Defendant's) yahoo email account...after (Plaintiff) informed her that (Defendant) had been corresponding with a paramour via email" Broome also admitted providing copies of the emails to Plaintiff and Cooke **(Exhibit 3 – Requests to Admit and Answers from Holly Broome).**

On March 13, 2008, Plaintiff took the deposition of Holly Broome who testified that the emails she improperly accessed went back for years, and that she had been involved in meetings with Defendant Jennings and her attorney, Mr. Neal, who had instructed and encouraged to continue to improperly access Plaintiff's email account.. **(Exhibit 4 – Deposition Excerpts from Defendant Holly Broome of March 13, 2008)**

As a result of Defendant Broome's deposition (whose husband is a former employee of Plaintiff and is currently a competitor), and because Plaintiff's email contains important business records and communications, on March 25, 2008 Plaintiff filed and served Notice of Motion and Motion to Amend his Complaint so as to add damages to Plaintiff's business.

On April 18, 2008, Plaintiff filed and served a Notice of Motion and Motion to Amend and Supplement his Complaint so as to make the forgoing amendments, and seeking to add Thomas M. Neal, III as party defendant.

From and including the date Defendant left the home (June 21, 2006), Broome began illegally accessing and disseminated information stored on

Defendant's private e-mail address without his permission, and otherwise improperly procured his private electronic mail communications.

Broome then distributed the same to Plaintiff, Plaintiff's attorney, and Cooke, the private investigator, all of whom then used the improperly obtained communications and evidence and information derived there from, in an attempt to gain an economic benefit and a collateral advantage for Plaintiff in this action.

Indeed, Broome (who had continuing access to Plaintiff's email account) was in constant communication with Cooke, and a comparison of Cooke's investigative reports, when compared with the record of telephone contact her and Broome, shows that Cooke was acting upon information passed on to her from Broome, all in an effort to save money on investigator's fees. **(See Exhibit 5 – Summary of Voluminous Records: Comparison of Telephone Records with Detective Records)**

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440,452, 548 S.E.2d 868, 874 (2001). "A motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' "

In determining whether a genuine issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the

nonmoving party. *Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

Clearly, if anyone is entitled to Summary Judgment, it is Plaintiff, not any Defendant.

PLAINTIFF SHOULD BE ALLOWED TO AMEND HIS COMPLAINT

"If a party seeks to amend his pleadings greater than thirty days after a responsive pleading has been filed, he may only do so by leave of the court or with express consent of the other parties. Rule 15(a), SCRCP. Leave to amend the pleadings 'shall be freely given when justice so requires and does not prejudice any other party.' Id. Amendments may also be made to conform the pleadings to the evidence when issues not pled are tried by express or implied consent of the parties. Rule 15(b), SCRCP." (*Armstrong v. Collins*, 621 S.E.2d 368, 366 S.C. 204 (S.C. App. 2005))

"A motion to amend is addressed to the trial court's sound discretion and **the burden of establishing prejudice rests on the party opposing the motion.**" (*Harvey v. Strickland*, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002)).

Plaintiff's proposed Second Amended Complaint includes a cause of action against Defendants, and Thomas M. Neal, III for violation of the Federal Stored Communications Act which for a private cause of action for violation of the act.

"18 USCS § 2707: Civil action

"(a) Cause of action. Except as provided in section 2703(e) [*18 USCS § 2703(e)*], any provider of electronic communication service, subscriber, or other **person aggrieved** by any violation of this chapter [*18 USCS §§ 2701* et seq.] in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the **person** or entity,

other than the United States, which engaged in that violation such relief as may be appropriate.

"(b) Relief. **In a civil action under this section,** appropriate relief includes—

"(1) such preliminary and other equitable or declaratory relief as may be appropriate;
(2) damages under subsection (c); and
(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

"(c) Damages. The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $ 1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court." (Emphasis Added)

Indeed, courts wherein this issue has been raised have upheld individual causes of action for violation of the Federal Stored Communications Act.

> "In *Fischer v. Mt. Olive Lutheran Church*, 207 F. Supp. 2d 914 (W.D. Wis. 2002), a church secretary overheard a personal call between the church's youth minister and another man concerning homosexual sex while she was trying to make an outgoing call on a cordless telephone. The church suspended the youth minister and hired a computer expert to access the church's computer for any evidence suggesting that the youth minister used the church's computer to have improper sexual communications with minors. The expert was able to log on to the youth minister's personal Hotmail account and retrieve emails from the minister's account on Hotmail's computer when he guessed the youth minister's password. Subsequently, the youth minister sued the church under both the Wiretap Act, for eavesdropping on his personal phone call, and the Stored Communications Act, for accessing his stored e-mail messages.
>
> "Relying on *Fraser,* the church argued that it could not have violated the Stored Communications Act because the email messages it retrieved had already been read by the youth minister and thus could not be in electronic storage under the Act. The Court rejected this argument because the youth minister's emails, unlike the emails in *Fraser*, were stored on Hotmail's computers and thus were stored by an electronic communication service. *Id.* at 925." (See W. Reid Wittliff, *Computer Hacking and Liability Issues: When Does Liability Attach?*, http://www.gdhm.com/pdf/wrw-hack_article.pdf)

(See also *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 874 (9th Cir. 2002); *Eagle Investment Systems Corporation v. Einer Tamm, et al.* 146 F.Supp.2d 105, 2001 U.S. Dist. Lexis 7349 (D. Mass., May 22, 2001))

PLAINTIFF'S MOTION IN LIMINE

Based upon the law of South Carolina and the United States, none of the emails obtained illegally by and on behalf of Plaintiff -- and no information or evidence derived from or gained by the use of said illegally obtained emails -- can be used for any purpose in this or any other court.

Specifically, Plaintiff and all of her witnesses should be barred from testifying to anything regarding any act of adultery allegedly committed by Defendant; her counsel should be restrained from asking any questions regarding Defendant's alleged adultery because he was provided with copies of the illegally obtained stored communications; and Plaintiff's cause of action for adultery should be stricken.

In short, it is impossible to know what information came from the illegally obtained emails under the facts of this case.

WARNER, PAYNE & BLACK, L.L.P.

Jan L. Warner
Matthew E. Steinmetz
Post Office Box 2628 (29202)
1122 Lady Street, Ste 1200
Columbia, South Carolina 29201
Telephone: (803) 799-0554
Facsimile: (803) 799-2517
ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
May 7, 2008

EXHIBIT 1

DATE: 6-26-06

S78: "Gail" M. Jennings "55" S78B 10-21: 765 1708

S78B: 3211 Bratton St Cola, SC 29205 S78 10-35: Volva S80 White 4-DR- 496 BTT

S78 Cell: 586-7918

S78A: Dept of Natural Resources Adm. Specialist S78A 10-21: 734-4817

1000 Assembly St Cola, S.C.

S16: M. "Lee" Jennings DOB: 11-11-54 "50" S16B 10-21: _

Dying your or front.

DL SC 4694610

The Wingate Hotel

S16B: Two Notch Rd Cola, SC SS# 251-96-5033 S16 Cell: 269-2291

6455 Bare Circle Place

S16A: Bag Appraisals S16A 10-21: 251-3000

ADD: 628 Pickens St Suite 201 Cola

S16A Schedule: M-

New Life MTW + Fri - 7AM - doesn't go to work until 11:00 or 11:30 does alot to do appraisals - Old Carolina House Park in front

S16 Description: 6'0, 185lbs - red hair - long - straight - Must ache - Blue eyes - Center of attention - Polo Shirt + White tennis shoes - Wedding ring -

S16 10-35: Black tagon front - "Beatles" -SUV- S16 10-28: 632 CPL

Burgundy Volvo Sports Utility

S17: "Michelle" Engwall - "46" married to Robert T. S17B 10-21:

S17B: 104 Stone Brook Dr. (Crickentree) Blythe Wood, SC S17 Cell:

S17A: Real Estate (Century Homes) S17A 10-21:

ADD:

S17 Schedule:

S17 Description: Picture on E-mail -

S17 10-35: S17 10-28:

502 JVX SUV - Cream Colored

1 Child - Daycare - 561 HTS White Sedan SAAR

S16 *Friends and Family:* All friends @ New Life -

S78 *Alternate Number:* Holly - 238-5667 or 926 7780

S16 *Entertainment:* Plays guitar, nice meals out, likes to walk, drinks Scotch & Wine, doesn't smoke - ~~Beatles~~ Music -
Works & goes to gym - goes to Lake & to lunch -
11-12 - lunch w/ S78,

SITUATION/ OBJECTIVE: 89/ New Life fitness on Two Notch Rd. - 803 736 9000

S78 afraid of him -
(S16 Addicted to Loritabs)
ASSIGNMENT:

Dr. Hightower - Physco.
REFERRAL:
HIS ATT: ?

HER ATT: Tom Neal

PRESENT STATUS:

MARRIED SINCE: 24 yrs. S78 Previously divorced -

SEP: left last Wed.

CHILDREN AND AGES: DAYCARE OR SITTER:
420 children together
She has 2 sons - Ryan 29 Charleston
Allen 34 Piney Grove

Son Damon 26 - works for S16 -
Harmony - 30 1/2.

EXHIBIT 2

January 15th, 2007

ANSWER TO SUBPOENA FOR JENNINGS

1. Work sheet (2 Pages)
2. Contract (2 Pages)
3. Pictures (3)
4. E-mails (46 pages)
5. Copy of report
6. Copy of Bob Engwall's numbers

Video will be sent as soon as it is converted to VCR tape AZR

Jan said he will pay reasonable costs for videos.

EXHIBIT 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, -vs- GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	)	CASE NO.: 07-CP-40-1125 **DEFENDANT HOLLY BROOME'S RESPONSES TO PLAINTIFF'S FIRST REQUESTS TO ADMIT**

TO: JAN L. WARNER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Defendant Holly Broome would respectfully reply to the Plaintiff's First Requests to Admit as follows:

1. Admit that you accessed and retrieved e-mails from Lee Jennings' yahoo e-mail account after June 21, 2006.

RESPONSE: ***Defendant Broome admits that she opened saved e-mails from Lee Jennings' yahoo e-mail account after June 21, 2006 after her mother-in-law, Defendant Jennings, informed her that the Plaintiff had admitted to her that he had been corresponding with a paramour via email.***

2. Admit that you provided two (2) copies of those e-mail to your mother-in-law, Gail Jennings on or about June 25, 2006.

RESPONSE: ***Admitted.***

3. Admit that you provided information contained in those e-mails to Brenda Cooke and Gail Jennings after June 26, 2006.

RESPONSE: ***Admitted.***

RECEIVED
2007 APR 19 PM 12:20
WYCHE, P.A. & B. LLP
ATTORNEYS AT LAW SERVICES
OF SC, PA

4. Admit that you continued monitoring Lee Jennings' e-mail account by accessing the same after June 26, 2006 and provided information contained therein.

RESPONSE: ***Admitted that she opened saved e-mails as aforestated after that date and provided information contained therein.***

GARY W. POPWELL, JR.
Attorney for Defendant Holly Broome

ATTORNEYS LEE, EADON, ISGETT,
POPWELL AND REARDON, P.A.
Post Office Box 1505
Columbia, South Carolina 29202
(803) 799-9811

Columbia, South Carolina

April 17, 2007.

CERTIFICATE OF SERVICE

Re: **M. Lee Jennings -vs- Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and BJR International Detective Agency, Inc.**
Case No.: 2007-CP-40-1125

I, the undersigned, do hereby certify that a copy of ***Defendant Holly Broome's Responses to Plaintiff's First Requests to Admit,*** in the above-referenced matter, has been served upon the following counsel of record, through the United States Mail with sufficient postage affixed thereto.

Jan L. Warner, Esquire
WARNER, PAYNE & BLACK
Post Office Box 2628
Columbia, South Carolina 29202

Gayle S. Reese

April 17, 2007.

EXHIBIT 4

Excerpts from Deposition of Holly Broome
(March 13, 2008)

12

Q: Did you go into Mr. Jennings e-mail account?
A: Yes.
Q: Okay. When did you start going into his e-mail account?
A: I did it on Sunday, the very next day.
Q: Sunday the 25th if that's correct?
A: Uh-huh (affirmative response.)

13

Q: Of June of 2006?
A: Uh-huh (affirmative response.)
Q: Okay. Did you have permission to go into it?
A: No.
Q: Did you know his e-mail address?
A: Yeah.
Q: How did you know that?
A: Well, working with him. I knew that he had a personal e-mail account.
Q: Okay.
A: Under Yahoo.
Q: Did you know his password?
A: No.
Q: Okay. Did he give you permission to go into his account?
A: No.
Q: Okay. So, tell me what you did?
A: I know that Yahoo is a free account and I also have a Yahoo account and you can sign on to your e-mail address and say that you have forgotten your password.
Q: Okay.
A: You answer a certain amount of questions and they give you a new password.
Q: Okay.

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A: And that's what I did.
Q: All right.
A: And it assigned me a password.
Q: And what did you do then?
A: Then I got on to his e-mail and read the extent

of the e-mails that he had sent to her.

...

16

Q: Okay. What was the purpose of you going into his e-mail account?
A: To find out the truth and if that's how he was corresponding with her, I wanted to see ... we both wanted to see what was being said.

17

Q: You both being who?
A: Me and Gail.
Q: Okay. And did you tell her you were going to do that?
A: No, I didn't.
Q: Okay. Did you tell her when you were doing it?
A: Yes. Well, I mean, I had her on the phone. I called her after I had read a few of them.
Q: So, on that Sunday, you called her?
A: Uh-huh (affirmative response.)
Q: Did she come over to your house?
A: Yes.
Q: And did she read them on line?
A: No. She didn't really care to read most of it. It was more of like I would say look what he just said, you know, he said this to her, he said that to her.
Q: And how many copies did you print?
A: Just one at the time.
Q: Okay. And what did you do with the copy that you printed?
A: Well, we made more copies.
Q: Okay. Who made the copies?
A: We .... she and I did.
Q: And where did you make them?

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A: At like an Office Max or something.
Q: Okay. How many copies did you make?
A: Three sets.
Q: Okay.
A: One for the attorney and one for her and then we gave some to Cookie, the private investigator.
Q: Okay. One for the attorney, Mr. Neal?
A: Yes.

Q: And had she retained Mr. Neal at that point?
A: She had already. Actually, she ... I think she did on Monday. She went the very next day and met with him.
Q: Did you print the e-mails on the Sunday or the Monday; do you remember?
A: The Sunday.
Q: Okay. So, you went out, after you did it, you made three sets?
A: Uh-huh (affirmative response.)
Q: Had she already had an appointment with a lawyer on Monday?
A: I believe so, yeah.
Q: Okay. And when did you meet Ms. Cooke?
A: After meeting with Tom Neal.
Q: Did you meet with ...

A: Sometime that week.
Q: Okay, excuse me.
A: Yes. I did go with her to the majority of her appointments just because of distress and she wanted someone else to be there and someone to help listen and follow along. So, yeah, I went to her first appointment with Tom Neal and then also I went to her first appointment with Ms. Cooke.
Q: Okay. And how long were you at the appointment with Tom Neal?
A: A while. It was ...
Q: Was it two hours?
A: Yeah, I would say. I mean, it was definitely the whole discussion of everything that had happened and what she had found out so far.
Q: And were the e-mails, the copies delivered to Mr. Neal that day?
A: I believe so if I remember correctly, yes.
Q: Did you tell Mr. Neal in Gail Jennings presence where you had gotten the e-mails?
A: Yes.
Q: And did he read them?
A: Yes.
Q: Okay.

A: Some. You know, I mean, he wasn't reading all, no. He would read some.
Q: He read some of them?
A: Uh-huh (affirmative response.)
Q: But he knew the source of them?
A: Yes.
Q: And what else was discussed in that meeting?
A: To get Cookie and to see ... just to get more I guess proof that he was actually out and still seeing her. So, it was under his advice that we go and see her.
Q: So, after you got the e-mails, you printed them, you took the e-mails to Mr. Neal. Mr. Neal made the suggestion in your presence and Ms. Jennings presence to hire Cookie. He made the referral to Cookie?
A: He did.
Q: Ms. Cooke? And did you go with Ms. Jennings to Ms. Cooke?
A: Yes.
Q: All right. What went on at that meeting?
A: She again, you know, we had to hire her and pay her and sign forms and told her basically what we could with pictures and that sort of thing and of course, you just have to go over where

he works and where he lives and what he could be doing and all that sort of stuff. So, yeah.
Q: Where did you ... did you go see Ms. Cooke on the same day after you left Mr. Neal?
A: No. I believe ... well, I don't remember. It could have been the same day. If it was not the same day, it was in that same week. We made an appointment as soon as possible.
Q: Okay. And did you give ... and you said you gave Ms. Cooke the e-mails?
A: We did give her ones that we thought were the most proof.
Q: So, you and Ms. Jennings went through those and made those decisions or did Mr. Neal help you make them?
A: I don't really remember.
Q: Okay. Did Ms. Cooke read them in your presence?
A: A few, yes.

Q: Okay. And was there a discussion about trying to save money on the detective's fees by getting the e-mails, continuing to get the e-mails to know where Mr. Jennings was going to be?
A: What do you mean, to save money? I don't ...

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Q: To save in the cost?
A: She has her fee. I mean, I don't know if there was any way to save any money with her. Of course, she is, you know, you use it up.
Q: Right.
A: If she has to work that many hours, then you use it up. It was actually under the advice of Tom Neal that we continue to try to help Cookie.
Q: Okay. So, Mr. Neal's advice was for you to continue to go into his e-mail?
A: Yes, if it was a help.
Q: Okay.
A: Uh-huh (affirmative response.)
Q: Okay. And so, therefore, based on Mr. Neal's advice, you went into the e-mail five or six additional times?
A: Yeah.
...

33

Q: Holly, Mr. Warner was asking you about the e-mail that you accessed, these were all e-mails that he had saved?
A: And it wasn't that ... I don't think there is like I told you. There's not the option to

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save the e-mails. He just didn't erase them.
Q: Okay.
A: He just didn't erase them.
Q: Okay.
A: I mean, he had sent e-mails that were in his sent e-mail folder from years ago.
Q: Okay.

EXHIBIT 5

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, BJR INTERNATIONAL DETECTIVE AGENCY, INC., THOMAS M. NEAL, III, and DEFENDANTS.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT DOCKET NO.: 2007-CP-40-1125 **SUMMARY OF VOLUMINOUS RECORDS PER RULE 1006, *S.C. R. Civ. P.*** B

The following summary is derived from a compilation and comparison of Confidential Intelligence Logs and Telephone Call Logs provided to Plaintiff by Defendant Cooke during the course of discovery. The supporting documents from which the summary is derived are attached hereto.

July 8, 2006

Time of Call:

20:36 hrs (8:36 p.m.) – Call from Defendant Cook to Defendant Broome

Confidential Intelligence Log contains the following language:

"Agents learned that [REDACTED] is going to [REDACTED]"

Time and Narrative of first entry on log:

21:00 hrs (9:00 p.m.) – "Agents are enroute to [REDACTED] in Columbia, SC."

July 11, 2006

Time of Call:

21:10 hrs (9:10 p.m.) – Call from Defendant Broome to Defendant Cook

Confidential Intelligence Log contains the following language:

"Agents learn that [REDACTED]'s husband is out of town."

Time and Narrative of first entry on log:

21:30 hrs (9:30 p.m.) – "Agents are enroute to residence of [REDACTED] . . .."

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May 1, 2008

Item #	Date	Time	Number Called	Call To	Minutes
22	6/28	6:06pm	(803)238-5667	Incoming	4
24	6/28	6:52pm	(803)238-5667	Incoming	2
36	6/29	11:44am	(803)238-5667	Incoming	5
44	6/29	2:00pm	(803)238-5667	Incoming	1
204	7/7	8:27am	(803)238-5667		8
206	7/7	9:01am	(803)238-5667	Incoming	15
207	7/7	9:22am	(803)238-5667	Incoming	3
257	7/7	9:50pm	(803)238-5667	Incoming	12
259	7/7	10:01pm	(803)238-5667		15
278	7/8	8:36pm	(803)238-5667		1
289	7/8	9:30pm	(803)238-5667	Incoming	7
302	7/9	1:06pm	(803)238-5667	Incoming	17
375	7/11	8:37pm	(803)238-5667		3
379	7/11	9:10pm	(803)238-5667	Incoming	2
384	7/11	9:49pm	(803)238-5667	Incoming	1
396	7/12	8:54am	(803)238-5667		35
435	7/12	6:39pm	(803)238-5667	Incoming	21
458	7/13	9:13am	(803)238-5667	Incoming	3
478	7/13	1:30pm	(803)734-4817	Incoming	9
480	7/13	1:38pm	(803)734-4817	Incoming	20
556	7/14	4:26pm	(803)238-5667		2
564	7/14	5:14pm	(803)238-5667	Incoming	3
615	7/15	4:27pm	(803)238-5667	Incoming	3
730	7/17	9:49pm	(803)238-5667		32
1112	7/23	3:39pm	(803)765-1708	Incoming	13
1141	7/24	9:10am	(803)238-5667		5
1160	7/24	5:48pm	(803)238-5667		1
1163	7/24	5:59pm	(803)238-5667		4
1201	7/24	9:26pm	(803)765-1708		1
1250	7/25	7:58pm	(803)238-5667		10
1277	7/26	7:43am	(803)238-5667	Incoming	1
1371	7/27	8:28pm	(803)238-5667		7
1402	7/27	7:25pm	(803)238-5667	Incoming	6
1711	6/27	6:06pm	(803)238-5667	Incoming	3
1725	6/27	8:49pm	(803)238-5667	Incoming	2
1736	6/27	10:04pm	(803)238-5667		13
44	7/29	10:05am	(803)765-1708	Incoming	9
591	8/26	2:06pm	(803)765-1708		47
592	8/6	2:52pm	(803)765-1708		15
593	8/26	3:07pm	(803)765-1708	Incoming	1
985	8/10	9:45pm	(803)765-1708		27

BJR INTERNATIONAL

309 ST. ANDREWS ROAD
COLUMBIA, SOUTH CAROLINA 29210
(803) 798-6554

Confidential Intelligence Log

JENNINGS vs. JENNINGS

Pursuant to the client's request, BJR International will document the activities of M. Lee Jennings, also known to agents as Lee Jennings. The suspected Paramour is [redacted] Agents learn that [redacted] is going to the [redacted] tonight.

Date: **Saturday, July 8th, 2006**

Time: 21:00 hrs.

Agents are enroute to the [redacted] in Columbia, South Carolina.

Time: 21:14 hrs.

Agents arrive at the [redacted] and locate a [redacted], bearing SC license tag [redacted] parked in the back of the parking lot. Agents learn that [redacted] drives this vehicle. Agents set up surveillance and prepare to video.

Time: 22:14 hrs.

[redacted] and another female come out of the [redacted] together. They walk to [redacted] vehicle, get in, and drive off. Agents follow. [redacted] drives straight to [redacted] Restaurant in Five Points. [redacted] pulls into the parking lot and parks the vehicle but does not get out of the vehicle. [redacted] and the female remain in the vehicle talking with one another. The headlights on the vehicle stay on.

Time: 22:20 hrs.

The female riding with [redacted] gets out of the vehicle and walks to a gray [redacted], bearing SC license [redacted] pulls off and tries to wait on the female to leave. [redacted] makes the light and the female has to stop for the light. [redacted] acts as though she is going towards the Interstate, but as soon as she is out of view of the female, [redacted] turns around and drives straight to [redacted] in Columbia, South Carolina.

BJR INTERNATIONAL
309 ST. ANDREWS ROAD
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Confidential Intelligence Log

JENNINGS vs. JENNINGS

Pursuant to the client's request, BJR International will document the activities of M. Lee Jennings, also known to agents as Lee Jennings. The Paramour is [redacted] *Agents learn that* [redacted] *husband is out of town.*

Date: **Tuesday, July 11th, 2006**

Time: 21:30 hrs.

Agents are enroute to the residence of [redacted] located at [redacted] Drive in [redacted], South Carolina.

Time: 21:50 hrs.

Agents arrive at the residence to find that Lee Jennings' vehicle is parked in the driveway on the side of the house. Agents set up surveillance and prepare to video.

Time: 22:11 hrs.

[redacted]

Time: 23:50 hrs.

There has been no change at the residence at this time. Agents wait.

Time: 23:59 hrs.

All the lights in the residence are now out. The residence is completely dark with the exception of the outside lights.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEASE FOR THE FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	)	DOCKET NO.: 2007-CP-40-1125 MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

FACTUAL BACKGROUND

Plaintiff incorporates herein by reference the factual allegations as set forth in his Memorandum in Opposition to Motion for Summary Judgment and in Support of Motion to Amend.

By way of Consent Order dated July 13, 2007, Plaintiff filed and served an Amended Complaint which included, among other things, causes of action for violation of the **Federal Stored Communications Act**.

At her deposition which was taken on Thursday, March 13, 2008, Defendant Holly Broome testified, in pertinent part, as follows:

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Q: Okay. What did you do?
A: What do you mean?
Q: Did you ...
A: **I went home.**
Q: Okay. And did you help her in any way?
A: With the divorce, no. I mean, more just like support. Just, I mean, I felt awful. I didn't ...

Q: **Did you go into Mr. Jennings e-mail account?**
A: **Yes.**
Q: Okay. When did you start going into his e-mail account?
A: I did it on Sunday, the very next day.
Q: Sunday the 25th if that's correct?
A: Uh-huh (affirmative response.)

13

Q: Of June of 2006?
A: Uh-huh (affirmative response.)
Q: Okay. **Did you have permission to go into it?**
A: **No.**
Q: Did you know his e-mail address?
A: Yeah.
Q: How did you know that?
A: Well, working with him. **I knew that he had a personal e-mail account.**
Q: Okay.
A: **Under Yahoo.**
Q: **Did you know his password?**
A: **No.**
Q: Okay. **Did he give you permission to go into his account?**
A: No.
Q: Okay. So, tell me what you did?
A: I know that Yahoo is a free account and I also have a Yahoo account and you can sign on to your e-mail address and say that you have forgotten your password.
Q: Okay.
A: **You answer a certain amount of questions and they give you a new password.**
Q: Okay.

14

A: And that's what I did.
Q: All right.
A: And it assigned me a password.
Q: And what did you do then?
A: **Then I got on to his e-mail and read the extent of the e-mails that he had sent to her.**
...
Q: Okay. Did you ... to whom did you give ... how many times did you go into his e-mail?
A: That I don't really remember. That first time

was the bulk of it. That was the basically all the information that I needed and it was like,

15

I guess about a month before he actually got served his divorce papers. So, I mean, in that month, I would have to ... if I had to guess, it was maybe five or six times.

Q: **And every time you went in, it changed his password?**

A: Uh-huh (affirmative response.)

Q: Is that a, yes?

A: **Yes.**

At the time of her sworn deposition taken on February 19, 2007, Defendant Jennings admitted that Holly Broom, without Plaintiff's permission, entered his private and personal email account, retrieved messages there from, printed the copies, and distributed copies to Defendant Jenning's attorney and the investigator, Defendant Cooke.

Defendant Jennings also admitted that her daughter in law continued to surreptitiously enter and retrieve Plaintiff's private and personal emails and gave them to the investigator on a continuing basis during the time of surveillance.

Defendant Jennings' sworn testimony at her February 19, 2007 deposition in this regard is as follows:

17

Q: When did you start getting his e-mails?

A: I received the e-mails on Sunday.

Q: How did you get into his e-mail box?

A: I did not.

Q: Who got into it?

A: Holly.

18

Q: Okay. When did Holly start going into Lee Jennings e-mail?

A: Whatever that Sunday was.

Q: The Sunday after he left?

A: Yes.

19

Q: It would have been the 27th of June?
A: Yes.
Q: Okay. Did she do it at your house or at her house?
A: Her house.
Q: And then what did she do; she printed them out?
A: Yes, sir.
Q: And gave them to you?
A: No, sir.
Q: What did she do with them?
A: Made Tom a copy, well, at the time, there were two copies made because I was going to seek the advice of an attorney.
Q: Okay. There were two copies made and where were they distributed?
A: Tom.
Q: Tom Neal?
A: Yes, sir.
Q: Okay. And where did the other one go?
A: Cookie.
Q: Okay. Did you give them to Cookie on the 26th?
A: The Monday, yes, sir.
Q: Okay. So, you gave out both copies that day?
A: Yes, sir.
Q: Now, did Holly go into ... how did ... did she go into his e-mail after that?

20

A: Yes, sir.
Q: Okay. How many times?
A: I do not know.
Q: Did she give you copies of what was provided?
A: No, sir.
Q: How did Cookie, Ms. Cooke get the e-mails that were after the time of the ...
A: Holly took them by there.
Q: Holly took them by there?
A: Yes, sir.
Q: Did Holly have your husband's permission to go into his e-mail box?
A: No.
*****
Q: On a free account? Did you get any information or check it out before you took these e-mails from your daughter?

24 A: No, sir.
25 Q: Did you seek any advice, and I don't want to

21

1 get into what anybody told you from any lawyer,
2 about the use of these e-mail messages?
3 A: No, sir.
4 **Q: Now, when you gave the e-mails to Ms. Cooke,**
5 **why did you give them to her?**
6 **A: I felt the more information she had to**
7 **background the, you know, the more expediently**
8 **she could get the information that was needed.**
9 **Q: And it would be less costly to you because you**
10 **might know where you could find him?**
11 **A: Yes, sir.**
12 **Q: Is that correct?**
13 **A: Yes, sir.**

22

12 **Q: I understand. Now, did you ask the**
13 **investigator to give copies of these e-mails to**
14 **Mr. XXXXX? (Name redacted)**
15 **A: No, sir.**
****
24 Q: So, she did not do that on your instruction at
25 all; true?

23

1 A: Not on instruction, no.
2 Q: Did you at any time tell her it might be a good
3 idea for her to give that information to him?
4 A: No, sir.
5 Q: Okay. Did your daughter tell her that?
6 A: No, sir, daughter in law.
****
9 Q: Okay. So, you don't know why she went out and
10 stood by the stop sign and waited for him?
11 **A: There was a conversation that she said that she**
12 **felt like he should be informed and I said, ...**
13 **I recall just saying, you know, that's, I, you**
14 **know, I've got to take care of my life. And**
15 **she said, do you think that Lee would want to**
16 **know if you ... and I said, yeah. I said, you**
17 **know, whatever you feel you want to do, do.**
****
21 Q: You didn't tell her to go?
22 A: I didn't say, Cookie, go tell him, no. But
23 after she pointed out that if I were doing the
24 same thing, ...

25 Q: Okay.

1 A: ... that wouldn't Lee want to know and I said,
2 yeah. I don't care what you do.

On February 19, 2007, Plaintiff's counsel deposed Brenda Cooke, the private investigator, who testified under oath that both Plaintiff and Holly Broome had given to her emails on June 26, 2006 and thereafter during her surveillance. She admitted that she had received 46 pages of emails from Defendant's private email account, some of which predated her hiring date of June 26, 2006; and that she was aware of the content of these emails at the time she was hired as private investigator by Plaintiff. **(See Plaintiff's Memorandum dated May 7, 2008)**

On April 19, 2007, Defendant's counsel received Broome's Responses to Requests to Admit in which she admits "opening and saving emails from (Defendant's) yahoo email account...after (Plaintiff) informed her that (Defendant) had been corresponding with a paramour via email" Broome also admitted providing copies of the emails to Plaintiff and Cooke. **(See Plaintiff's Memorandum dated May 7, 2008)**

As a result of Defendant Broome's deposition (whose husband is a former employee of Plaintiff and is currently a competitor), and because Plaintiff's email contains important business records and communications, on March 25, 2008 Plaintiff filed and served Notice of Motion and Motion to Amend his Complaint so as to add damages to Plaintiff's business.

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440,452, 548 S.E.2d 868, 874 (2001). "A motion for summary judgment shall be

granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' "

In determining whether a genuine issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

Defendants argue that Plaintiff's cause of action arising under the Federal Stored Communications Act must be dismissed even though the cases they refer to shows that such a cause of action exists.

However, our Federal Courts have previously held that a private cause of action can arise under the Federal Stored Communications Act for illegally accessing stored emails.

> "In *Fischer v. Mt. Olive Lutheran Church*, 207 F. Supp. 2d 914 (W.D. Wis. 2002), a church secretary overheard a personal call between the church's youth minister and another man concerning homosexual sex while she was trying to make an outgoing call on a cordless telephone. The church suspended the youth minister and hired a computer expert to access the church's computer for any evidence suggesting that the youth minister used the church's computer to have improper sexual communications with minors. **The expert was able to log on to the youth minister's personal Hotmail account and retrieve emails from the minister's account on Hotmail's computer when he guessed the youth minister's password.** Subsequently, the youth minister sued the church under both the Wiretap Act, for eavesdropping on his personal phone call, and the Stored Communications Act, for accessing his stored e-mail messages.
>
> "Relying on *Fraser,* the church argued that it could not have violated the Stored Communications Act because the email messages it retrieved had already been read by the youth minister and thus could not

be in electronic storage under the Act. **The Court rejected this argument because the youth minister's emails, unlike the emails in *Fraser*, were stored on Hotmail's computers and thus were stored by an electronic communication service.** *Id.* at 925." (See W. Reid Wittliff, *Computer Hacking and Liability Issues: When Does Liability Attach?*, http://www.gdhm.com/pdf/wrw-hack_article.pdf)

Here, Defendants gained access to Plaintiff's private emails by accessing his Yahoo email account and retrieving the emails stored on Yahoo's computers.

As testified to by Defendant Broome, the emails she improperly obtained were obtained directly from Plaintiff's Yahoo account, not from his personal computer. **(See Deposition of Holly Broome supra. At pp. 13 and 14)**

In *United States of America v. Steiger*, 318 F.3d 1039 (11th Cir 2003) the United States Court of Appeals for the 11th Circuit provided "The SCA [Stored Communications Act] creates civil and criminal penalties...for unauthorized access to a 'facility through which an electronic communication is provided' to 'obtain, alter, or prevent authorized access to a wire or electronic communication while it is in electronic storage in such system' 18 U.S.C. 2701...Thus the SCA clearly applies, for example, to information stored with a phone company, Internet Service Provider (ISP), or electronic bulletin board system (BBS)."

In *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 874 (9th Cir. 2002), the United States Court of Appeals addressed the authorization of third parties to access stored communications under 18 U.S.C. 2701, providing:

"Section 2701(c)(2) allows a person to authorize a third party's access to an electronic communication if the person is 1) a 'user' of the 'service' and 2) the communication is 'of or intended for that user'."

The Court continued "...the plain language of § 2701(c)(2) indicates that only a 'user' of the service can authorize a third party's access to the communication. The statute defines 'user' as one who 1) uses the service and 2) is duly authorized to do so."

Here, Plaintiff did not authorize any of the Defendants to access his private emails from his Yahoo email account and a private civil cause of action lies against an individual that improperly accesses a stored communication.

Based upon the forgoing, this Court should grant Plaintiff's motions for summary judgment against the Defendants for violation of the Federal Stored Communication Act.

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OF SC, PA

RE: Jennings v. Jennings, et al
Case No. 07-CP-40-1125

Dear Counsel:

Following and hereby served upon each of you this date is the filed Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion to Amend Complaint.

I am, very truly yours,

R. G. Whiting

Richard G. Whiting

/klh
cc: Gail Jennings

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
:	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	
M. LEE JENNINGS,)	CASE NO.: 07-CP-40-1125
PLAINTIFF,)	
-vs-)	**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT**
GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,)	
DEFENDANTS.)	

FILED
2009 SEP 24 AM 11:00
BARBARA SCOTT
CLERK C.C.P.&G.S.

This matter was before me for hearing on June 19, 2008 pursuant to the Defendants' Motions for Summary Judgment and the Plaintiff's Motion to Amend the Complaint to add an additional party defendant and an additional cause of action for damage to his business. All parties were present and represented by their respective counsel.

During the hearing, counsel for the Plaintiff stipulated that the causes of action under the South Carolina Homeland Security Act, §17-30-10, et seq., S.C. Code Ann. (1976, as amended); the South Carolina Computer Crime Act, §16-16-10, et seq., S.C. Code Ann. (1976, as amended); and the Federal Electronic Communications Privacy Act, 18 U.S.C., §§2510-2520, et. seq., are no longer being pursued by the Plaintiff as it was stipulated that there was no interception of the emails in question by the Defendants. He also stipulated that the Plaintiff was no longer pursuing his fourth cause of action for conspiracy which the Complaint referenced as improperly intercepting the Plaintiff's private electronic communications.

Therefore, the issues before the Court on Defendants' Motions for Summary Judgment were the Plaintiff's cause of action alleging violation of the Federal Stored Communications Act,

18 U.S.C., §§2701-2712 under the First Cause of Action, the Common Law Invasion of Privacy Claim (publicizing private affairs) under the Second Cause of Action, the Common Law Invasion of Privacy Claim (wrongful intrusion) under the Third Cause of Action, and the Plaintiff's Motion to amend his Complaint to add an additional party defendant and add an additional cause of action for damage to his business.

Upon review of the pleadings and the evidence in the record, the depositions submitted at the hearing and the arguments of counsel, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiff, Lee Jennings, is the husband of the Defendant Gail Jennings. The Defendant Holly Broome is the daughter-in-law of the Defendant Gail Jennings and the step daughter-in-law of the Plaintiff Lee Jennings.

2. Gail Jennings and Lee Jennings separated on June 21, 2006 when the Plaintiff told Gail that he had fallen in love with someone else, who was also married. The Plaintiff told Gail Jennings that he had been corresponding with the woman with whom he had fallen in love via email, but he would not tell her the woman's name.

3. Defendant Gail Jennings told Defendant Holly Broome about the separation when Holly and her husband came over to Defendant Jennings' house on Saturday, June 24, 2006, and explained that the Plaintiff had told her that he had fallen in love with someone else and that they had been corresponding by email after Defendant Jennings had found a card for flowers in Plaintiff Jennings' car and realized the flowers were not for her. Defendant Gail Jennings was extremely upset.

4. The next day Defendant Broome, using her computer at her home, went onto the Plaintiff's Yahoo email account and changed his password, therefore giving her access to the saved emails which Mr. Jennings had received and not deleted, and had sent and not deleted. She printed emails which the Plaintiff had sent to his girlfriend, and which his girlfriend had sent to him. The Defendant Broome subsequently went on the email account several more times and printed out other emails which Plaintiff had sent his girlfriend, and which his girlfriend had sent him and which had been opened and saved by Plaintiff Jennings.

5. Defendant Broome and Defendant Jennings made three copies of the emails, which Defendant Broome had printed and gave one to Plaintiff's domestic attorney and one to Defendant Cooke, the private investigator hired by Defendant Jennings and Defendant Jennings kept one copy.

6. Family Court litigation was initiated in the summer of 2006 by Defendant Gail Jennings. That litigation is still pending. There is no evidence in the record that the emails between the Plaintiff and his girlfriend, which had been printed by Defendant Broome, were ever filed with the Family Court and those emails have not been filed with this Court.

7. The parties consented to amendment of the Summons and Complaint of the Plaintiff to add additional causes of action and the Amended Summons and Complaint was filed on July 25, 2007.

8. There is no evidence in the record that the emails in question which were sent between the Plaintiff and his girlfriend and saved by the Plaintiff were temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof, nor is there any evidence that they were stored by an electronic communication service for

purposes of back-up protection of those communications. The emails were saved on Plaintiff's personal account where they were kept at Plaintiff's discretion.

9. The Plaintiff learned that the emails in question had been accessed without his permission on or about January 3, 2007. He saw a counselor in June, 2007.

10. The Plaintiff's business has not suffered since his discovery that his saved emails had been printed and he started counseling.

CONCLUSIONS OF LAW

1. Plaintiff's Motion for Summary Judgment as to the First Cause of Action alleging violations of §16-16-10, et seq., S.C. Code Ann. (1976, as amended); §17-30-10, et seq., §16-16-10, et seq., 18 U.S.C., §§2510-2520, et. seq., and Plaintiff's Fourth Cause of Action for conspiracy to intercept and disseminate the Plaintiff's electronic communications is granted as to those causes of action as it was stipulated at the hearing that there was no interception of Plaintiff's emails under the statutes and that none of the Defendants had been convicted under §16-16-10, et seq: As was stipulated, since there was no interception then there was no conspiracy to intercept the Plaintiff's emails and there is no evidence in the record that interception of Plaintiff's emails were ever contemplated or attempted by Defendants.

2. Under the cause of action for public disclosure of private facts, one essential element of recovery is publicity. It is publicity, as opposed to publication, that gives rise to a cause of action for invasion of privacy. Communication to a single individual or to a small group of people, absent a breach of contract, trust or other confidential relationship, will not give rise to liability. *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (S.C. App. 1984). No evidence has been presented showing that the emails in question were disclosed to the public or were the subject of publicity. No evidence has been presented which shows that the Defendants

mentioned the emails in any Family Court pleading or proceeding, or entered the emails in question into the record in either the Family Court proceeding or this proceeding. Therefore, there has been no publicity attendant to the emails in question and summary judgment is therefore granted for the Defendants as to Plaintiff's Second Cause of Action.

3. Plaintiff's Third Cause of Action alleges invasion of privacy on the basis of wrongful intrusion. When a plaintiff bases an action for invasion of privacy on intrusion alone, bringing forth no evidence of public disclosure, it is incumbent upon him to show a blatant and shocking disregard of his rights and serious mental or physical injury, or humiliation to himself resulting therefrom. *Rycroft, supra, citing, Shorter v. Retail Credit Co.*, 251 F. Supp. 329 (D.S.C. 1966). The right of privacy protects only the ordinary sensibilities of an individual and not super sensitiveness. It is relative to the customs of the time and place, and it is determined by the norm of the ordinary man. Protection afforded by law must be restricted to the ordinary sensibilities and cannot extend to super sensitiveness or agoraphobia. In order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant; and this question is to some extent one of law. *Meetze v. The Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956); *citing* 41 Am. Jur., Privacy, §12. As there has been no publication of the emails in question, it is incumbent upon the Plaintiff to show serious mental or physical injury or humiliation to himself. *Rycroft, supra.*

The Plaintiff had already admitted to the Defendant Jennings that he had fallen in love with another woman and that they had been emailing each other. He would not provide Defendant Jennings with the woman's name. The Plaintiff and Defendant Jennings then

separated. The question then becomes whether an ordinary man of ordinary sensibilities, having informed his wife that he had fallen in love with someone else with whom he had been corresponding via email and separated from his wife, would be so shocked and humiliated by his wife or another family member on her behalf snooping to try to find out the identity of the girlfriend and/or the nature of the relationship between the Plaintiff and his girlfriend so as to suffer serious mental or physical injury or humiliation. As aforestated, Family Court litigation is on-going concerning this matter and the identity of the Plaintiff's girlfriend, would certainly have been revealed via discovery in the Family Court litigation. While it is certainly preferable that everyone mind their own business and not snoop into other family members' correspondence, via email or otherwise, given the specific facts and circumstances and the record in this case, I find that the ordinary husband with ordinary sensibilities would not be so shocked and outraged under the particular facts and circumstances of this case so as to suffer severe mental or physical injury, or severe humiliation when a family member, in this particular case Defendant Broome, having accessed his emails without permission and discovered the identity of his girlfriend and the nature of their relationship, provided that information to Plaintiff's wife. This is especially true in light of the fact that the Plaintiff had informed Defendant Jennings that he had been corresponding with his girlfriend via email and chose to save the emails which had passed between him and his girlfriend when he could have deleted them at any time.

Furthermore, there is no evidence in the record that Defendant Jennings or Defendant Cook, individually or d/b/a BJR International Detective Agency, Inc. ever accessed Plaintiff's email account.

Therefore, summary judgment is hereby granted to the Defendants on Plaintiff's Third Cause of Action.

4. Plaintiff has asserted a cause of action under 18 USC § 2701(a) of the Stored Communications Act, alleging that Defendant "intentionally access[ed] without authorization a facility through which an electronic communication service is provided." Amended Complaint, Paragraph 16. While this language has been taken directly from the statute, it is a fatally incomplete description of the elements of § 2701 which give rise to a cause of action. There are other elements that must be satisfied to impute liability because the statute goes on to read: "and thereby obtains, alters, or prevents authorized access to a wire or electronic communication *while it is in electronic storage* in such system" [emphasis added]. The term "electronic storage" is defined in the statute. 18 USC § 2510(17) of the Act clearly defines "electronic storage" to be "(A) any *temporary, intermediate storage* of a wire or electronic communication *incidental to the electronic transmission thereof*; and (B) any storage of such communication *by an electronic communication service for purposes of backup protection* of such communication" [emphasis added]. Therefore, Plaintiff has failed to allege all the elements of the cause of action under the statute. Furthermore, Plaintiff has not alleged any facts or provided any evidence that tends to establish that any e-mail in question was in "electronic storage" for purposes of the statute. This Court finds that no recovery or relief can be obtained by Plaintiff under this statute because the e-mails in question were not in "electronic storage" as defined by the clear language of the statute. The e-mails distributed to Defendant Jennings were those discovered by Defendant Broome, having been received, opened and read by the Plaintiff and then "saved" by the Plaintiff on his personal account or those sent by the Plaintiff and then "saved" by the Plaintiff, again in his personal account.

The e-mails that are at issue in this action were in a post-transmission, stored state. Thus, they fall outside the scope of the 18 USC § 2510(17) definition of "electronic storage." Under § 2510(17)(A) the e-mails were in neither "temporary" nor "intermediate storage" that is "incidental to the electronic transmission thereof." In fact, the e-mails had already been transmitted and had reached their final destination where they would be preserved indefinitely (presumably until Plaintiff deletes them), preventing any finding that they were in "temporary, intermediate storage." Nor could they be "incidental to the electronic transmission thereof," because they were the principal e-mails that were actually transmitted. As such, they fail all aspects of the 18 USC §2510(17)(A) definition of "electronic storage."

The e-mails also fall outside the scope of 18 USC § 2510(17)(B) because the e-mails were not stored "by an electronic communication service for purposes of backup protection." Plaintiff has not asserted or provided evidence from which to conclude he is an "electronic communication service;" his personal storage of the e-mails is not within the scope of § 2510(17)(B). Plaintiff has also failed to assert or offer evidence that the e-mails were being stored by such an electronic communication service "for purposes of backup protection." *Id.* Indeed, there is every reason to believe that the e-mails accessed by Defendant Broome were the original and principal transmissions that were stored in Plaintiff's own account, not any sort of backup system controlled and managed by the electronic communications service (in this case, the Internet Service Provider: Yahoo). In other words, since the e-mails in question were stored on Plaintiff's personal account and could have been deleted by Plaintiff at any time, they can hardly be considered part of any "backup protection" system operated "by an electronic communication service." *Id.*

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Paschal v. State Election Commission*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); *Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *Paschal*, 437, 892; *Bryant v. City of Charleston*, 295 S.C. 408, 368 S.E.2d 899 (1988); *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). While these rules of statutory construction are axiomatic, they are critical with respect to the interpretation of "electronic storage" from 18 USC § 2510(17)(B) in the context of 18 USC § 2701, especially when considering the other provisions of the Stored Communications Act.

The first requirement of § 2510(17)(B) is that the storage of the communication be "by an electronic communications service." Although one may argue that the interpretation of the word "by" could be ambiguous, its meaning becomes crystal clear when considered with the rest of the provision and the other provisions of the Stored Communications Act. The phrase is intended to denote at whose discretion or instruction the communication is maintained rather than merely where the communication is maintained, since it is already a given that the communication is stored within an electronic communication service's facility. 18 USC § 2701. § 2510(17)(B) goes on to read that the storage by the electronic communication service must be "for purposes of backup protection of such communication," indicating a specific purpose behind the electronic

communication service's storage of an electronic communication. 18 USC § 2704, which is also part of the Stored Communications Act, is the statute that governs "backup preservation" by service providers, and states the instances in which the government may require such service providers to backup documents, which is basically to perpetually preserve them in case the subscriber erases them from his principal account. An inference that this is exactly the type of "backup protection" referenced in § 2510(17)(B) is most reasonable, and affords meaning to the entire language of the statute without expanding it's operation beyond Congressional intent. In fact, were the language "for purposes of backup protection" to pertain to the Plaintiff's personal intent, it would render that language meaningless, because almost anything could be considered backup with such an amorphous and expansionary interpretation. Furthermore, if the court were to construe the phrase "by an electronic communications service" to mean that the communication preservation could be at the direction or discretion of the subscriber, then the language "for purposes of backup protection" would likewise be meaningless and unnecessary, since the subscriber could claim his preservation was for any purpose and almost any preservation could be considered "backup." This would be a forced interpretation of the statute that would ignore its plain meaning as well as other provisions of the Act, which provides a more specific and practical meaning. The statute was not intended to protect any and all personal electronic communication storage on internet service providers by individuals, or it would have been written that way; it was intended to protect subscribers from the inherently peculiar operations of such internet service providers from computer hackers, such as when an internet service provider is directed by the government under 18 USC § 2704 to indefinitely backup certain electronic communications or when they choose to do so for other reasons.

Plaintiff has failed to assert any basis for concluding the e-mails obtained by Defendant Broome met either definition of "electronic storage" in § 2510(17) of the Act. In fact, Plaintiff's basis for recovery, described in his Amended Complaint Paragraph 7, is that Defendant Broome has "illegally accessed Plaintiff's private e-mail address without his permission." Storage of e-mails by Plaintiff on his personal e-mail account by definition falls outside the scope of § 2510(17). The e-mails in question can most accurately be classified as in the personal long-term storage of the e-mail client; they are neither incidental to the transmission of the communication nor are they maintained by the electronic communication service for backup protection. Therefore, there is no basis for finding a violation of 18 USC § 2701 and therefore summary judgment as to this cause of action is also granted.

Finally, regardless of this Court's findings as to whether any violation of 18 USC §2701 occurred, Plaintiff cannot obtain any relief or recovery against Defendant Jennings or Defendant Cooke, as Defendant Jennings and Defendant Cooke are not persons who potentially engaged in such alleged violation. 18 USC § 2707(a). The Fourth Circuit has considered a circumstance similar to the case at bar and ruled that the plain language of the statute only authorizes a cause of action against the "person or entity... which engaged in that violation." *Id. See Tucker v. Waddell*, 83 F.3d 688, at 691 (4th Cir.1996) ("Persons aggrieved by violations of the [§ 2707 of the Electronic Communications Privacy] Act can only assert a cause of action against the person or entity that 'engaged in that violation.'"). Plaintiff has not asserted or provided any basis that Defendant Jennings or Defendant Cooke engaged in a violation of the Stored Communications Act, he merely asserts in Paragraph 7 of his Amended Complaint that Defendant Broome

accessed his private e-mail account; thus, the cause of action against Defendant Jennings and Defendant Cooke under 18 USC § 2707 is dismissed as a matter of law.

5. As the Complaint has already been amended once and as this Court has granted summary judgment to the Defendants on the causes of action listed above, the Plaintiff's Motion for amendment of the Complaint to add an additional party defendant and allege damage to his business is denied.

AND IT IS SO ORDERED.

L. CASEY MANNING
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina
Sept. 23, 2008.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. Lee Jennings, Plaintiff, versus Gail M. Jennings, Holly Broome, Brenda Cook, individually and BJR International Detective Agency, Inc. Defendants.	)	CERTIFICATE OF SERVICE Civil Action No. 2007-CP-40-1125

I, Keri L. Hannon, paralegal for Richard G. Whiting, attorney for Defendant Jennings do hereby certify that I have this 24th day of September, 2008, served the filed Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motin to Amend Complaint, via facsimile and U. S. Postal Service, postage prepaid, to the following addresses:

John K. Koon, Esquire
Koon and Cook, P.A.
2016 Gadsden Street
Columbia, SC 29201
(803) 254-0658

Gary W. Popwell, Jr., Esquire
Lee Eadon Isgett & Popwell
Post Office Box 1505
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(803) 779-8572

Jan L. Warner, Esquire
Warner Payne & Black, LLP
Post Office Box 2628
Columbia, SC 29202
(803) 799-2517

Keri L. Hannon

Keri L. Hannon
Paralegal for Richard G. Whiting
1515 Lady Street
Post Office Box 7877
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(803) 256-9067

September 24, 2008

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
M. LEE JENNINGS)
☒ Plaintiff)
)
v.)
)
Gail M. Jennings, Holly Broome, Brenda Cooke, Individually, And Bjr International Detective Agency, Inc.,)
☐ Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2007-CP-40-1125

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

FILED
2008 SEP 25 PM 4:44
BARBARA A. SCOTT
C.C.C. & G.S.

Plaintiff's Attorney:	Defendant's Attorney:
Jan L. Warner, Bar No. 5947 Address: Post Office Box 2628, Cola, SC 29202 phone: 803-799-0554 fax: 803-799-2517 e-mail: jlw@janwarner.com other:	Richard G. Whiting, Gary W. Popwell, And John K. Koon, Bar No. Address: phone: fax: e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Reconsider
Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant — September 25 2008 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____
☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)) M. LEE JENNINGS,)) PLAINTIFF,)) vs.)) GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,)) DEFENDANTS.)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT DOCKET NO.: 2007-CP-40-1125 **NOTICE OF MOTION AND MOTION TO RECONSIDER, VACATE, SET ASIDE, ALTER AND/OR AMEND OR CLARIFY ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT DATED SEPTEMBER 23, 2008 COPY OF WHICH WAS RECEIVED ON SEPTEMBER 24, 2008**

FILED
2008 SEP 25 PM 4:54
BARBARA SCOTT
CLERK OF COURT
RICHLAND COUNTY, SC

TO: THE HONORABLE L. CASEY MANNING, PRESIDING JUDGE, COURT OF COMMON PLEAS, FIFTH JUDICIAL CIRCUIT; RICHARD G. WHITING, ATTORNEY FOR DEFENDANT GAIL M. JENNINGS, GARY W. POPWELL, JR., ATTORNEY FOR DEFENDANT HOLLY BROOME, AND JOHN K. KOON, ATTORNEY FOR DEFENDANT BRENDA COOKE:

YOU WILL PLEASE TAKE NOTICE that Plaintiff, by and through his undersigned counsel, will move before the Honorable L. Casey Manning, Presiding Judge of the Court of Common Pleas at the Richland County Courthouse, 1701 Main Street, Columbia, South Carolina, on the tenth (10th) day after service hereof at 10:00 A.M., or at such time and place as the Court may deem appropriate, pursuant to the provisions of Rules 52, 59, and 60, *South Carolina Rules of Civil Procedure*, for an Order setting aside, vacating, altering, amending, clarifying, or reconsidering Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion to Amend Complaint dated September 23, 2008, copy of which was received by counsel for Plaintiff on September 24, 2008 **(Exhibit 1)** in the following particulars and upon the following grounds.

1. The Court erred in failing to find that the unauthorized access of Plaintiff's personal web email account that was stored on Yahoo servers did not constitute a violation of the Federal Stored Communications Act.

2. The Court misapprehended or misunderstood that when emails are stored on email servers such as Yahoo, the same constitutes "electronic storage" as defined by 18 U.S.C. §2510, et. seq.

3. The Court failed to consider or apprehend the case law submitted by counsel for Plaintiff which includes decisions of federal courts that the unauthorized access of email accounts such as Plaintiff's constitutes a violation of the Federal Stored Communications Act, regardless of whether the emails were opened by the sender, receiver, or are merely stored on the servers of said web email providers

4. The Court failed to consider or apprehend that the storage of Plaintiff's emails on outside Yahoo servers was "temporary" was "intermediate storage", thus constituting emails "electronic storage" as defined by the statute.

5. The Court erred and/or misapprehended that all Plaintiff was required to plead in his Complaint was that his emails were in "temporary" or "intermediate storage", and that the allegations in the Complaint are sufficient to put Defendants on notice that Plaintiff was seeking a cause of action pursuant to the Federal Stored Communications Act. Further, since there was no pending Motion for a More Definite Statement, if the Court determined Defendants were not on notice of Plaintiff's claims, the Court should have allowed Plaintiff to amend or supplement his Complaint rather than granting summary judgment on this ground.

6. The Court erred in not granting Plaintiff's Motion to add Thomas Neal as Defendant based upon Plaintiff's Motion.

YOU WILL PLEASE TAKE FURTHER NOTICE that this Motion shall be based upon the full record in this matter, together with such additional memoranda, briefs, and arguments as may be presented to the Court at a hearing on this Motion.

WARNER, PAYNE & BLACK, L.L.P.

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Matthew E. Steinmetz
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Telephone: (803) 799-0554
Facsimile: (803) 799-2517
ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina
September 25, 2008

EXHIBIT 1

LAW OFFICES OF
RICHARD G. WHITING
A PROFESSIONAL ASSOCIATION
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TELEPHONE (803) 256-9087
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dick.whiting@whitinglawsc.com

September 24, 2008

VIA FACSIMILE & U.S. MAIL
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Gary W. Popwell, Jr., Esquire
Lee Eadon Isgett & Popwell
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Columbia, SC 29202

RECEIVED
08 SEP 24 PM 5:10
W P & B, LLP
ELDERLAW SERVICES
OF SC, PA

RE: Jennings v. Jennings, et al
Case No. 07-CP-40-1125

Dear Counsel:

Following and hereby served upon each of you this date is the filed Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion to Amend Complaint.

I am, very truly yours,

R. G. Whiting

Richard G. Whiting

/klh
cc: Gail Jennings

CERTIFIED FAMILY COURT MEDIATOR

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, -vs- GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	CASE NO.: 07-CP-40-1125 **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT**

FILED
2008 SEP 24 AM 11:00
BARBARA SCOTT
CLERK C.C.P.S.

This matter was before me for hearing on June 19, 2008 pursuant to the Defendants' Motions for Summary Judgment and the Plaintiff's Motion to Amend the Complaint to add an additional party defendant and an additional cause of action for damage to his business. All parties were present and represented by their respective counsel.

During the hearing, counsel for the Plaintiff stipulated that the causes of action under the South Carolina Homeland Security Act, §17-30-10, et seq., S.C. Code Ann. (1976, as amended); the South Carolina Computer Crime Act, §16-16-10, et seq., S.C. Code Ann. (1976, as amended); and the Federal Electronic Communications Privacy Act, 18 U.S.C., §§2510-2520, et seq., are no longer being pursued by the Plaintiff as it was stipulated that there was no interception of the emails in question by the Defendants. He also stipulated that the Plaintiff was no longer pursuing his fourth cause of action for conspiracy which the Complaint referenced as improperly intercepting the Plaintiff's private electronic communications.

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18 U.S.C., §§2701-2712 under the First Cause of Action, the Common Law Invasion of Privacy Claim (publicizing private affairs) under the Second Cause of Action, the Common Law Invasion of Privacy Claim (wrongful intrusion) under the Third Cause of Action, and the Plaintiff's Motion to amend his Complaint to add an additional party defendant and add an additional cause of action for damage to his business.

Upon review of the pleadings and the evidence in the record, the depositions submitted at the hearing and the arguments of counsel, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiff, Lee Jennings, is the husband of the Defendant Gail Jennings. The Defendant Holly Broome is the daughter-in-law of the Defendant Gail Jennings and the step daughter-in-law of the Plaintiff Lee Jennings.

2. Gail Jennings and Lee Jennings separated on June 21, 2006 when the Plaintiff told Gail that he had fallen in love with someone else, who was also married. The Plaintiff told Gail Jennings that he had been corresponding with the woman with whom he had fallen in love via email, but he would not tell her the woman's name.

3. Defendant Gail Jennings told Defendant Holly Broome about the separation when Holly and her husband came over to Defendant Jennings' house on Saturday, June 24, 2006, and explained that the Plaintiff had told her that he had fallen in love with someone else and that they had been corresponding by email after Defendant Jennings had found a card for flowers in Plaintiff Jennings' car and realized the flowers were not for her. Defendant Gail Jennings was extremely upset.

4. The next day Defendant Broome, using her computer at her home, went onto the Plaintiff's Yahoo email account and changed his password, therefore giving her access to the saved emails which Mr. Jennings had received and not deleted, and had sent and not deleted. She printed emails which the Plaintiff had sent to his girlfriend, and which his girlfriend had sent to him. The Defendant Broome subsequently went on the email account several more times and printed out other emails which Plaintiff had sent his girlfriend, and which his girlfriend had sent him and which had been opened and saved by Plaintiff Jennings.

5. Defendant Broome and Defendant Jennings made three copies of the emails, which Defendant Broome had printed and gave one to Plaintiff's domestic attorney and one to Defendant Cooke, the private investigator hired by Defendant Jennings and Defendant Jennings kept one copy.

6. Family Court litigation was initiated in the summer of 2006 by Defendant Gail Jennings. That litigation is still pending. There is no evidence in the record that the emails between the Plaintiff and his girlfriend, which had been printed by Defendant Broome, were ever filed with the Family Court and those emails have not been filed with this Court.

7. The parties consented to amendment of the Summons and Complaint of the Plaintiff to add additional causes of action and the Amended Summons and Complaint was filed on July 25, 2007.

8. There is no evidence in the record that the emails in question which were sent between the Plaintiff and his girlfriend and saved by the Plaintiff were temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof, nor is there any evidence that they were stored by an electronic communication service for

purposes of back-up protection of those communications. The emails were saved on Plaintiff's personal account where they were kept at Plaintiff's discretion.

9. The Plaintiff learned that the emails in question had been accessed without his permission on or about January 3, 2007. He saw a counselor in June, 2007.

10. The Plaintiff's business has not suffered since his discovery that his saved emails had been printed and he started counseling.

CONCLUSIONS OF LAW

1. Plaintiff's Motion for Summary Judgment as to the First Cause of Action alleging violations of §16-16-10, et seq., S.C. Code Ann. (1976, as amended); §17-30-10, et seq., §16-16-10, et seq., 18 U.S.C., §§2510-2520, et. seq., and Plaintiff's Fourth Cause of Action for conspiracy to intercept and disseminate the Plaintiff's electronic communications is granted as to those causes of action as it was stipulated at the hearing that there was no interception of Plaintiff's emails under the statutes and that none of the Defendants had been convicted under §16-16-10, et seq: As was stipulated, since there was no interception then there was no conspiracy to intercept the Plaintiff's emails and there is no evidence in the record that interception of Plaintiff's emails were ever contemplated or attempted by Defendants.

2. Under the cause of action for public disclosure of private facts, one essential element of recovery is publicity. It is publicity, as opposed to publication, that gives rise to a cause of action for invasion of privacy. Communication to a single individual or to a small group of people, absent a breach of contract, trust or other confidential relationship, will not give rise to liability. *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (S.C. App. 1984). No evidence has been presented showing that the emails in question were disclosed to the public or were the subject of publicity. No evidence has been presented which shows that the Defendants

mentioned the emails in any Family Court pleading or proceeding, or entered the emails in question into the record in either the Family Court proceeding or this proceeding. Therefore, there has been no publicity attendant to the emails in question and summary judgment is therefore granted for the Defendants as to Plaintiff's Second Cause of Action.

3. Plaintiff's Third Cause of Action alleges invasion of privacy on the basis of wrongful intrusion. When a plaintiff bases an action for invasion of privacy on intrusion alone, bringing forth no evidence of public disclosure, it is incumbent upon him to show a blatant and shocking disregard of his rights and serious mental or physical injury, or humiliation to himself resulting therefrom. *Rycroft, supra, citing, Shorter v. Retail Credit Co.*, 251 F. Supp. 329 (D.S.C. 1966). The right of privacy protects only the ordinary sensibilities of an individual and not super sensitiveness. It is relative to the customs of the time and place, and it is determined by the norm of the ordinary man. Protection afforded by law must be restricted to the ordinary sensibilities and cannot extend to super sensitiveness or agoraphobia. In order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant; and this question is to some extent one of law. *Meetze v. The Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956); *citing* 41 Am. Jur., Privacy, §12. As there has been no publication of the emails in question, it is incumbent upon the Plaintiff to show serious mental or physical injury or humiliation to himself. *Rycroft, supra*.

The Plaintiff had already admitted to the Defendant Jennings that he had fallen in love with another woman and that they had been emailing each other. He would not provide Defendant Jennings with the woman's name. The Plaintiff and Defendant Jennings then

separated. The question then becomes whether an ordinary man of ordinary sensibilities, having informed his wife that he had fallen in love with someone else with whom he had been corresponding via email and separated from his wife, would be so shocked and humiliated by his wife or another family member on her behalf snooping to try to find out the identity of the girlfriend and/or the nature of the relationship between the Plaintiff and his girlfriend so as to suffer serious mental or physical injury or humiliation. As aforestated, Family Court litigation is on-going concerning this matter and the identity of the Plaintiff's girlfriend, would certainly have been revealed via discovery in the Family Court litigation. While it is certainly preferable that everyone mind their own business and not snoop into other family members' correspondence, via email or otherwise, given the specific facts and circumstances and the record in this case, I find that the ordinary husband with ordinary sensibilities would not be so shocked and outraged under the particular facts and circumstances of this case so as to suffer severe mental or physical injury, or severe humiliation when a family member, in this particular case Defendant Broome, having accessed his emails without permission and discovered the identity of his girlfriend and the nature of their relationship, provided that information to Plaintiff's wife. This is especially true in light of the fact that the Plaintiff had informed Defendant Jennings that he had been corresponding with his girlfriend via email and chose to save the emails which had passed between him and his girlfriend when he could have deleted them at any time.

Furthermore, there is no evidence in the record that Defendant Jennings or Defendant Cook, individually or d/b/a BJR International Detective Agency, Inc. ever accessed Plaintiff's email account.

Therefore, summary judgment is hereby granted to the Defendants on Plaintiff's Third Cause of Action.

4. Plaintiff has asserted a cause of action under 18 USC § 2701(a) of the Stored Communications Act, alleging that Defendant "intentionally access[ed] without authorization a facility through which an electronic communication service is provided." Amended Complaint, Paragraph 16. While this language has been taken directly from the statute, it is a fatally incomplete description of the elements of § 2701 which give rise to a cause of action. There are other elements that must be satisfied to impute liability because the statute goes on to read: "and thereby obtains, alters, or prevents authorized access to a wire or electronic communication *while it is in electronic storage* in such system" [emphasis added]. The term "electronic storage" is defined in the statute. 18 USC § 2510(17) of the Act clearly defines "electronic storage" to be "(A) any *temporary, intermediate storage* of a wire or electronic communication *incidental to the electronic transmission thereof*; and (B) any storage of such communication *by an electronic communication service for purposes of backup protection* of such communication" [emphasis added]. Therefore, Plaintiff has failed to allege all the elements of the cause of action under the statute. Furthermore, Plaintiff has not alleged any facts or provided any evidence that tends to establish that any e-mail in question was in "electronic storage" for purposes of the statute. This Court finds that no recovery or relief can be obtained by Plaintiff under this statute because the e-mails in question were not in "electronic storage" as defined by the clear language of the statute. The e-mails distributed to Defendant Jennings were those discovered by Defendant Broome, having been received, opened and read by the Plaintiff and then "saved" by the Plaintiff on his personal account or those sent by the Plaintiff and then "saved" by the Plaintiff, again in his personal account.

The e-mails that are at issue in this action were in a post-transmission, stored state. Thus, they fall outside the scope of the 18 USC § 2510(17) definition of "electronic storage." Under § 2510(17)(A) the e-mails were in neither "temporary" nor "intermediate storage" that is "incidental to the electronic transmission thereof." In fact, the e-mails had already been transmitted and had reached their final destination where they would be preserved indefinitely (presumably until Plaintiff deletes them), preventing any finding that they were in "temporary, intermediate storage." Nor could they be "incidental to the electronic transmission thereof," because they were the principal e-mails that were actually transmitted. As such, they fail all aspects of the 18 USC §2510(17)(A) definition of "electronic storage."

The e-mails also fall outside the scope of 18 USC § 2510(17)(B) because the e-mails were not stored "by an electronic communication service for purposes of backup protection." Plaintiff has not asserted or provided evidence from which to conclude he is an "electronic communication service;" his personal storage of the e-mails is not within the scope of § 2510(17)(B). Plaintiff has also failed to assert or offer evidence that the e-mails were being stored by such an electronic communication service "for purposes of backup protection." *Id.* Indeed, there is every reason to believe that the e-mails accessed by Defendant Broome were the original and principal transmissions that were stored in Plaintiff's own account, not any sort of backup system controlled and managed by the electronic communications service (in this case, the Internet Service Provider: Yahoo). In other words, since the e-mails in question were stored on Plaintiff's personal account and could have been deleted by Plaintiff at any time, they can hardly be considered part of any "backup protection" system operated "by an electronic communication service." *Id.*

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Paschal v. State Election Commission*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); *Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *Paschal*, 437, 892; *Bryant v. City of Charleston*, 295 S.C. 408, 368 S.E.2d 899 (1988); *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). While these rules of statutory construction are axiomatic, they are critical with respect to the interpretation of "electronic storage" from 18 USC § 2510(17)(B) in the context of 18 USC § 2701, especially when considering the other provisions of the Stored Communications Act.

The first requirement of § 2510(17)(B) is that the storage of the communication be "by an electronic communications service." Although one may argue that the interpretation of the word "by" could be ambiguous, its meaning becomes crystal clear when considered with the rest of the provision and the other provisions of the Stored Communications Act. The phrase is intended to denote at whose discretion or instruction the communication is maintained rather than merely where the communication is maintained, since it is already a given that the communication is stored within an electronic communication service's facility. 18 USC § 2701. § 2510(17)(B) goes on to read that the storage by the electronic communication service must be "for purposes of backup protection of such communication," indicating a specific purpose behind the electronic

communication service's storage of an electronic communication. 18 USC § 2704, which is also part of the Stored Communications Act, is the statute that governs "backup preservation" by service providers, and states the instances in which the government may require such service providers to backup documents, which is basically to perpetually preserve them in case the subscriber erases them from his principal account. An inference that this is exactly the type of "backup protection" referenced in § 2510(17)(B) is most reasonable, and affords meaning to the entire language of the statute without expanding it's operation beyond Congressional intent. In fact, were the language "for purposes of backup protection" to pertain to the Plaintiff's personal intent, it would render that language meaningless, because almost anything could be considered backup with such an amorphous and expansionary interpretation. Furthermore, if the court were to construe the phrase "by an electronic communications service" to mean that the communication preservation could be at the direction or discretion of the subscriber, then the language "for purposes of backup protection" would likewise be meaningless and unnecessary, since the subscriber could claim his preservation was for any purpose and almost any preservation could be considered "backup." This would be a forced interpretation of the statute that would ignore its plain meaning as well as other provisions of the Act, which provides a more specific and practical meaning. The statute was not intended to protect any and all personal electronic communication storage on internet service providers by individuals, or it would have been written that way; it was intended to protect subscribers from the inherently peculiar operations of such internet service providers from computer hackers, such as when an internet service provider is directed by the government under 18 USC § 2704 to indefinitely backup certain electronic communications or when they choose to do so for other reasons.

Plaintiff has failed to assert any basis for concluding the e-mails obtained by Defendant Broome met either definition of "electronic storage" in § 2510(17) of the Act. In fact, Plaintiff's basis for recovery, described in his Amended Complaint Paragraph 7, is that Defendant Broome has "illegally accessed Plaintiff's private e-mail address without his permission." Storage of e-mails by Plaintiff on his personal e-mail account by definition falls outside the scope of § 2510(17). The e-mails in question can most accurately be classified as in the personal long-term storage of the e-mail client; they are neither incidental to the transmission of the communication nor are they maintained by the electronic communication service for backup protection. Therefore, there is no basis for finding a violation of 18 USC § 2701 and therefore summary judgment as to this cause of action is also granted.

Finally, regardless of this Court's findings as to whether any violation of 18 USC §2701 occurred, Plaintiff cannot obtain any relief or recovery against Defendant Jennings or Defendant Cooke, as Defendant Jennings and Defendant Cooke are not persons who potentially engaged in such alleged violation. 18 USC § 2707(a). The Fourth Circuit has considered a circumstance similar to the case at bar and ruled that the plain language of the statute only authorizes a cause of action against the "person or entity... which engaged in that violation." *Id. See Tucker v. Waddell*, 83 F.3d 688, at 691 (4th Cir.1996) ("Persons aggrieved by violations of the [§ 2707 of the Electronic Communications Privacy] Act can only assert a cause of action against the person or entity that 'engaged in that violation.'"). Plaintiff has not asserted or provided any basis that Defendant Jennings or Defendant Cooke engaged in a violation of the Stored Communications Act, he merely asserts in Paragraph 7 of his Amended Complaint that Defendant Broome

accessed his private e-mail account; thus, the cause of action against Defendant Jennings and Defendant Cooke under 18 USC § 2707 is dismissed as a matter of law.

5. As the Complaint has already been amended once and as this Court has granted summary judgment to the Defendants on the causes of action listed above, the Plaintiff's Motion for amendment of the Complaint to add an additional party defendant and allege damage to his business is denied.

AND IT IS SO ORDERED.

L. CASEY MANNING
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina
Sept. 23, 2008.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. Lee Jennings, Plaintiff, versus Gail M. Jennings, Holly Broome, Brenda Cook, individually and BJR International Detective Agency, Inc. Defendants.	CERTIFICATE OF SERVICE Civil Action No. 2007-CP-40-1125

I, Keri L. Hannon, paralegal for Richard G. Whiting, attorney for Defendant Jennings do hereby certify that I have this 24th day of September, 2008, served the filed Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motin to Amend Complaint, via facsimile and U. S. Postal Service, postage prepaid, to the following addresses:

John K. Koon, Esquire
Koon and Cook, P.A.
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(803) 254-0658

Gary W. Popwell, Jr., Esquire
Lee Eadon Isgett & Popwell
Post Office Box 1505
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Jan L. Warner, Esquire
Warner Payne & Black, LLP
Post Office Box 2628
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Keri L. Hannon

Keri L. Hannon
Paralegal for Richard G. Whiting
1515 Lady Street
Post Office Box 7877
Columbia, SC 29202
(803) 256-9067

September 24, 2008

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	DOCKET NO.: 2007-CP-40-1125 **CERTIFICATE OF SERVICE**

FILED
2008 SEP 25 PM 4:44
BARBARA A. SCOTT
C.C.C.P. & G.S.

I, Israel Stone, a legal assistant for the law firm of Warner, Payne & Black, L.L.P./ ElderLaw Services of South Carolina, P.A., attorneys for M. Lee Jennings do hereby certify that on this date I caused a copy of the **Notice of Motion and Motion to Reconsider, Vacate, Set Aside, Alter and/or Amend or Clarify Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion to Amend Complaint dated September 23 2008, copy of which was received on September 24, 2008** to be served upon the parties listed below by depositing a copy of same in the United States Mail, postage pre-paid, and addressed to the following:

John K. Koon, Esquire
2016 Gadsden Street
Columbia, SC 29201

Richard G. Whiting, Esquire
Post Office Box 7877
Columbia, SC 29202

Gary W. Popwell, Esquire
Post Office Box 1505
Columbia, SC 29202

The Honorable L. Casey Manning
Presiding Judge, Court of Common Pleas
Post Office Box 192
Columbia, South Carolina 29202

Columbia, South Carolina
September 25, 2008

Israel Stone

Form 4

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2007CP4001125

M Lee Jennings *vs.* **Gail M Jennings**

Plaintiff Defendant

RICHLAND COUNTY
FILED
2008 NOV 10 AM 9:02
BARBARA A. SCOTT
C.C.C. & G.S.

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*:
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of _____, 2008.

_____
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2008, and a copy mailed first class this 12th day of November, 2008, to attorneys of record or to parties (when appearing pro se) as follows:

Jan L Warner

ATTORNEY(S) FOR THE PLAINTIFF(S)

John K Koon
Gary W Popwell Jr
Richard Giles Whiting

ATTORNEY(S) FOR THE DEFENDANT(S)

FEDERAL EXPRESS CORP. OF SC, PA
2008 NOV 14 AM 11:16
RECEIVED

s/BARBARA A. SCOTT

Clerk of Court

SCRCP APP-24/FORM 4

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
M. LEE JENNINGS,	)	DOCKET NO.: 2007-CP-40-1125
	)	
PLAINTIFF,	)	
	)	
vs.	)	**ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION**
	)	
GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, individually and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,	)	
	)	
DEFENDANTS.	)	

RICHLAND COUNTY
FILED
2008 NOV -7 PM 2:32
BARBARA A. SCOTT
C.C. & G.S.

This matter is before the Court upon Application of Plaintiff to Reconsider, Vacate, Set Aside, Alter and/or Amend or Clarify Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion to Amend Complaint dated September 25, 2008.

It appears that on September 23, 2008, I issued an Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion to Amend Complaint.

Plaintiff timely moved for reconsideration and related relief pursuant to Rules 52, 59 and 60, SCRCivP.

After due consideration, I hereby deny Plaintiff's Motion to Reconsider, Vacate, Set Aside, Alter and/or Amend or Clarify Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion to Amend Complaint dated September 25, 2008.

IT IS SO ORDERED.

L. Casey Manning
Chief Administrative Judge
Fifth Judicial Circuit

At Chambers
Columbia, South Carolina
November 7, 2008

RECEIVED
NOV 17 2008
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT

L. Casey Manning, CIRCUIT COURT JUDGE

DOCKET NO. 2007-CP-40-1125

M. LEE JENNINGS,

APPELLANT,

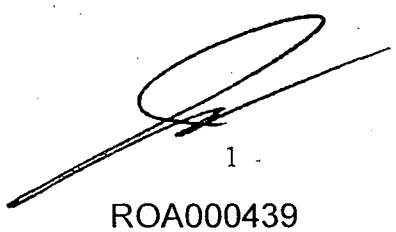
V.

GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, individually and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,

RESPONDENTS.

NOTICE OF APPEAL

YOU WILL PLEASE TAKE NOTICE that M. Lee Jennings, hereby appeals Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion to Amend Compliant issued by the Honorable L. Casey Manning dated September 23, 2008, and received by counsel for Appellant on September 24, 2008 **(Exhibit 1)** and Order Denying Plaintiff's Motion for Reconsideration dated November 7, 2008, and received by counsel for Appellant on November 14, 2008 **(Exhibit 2)**.



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Columbia, South Carolina
November 17, 2008

Other Counsel of Record:

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ATTORNEY FOR RESPONDENT BRENDA COOKE, individually and BJR INTERNATIONAL DETECTIVE AGENCY, INC.

EXHIBIT 1

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September 24, 2008

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RECEIVED
08 SEP 24 PM 5:10
W.P.&B. LLP
ELDERLAW SERVICES
OF SC, PA

RE: Jennings v. Jennings, et al
Case No. 07-CP-40-1125

Dear Counsel:

Following and hereby served upon each of you this date is the filed Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion to Amend Complaint.

I am, very truly yours,

R. G. Whiting

Richard G. Whiting

/klh
cc: Gail Jennings

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. LEE JENNINGS, PLAINTIFF, -vs- GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, Individually, and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	)	CASE NO.: 07-CP-40-1125 **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT**

FILED
2008 SEP 24 AM 11:00
BARBARA SCOTT
CLERK OF COURT
R.C., S.C.

This matter was before me for hearing on June 19, 2008 pursuant to the Defendants' Motions for Summary Judgment and the Plaintiff's Motion to Amend the Complaint to add an additional party defendant and an additional cause of action for damage to his business. All parties were present and represented by their respective counsel.

During the hearing, counsel for the Plaintiff stipulated that the causes of action under the South Carolina Homeland Security Act, §17-30-10, et seq., S.C. Code Ann. (1976, as amended); the South Carolina Computer Crime Act, §16-16-10, et seq., S.C. Code Ann. (1976, as amended); and the Federal Electronic Communications Privacy Act, 18 U.S.C., §§2510-2520, et seq., are no longer being pursued by the Plaintiff as it was stipulated that there was no interception of the emails in question by the Defendants. He also stipulated that the Plaintiff was no longer pursuing his fourth cause of action for conspiracy which the Complaint referenced as improperly intercepting the Plaintiff's private electronic communications.

Therefore, the issues before the Court on Defendants' Motions for Summary Judgment were the Plaintiff's cause of action alleging violation of the Federal Stored Communications Act,

18 U.S.C., §§2701-2712 under the First Cause of Action, the Common Law Invasion of Privacy Claim (publicizing private affairs) under the Second Cause of Action, the Common Law Invasion of Privacy Claim (wrongful intrusion) under the Third Cause of Action, and the Plaintiff's Motion to amend his Complaint to add an additional party defendant and add an additional cause of action for damage to his business.

Upon review of the pleadings and the evidence in the record, the depositions submitted at the hearing and the arguments of counsel, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiff, Lee Jennings, is the husband of the Defendant Gail Jennings. The Defendant Holly Broome is the daughter-in-law of the Defendant Gail Jennings and the step daughter-in-law of the Plaintiff Lee Jennings.

2. Gail Jennings and Lee Jennings separated on June 21, 2006 when the Plaintiff told Gail that he had fallen in love with someone else, who was also married. The Plaintiff told Gail Jennings that he had been corresponding with the woman with whom he had fallen in love via email, but he would not tell her the woman's name.

3. Defendant Gail Jennings told Defendant Holly Broome about the separation when Holly and her husband came over to Defendant Jennings' house on Saturday, June 24, 2006, and explained that the Plaintiff had told her that he had fallen in love with someone else and that they had been corresponding by email after Defendant Jennings had found a card for flowers in Plaintiff Jennings' car and realized the flowers were not for her. Defendant Gail Jennings was extremely upset.

4. The next day Defendant Broome, using her computer at her home, went onto the Plaintiff's Yahoo email account and changed his password, therefore giving her access to the saved emails which Mr. Jennings had received and not deleted, and had sent and not deleted. She printed emails which the Plaintiff had sent to his girlfriend, and which his girlfriend had sent to him. The Defendant Broome subsequently went on the email account several more times and printed out other emails which Plaintiff had sent his girlfriend, and which his girlfriend had sent him and which had been opened and saved by Plaintiff Jennings.

5. Defendant Broome and Defendant Jennings made three copies of the emails, which Defendant Broome had printed and gave one to Plaintiff's domestic attorney and one to Defendant Cooke, the private investigator hired by Defendant Jennings and Defendant Jennings kept one copy.

6. Family Court litigation was initiated in the summer of 2006 by Defendant Gail Jennings. That litigation is still pending. There is no evidence in the record that the emails between the Plaintiff and his girlfriend, which had been printed by Defendant Broome, were ever filed with the Family Court and those emails have not been filed with this Court.

7. The parties consented to amendment of the Summons and Complaint of the Plaintiff to add additional causes of action and the Amended Summons and Complaint was filed on July 25, 2007.

8. There is no evidence in the record that the emails in question which were sent between the Plaintiff and his girlfriend and saved by the Plaintiff were temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof, nor is there any evidence that they were stored by an electronic communication service for

purposes of back-up protection of those communications. The emails were saved on Plaintiff's personal account where they were kept at Plaintiff's discretion.

9. The Plaintiff learned that the emails in question had been accessed without his permission on or about January 3, 2007. He saw a counselor in June, 2007.

10. The Plaintiff's business has not suffered since his discovery that his saved emails had been printed and he started counseling.

CONCLUSIONS OF LAW

1. Plaintiff's Motion for Summary Judgment as to the First Cause of Action alleging violations of §16-16-10, et seq., S.C. Code Ann. (1976, as amended); §17-30-10, et seq., §16-16-10, et seq., 18 U.S.C., §§2510-2520, et. seq., and Plaintiff's Fourth Cause of Action for conspiracy to intercept and disseminate the Plaintiff's electronic communications is granted as to those causes of action as it was stipulated at the hearing that there was no interception of Plaintiff's emails under the statutes and that none of the Defendants had been convicted under §16-16-10, et seq: As was stipulated, since there was no interception then there was no conspiracy to intercept the Plaintiff's emails and there is no evidence in the record that interception of Plaintiff's emails were ever contemplated or attempted by Defendants.

2. Under the cause of action for public disclosure of private facts, one essential element of recovery is publicity. It is publicity, as opposed to publication, that gives rise to a cause of action for invasion of privacy. Communication to a single individual or to a small group of people, absent a breach of contract, trust or other confidential relationship, will not give rise to liability. *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (S.C. App. 1984). No evidence has been presented showing that the emails in question were disclosed to the public or were the subject of publicity. No evidence has been presented which shows that the Defendants

mentioned the emails in any Family Court pleading or proceeding, or entered the emails in question into the record in either the Family Court proceeding or this proceeding. Therefore, there has been no publicity attendant to the emails in question and summary judgment is therefore granted for the Defendants as to Plaintiff's Second Cause of Action.

3. Plaintiff's Third Cause of Action alleges invasion of privacy on the basis of wrongful intrusion. When a plaintiff bases an action for invasion of privacy on intrusion alone, bringing forth no evidence of public disclosure, it is incumbent upon him to show a blatant and shocking disregard of his rights and serious mental or physical injury, or humiliation to himself resulting therefrom. *Rycroft, supra, citing, Shorter v. Retail Credit Co.*, 251 F. Supp. 329 (D.S.C. 1966). The right of privacy protects only the ordinary sensibilities of an individual and not super sensitiveness. It is relative to the customs of the time and place, and it is determined by the norm of the ordinary man. Protection afforded by law must be restricted to the ordinary sensibilities and cannot extend to super sensitiveness or agoraphobia. In order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant; and this question is to some extent one of law. *Meetze v. The Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956); *citing* 41 Am. Jur., Privacy, §12. As there has been no publication of the emails in question, it is incumbent upon the Plaintiff to show serious mental or physical injury or humiliation to himself. *Rycroft, supra.*

The Plaintiff had already admitted to the Defendant Jennings that he had fallen in love with another woman and that they had been emailing each other. He would not provide Defendant Jennings with the woman's name. The Plaintiff and Defendant Jennings then

separated. The question then becomes whether an ordinary man of ordinary sensibilities, having informed his wife that he had fallen in love with someone else with whom he had been corresponding via email and separated from his wife, would be so shocked and humiliated by his wife or another family member on her behalf snooping to try to find out the identity of the girlfriend and/or the nature of the relationship between the Plaintiff and his girlfriend so as to suffer serious mental or physical injury or humiliation. As aforestated, Family Court litigation is on-going concerning this matter and the identity of the Plaintiff's girlfriend, would certainly have been revealed via discovery in the Family Court litigation. While it is certainly preferable that everyone mind their own business and not snoop into other family members' correspondence, via email or otherwise, given the specific facts and circumstances and the record in this case, I find that the ordinary husband with ordinary sensibilities would not be so shocked and outraged under the particular facts and circumstances of this case so as to suffer severe mental or physical injury, or severe humiliation when a family member, in this particular case Defendant Broome, having accessed his emails without permission and discovered the identity of his girlfriend and the nature of their relationship, provided that information to Plaintiff's wife. This is especially true in light of the fact that the Plaintiff had informed Defendant Jennings that he had been corresponding with his girlfriend via email and chose to save the emails which had passed between him and his girlfriend when he could have deleted them at any time.

Furthermore, there is no evidence in the record that Defendant Jennings or Defendant Cook, individually or d/b/a BJR International Detective Agency, Inc. ever accessed Plaintiff's email account.

Therefore, summary judgment is hereby granted to the Defendants on Plaintiff's Third Cause of Action.

4. Plaintiff has asserted a cause of action under 18 USC § 2701(a) of the Stored Communications Act, alleging that Defendant "intentionally access[ed] without authorization a facility through which an electronic communication service is provided." Amended Complaint, Paragraph 16. While this language has been taken directly from the statute, it is a fatally incomplete description of the elements of § 2701 which give rise to a cause of action. There are other elements that must be satisfied to impute liability because the statute goes on to read: "and thereby obtains, alters, or prevents authorized access to a wire or electronic communication *while it is in electronic storage* in such system" [emphasis added]. The term "electronic storage" is defined in the statute. 18 USC § 2510(17) of the Act clearly defines "electronic storage" to be "(A) any *temporary, intermediate storage* of a wire or electronic communication *incidental to the electronic transmission thereof*; and (B) any storage of such communication *by an electronic communication service for purposes of backup protection* of such communication" [emphasis added]. Therefore, Plaintiff has failed to allege all the elements of the cause of action under the statute. Furthermore, Plaintiff has not alleged any facts or provided any evidence that tends to establish that any e-mail in question was in "electronic storage" for purposes of the statute. This Court finds that no recovery or relief can be obtained by Plaintiff under this statute because the e-mails in question were not in "electronic storage" as defined by the clear language of the statute. The e-mails distributed to Defendant Jennings were those discovered by Defendant Broome, having been received, opened and read by the Plaintiff and then "saved" by the Plaintiff on his personal account or those sent by the Plaintiff and then "saved" by the Plaintiff, again in his personal account.

The e-mails that are at issue in this action were in a post-transmission, stored state. Thus, they fall outside the scope of the 18 USC § 2510(17) definition of "electronic storage." Under § 2510(17)(A) the e-mails were in neither "temporary" nor "intermediate storage" that is "incidental to the electronic transmission thereof." In fact, the e-mails had already been transmitted and had reached their final destination where they would be preserved indefinitely (presumably until Plaintiff deletes them), preventing any finding that they were in "temporary, intermediate storage." Nor could they be "incidental to the electronic transmission thereof," because they were the principal e-mails that were actually transmitted. As such, they fail all aspects of the 18 USC §2510(17)(A) definition of "electronic storage."

The e-mails also fall outside the scope of 18 USC § 2510(17)(B) because the e-mails were not stored "by an electronic communication service for purposes of backup protection." Plaintiff has not asserted or provided evidence from which to conclude he is an "electronic communication service;" his personal storage of the e-mails is not within the scope of § 2510(17)(B). Plaintiff has also failed to assert or offer evidence that the e-mails were being stored by such an electronic communication service "for purposes of backup protection." *Id.* Indeed, there is every reason to believe that the e-mails accessed by Defendant Broome were the original and principal transmissions that were stored in Plaintiff's own account, not any sort of backup system controlled and managed by the electronic communications service (in this case, the Internet Service Provider: Yahoo). In other words, since the e-mails in question were stored on Plaintiff's personal account and could have been deleted by Plaintiff at any time, they can hardly be considered part of any "backup protection" system operated "by an electronic communication service." *Id.*

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Paschal v. State Election Commission*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); *Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *Paschal*, 437, 892; *Bryant v. City of Charleston*, 295 S.C. 408, 368 S.E.2d 899 (1988); *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). While these rules of statutory construction are axiomatic, they are critical with respect to the interpretation of "electronic storage" from 18 USC § 2510(17)(B) in the context of 18 USC § 2701, especially when considering the other provisions of the Stored Communications Act.

The first requirement of § 2510(17)(B) is that the storage of the communication be "by an electronic communications service." Although one may argue that the interpretation of the word "by" could be ambiguous, its meaning becomes crystal clear when considered with the rest of the provision and the other provisions of the Stored Communications Act. The phrase is intended to denote at whose discretion or instruction the communication is maintained rather than merely where the communication is maintained, since it is already a given that the communication is stored within an electronic communication service's facility. 18 USC § 2701. § 2510(17)(B) goes on to read that the storage by the electronic communication service must be "for purposes of backup protection of such communication," indicating a specific purpose behind the electronic

communication service's storage of an electronic communication. 18 USC § 2704, which is also part of the Stored Communications Act, is the statute that governs "backup preservation" by service providers, and states the instances in which the government may require such service providers to backup documents, which is basically to perpetually preserve them in case the subscriber erases them from his principal account. An inference that this is exactly the type of "backup protection" referenced in § 2510(17)(B) is most reasonable, and affords meaning to the entire language of the statute without expanding it's operation beyond Congressional intent. In fact, were the language "for purposes of backup protection" to pertain to the Plaintiff's personal intent, it would render that language meaningless, because almost anything could be considered backup with such an amorphous and expansionary interpretation. Furthermore, if the court were to construe the phrase "by an electronic communications service" to mean that the communication preservation could be at the direction or discretion of the subscriber, then the language "for purposes of backup protection" would likewise be meaningless and unnecessary, since the subscriber could claim his preservation was for any purpose and almost any preservation could be considered "backup." This would be a forced interpretation of the statute that would ignore its plain meaning as well as other provisions of the Act, which provides a more specific and practical meaning. The statute was not intended to protect any and all personal electronic communication storage on internet service providers by individuals, or it would have been written that way; it was intended to protect subscribers from the inherently peculiar operations of such internet service providers from computer hackers, such as when an internet service provider is directed by the government under 18 USC § 2704 to indefinitely backup certain electronic communications or when they choose to do so for other reasons.

Plaintiff has failed to assert any basis for concluding the e-mails obtained by Defendant Broome met either definition of "electronic storage" in § 2510(17) of the Act. In fact, Plaintiff's basis for recovery, described in his Amended Complaint Paragraph 7, is that Defendant Broome has "illegally accessed Plaintiff's private e-mail address without his permission." Storage of e-mails by Plaintiff on his personal e-mail account by definition falls outside the scope of § 2510(17). The e-mails in question can most accurately be classified as in the personal long-term storage of the e-mail client; they are neither incidental to the transmission of the communication nor are they maintained by the electronic communication service for backup protection. Therefore, there is no basis for finding a violation of 18 USC § 2701 and therefore summary judgment as to this cause of action is also granted.

Finally, regardless of this Court's findings as to whether any violation of 18 USC §2701 occurred, Plaintiff cannot obtain any relief or recovery against Defendant Jennings or Defendant Cooke, as Defendant Jennings and Defendant Cooke are not persons who potentially engaged in such alleged violation. 18 USC § 2707(a). The Fourth Circuit has considered a circumstance similar to the case at bar and ruled that the plain language of the statute only authorizes a cause of action against the "person or entity... which engaged in that violation." *Id. See Tucker v. Waddell*, 83 F.3d 688, at 691 (4th Cir.1996) ("Persons aggrieved by violations of the [§ 2707 of the Electronic Communications Privacy] Act can only assert a cause of action against the person or entity that 'engaged in that violation.'"). Plaintiff has not asserted or provided any basis that Defendant Jennings or Defendant Cooke engaged in a violation of the Stored Communications Act, he merely asserts in Paragraph 7 of his Amended Complaint that Defendant Broome

accessed his private e-mail account; thus, the cause of action against Defendant Jennings and Defendant Cooke under 18 USC § 2707 is dismissed as a matter of law.

5. As the Complaint has already been amended once and as this Court has granted summary judgment to the Defendants on the causes of action listed above, the Plaintiff's Motion for amendment of the Complaint to add an additional party defendant and allege damage to his business is denied.

AND IT IS SO ORDERED.

L. CASEY MANNING
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina
Sept. 23, 2008.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
M. Lee Jennings, Plaintiff, versus Gail M. Jennings, Holly Broome, Brenda Cook, individually and BJR International Detective Agency, Inc. Defendants.	)	CERTIFICATE OF SERVICE Civil Action No. 2007-CP-40-1125

I, Keri L. Hannon, paralegal for Richard G. Whiting, attorney for Defendant Jennings do hereby certify that I have this 24th day of September, 2008, served the filed Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motin to Amend Complaint, via facsimile and U. S. Postal Service, postage prepaid, to the following addresses:

John K. Koon, Esquire
Koon and Cook, P.A.
2016 Gadsden Street
Columbia, SC 29201
(803) 254-0658

Gary W. Popwell, Jr., Esquire
Lee Eadon Isgett & Popwell
Post Office Box 1505
Columbia, SC 29202
(803) 779-8572

Jan L. Warner, Esquire
Warner Payne & Black, LLP
Post Office Box 2628
Columbia, SC 29202
(803) 799-2517

Keri L. Hannon

Keri L. Hannon
Paralegal for Richard G. Whiting
1515 Lady Street
Post Office Box 7877
Columbia, SC 29202
(803) 256-9067

September 24, 2008

EXHIBIT 2

Form 4

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2007CP4001125

M Lee Jennings *vs.* **Gail M Jennings**

Plaintiff Defendant

RICHLAND COUNTY FILED
2008 NOV 10 AM 9:02
BARBARA A. SCOTT
C.C.C. & G.S.

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*:
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of _____, 2008.

_____
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2008, and a copy mailed first class this 12th day of November, 2008, to attorneys of record or to parties (when appearing pro se) as follows:

Jan L Warner
ATTORNEY(S) FOR THE PLAINTIFF(S)

John K Koon
Gary W Popwell Jr
Richard Giles Whiting
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT OF SC, PA
2008 NOV 14 AM 11:15
RECEIVED

s/BARBARA A. SCOTT
Clerk of Court

SCRCP APP-24/FORM 4

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND M. LEE JENNINGS, PLAINTIFF, vs. GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, individually and BJR INTERNATIONAL DETECTIVE AGENCY, INC., DEFENDANTS.	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT DOCKET NO.: 2007-CP-40-1125 **ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION**

RICHLAND COUNTY FILED
2008 NOV -7 PM 2:32
BARBARA A. SCOTT C.C. & G.S.

This matter is before the Court upon Application of Plaintiff to Reconsider, Vacate, Set Aside, Alter and/or Amend or Clarify Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion to Amend Complaint dated September 25, 2008.

It appears that on September 23, 2008, I issued an Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion to Amend Complaint.

Plaintiff timely moved for reconsideration and related relief pursuant to Rules 52, 59 and 60, SCRCivP.

After due consideration, I hereby deny Plaintiff's Motion to Reconsider, Vacate, Set Aside, Alter and/or Amend or Clarify Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion to Amend Complaint dated September 25, 2008.

IT IS SO ORDERED.

L. Casey Manning
Chief Administrative Judge
Fifth Judicial Circuit

At Chambers
Columbia, South Carolina
November 7, 2008

RECEIVED

NOV 1 7 2008

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT

L. Casey Manning, CIRCUIT COURT JUDGE

DOCKET NO. 2007-CP-40-1125

M. LEE JENNINGS,

APPELLANT,

V.

GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, individually and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,

RESPONDENTS.

CERTIFICATE OF SERVICE

I, Israel Stone, a legal assistant for the law firm of Warner, Payne & Black, L.L.P. attorneys for M. Lee Jennings, do hereby certify that on this date I caused a copy of Notice of Appeal to be served upon the party listed below by depositing a copy of same in the United States Mail, postage pre-paid, addressed to the following:

Richard G. Whiting, Esquire
Law Offices of Richard G. Whiting
Post Office Box 7877
Columbia, South Carolina 29202

Gary W. Popwell, Jr., Esquire
Lee Eadon Isgett & Popwell
Post Office Box 1505
Columbia, South Carolina 29202

John K. Koon, Esquire
Koon and Cook, P.A.
2016 Gadsden Street
Columbia, South Carolina 29202

Columbia, South Carolina
November 17, 2008

Israel Stone

STATE OF SOUTH CAROLINA) FAMILY COURT
)
COUNTY OF RICHLAND) C/A #: 2006-DR-40-2461

Gail M. Jennings,)
)
Plaintiff,)
)
v.)
)
M. Lee Jennings,)
)
Defendant,)
_____)

DEPOSITION OF

GAIL M. JENNINGS

****

Monday, February 19, 2007
11:30 a.m. - 12:55 p.m.

The deposition of GAIL M. JENNINGS, taken on behalf of the Defendant at the law offices of Warner, Payne & Black, LLP, 1122 lady Street, Suite 1200, Columbia, South Carolina, on the 19th day of February, 2007 before Linda Y. Love, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition.

A: Lee.
Q: Well, how did ... what did he tell you?
A: I said, well, you were with me all the time last week, night and day. And he said that when he would go home, he would stop by the office, call her and e-mail her.
Q: Okay.
A: From his office.
Q: Now, did you have any of his e-mails at that time?
A: No, sir, I did not.

Q: When did you start getting his e-mails?
A: I received the e-mails on Sunday.
Q: How did you get into his e-mail box?
A: I did not.
Q: Who got into it?
A: Holly.
Q: How did she do it?
A: I don't know.
Q: Was she with you; were you with her?
A: No, sir, I was not.
Q: Now, who is Holly?
A: Holly is my daughter in law.
Q: Your daughter in law?
A: In law, yes, sir.

Q: She married your son?
A: The oldest son.
Q: What is her last name?
A: Broome.
Q: B-R-O-O-M-E?
A: Yes, sir.
Q: And where does she live?
A: 309 Vincienne Drive which is in Columbia.
Q: And what does she do for a living?
A: Now, she's in real estate.
Q: What does your son do?
A: He's a real estate appraiser.
Q: And he works for who?
A: Himself.
Q: Did he ever work for your husband?
A: Yes, sir.
Q: What is his first name?
A: Alan.
Q: Alan?
A: Well, that's his middle name.
Q: Okay. When did Holly start going into Lee Jennings e-mail?
A: Whatever that Sunday was.
Q: The Sunday after he left?
A: Yes.

Q: It would have been the 27th of June?
A: Yes.
Q: Okay. Did she do it at your house or at her

house?
A: Her house.
Q: And then what did she do; she printed them out?
A: Yes, sir.
Q: And gave them to you?
A: No, sir.
Q: What did she do with them?
A: Made Tom a copy, well, at the time, there were two copies made because I was going to seek the advice of an attorney.
Q: Okay. There were two copies made and where were they distributed?
A: Tom.
Q: Tom Neal?
A: Yes, sir.
Q: Okay. And where did the other one go?
A: Cookie.
Q: Okay. Did you give them to Cookie on the 26th?
A: The Monday, yes, sir.
Q: Okay. So, you gave out both copies that day?
A: Yes, sir.
Q: Now, did Holly go into ... how did ... did she

go into his e-mail after that?
A: Yes, sir.
Q: Okay. How many times?
A: I do not know.
Q: Did she give you copies of what was provided?
A: No, sir.
Q: How did Cookie, Ms. Cooke get the e-mails that were after the time of the ...
A: Holly took them by there.
Q: Holly took them by there?
A: Yes, sir.
Q: Did Holly have your husband's permission to go into his e-mail box?
A: No.
Q: Did you know it was illegal to do that?
A: No.
Q: Do you know it now?
A: No.
Q: You still don't know it's illegal?
A: Not on ... I would not think on a free account.
Q: On a free account? Did you get any information or check it out before you took these e-mails

from your daughter?
A: No, sir.
Q: Did you seek any advice, and I don't want to

get into what anybody told you from any lawyer, about the use of these e-mail messages?
A: No, sir.
Q: Now, when you gave the e-mails to Ms. Cooke, why did you give them to her?
A: I felt the more information she had to background the, you know, the more expediently she could get the information that was needed.
Q: And it would be less costly to you because you might know where you could find him?
A: Yes, sir.
Q: Is that correct?
A: Yes, sir.
Q: On the night that you went to the theater, did you get that information from an e-mail?
A: I do not know.
Q: Did Holly get it off an e-mail?
A: Yes, sir.
Q: So, Holly got it off the e-mail and told Ms. Cooke that he would be at the ... that she would be at the Town Theater or whatever theater it was?
A: I do not know, I do not know.
Q: When you married Mr. Jennings, how old were your children?

A: My son, my oldest son was nine and my youngest one was five.
Q: And did you receive support from your ex-husband?
A: Yes, sir.
Q: Okay. Was that enough to maintain the family or did it take you and your husband's, Lee's money to help?
A: It took both of us.
Q: To help with the children?
A: We put everything together, yes, sir.
Q: I understand. Now, did you ask the investigator to give copies of these e-mails to Mr. Engwall?

A: No, sir.
Q: Did you ask her to call Mr. Engwall?
A: No, sir.
Q: Did you ask her to go by and see him?
A: No, sir.
Q: Okay. Do you know why or do you know who gave her instructions, Ms. Cooke, to go stand by the stop sign at Mr. Engwall's house?
A: No, sir.
Q: So, she did not do that on your instruction at all; true?

A: Not on instruction, no.
Q: Did you at any time tell her it might be a good idea for her to give that information to him?
A: No, sir.
Q: Okay. Did your daughter tell her that?
A: No, sir, daughter in law.
Q: Daughter in law?
A: No, sir.
Q: Okay. So, you don't know why she went out and stood by the stop sign and waited for him?
A: There was a conversation that she said that she felt like he should be informed and I said, ... I recall just saying, you know, that's, I, you know, I've got to take care of my life. And she said, do you think that Lee would want to know if you ... and I said, yeah. I said, you know, whatever you feel you want to do, do.
Q: Okay. So, whatever she did, she did on her own?
A: That's a matter of opinion.
Q: You didn't tell her to go?
A: I didn't say, Cookie, go tell him, no. But after she pointed out that if I were doing the same thing, ...
Q: Okay.

A: ... that wouldn't Lee want to know and I said, yeah. I don't care what you do.
Q: Now, at the time that you and he separated, you had some credit card bills; did you not?
A: I did, absolutely.
Q: Let me show you your financial declaration that

was filed at the temporary hearing. Is that the one that you swore to on the 8th of August of '06?
A: Yes, sir.
Q: Okay. Mark that as Exhibit.
(Defendant's Exhibit Number One was marked for identification purposes.)
Q: Tell me, please, the $9,000 Wachovia Visa bill, what was the purpose of those charges?
A: Things for the household, gifts for our daughters.
Q: Your daughters?
A: Daughters.
Q: Who's daughters?
A: Our's. At the time, we had one family. We had ... we just combined all of our children and it was one family.
Q: Okay. So, Lee had children, too?
A: Yes, sir.

STATE OF SOUTH CAROLINA) FAMILY COURT
)
COUNTY OF RICHLAND) C/A #: 2006-DR-40-2461

Gail M. Jennings,)
)
Plaintiff,)
)
v.)
)
M. Lee Jennings,)
)
Defendant,)
_____)

DEPOSITION OF

BRENDA F. COOKE

****

Monday, February 19, 2007
10:10 a.m. - 11:20 p.m.

The deposition of BRENDA F. COOKE, taken on behalf of the Defendant at the law offices of Warner, Payne & Black, LLP, 1122 lady Street, Suite 1200, Columbia, South Carolina, on the 19th day of February, 2007 before Linda Y. Love, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition.

mail?
A: Picture on ... I don't know if that's on or and e-mail. It's cold now.
Q: Okay. Picture on e-mail and did you find anything else about that?
A: I'm assuming that's what this is, (indicating).
Q: Okay. So, you're assuming she brought that with her?
A: I don't know if it was brought then or later, I'm not sure.

Q: Okay. Let's look, please, ma'am, at page eleven of Exhibit Two which is the first page of your confidential intelligence log.
A: Uh-huh (affirmative response).
Q: On Friday, the 7th of July, was that ... that was your first surveillance?
A: No.
Q: When were your other surveillance?
A: There were other times that we went out and looked at Mr. Jennings, but it wasn't anything relevant enough to put on paper.
Q: Say that again?
A: It wasn't relevant to an adultery case.
Q: Okay. So, your report then, it does not contain everything you did; is that correct?

A: Not unless it was pertinent to the case.
Q: Okay. When you went to Ms. Engwall's house to look at her car, that's not in your report?
A: No.
Q: Is that correct?
A: That's right.
Q: Because it was not relevant?
A: Well, we really didn't know what I was looking at then because at that point, she had not been ... she was not the paramour. She was only the suspected paramour, not the paramour.
Q: Okay. It says on the first page of this, pursuant to client's request, BJR will document the activities of M. Lee Jennings. The suspected paramour is Michelle Engwall. So, the first report that you made was Friday, the 6th, at 6:30 in the morning or the afternoon?
A: That's Friday the 7th.
Q: I'm sorry, Friday the 7th. I apologize. Is that in the morning or the afternoon?
A: That's in the morning.
Q: That's a.m., okay. Now, where is the Extended Stay on Two Notch Road?
A: On Two Notch Road, kind of like across from ... is that the Ramada? It was Ramada and it's

something else now. It's on Two Notch Road.
Q: Okay. And did you do this investigation

yourself?
A: I did.
Q: And you know there was an Extended Stay on Two Notch Road?
A: I know that.
Q: And you know that's where Mr. Jennings was staying?
A: I found the vehicle. He had moved from whatever was on my worksheet, The Wingate.
Q: He had moved from The Wingate ...
A: And he was no longer there.
Q: ... to the Extended Stay on Two Notch Road?
A: Uh-huh (affirmative response).
Q: And you're sure there's an Extended Stay on Two Notch Road?
A: Yes.
Q: And you say it's across from the Ramada?
A: It's not quite directly across from the Ramada. It's in the area.
Q: If you're headed north on Two Notch Road, would it be on your right or your left?
A: If you're headed which way?
Q: North, out toward ...

A: Clemson Road?
Q: ... out toward Clemson Road?
A: On your right.
Q: It would be on your right?
A: It's on the right.
Q: And again, you're positive that that is an Extended Stay?
A: I believe it was, yes.
Q: Was there any question in your mind it was an Extended Stay?
A: I don't know. I can take you and show it to you.
Q: Okay. When you arrived at the Extended Stay, you found the motel ... you found his car in the parking lot?
A: That's right.
Q: And you prepared to video it?
A: Yes.
Q: And you videoed him coming out of the room of the Extended Stay?
A: I can't tell you that. It's ... the video is

here.
Q: Well, this is your report though?
A: That's right.
Q: A white male known to agents and this was you;

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correct?
A: Not just me, no.
Q: Who was with you?
A: That morning, probably Donnie.
Q: Okay. So, the two of you, you were there and this is your report; correct?
A: I was there.
Q: Okay.
A: I was there for all of these.
Q: Okay. So, every one of these that we're talking about, you were present?
A: I was there.
Q: All right. A white male known to agents as Lee Jennings came out of the room and went to his vehicle, unlocked the car, got in and drove off.
A: That's right.
Q: And where did he drive from there?
A: New Life Fitness.
Q: And how far is that from the Extended Stay out on Two Notch?
A: It's on Two Notch, it's just down the street, not too far.
Q: Okay. And at 7:19, did he just stay in his car between 7:19 and 7:56?

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A: No. If you read 7:19, it says he parks his vehicle in the parking lot, gets out and goes inside.
Q: Okay. So, he went inside?
A: Uh-huh (affirmative response).
Q: And at 7:56, you saw the lady who's picture is in Exhibit Four; is that correct?
A: That's right.
Q: So, you had Exhibit Four on that date?
A: I don't know if I did or not.
Q: Had you seen Ms. Engwall before?
A: I compared the tags.
Q: Okay. So, if it was ...

A: If the tag ...
Q: Pardon me?
A: The tag that was at her home pulled up to the gym and a lady got out.
Q: Okay. So, the same vehicle pulled up to the gym, but at that point, you didn't know if it was Ms. Engwall or not?
A: I'm pretty sure it was.
Q: Well, you'd never seen her before; had you?
A: No.
Q: So, what you really know is that a vehicle with the same tag number came to the gym and a lady

got out of it; is that correct?
A: That's right.
Q: So, you surmised it was Ms. Engwall because she was in that vehicle?
A: Well, it's on video and you can look and see who it was.
Q: All right. But at this point in time, you did not know Ms. Engwall; did you?
A: No.
Q: And you hadn't seen a picture of her?
A: I don't know if I had seen it or not. I don't know when the picture was brought.
Q: Okay. If you had seen a picture of her, it would be Exhibit Number Four?
A: That's right.
Q: Okay. So, this lady arrives at New Life driving a Saab. You videotape her, she's with a girl and they go in together; right?
A: That's right.
Q: And at 10:26, some three hours later, the three of them come out together?
A: At 10:26, what ever time that was or however long that was.
Q: Okay. Two hours and thirty minutes. They ... and she gets in her car and he gets in his car

and they drive off; is that right?
A: They stopped and they were talking, standing there talking.
Q: Okay.
A: He was talking to the child.

Q: Any affection?
A: No.
Q: And at this point, agents make a management decision to discontinue surveillance. What kind of management decision?
A: A decision that we needed to discontinue and not waste any more money ...
Q: Okay.
A: ... because one went one direction and the other went the other direction.
Q: Okay. Now, let's look at the next one. Saturday the 8th.
A: Okay.
Q: It says at the top, BJR. What does BJR stand for?
A: It's just the name of our company.
Q: It doesn't ... BJR doesn't stand for anything?
A: No.
Q: Okay. It says, pursuant to client's request, BJR International will document the activities

of Lee Jennings ... suspected paramour. Agents learn that Michelle Engwall is going to the Workshop Theater. How did you ... were you on this surveillance?
A: Yes.
Q: And how did you learn that she was going to the Workshop Theater?
A: It was ... that information was given to me.
Q: From, by whom?
A: Ms. Jennings.
Q: So, Ms. Jennings told you she was going to the Workshop Theater?
A: Yes.
Q: And how did Ms. Jennings know?
A: I don't know that.
Q: Did you ask her how she knew?
A: I could have, I don't know.
Q: Okay.
A: That was a long time ago.
Q: What time of day would she have called you?
A: I don't know.
Q: Would that have been on her cell records or ...
A: It should be or it could be on the business phone, either one.

Q: Okay. Would she have called you on your cell

phone?
A: Sure.
Q: What is your cell number?
A: It's 318-5117.
Q: And which entity provides your cell service?
A: Cingular.
Q: So, sometime before 21:00 hours, which is what, 9:00 at night on the 8th of July, Ms. Jennings called to tell you that Ms. Engwall was going to the Workshop Theater; true?
A: Somebody told me, yeah.
Q: Well, if it wasn't Ms. Jennings, who was it?
A: Well, I had conversations with the lady that brought her to my residence.
Q: The lady that brought who?
A: Ms. Jennings.
Q: And who was that?
A: I don't know her last name.
Q: You had a conversation with her on this day, also?
A: I did.
Q: And what is her first name?
A: Holly.
Q: Holly?
A: Holly. It's the one I told you a while ago

that is kin to them ...
Q: Right.
A: ... in some manner.
Q: So, Holly was with Ms. Jennings when she came to you the first time?
A: That's correct.
Q: Okay. And did you talk to Holly on the 8th of July?
A: Oh, on that particular day, I don't know.
Q: Well, you say agents learned that Michelle was going to the Workshop Theater and you told me they came from Ms. Jennings, but you think it might have come from somebody else?
A: To me, they're one in the same on that case.
Q: So, you don't remember Holly's name?
A: All I know is her name is Holly.

Q: And we'll know that Holly has got two phone numbers; 238-5667 or 926-7780?
A: That's right.
Q: Okay. And she's just a friend or you don't know?
A: I told you, they're some relationship there, but I don't know what it is.
Q: Okay. So, you ... who was with you this night?
A: I don't remember.

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Q: But you were there?
A: Definitely.
Q: Okay. So, at 9:00, you went to the Workshop Theater, you arrived there at 9:14 and located the Saab. Is that the same Saab that was at the ...
A: It is.
Q: Okay. Agents learned that Michelle drives this vehicle?
A: That's correct.
Q: Well, you already knew she drove it, did you not?
A: Yes, but the judge needed to know that, not me.
Q: So, the judge ...
A: It's in the reports so that the judge will recognize the fact that it's her vehicle or that she's driving it anyway.
Q: You set up the surveillance and prepared the video, 22:14 or 10:14, Michelle Engwall, now, this is the same lady that was at the gym?
A: Yes.
Q: And another female came out of the theater ...
A: Yes.
Q: ... and they drove off; right?
A: Yes.

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Q: And she's in the car talking to another lady until 22:20, 10:20; is that right?
A: Yes.
Q: And the female who was with her, did you ever check and see who she was?
A: No. I think she was some kin, also.
Q: She was kin to Ms. Engwall?
A: She's kin somehow or another, I don't remember

how I even heard that, but I heard that.
Q: And that's the lady in the gray Taurus?
A: Yes.
Q: Okay. And you didn't run her tag?
A: I didn't need to.
Q: Okay. Michelle then went to the interstate and then went to Pickens Street which is who's office?
A: Mr. Jennings.
Q: Okay. So, 22:23, which I guess is 10:23, you see Mr. Jennings vehicle in the parking lot?
A: That's right.
Q: And he's waiting for her in the parking lot?
A: That's right.
Q: They hugged and kissed each other?
A: That's right.
Q: And he's running his fingers through her hair

and this goes on a couple of minutes and then they go inside the office holding hands?
A: That's right.
Q: And at 11:58, they're still in the office?
A: That's right.
Q: And then they came out at 12:38 and they kissed patiently and hugged?
A: That's right.
Q: And then three minutes later at 12:41, he kisses her through the window of the car and she leaves; is that correct?
A: She started to leave.
Q: Then what happened?
A: He stopped her again and went back and kissed her again.
Q: Okay. And then they both left and at 1:06 in the morning, you terminated your surveillance?
A: That's right.
Q: And this whole surveillance was based on the information you learned that Michelle Engwall was going to the Workshop Theater?
A: It was based on ... all that was based on was a place to pick her up to be able to do surveillance.
Q: Right, right. And it made it easier to know

where she was going to be; did it not?
A: Well, no. We would have followed him.
Q: Oh. You would have followed him at 21:00 hours that night?
A: If we had thought that they were going to be together, we would have followed him.
Q: Okay. But you didn't know they were going to be together until you ...
A: I go by what my client says.
Q: Okay. So, ...
A: If my client says tonight is a good night or tonight I know that he's going to be with her tonight, then ...
Q: Okay.
A: ... then we do surveillance.
Q: Okay. So, do your records show what time this call came in to you that learned ...
A: No.
Q: ... she was going to ... it does not, okay.
A: Huh-uh (negative response).
Q: Now, let's look at the next one which I think is July the 11th.
A: Okay.
Q: It's BATES stamped sixteen in the ... well, the same thing. BJR conducts surveillance.

Agents learn that Michelle's husband is out of town. How did you learn that?
A: Well, that was actually after he spent the night there and then Mr. Engwall or whatever his name is, told me himself he was out of town.
Q: So, Mr. Engwall, you've talked to Mr. Engwall. So, you filled that in; is that correct?
A: Yes.
Q: So, you didn't know when you did this surveillance that Mr. Engwall was out of town?
A: We assumed that he was out of town because Lee would not have been there.
Q: Well, you went directly to his house; did you not at 9:30 in the evening?
A: To her house.
Q: You went directly to Michelle Engwall's house at 9:30; correct?
A: That's right.

Q: How did you know to go to her house at 9:30?
A: I didn't. I was ... actually, the surveillance actually started before that. I was looking for him and could not find him.
Q: Where is that in this report?
A: It's not in there.

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Q: And the reason it's not in there is?
A: Because it was not important, it's not ... matters not. The fact of the matter is that I went to her residence and that's when I started charging her because before that, I could not find him, I could not locate him. I went to the office, I went to his home and then just on a fluke, I went to her house.
Q: It says up at the top here, agents learn that Michelle's husband is out of town. You didn't know that until after the fact; is that what you're telling me?
A: That's right.
Q: So, you just filled that in?
A: Yes. That's a pursuant to.
Q: Right. And so, when you went out to her house that night at 9:30, you did not know her husband was out of town?
A: I had no clue that he was out of town.
Q: Okay. You just went out there on a fluke and you didn't bill her for the hours that ...
A: Our hours usually start when we find something.
Q: Your hours start when you find something. Is that in your contract?
A: I don't know.

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Q: Well, let's look at that a minute because ...
A: Sure.
Q: ... I may have missed it. Paragraph three; shall be applied to the hourly rate earned during the investigation. That's at page seven of Exhibit Two. Let's see. All other service and activities will be charged against the retainer at $70 an hour, ...
A: Uh-huh (affirmative response).
Q: ... plus, mileage; correct?
A: Yes, if it's out of town.

Q: And where does it say that I only bill when I find something?
A: It doesn't say that. I own the company, I bill whenever I feel that it's necessary to start billing.
Q: So, in this case, you didn't bill her for all the time you spent?
A: Sure, I did.
Q: Well, you didn't bill her for the time you were trying to hunt down Mr. Jennings that night; did you?
A: That's right.
Q: You did not?
A: I did not.

Q: You didn't bill her for the hours?
A: I don't bill for something until it's ... until we start finding something or until we start intense surveillance on a subject.
Q: Okay. So, your bill in this case, 31 hours, ...
A: Uh-huh (affirmative response).
Q: ... is just the time that is in this report; is that correct?
A: That's correct.
Q: So, if I go back to this report, let me just look here a minute and let me ... on Friday, the 6th, we go from 6:30 a.m., until 10:26. So, 6:30, 7:30, 8:30, 9:30, 10:30, three hours and 54 minutes; right?
A: If you say so.
Q: Well, if we add that up, I just want to ...
A: Yeah, I'm with you.
Q: Okay. Then, on Saturday the 8th, from 9:00 p.m. until 11:58 ... excuse me, 12:41 ... 1:06, excuse me. So, it's 9:00, 10:00, 11:00, 12:00, 1:00, that's three hours and six minutes. Then we've got Tuesday, the 11th from 9:30 until 4:49 or 4:00. So, 9:30, 10:30, 11:30, 12:30, 1:32, 33, 34, ... that's seven, seven hour and 19

minutes. And then I'll just look at the 17th before we finish here. The 17th is one hour and 33 minutes and the 24th,, 8:04 to 9:22, that's

one hour and 18 minutes. So, if we add all that up, ...

A: Where are you on that, where were you on the last one you just said?

Q: Monday, the 24th,. ...

A: Uh-huh (affirmative response).

Q: ... from 8:04 to 9:45?

A: That's right. And on all those, it needs to be the time out, not the last time that you see documented.

Q: All right. Time out?

A: Like not 9:33, but 9:55 and not at 4:00, ...

Q: Not 4:49, but 4:00, left at 4:00?

A: That should have been 5:00.

Q: Oh, so, that should have been 5:00. Then that's an error then; is that right?

A: Uh-huh, that's right.

Q: Okay.

A: Probably a typographical error.

Q: All right. So, left at 5:00. So, let's add another ... let's see here a minute.

A: The same thing with all of them. Not 12:41,

but 1:06 and 10:52 and that's it.

Q: I come up with about 17 hours ...

A: Okay.

Q: ... of surveillance?

A: Okay.

Q: Your bill is for 31 hours.

A: Times two is what?

Q: Ma'am?

A: Times two.

Q: Is 34 hours? So, you had two people with you on all of these trips?

A: At least.

Q: So, sometimes you had three?

A: That's correct.

Q: So, that's where you ... that's how your 31 total man hours; right?

A: Yes, sir.

Q: Okay. So, you went to Ms. Engwall's house and you videotaped. Did you ...

A: Where are you at again?

Q: I'm on now page eight of ... or page 16 of the ...

A: Okay. Go ahead.
Q: You videotaped through the windows of the house?

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A: No.
Q: What did you videotape?
A: His vehicle sitting in the driveway.
Q: Okay. So, you videotaped the vehicles?
A: That's right.
Q: And you said that at ... excuse me, 22:11, which is 10:11, you're physically able to see them inside the residence. How did you see them?
A: Because if you're standing at ... if you're walking down the road on the garage side, you can see into the house.
Q: Through the windows?
A: Yes. The window was wide open.
Q: Okay. And the lights are out at ...
A: At 11:59.
Q: ... 11:59 and they're still in there at 2:10 and still in there at 4:49 and you leave at 5:00 and he's still there?
A: No. We leave at 4:49.
Q: You leave at 4:49?
A: Time out is when you get back to where you came from.
Q: I see, okay. And then you put in bold, it's now obvious to agents that Lee Jennings are

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spending the night together in her marital residence while her husband is out of town. You didn't know that then, did you?
A: I knew he wasn't in that house.
Q: You knew her husband wasn't there?
A: That's correct.
Q: How did you know he wasn't there?
A: Well, I don't think they were doing a threesome.
Q: Well, how did you know he wasn't there?
A: Because I wouldn't let my husband or my wife kiss him and me be standing there.
Q: How do you know he wasn't there?
A: He told me.

Q: After the fact?
A: At a later point.
Q: At a later point; was that right?
A: Uh-huh (affirmative response). But it was obvious to me that he wasn't there.
Q: Right. So, when you added that in, that was learned by you afterward; is that correct?
A: Well, no. Common sense told me he wasn't in there.
Q: Yes, ma'am. Well, I'm not talking about common sense. I'm talking about what is in this

report.
A: Okay.
Q: You did not know when you were there whether he was at the home or not; did you?
A: No. But just like my report says, it was obvious.
Q: Right. And you put that in bold ...
A: Uh-huh (affirmative response).
Q: ... and he told you that later?
A: Uh-huh (affirmative response).
Q: Is that ...
A: He didn't tell me that it was obvious. He told me that he wasn't in town.
Q: When did you talk to him?
A: I don't have the date.
Q: Well, let's look at Monday, the 17th.
A: Okay.
Q: You go to the Fitness Center at 8:00.
A: Uh-huh (affirmative response).
Q: You find his car there and her's; is that correct?
A: That's right.
Q: And you see them out, coming out together walking and talking at 9:30?
A: That's right.

Q: Okay. Look at the 24th, please, Monday the 24th. Is that the last day you did surveillance?
A: That's right.
Q: You go to the gym and find the vehicles and you've got videos of that, too?
A: Yes.

Q: And you discontinue surveillance at 9:22 or 9:45, whichever the case may be; is that correct?
A: Yes.
Q: Now, the last ... are these photographs, these four, do you have that ... do you have those in your file?
A: No. I don't have those with me.
Q: Do you have another part of your file; it's not here?
A: No.
Q: And I see this, who's handwriting is that on ...
A: It's mine.
Q: ... Bob Engwall?
A: That's mine.
Q: Where did you get his information?
A: He sat down in my office and gave it to me.
Q: Okay. After the fact; after this?

A: Yeah.
Q: So, when you brought this, you don't know the ... do you know the date that you typed your report?
A: I don't know what date it was actually typed.
Q: Did you know that this lawsuit had been filed on the 24th of June?
A: Do what?
Q: Did you know this lawsuit had been filed on the 24th of June?
A: Oh, no, I don't know when it was filed.
Q: Okay. Excuse me, the 29th of June. You didn't know that the lawsuit had been filed on the 29th of June?
A: That's not my expertise.
Q: But I'm just asking, but, you didn't know that?
A: No, I answered you.
Q: All right. Where did you get the e-mails that are shown in the next Exhibit?
A: They were given to me.
Q: By whom?
A: Different people.
Q: Ma'am?
A: Different people.
Q: This is Exhibit Number Three. Would you pick

up Exhibit Number Three?
A: Sure.
Q: All right. Now, who are the different people that gave you these e-mails?
A: The two people that came to see me.
Q: And those are?
A: Ms. Jennings and Holly.
Q: So, Holly gave you Mr. Jennings e-mails?
A: This is what was given to me right.
Q: Right. Did you read them?
A: A couple of them and then just threw it to the side.
Q: Which ones did you read?
A: I have no clue.
Q: Did you go into Mr. Jennings e-mail?
A: You give me way too much credit. I don't know how.
Q: Do you have a Yahoo e-mail address?
A: I don't.
Q: Do you have a Cookie ... let me back up. When were these e-mails given to you?
A: At different times.
Q: Which ones were given when?
A: I don't know.
Q: I'm looking at the first sheet of Exhibit Three

and it looks like April 5th, of 2006. That was before you were hired; is it not?
A: I was hired June the 26th of 2006.
Q: So, the e-mail of April 5th, of '06, was before, predates your hiring; is that correct?
A: If it's before June, yes.
Q: The second page of May the 9th, of '06, predates your hiring; does it not?
A: Yes.
Q: The third page, May the 8th, of '06, predates your hiring?
A: Yes.
Q: The fourth page predates your hiring?
A: I don't know, I ...
Q: May the 8th, May the 8th?
A: I guess so, yeah.
Q: The sixth page, May the 18th, predates your

hiring by a month and change; true?
A: Yes.
Q: Okay. May 22nd, page seven predates your hiring?
A: Yes.
Q: Page eight, May 21st, predates your hiring; true?
A: Yes.

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Q: Were these given to you before you were hired?
A: What?
Q: Were these e-mails given to you before you were hired?
A: Well, of course not.
Q: Okay. So, you never saw these until after June the 26th?
A: That's correct.
Q: Okay.
A: And if you want to, you can skip all those instead of asking me about each date all the way over to when I was hired and I know I'm already to page 20 myself. So, just a second.
Q: Okay. You're already at page 20?
A: Yes, hold on. I'm looking for the date on number 22 now instead of going through each one of these.
Q: And at 18, June the 2nd, that's before you were hired.
A: Right.
Q: Twenty-one is June the 14th, before you were hired.
A: Page 25 is ... no, that's the 19th. Hold on. Half of these I don't even see a date on. Page 35 is the 24th. Let's see. Okay. Wednesday,

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June the 28th. That's after I was hired, page 37.
Q: Were these given to you, the ones that predate June 28th, were they given to you on June the 26th?
A: No.
Q: And did you say that they came to you at different times?
A: Yes.

Q: Okay. June ... number 37, page 37, June the 28th, that was given to you by Ms. Jennings or Holly?
A: That's correct.
Q: And that's when June the 11th was given to you by ...
A: That's July the 11th.
Q: July the 11th, excuse me.
A: Okay.
Q: And July the 13th, of '06?
A: Wait a minute. That's right.
Q: Now, July 25th of '06 is after your last surveillance; is it not?
A: That is. And then there's a July the 22nd, there.
Q: Okay.

A: It's the next page and then I don't have a clue what date the other one is.
Q: Do you have a Yahoo ID ...
A: Absolutely not.
Q: ... called Cookie?
A: No.
Q: You do not and have never had one?
A: No.
Q: Did you ask Ms. Jennings where ... and Holly where they got these e-mails?
A: No.
Q: Did it concern you that a client would give you e-mails from a spouse's e-mail box?
A: No.
Q: Why?
A: Because I don't care. I didn't care anything about the e-mails.
Q: You didn't?
A: No. The e-mails just showed me that there was an affair going on.
Q: Okay.
A: And it's my job to go out and find it.
Q: Okay. So, you knew about the e-mails when you started your case; you knew there was an affair going on?

A: I knew there was some e-mails. I did not know,

no.
Q: And you never read them?
A: I read a couple of them and they were just garbage, I mean, excuse me. It's just not something that entertained me.
Q: Okay. Are you familiar with Title 17 of the South Carolina Code?
A: No.
Q: Are you familiar with the Stored Communications Act?
A: No.
Q: Now, you gave a set of these e-mails to Mr. Engwall; did you not?
A: No, I did not.
Q: What did you give him?
A: Nothing.
Q: Did you not ...
A: Absolutely nothing. He left my house with nothing, my office with nothing.
Q: Did you show Mr. Engwall these e-mails?
A: No.
Q: So, you deny that you either gave or showed Mr. Engwall these e-mails?
A: That's right.

Q: Now, how did he get to your place; did you call him?
A: I talked with him.
Q: Did you call him?
A: No, I didn't call him. I talked with him.
Q: How did you get his phone numbers?
A: I didn't have his phone numbers.
Q: I saw in your report that there was a ...
A: That was at a later date and he gave them to me when he was in my office.
Q: So, he came to your ...
A: And he asked me to keep him informed which I haven't done, but he did ask me to keep him informed.
Q: So, he came to your office?
A: That's correct.
Q: Unsolicited?
A: What do you mean, unsolicited?
Q: You didn't call him?
A: I didn't call him.

Q: Did you e-mail him?
A: No.
Q: Do you have an e-mail address?
A: Yes.
Q: What is your e-mail address?

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A: Cookie1PI@AOL.com.
Q: Say it again?
A: Cookie1, it's on my business card there, PI@aol.com.
Q: Okay. Now, how did you first get in touch with Mr. Engwall?
A: I talked to him.
Q: You called him?
A: No. I went and talked with him, face to face talked to him.
Q: You went to his house?
A: No.
Q: Did you go to his place of employment?
A: No.
Q: Where did you meet him?
A: At the stop sign.
Q: At the stop sign? You went out and followed his car?
A: I didn't follow him, no.
Q: Well, how did you find him?
A: Ms. Jennings asked me to get in touch with him. I tried to get in touch with him and I could not get in touch with him because I did not have his phone numbers.
Q: Okay.

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A: When he left the house one morning, he pulled up to the stop sign and I was standing there and I asked ... I said can I talk to you a minute and he said, sure. Get in.
Q: Okay. So, that's when you wrote down and got his work number and his ...
A: No, absolutely not, no.
Q: Okay.
A: He came ... he called me back.
Q: Okay.
A: He told me he wanted to come talk to me. He came there and then he gave me these phone

numbers.
Q: Okay. And you deny that you gave him a copy of these e-mails?
A: I certainly do.
Q: Okay. You deny that you told him about the e-mails?
A: Oh, no. I didn't say that now.
Q: You did tell him about him about them?
A: Sure.
Q: What did you tell him?
A: I just said there were e-mails back and forth.
Q: And how did you know that?
A: I had them in my possession. What do you

mean, how did I know?
Q: And you still have them in your files?
A: I sent you a copy of them.
Q: Yes.
A: Yeah, yes.
Q: Now, do you know where this photograph came from that's marked as page number 22?
A: I do not.
Q: You do not?
A: I do not.
Q: Okay. You didn't print it off of your computer?
A: I did not.
Q: Is that correct?
A: That's correct.
Q: Have you conducted any other surveillance on this case?
A: No.
Q: None?
A: No.
Q: Have you conducted any surveillance for Mr. Engwall?
A: No.
Q: Have you been hired by Mr. Engwall?
A: No, sir.

Q: Ma'am?
A: No, sir.
Q: So, you've not been paid by Mr. Engwall and have no contract with him?

A: That's correct.
Q: Okay. Does anybody in your office have a contract with or been paid by Mr. Engwall?
A: No, sir.
Q: Okay. So, the last time you worked this case was the date on your report?
A: That's correct.
Q: Now again, did you meet any other people with Ms. Jennings other than Holly?
A: Did I do what; did I meet?
Q: Were there any other people who were helping Ms. Jennings other than Holly?
A: I don't know. I mean, I don't know who was helping her. I'm sure she had to have some help, but I don't know.
Q: That met with you other than Holly?
A: Oh, no.
Q: Okay. How many times did you talk to Holly?
A: I have no clue. I answer the telephone and if she's there, I talk to her.
Q: Okay. How many times did Holly bring you e-

mails?
A: I don't know.
Q: How many times did Ms. Jennings bring you e-mails?
A: I don't know that, but I gave you what I have.
Q: Ma'am?
A: I gave you what I have.
Q: I understand. I don't have any further questions for this witness.
MS. COOKE - EXAMINATION BY MR. NEAL:
Q: When you were talking about that you don't bill when you're looking for somebody or are you ... am I quoting you correctly?
A: Yes.
Q: Is it fair to say that the way you handle that is you don't bill when you're just on a fishing expedition?
A: That's right.
Q: That's all I have.
(There being no further questions, the deposition concluded at 11:20 a.m.)

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT

L. Casey Manning, CIRCUIT COURT JUDGE

DOCKET NO. 2007-CP-40-1125

M. LEE JENNINGS,

APPELLANT,

V.

GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, individually and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,

RESPONDENTS.

RECORD ON APPEAL Vol. 2 of 2

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Date: March 13, 2008

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	C/A #: 2007-CP-40-1125
M. Lee Jennings,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Gail M. Jennings, Holly Broome, Brenda Cooke, individually BJR International Detective Agency, Inc.,	)	
	)	
Defendants,	)	
	)	

DEPOSITION OF

HOLLY E. BROOME

****

Thursday, March 13, 2008
10:11 a.m. - 10:41 a.m.

The deposition of HOLLY E. BROOME, taken on behalf of the Plaintiff at the law offices of Warner Payne & Black, LLP, 1122 Lady Street, Suite 1200, Columbia, South Carolina, on the 13th day of March, 2008 before Linda Y. Love, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition.

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Also Present:
M. Lee Jennings

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(Defendant Holly Broome's Responses to Plaintiff's First Request to Admit)

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the South Carolina Rules of Civil Procedure.

It is stipulated by and between counsel and the witness that the reading and signing of the following deposition be, and the same are, hereby waived.

HOLLY E. BROOME, having been duly sworn, deposes and testifies as follows:

MS. BROOME - EXAMINATION BY MR. WARNER:

Q: Ms. Broome, before we get started, I'm required to tell you a couple of things. Have you had your deposition taken before?

A: No.

Q: Okay. If I'm not clear in any question, if I slur or you can't understand me, just please, ask me and I'll try to repeat it so it's intelligible. If you need to take a break at any time, that's fine.

A: Okay.

Q: You're not supposed to talk to anybody during the taking of the deposition.

A: Okay.

Q: If you do, we can find out what you said; okay?

A: Okay.

Q: If your lawyer tells you don't answer something, you don't answer it; okay?

A: Okay.

Q: Tell me your full name, please?

A: Holly Ebert Broome.

Q: Okay. And what is your date of birth?

A: It's March 27th, 1979.

Q: And where were you born?
A: In Columbia.
Q: Okay. What is your date of birth?
A: March 27th, 1979.
Q: Okay. Are you married?
A: Yes.
Q: And who is your husband?
A: Allen Broome.
Q: Okay. When did you and he get married?
A: April 4th, of 2004.
Q: And is Allen Broome related to Gail Jennings?
A: Yes. That's her first son.
Q: Okay. Do you have any children?
A: Yes, we do.
Q: How many children?
A: One son.
Q: And age?
A: He is a year and a half.
Q: What is your background as far as education is concerned?
A: I have a two year associates degree from Midland's Tech in office systems technology.
Q: And when did you get that?
A: Oh, gosh. In '02, I think I graduated.
Q: Where have you worked or did you go there

immediately after high school?
A: No, I didn't.
Q: What did you do after high school?
A: I modeled for a while and traveled and waited tables and bartended and ...
Q: Okay. And your parent's names are?
A: Bill and Shirley Ebert.
Q: And spell that last name?
A: E-B-E-R-T.
Q: And they live in Lexington County?
A: They don't. They live in Anderson County now.
Q: After you finished your two year associates degree, where have you worked?
A: I worked for Mr. Jennings at Bag Appraisals.
Q: Okay. When did you work there?
A: Oh, I don't remember the dates exactly. Not for long, three or four months during a summer.
Q: Okay. Was that before or after Mr. And Ms. Jennings separated?
A: Oh, that was before.
Q: Okay. And after you left there, where did you work?
A: I worked with Carolina Real Estate, an investment group.
Q: And how long did you work there?

A: Probably about, just about a year. I still do hang my license there, but I don't really work there.
Q: You have a real estate license?
A: Yes, I do.
Q: When did you get it?
A: In November of '06 I believe. It's only been a year or so since ... two years going on now.
Q: Is Carolina Real Estate, is that a brokerage, ...
A: Uh-huh (affirmative response.)
Q: ... they're a retail brokerage of commercial and ...
A: They don't do much commercial, just residential.
Q: Okay.
A: Mostly investment properties.
Q: Okay. And do you work for them for a salary or are you on commission?
A: No. I did then. I did have somewhat of a salary, but I was also on commission then.
Q: Okay. What does your husband do?
A: He's a real estate appraiser.
Q: And which company is he with?
A: Appraisal Carolina.

Q: And your home address is what?
A: It's 104 Owl's Roost Run.
Q: Okay. And that's in Richland County?
A: That's in Lexington.
Q: Lexington County?
A: Uh-huh (affirmative response.)
Q: And who's name is that property titled?
A: The deed is to my husband and I, but the mortgage is his.
Q: Okay. Do you own any other property?
A: No.
Q: Okay. When did you first get involved in the marital issues between Mr. Jennings and his wife?
A: That Saturday in June I believe that Mr. Jennings had left the house on a Wednesday and she ... we went over to her house and she told us about it on Saturday.
Q: Okay. So, that would have been Saturday the?
A: June ... the twenty-something I believe.
Q: The 24th, would that be about right?
A: Probably, yeah. I think it was the 21st was the day that he left.
Q: Okay. So, he left on June 21st?
A: It was a Wednesday I believe. I'm not sure, I

don't have the calendar right in front of me, but ...
Q: And that would have been in the year 2006?
A: Uh-huh (affirmative response.)
Q: Is that correct?
A: Uh-huh (affirmative response.)
Q: You need to say, yes or no?
A: I'm ...
Q: Was it '06?
A: Yes, I believe so.
Q: Okay.
A: Right? It's been ... we're going on two years now.
Q: So, if he left on a Wednesday and you and your husband went over there on a Saturday which would have been if our numbers are correct, June the 24th, of '06?
A: Uh-huh (affirmative response.)
Q: Okay. And what conversation did you have with Ms. Jennings?
A: She just went basically over the whole story of the conversation that they had had and finding the card in the car and what they had discussed and everything basically that he had told her.
Q: Okay. What did she tell you he had told her?

A: Gosh, it's been so long. I'm going to have to try and really remember.
Q: Okay.
A: That she found the card to flowers in her car. They had exchanged cars maybe for some repairs or something and then upon asking him about that card for the flowers, he admitted that, yes, he was, you know, that those flowers weren't for her and that he was giving them to someone else and then they went into detail about, you know, how they were talking and corresponding and all that and along the lines that they talked on e-mail. He didn't discuss who she was I don't believe or how they met or anything. But that that's how they mainly communicated was through e-mail, so ...
Q: Okay. So, Ms. Jennings told you on this Saturday and you and your husband were the only people there?
A: Uh-huh (affirmative response.)
Q: Did you make any notes of the conversation; you haven't kept any calendars about this case; have you?
A: No.
Q: Okay. That she and her husband had talked,

that he was seeing someone else and that their communications were mainly by e-mail?
A: Uh-huh (affirmative response.) And, you know, asked about their feelings toward each other and he said that he was confused about their feelings to Ms. Jennings.
Q: Okay.
A: And that he wanted to take a break and to leave and I believe that he left on his own, he decided to leave.
Q: Okay. Did she tell you at that time that she had talked to a private investigator?
A: No. She hadn't talked to the private investigator yet.
Q: Okay. She had not talked to them?
A: Not on that day, no.
Q: Okay.
A: No, this was the first time she had talked to Lee about it.
Q: Well, my question is, Ms. Jennings never talked or did not tell you that she talked to an investigator prior to the day or on the Saturday that you were there?
A: No. She had not discussed it with anyone else. We were the first people that she had told.

Q: Okay. How long were you there?
A: All day. All day on Saturday. From early in the morning, probably 9:00 or 10:00 until 9:00 or 10:00 that night.
Q: Okay. Because she was upset?
A: Yes, extremely.
Q: Okay. All right. What did you do then? Did you ... what did you tell her you would do or did you tell her you were going to do anything?
A: I didn't tell her I was going to do anything.
Q: Okay. What did you do?
A: What do you mean?
Q: Did you ...
A: I went home.
Q: Okay. And did you help her in any way?
A: With the divorce, no. I mean, more just like support. Just, I mean, I felt awful. I didn't ...
Q: Did you go into Mr. Jennings e-mail account?
A: Yes.
Q: Okay. When did you start going into his e-mail account?
A: I did it on Sunday, the very next day.
Q: Sunday the 25th if that's correct?
A: Uh-huh (affirmative response.)

Q: Of June of 2006?
A: Uh-huh (affirmative response.)
Q: Okay. Did you have permission to go into it?
A: No.
Q: Did you know his e-mail address?
A: Yeah.
Q: How did you know that?
A: Well, working with him. I knew that he had a personal e-mail account.
Q: Okay.
A: Under Yahoo.
Q: Did you know his password?
A: No.
Q: Okay. Did he give you permission to go into his account?
A: No.
Q: Okay. So, tell me what you did?
A: I know that Yahoo is a free account and I also have a Yahoo account and you can sign on to your e-mail address and say that you have forgotten your password.
Q: Okay.
A: You answer a certain amount of questions and they give you a new password.
Q: Okay.

A: And that's what I did.
Q: All right.
A: And it assigned me a password.
Q: And what did you do then?
A: Then I got on to his e-mail and read the extent of the e-mails that he had sent to her.
Q: Okay.
A: And it was, you know, that was basically it. We read and read and read and then I called Ms. Jennings and let her know that obviously what he was telling her wasn't the truth because he was telling Michelle in the e-mails something completely different, so ...
Q: Okay. Did you print the e-mails?
A: I did.
Q: Okay. Did you download any photographs?
A: No.
Q: You did not download any pictures of anybody from his e-mail?
A: No.
Q: Okay. Did you ... to whom did you give ... how many times did you go into his e-mail?
A: That I don't really remember. That first time was the bulk of it. That was the basically all the information that I needed and it was like,

I guess about a month before he actually got served his divorce papers. So, I mean, in that month, I would have to ... if I had to guess, it was maybe five or six times.

Q: And every time you went in, it changed his password?

A: Uh-huh (affirmative response.)

Q: Is that a, yes?

A: Yes.

Q: Okay. And so, when he went in, he couldn't get in with his password; is that correct?

A: I don't know about that.

Q: Okay. Did you download e-mails that he had sent?

A: No, no. I never saved anything, never downloaded anything. I wouldn't even know how to do that ...

Q: Well, you printed it?

A: I did print, yes.

Q: And you understand that if you print it off the internet, it has to go through the DSL or the line or whatever it is to go to your printer?

A: Sure.

Q: Okay. So, could you tell if these e-mails ... did you print e-mails that other people had

sent to him?
A: Michelle.
Q: Okay. Did you look at any other e-mails?
A: No.
Q: Okay. So, you would open e-mails that someone named Michelle would send to him?
A: Yes.
Q: And print them?
A: Yes. Well, they were sending back and forth. I mean, it was either that he had sent to her, she had sent to him and some of the e-mails would go on forever, back and forth, back and forth, being sent.
Q: Okay. So, how many pages did you print?
A: I don't really remember that either.
Q: Now, ... go ahead, I'm sorry.
A: The majority of them, I mean, there were a lot of them, so, I don't really know exactly how many e-mails were printed, but it was probably over 30 pages.
Q: Okay. What was the purpose of you going into his e-mail account?
A: To find out the truth and if that's how he was corresponding with her, I wanted to see ... we both wanted to see what was being said.

Q: You both being who?
A: Me and Gail.
Q: Okay. And did you tell her you were going to do that?
A: No, I didn't.
Q: Okay. Did you tell her when you were doing it?
A: Yes. Well, I mean, I had her on the phone. I called her after I had read a few of them.
Q: So, on that Sunday, you called her?
A: Uh-huh (affirmative response.)
Q: Did she come over to your house?
A: Yes.
Q: And did she read them on line?
A: No. She didn't really care to read most of it. It was more of like I would say look what he just said, you know, he said this to her, he said that to her.
Q: And how many copies did you print?
A: Just one at the time.
Q: Okay. And what did you do with the copy that you printed?
A: Well, we made more copies.
Q: Okay. Who made the copies?
A: We .... she and I did.
Q: And where did you make them?

A: At like an Office Max or something.
Q: Okay. How many copies did you make?
A: Three sets.
Q: Okay.
A: One for the attorney and one for her and then we gave some to Cookie, the private investigator.
Q: Okay. One for the attorney, Mr. Neal?
A: Yes.
Q: And had she retained Mr. Neal at that point?
A: She had already. Actually, she ... I think she did on Monday. She went the very next day and met with him.
Q: Did you print the e-mails on the Sunday or the Monday; do you remember?
A: The Sunday.
Q: Okay. So, you went out, after you did it, you made three sets?
A: Uh-huh (affirmative response.)
Q: Had she already had an appointment with a lawyer on Monday?
A: I believe so, yeah.
Q: Okay. And when did you meet Ms. Cooke?
A: After meeting with Tom Neal.
Q: Did you meet with ...

A: Sometime that week.
Q: Okay, excuse me.
A: Yes. I did go with her to the majority of her appointments just because of distress and she wanted someone else to be there and someone to help listen and follow along. So, yeah, I went to her first appointment with Tom Neal and then also I went to her first appointment with Ms. Cooke.
Q: Okay. And how long were you at the appointment with Tom Neal?
A: A while. It was ...
Q: Was it two hours?
A: Yeah, I would say. I mean, it was definitely the whole discussion of everything that had happened and what she had found out so far.
Q: And were the e-mails, the copies delivered to Mr. Neal that day?
A: I believe so if I remember correctly, yes.
Q: Did you tell Mr. Neal in Gail Jennings presence where you had gotten the e-mails?
A: Yes.
Q: And did he read them?
A: Yes.
Q: Okay.

A: Some. You know, I mean, he wasn't reading all, no. He would read some.
Q: He read some of them?
A: Uh-huh (affirmative response.)
Q: But he knew the source of them?
A: Yes.
Q: And what else was discussed in that meeting?
A: To get Cookie and to see ... just to get more I guess proof that he was actually out and still seeing her. So, it was under his advice that we go and see her.
Q: So, after you got the e-mails, you printed them, you took the e-mails to Mr. Neal. Mr. Neal made the suggestion in your presence and Ms. Jennings presence to hire Cookie. He made the referral to Cookie?
A: He did.
Q: Ms. Cooke? And did you go with Ms. Jennings to Ms. Cooke?
A: Yes.
Q: All right. What went on at that meeting?
A: She again, you know, we had to hire her and pay her and sign forms and told her basically what we could with pictures and that sort of thing and of course, you just have to go over where

he works and where he lives and what he could be doing and all that sort of stuff. So, yeah.

Q: Where did you ... did you go see Ms. Cooke on the same day after you left Mr. Neal?

A: No. I believe ... well, I don't remember. It could have been the same day. If it was not the same day, it was in that same week. We made an appointment as soon as possible.

Q: Okay. And did you give ... and you said you gave Ms. Cooke the e-mails?

A: We did give her ones that we thought were the most proof.

Q: So, you and Ms. Jennings went through those and made those decisions or did Mr. Neal help you make them?

A: I don't really remember.

Q: Okay. Did Ms. Cooke read them in your presence?

A: A few, yes.

Q: Okay. And was there a discussion about trying to save money on the detective's fees by getting the e-mails, continuing to get the e-mails to know where Mr. Jennings was going to be?

A: What do you mean, to save money? I don't ...

Q: To save in the cost?
A: She has her fee. I mean, I don't know if there was any way to save any money with her. Of course, she is, you know, you use it up.
Q: Right.
A: If she has to work that many hours, then you use it up. It was actually under the advice of Tom Neal that we continue to try to help Cookie.
Q: Okay. So, Mr. Neal's advice was for you to continue to go into his e-mail?
A: Yes, if it was a help.
Q: Okay.
A: Uh-huh (affirmative response.)
Q: Okay. And so, therefore, based on Mr. Neal's advice, you went into the e-mail five or six additional times?
A: Yeah.
Q: And when you went in, you printed the e-mails?
A: No, I never printed again.
Q: You never printed again?
A: No.
Q: So, when you went in, you would do the password change like you did; is that correct?
A: Uh-huh (affirmative response.)

Q: And you would call Ms. Cooke and tell her where Mr. Jennings was going to be?
A: Uh-huh (affirmative response.)
Q: That's a, yes?
A: Yes.
Q: Okay.
A: I'm sorry.
Q: And did you report that back to Mr. Neal?
A: Yes.
Q: Okay. So, how many meetings did you attend with Mr. Neal?
A: Multiple. I couldn't say exactly how many. There might have been two or three more after that first initial.
Q: Did you tell Mr. Neal that you did not have permission to go into Mr. Jennings' e-mail?
A: Yes.
Q: Okay. When you called Ms. Cooke based on what you read when you went back into the ... into Mr. Jennings' e-mail account, is that the time she worked the case when you would call her and tell her ...
A: No. She was working it from the day that we left. I mean, she continued to work and to do, you know, to follow and to find out where he

was and ...
Q: Have you talked to Ms. Cooke since this case, since you were ... since this case was brought ...
A: No, huh-uh.
Q: ... in ... you have not?
A: No.
Q: Have you discussed this case with Ms. Jennings?
A: Yes.
Q: Have you discussed this case with Mr. Neal?
A: I don't believe so. I don't believe that I've met with Mr. Neal in quite some time. So, I know that Ms. Jennings does, but I haven't spoken with him.
Q: Okay. How many times total did you go to Mr. Neal's office to meet with him?
A: If I had to guess, four.
Q: Did you tell Mr. Neal that you were continuing to get information from the e-mail and pass that on ... Mr. Jennings e-mail and pass that on to Ms. Cooke?
A: Yes.
Q: Did he ever advise you or Ms. Jennings that it was inappropriate to do that?
A: He didn't really know. He, you know, he

thought that if it was going to help, then it was going to help. He didn't know the laws or, you know, if it was ... I don't know.

Q: Did you use a Yahoo ID of Cookie, C-O-O-K-I-E, when you went into his e-mail at any time?

A: No. What do you ... I never ... what do you mean?

Q: When you went into his e-mail, ...

A: Right.

Q: ... did you at any time use an ID as being Cookie, C-O-O-K-I-E?

A: No. I never ... to get into his e-mail, you're using his ID.

Q: Okay.

A: I never would have used someone else's ID to get into his e-mail. I mean, that's not possible.

Q: Do you know if ... did Ms. Cooke tell you whether or not she went into his e-mail account?

A: No, she did not.

Q: Now, in your Request to Admit, you said you did not ... let me give y'all a copy of that. Look at the last question on there, please. Mark that as Number One.

(Plaintiff's Exhibit Number One was marked for identification purposes.)

A: You mean Number Four here?

Q: Yes. The last question, it asked you, admit you continued monitoring Lee Jennings e-mail account by accessing the same after June 26th and provided information contained therein. And you answered, admitted that you opened and saved e-mails as aforestated after that date and provided information contained therein. So, you did save the e-mails?

A: That doesn't make sense, no. I can't save the e-mails. You either read them or you don't read them. The e-mails that I did read were all ones that he had sent out. So, it was never that I saved anything. Never did I even open anything that he had not opened and read himself. So, ...

Q: So, every time ... so, if there was a new e-mail from Michelle, you didn't open it?

A: No.

Q: Are you sure?

A: Yes.

Q: Okay. Well, why didn't you open it?

A: It wasn't ... there weren't ever any that I

needed to read I felt that wasn't ... hadn't already been sent. Most of the time, Mr. Jennings would correspond to her and then she would write back. But that's all in the same e-mail that he had sent out to her. I never had to read any that he hadn't read.

Q: Okay. Other than to give copies to and discuss the e-mails and the content with Mr. Neal, Ms. Jennings and Ms. Cooke, have you talked to anybody else about this ... about the content of those e-mails?

A: Immediate family, my husband and he also has a brother and a wife and I think we discussed it as a family.

Q: Okay. And you discussed the content of these messages?

A: Just, you know, in discussed, I guess kind of what was said and ...

Q: Did you print photographs of Michelle and give them to Ms. Cooke?

A: I might have, yes.

Q: Okay. And how did you ... you would open her e-mail and then open an attachment?

A: They were on the e-mails, yeah.

Q: Okay. So, you didn't download ... you didn't

save them, you just printed photographs?
A: Yeah, I didn't save them. I probably just printed them.
Q: And gave those to Ms. Cooke periodically?
A: I guess right after I saw it I must have ... it could have been given to Ms. Jennings and then to her, I don't ...
Q: How many times did you talk to Ms. Cooke; do you know?
A: Over the entire ... her investigation?
Q: Yes.
A: I don't remember an exact number, but it was a lot. I mean, a good bit. A lot of it was that Ms. Jennings didn't want to have to hear or discuss anything with her, so I was kind of like her contact in her findings.
Q: And when you met with her and Mr. Neal, you were not Mr. Neal's client? I mean, he did not represent you; is that correct?
A: No.
Q: Give us just a second here.
(Off the Record)
Q: I mean, you said you discussed this with immediate family. Who besides your husband; your parents?

A: My ... no. The brother in law and sister in law, so, Allen's brother.
Q: Okay. Who else?
A: Nobody, not that I can remember. Not the contents of the e-mail, you know. I mean, that I had done it, I probably did discuss that with my parents, yes.
Q: Do you expect that your e-mail account will remain private to you?
A: Yes.
Q: Okay. Did it ever cross your mind that you were doing something that was invading Mr. Jennings' privacy?
A: It did, but I felt like I was doing it in his wife's best interest and I mean, I don't see why she's not allowed to read the e-mails, you know. I mean, my husband can read my e-mails, that's not any kind of ...
Q: So, your husband has the password to get into your e-mails?
A: Yeah, sure.
Q: Ms. Jennings did not have her husbands; did she?
A: No.
Q: And you didn't have it; did you?

A: No.
Q: And did that put you on notice that Mr. Jennings did not want anybody in his e-mails?
A: Sure, I guess, yeah.
Q: But you made the decision regardless of that to go into them?
A: Yes.
Q: And you read them and you distributed them?
A: Yes, to her, I mean, ...
Q: Well, to her, Ms. Cooke, Mr. Neal; correct?
A: Yeah. I mean, I guess you could say that. It wasn't like me personally, only me taking the e-mails in there. I mean, they were given to her. We were giving them to the attorneys and to the private investigator.
Q: And you knew that the pleadings were held until they were filed in ... I think it was sometime in late June or early July and held until August; did you know that?
A: I don't understand that question, no.
Q: Did you know that? You didn't; okay. Well, let me ask you this. How many times did Mr. Neal tell you to continue to look at Mr. Jennings e-mail?
A: After he'd originally seen the original ones

...
Q: Yes.
A: ... and advised us to see Ms. Cooke, ...
Q: Right.
A: ... he said that ... I mean, at that point, he was like if you can continue to do it, then continue to do it and let's help and find out where he is and what he's doing.
Q: Okay.
A: It wasn't like you can get on now, you know.
Q: Was there any ... ever any discussion that you remember that it would save Ms. Jennings money with the private investigator if you could find out where Mr. Jennings was going to be?
A: Yes, possibly.
Q: Okay. Now, who's conversation was that?
A: That would be with Cookie in the office that original day because you're right, it does come down to you have to spend this amount of money and it counts down your money by the hours ...
Q: Right.
A: ... that are being spent.
Q: Right.
A: So, if we can do it quicker, sure, she wouldn't have to pay again. That lump sum of money that

she had was going to her whether she used the hours or not.

Q: Okay.

A: So, it was like can we get it done quick enough that we don't have to pay even more a whole another time to hire you again.

Q: Okay. So, after Mr. Neal referred you to Ms. Cooke and you and Ms. Jennings went to Ms. Cooke with the e-mails, Ms. Cooke told you that if you could give her information about where Mr. Jennings would be from his e-mails, that would reduce Ms. Jennings cost?

A: It wasn't even like a conversation that you had to have.

Q: Well, tell me about it.

A: Well, we can kind of figure out if we can find him quicker and do it faster, then less money is going to be spent. '

Q: Okay.

A: I don't know that she said, hey, yes, you do it quicker, it will cost less money. I don't remember her saying that. It's just we knew that if we could get it done quicker, then we're getting it done quicker.

Q: But Ms. Cooke knew that you were continuing to

go in ...
MR. POPWELL: Objection.
Q: Ms. Cooke was there when you told her you were going to continue to go into his e-mail?
A: I don't know that I ... I mean, I ... I'm sorry. Ask that question again. Was she there?
Q: Did you discuss that you were going to continue to go into his e-mail?
A: I would say, yes.
Q: Okay. And Ms. Cooke was present when that was said?
A: Yes.
Q: And in fact, you would call her periodically after that?
A: Yes.
Q: I don't have any other questions.
MR. KOON: No questions.
MR. WHITING: No questions.
MS. BROOME - EXAMINATION BY MR. POPWELL:
Q: Holly, Mr. Warner was asking you about the e-mail that you accessed, these were all e-mails that he had saved?
A: And it wasn't that ... I don't think there is like I told you. There's not the option to

save the e-mails. He just didn't erase them.
Q: Okay.
A: He just didn't erase them.
Q: Okay.
A: I mean, he had sent e-mails that were in his sent e-mail folder from years ago.
Q: Okay.
A: I mean, so, it wasn't that I don't think that he had saved them, you know.
Q: You never intercepted any of his e-mails as he was sending them ...
A: No.
Q: ... or as he was receiving them?
A: No. Like I said. I mean, I never opened anything that he had not read, I never opened anything ... and a lot of it was through the past, you know, I mean, it was ...
Q: I understand.
A: ... I mean, it was long conversations.
Q: And the way you found out about this was when Ms. Jennings called you and her son, Allen, over to her house and told you that Mr. Jennings had left?
A: Yeah.
Q: And ...

A: And really, the only detail about him leaving and the other woman was that he corresponded through e-mails.
Q: So, Mr. Jennings admitted to Ms. Jennings that he had been corresponding with this other woman via e-mail?
A: Yes.
Q: Okay. Otherwise, you wouldn't have known that there was e-mails?
A: Yeah, I know.
Q: Okay.
A: I would have never done it, yeah.
Q: Hadn't Ms. Jennings just gotten out of the hospital when Mr. Jennings dropped this on her?
A: Yes, and he was corresponding with her while she was in the hospital.
Q: Okay. So, Mr. Jennings was corresponding with this Michelle while Ms. Jennings was in the hospital?
A: Uh-huh (affirmative response.)
Q: What was she in the hospital for?
A: Pulmonary embolisms which is blood clots in her lungs and he had multiple ...
Q: Okay. And so, some of Mr. Jennings e-mails with this Michelle woman were ... took place

while Ms. Jennings was in the hospital?
A: Yes.
Q: Okay. What dog do you have in this fight, Holly? What did you gain by doing this?
A: Nothing. I mean, ...
Q: Did you gain any financial advantage whatsoever ...
A: No.
Q: ... by doing that?
A: No, I mean, a messed up family, that's about it.
Q: That's about it?
A: You know, I mean, a loss of some brothers and sisters and family, but ...
Q: Okay.
A: ... that wouldn't be a gain. No, I did not gain anything.
Q: Okay. That's all I have. Thank you.
MS. BROOME - RE-EXAMINATION BY MR. WARNER:
Q: Just a follow up question. You went through all of Mr. Jennings sent e-mails?
A: No. I didn't go through them.
Q: You testified that you saw they had gone back for years?
A: Uh-huh (affirmative response.) If you go to

his sent, there's, you know, different folders, your inbox, your outbox, your sent box, drafts, whatever. And in his sent box, I mean, it went up through the numbers of thousands and you could just scroll page by page and see dates after dates after dates of how many sent e-mails were in his sent box.

Q: Okay. You didn't open any of them or read them?

A: The ones that were to and from Michelle.

Q: Other than that?

A: No.

Q: Okay.

A: Maybe a few that he had written to Gail I remembered opening, but he stopped writing her, so, ...

Q: So, you also read e-mails he sent to his wife?

A: I think one and it was again, years ago.

Q: That's it.

MR. KOON: I don't have anything.

MR. WHITING: I don't have any.

MR. POPWELL: Nothing further from me.

(There being no further questions, the deposition concluded at 10:41 a.m.)

Transcript of the Testimony of
M. LEE JENNINGS

Date: March 13, 2008

CREEL COURT REPORTING, INC.
Condensed Transcript and Word Index

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	C/A #: 2007-CP-40-1125
M. Lee Jennings,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Gail M. Jennings, Holly Broome, Brenda Cooke, individually BJR International Detective Agency, Inc.,	)	
	)	
Defendants,	)	
	)	

DEPOSITION OF

M. LEE JENNINGS

****

Thursday, March 13, 2008
10:48 a.m. - 11:37 a.m.

The deposition of M. LEE JENNINGS, taken on behalf of the Defendants at the law offices of Warner Payne & Black, LLP, 1122 Lady Street, Suite 1200, Columbia, South Carolina, on the 13th day of March, 2008 before Linda Y. Love, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition.

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Also Present:
Holly E. Broome

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STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the South Carolina Rules of Civil Procedure.

It is stipulated by and between counsel and the witness that the reading and signing of the following deposition be, and the same are, hereby not waived. Signature sheet is attached at page 24.

M. LEE JENNINGS, having been duly sworn, deposes and testifies as follows:

MR. JENNINGS - EXAMINATION BY MR. POPWELL:

Q: State your full name, please, sir?

A: Melvin Leroy Lee Jennings.

Q: What is your date of birth, Mr. Jennings?

A: 11/1/54.

Q: Where do you live?

A: 1200 Woodrow Street, it's Columbia, 29205.

Q: Are you renting that house or is it an apartment or what is ...

A: Yes, it's a duplex.

Q: A duplex?

A: Renting, yeah.

Q: Where are you employed, Mr. Jennings?

A: I'm sorry?

Q: Where are you employed?

A: Bag Appraisals.

Q: Do you own that business?

A: I'm a partner.

Q: Are you still married, Mr. Jennings?

A: Yes.

Q: What is your wife's name?

A: Gail.

Q: Are y'all are currently undergoing domestic

litigation in the family court?
A: Correct.
Q: Okay. When did you separate?
A: June 21st, of 2006.
Q: And why did you separate?
A: We separated because frankly, I fell in love with somebody else.
Q: Okay. Who is the person you fell in love with?
A: Michelle Engwall.
Q: Spell her last name, please?
A: E-N-G-W-A-L-L.
Q: E-N-G?
A: W-A-L-L.
Q: W-A-L-L, Michelle?
A: Uh-huh (affirmative response.)
Q: Where does Michelle Engwall live?
A: I do not know her street address, but it's Stone Creek Court or Drive.
Q: Is Michelle Engwall married?
A: Yes.
Q: What is her husband's name?
A: Robert.
Q: Robert Engwall?
A: Yes.
Q: Do you know where he works?

A: I do not.
Q: Where does Michelle work?
A: She is unemployed.
Q: Where did you meet Michelle Engwall?
A: At the gym.
Q: At the gym?
A: Uh-huh (affirmative response.)
Q: When did you start seeing Michelle Engwall?
A: Define seeing?
Q: Did you ever have an affair with Michelle Engwall while you were still married to Gail Jennings?
A: Well, we would see each other at the gym and talk.
Q: That's not what I asked you. Did you ever have an affair with Michelle Engwall while you were still married to Gail Jennings? Did you ever have sexual relations with Michelle Engwall?
A: Yes.
Q: While you were married to Gail Jennings?
A: Yes.
Q: When was the first time you did that?
A: August of '06.
Q: Were you separated from Gail at that time?
A: Yes.

Q: Did you tell Gail when y'all separated that you had fallen in love with Michelle Engwall?
A: Yes.
Q: And did you tell Gail that you had been corresponding with Michelle Engwall via e-mail?
A: Yes, I did.
Q: Did you tell Gail Michelle's name at that time?
A: Just her first name.
Q: Just her first name, okay. Why didn't you tell Gail her last name?
A: Trying to protect Michelle.
Q: Okay. Trying to protect Michelle from what?
A: From this.
Q: Oh, okay. Michelle was married at the time too?
A: Yes.
Q: Is she separated from her husband now?
A: Yes.
Q: Okay. And Gail was upset when you told her about that you had fallen in love with Michelle?
A: Yes.
Q: Okay. Gail didn't do anything to bring about you falling in love with Michelle, that's just something that happened at the gym?

A: Well, our relationship was strained and had been for a number of years.
Q: I understand.
A: We had to each share in the blame.
Q: I understand. So, as far as Gail didn't do anything to foster or contribute in you falling in love with Michelle at the gym, that's just something that happened because you went to the gym?
A: I guess that's a fair assumption.
Q: Okay, all right. Tell me this. You filed this Complaint, tell me how you have been damaged by Holly getting on your Yahoo account and looking at the e-mails that you hadn't erased that you sent to Michelle? How have you been damaged by that?
A: Well, I had to hire an attorney to defend me. I've had to seek some therapy. It's the whole thing, it's just been a very trying time. So, I'm seeing a therapist once a week and that's all out of pocket now since I've been dropped from Gail's insurance.
Q: You were on Gail's group insurance?
A: Yeah.
Q: Okay.

A: And I ...
Q: Let me ask you this. Do you think you would have stayed on Gail's group insurance after you told her you had fallen in love with Michelle?
A: She had agreed to keep me on.
Q: Okay.
A: And of course, I'm having to miss work to do things like this today.
Q: Well, that's because you filed this lawsuit; right?
A: Correct.
Q: You're the one that filed this lawsuit; right?
A: That's correct.
Q: So, we're here because you filed this lawsuit?
A: Right.
Q: So, is Holly to blame for you having to be here because you filed this lawsuit?
A: That's my opinion, yes.
Q: Oh, okay. You had told Gail that you had fallen in love with Michelle and had been having a relationship with Michelle before Holly ever accessed your e-mail account; isn't that correct?
A: Yes.
Q: Okay. So, you had to defend yourself from what

because Holly accessed your e-mail account?
A: I had to defend myself against them using illegally gotten evidence I guess in trying to absolutely destroy me financially.
Q: Well, you had already admitted to Gail ...
A: So, ...
Q: ... that you were having this relationship with Michelle before that ever happened; right?
A: That's correct.
Q: But you wouldn't tell her her last name?
A: What good would that have served when you've already made the admission.
Q: Okay. Well, let me ask you this. In your domestic case, when Gail's attorney asked you if you had been having an extramarital affair with Michelle, you wouldn't have lied would you; you would have admitted it, right?
A: Would you repeat that, please.
Q: Okay. Have you been asked by Ms. Jennings attorney whether or not you had an extramarital affair with Michelle Engwall?
A: At the time of separation, we had not.
Q: Okay. But if put under oath, you wouldn't have lied about it; would you?
A: No, I wouldn't have lied about it. I would

have said that we had not had an extramarital affair at the time that we separated.

Q: Okay. So, y'all were just sending e-mails to each other?

A: Right.

Q: Okay. And so, you're telling me that you didn't ... you never had sexual relations with Michelle Engwall prior to your separation from Gail Jennings?

A: That is correct.

Q: Okay. So, how have you been damaged by Holly printing out these e-mails and giving them to Gail?

A: By the things I've already explained.

Q: Okay. Well, how many of those things wouldn't have happened anyway since you had already admitted the relationship with Michelle?

A: I have no way of answering that question.

Q: Well, I'm not ... I'm just interested. You admitted that you were having an extramarital or having a relationship ...

MR. WARNER: Excuse me a second. Let me take this call.

(A short break was taken 11:00 a.m. to 11:20 a.m.)

Q: All right. Mr. Jennings, when did you tell Ms.

Jennings that you had fallen in love with Michelle Engwall?
A: June 21st, 2006.
Q: And did you move out that day?
A: I did.
Q: When did you first seek legal representation for a divorce?
A: I don't remember the exact date, but it was after she served me with the papers.
Q: Okay. Where did you move to when you moved out on June the 21st?
A: Initially, I just went to different hotels for the first few weeks and then my son has a detached like a mother in law suite for a while while I was looking for an apartment.
Q: Okay. And what exactly did you say to Gail when you told her about you and Michelle?
A: Basically just that I had met someone and that I had feelings for her and then told her and she had told me. But I was also very clear that we had not been intimate and that we just had feelings for each other and that absolutely nothing had happened and that we should probably just take some time apart and think about it and see what we could do.

Q: Okay. When did you first start e-mailing Michelle Engwall?
A: Again, I don't know exactly, but we had been e-mailing out and back for months.
Q: Okay.
A: We were great friends, best friends.
Q: Okay. And you had been e-mailing Michelle for approximately how many months prior to June the 21st of 2006?
A: I would estimate five or six months.
Q: Okay. Where does Robert Engwall work?
A: I still don't work.
Q: And Michelle is separated from him right now?
A: Yes.
Q: Is she represented by counsel?
A: Not to my knowledge.
Q: Okay. Do you know if Mr. Engwall is represented by counsel?
A: I have no idea.
Q: Do you know if Ms. Michelle Engwall or Robert Engwall has initiated family court action?
A: Not to my knowledge.
Q: Okay. Who is Michelle's best friend other than you?
A: I have no idea.

Q: Michelle doesn't work?
A: No.
Q: Are you still seeing Michelle Engwall?
A: Occasionally.
Q: And you don't know the names of any of her friends?
A: She has a former housekeeper she had mentioned a few times, a lady named Marianna or something like that as a friend.
Q: Michelle doesn't work?
A: No, she still doesn't work.
Q: Was she working in June of 2006?
A: No.
Q: Does Michelle have any children?
A: Yes.
Q: How many?
A: One.
Q: Boy or girl?
A: Girl.
Q: How old is she?
A: Ten or eleven.
Q: Okay. I may have asked you this, Mr. Jennings, but I'm going to ask it again. Where does Michelle live?
A: I don't know her address. It's like Stone

Brook or Stone Creek Court Drive or something. I do not know.

Q: Does she live now where she lived in June of 2006?

A: I think so.

Q: Okay. Had you ever been over to her house prior to June of 2006?

A: Prior to June of 2006, no.

Q: What gym did y'all meet at?

A: New Life.

Q: New Life Fitness?

A: Right.

Q: Which one?

A: Two Notch Road.

Q: I asked you before, Mr. Jennings, let me ask it again and see if I can clarify this. You separated from Gail on June 21st of 2006?

A: Right.

Q: And you told Gail that you had been corresponding with another woman via e-mail and that you had fallen in love with this woman?

A: That's correct.

Q: Fair enough, okay. So, the only thing you didn't tell Gail on June 21st of 2006 was Michelle's last name?

A: Right. And I also did not tell her how we met.
Q: Okay. You didn't tell her how y'all met?
A: Right.
Q: Okay. Why is Michelle separated from Robert right now?
A: If I had to speculate, I would say it's irreconcilable differences.
Q: Okay. Were you the cause of Michelle's separation from her husband?
A: No.
Q: Was she separated from her husband when you had sex with her in August of 2006?
A: No.
Q: She was not?
A: No.
Q: Okay. So, you had sex with Michelle while she was still married and living with Robert Engwall?
A: Correct.
Q: Okay. Who has custody of her daughter?
A: She does.
Q: She does, sole custody or joint custody?
A: They haven't to my knowledge, I have no earthly idea.
Q: Okay.

A: Her daughter lives with her. I don't know about a custody issue.
Q: I understand, I understand. When did Michelle separate from Robert Engwall?
A: I don't know exactly. I think the first part of last year.
Q: Okay. Are you still romantically involved with Michelle Engwall?
A: I still care very deeply for her.
Q: When is the last time you saw her?
A: Maybe three weeks ago.
Q: Okay. Explain to me, Mr. Jennings, any damages you have suffered that you would not have suffered anyway given the fact that you separated from Gail Jennings on June 21st of 2006?
MR. WARNER: Object to the form of the question.
Q: You can answer it.
A: I didn't hear what that exchange there was. Did I miss something there, Jan?
Q: What damaged have you suffered that you would not have suffered regardless of whether or not Holly ...
A: Okay.
Q: ... looked at the e-mails that you sent to

Michelle and that were still on your computer?
A: How about the invasion of privacy.
Q: Okay. What damages have you suffered from that?
A: How about just the feeling of paranoia of every time you go to open your e-mail account, you don't know if someone has been in there reading your personal private thoughts. How about every time you're on the phone, you don't know if it's been wire tapped or something. If someone will break into your e-mail, why not wire tap your phone. How about every time you go to your mail box, you don't know if someone has gone through your mail and rifled through it. Gail has a habit of dropping mail that still comes to my former address into the mail box there. I don't know if she's gone through it when she comes by and drops that mail off.
Q: Okay. What money have you lost, that's what I'm asking you?
A: I don't know. We're ... this is all going to be determined here.
Q: Well, put a figure on it. What money have you lost that you wouldn't have lost anyway?
A: What money have I lost that I wouldn't have

lost anyway?
Q: Yes.
A: You're asking me to speculate about something and I have no idea of because we have to deal with what we have to deal with.
Q: You separated from Gail on June 21st, of 2006; right?
A: Yes.
Q: And you told her about Michelle on June the 21st, of 2006; right?
A: Right.
Q: So, how have you been damaged by Holly just confirming what you had already told Gail?
A: Because of the way that they went about it. The way that they illegally intercepted my e-mails. The way they invaded my privacy compelled me to hire an attorney and try to stop it. I'm glad you find some humor in that.
Q: Well, I just feel real sorry for you because somebody caught you getting in the short rows with somebody else.
MR. WARNER: I object to the comments.
Q: I don't have any more.
MR. KOON: Nothing.
MR. WHITING: Nothing.

MR. JENNINGS - EXAMINATION BY MR. WARNER:
Q: Mr. Jennings, let me ... you mentioned the feeling of paranoia. Have you been receiving any counseling?
A: Yes, I have.
Q: Who has been counseling you for these problems, these issues?
A: Dr. Leslie Burke.
Q: And how long, how much have you been paying to Dr. Burke?
A: It's $125 a session.
Q: And how long have you been seeing you?
A: Since last June.
Q: And how much of your seeing her is a result of this invasion of your privacy?
A: The vast majority of it.
Q: Did you have any kind of counseling ...
MR. KOON: Let me object to that question by the ending invasion of privacy.
MR. WARNER: That's fine.
Q: Did you have any issues of paranoia or worrying about people getting into your private information before Ms. Broome decided to get into your e-mail?
A: Absolutely none.

Q: And about how much have you spent on this counseling?
A: About $6,000 approximately I guess.
Q: You're aware that the content of what was gained through these e-mails has been filed in the public records down here in Richland County?
A: Yes.
Q: You're familiar with that and that those are ... that anybody can go in and see those records?
A: Yes.
Q: Did you know or give Holly Broome permission to go into your e-mail?
A: Absolutely not.
Q: Did you give her permission to scroll through your sent items to see to whom you had sent e-mails?
A: No.
Q: Did you give her permission to disclose these, your private business that was in your e-mail?
A: No.
Q: As I understand in the answers to your questions, you told your wife you were leaving, you were honest with her when you left because

you had feelings for someone else; is that correct?
A: That's right.
Q: And had your wife hired a detective without her lawyer and Ms. Broome getting involved and giving these e-mails to Ms. Cooke, she would have found you with Ms. ... with Michelle if she'd worked those days?
A: Perhaps.
Q: You wouldn't have changed your schedule; would you?
A: No.
Q: When you went into your e-mail, how many times did you try to get in your e-mail and you couldn't get into it because of the password?
A: I don't know a specific number, but there was a period of a couple of weeks.
Q: Did you write Yahoo about it?
A: I did.
Q: And did you get a response from them?
A: Yes.
Q: Let me see it, do you have a copy of it?
A: Here you go.
Q: Mark that as Number One.
(Plaintiff's Exhibit Number One was marked for

identification purposes.)
Q: What is the date you wrote Yahoo?
A: Well, January the 3rd, of 2007.
Q: When did you figure out that your e-mail had been tampered with?
A: Well, when I saw the e-mail copies that they had.
Q: What was this doctor's name you're seeing?
A: Burke.
Q: B-U-R?
A: K-E.
Q: Has your business suffered because of your counseling?
A: The business overall hasn't suffered. My personal performance has.
Q: Why has your personal performance suffered?
A: I'm just not able to do as many reports as I could previously take care of and do.
Q: And for how long had you and your wife had problems before you left?
A: Nine or ten years.
Q: That's all I have.
(Off the Record)
(There being no further questions, the deposition concluded at 11:37 a.m.)



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TO: Richard G. Whiting, ESQ.
P.O. Box 2628
Columbia, S.C. 29202

IN RE: M. Lee Jennings Vs. Gail Jennings, et al.

Case No. 2007-CP-40-1125

DATE: July 30th, 2008

****

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COUNTY OF RICHLAND	)	COURT
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	)	RECORD
GAIL JENNINGS, ET. AL.	)	2007-CP-40-1125
DEFENDANT.	)	

JUNE 25TH, 2008

RICHLAND, SOUTH CAROLINA

B-E-F-O-R-E:

HONORABLE CASEY L. MANNING, JUDGE;

A-P-P-E-A-R-A-N-C-E-S:

FOR THE PLAINTIFF:

DICK WHITLING, ESQ.

FOR THE DEFENDANT:

JAN L. WARNER, ESQ.

DAVID TRUITT, ESQ.

GARY W. POPWELL, JR.

I-N-D-E-X

	PG.
MOTION:	3
CERTIFICATE OF REPORTER:	43

E-X-H-I-B-I-T-S

REPORTER'S NOTE: THERE WERE NO EXHIBITS ENTERED.

(The following proceedings were held on June 25th, 2008.)

THE COURT: First of all, I hope we can a agree on what motions I'll hear today.

MR. WARNER: Judge, we've got and I've kind of layed them out a motion for summary judgment that's dated May the 2nd of '07, that's from the plaintiff and we've agreed even though it was made before the amended complaint, it applies to the amended complaint that was authorized on April -- June the 8th of '07.

THE COURT: Okay.

MR. WARNER: We have a motion the amend and to superseding motion to amend to add a party that are dated March 25th and March 18th, '08 and then all of the defendants have motions for summary judgment.

MR. WHITLING: And, Judge, all of those motions for summary judgment also run to the first amendment complaint, some of those were filed when there were -- complaint but we've agreed that all of those motions roll over to the amendment --

THE COURT: So everything is wrapped up in one ball here and now, is that fair enough?

MR. POPWELL: That's correct.

MR. WHITLING: That's correct, Your Honor.

THE COURT: All right. So who wants to go first?

MR. WARNER: Your Honor, I guess our position is that before we argue the motion for summary judgment there's a motion to amend and a party is added and there should be probable somebody else here when the motion for summary judgment is granted. I think if you grant the motion to amend then --

THE COURT: You're entitled to believe and think what you want now I'm going to hear all the motions.

MR. WARNER: Okay, that's fine.

THE COURT: And I'm not going to rule on them until I hear them all, I'm going to give everybody a chance to do the best job that they can, so you go back to your customer and say I did this, I did that. The judge he ruled against me or for but I think the fair thing to do is just hear it all and I'll sort through it.

MR. WARNER: That's fine, they can go first.

THE COURT: All right. Mr. Popwell, I think we stopped you about --

MR. POPWELL: Yes.

THE COURT: About a fourth of the way in your argument the last time.

MR. POPWELL: Right.

THE COURT: It appeared to me at that time that it would take too much time.

MR. POPWELL: That's right.

THE COURT: That's really why we're back here to afford everybody an opportunity to say what they want to say. All right, Mr. Popwell.

MR. POPWELL: Plaintiff in the case is Lee Jennings he's the husband of the defendant Gail Jennings defendant Holly Broom is the daughter-in-law of Gail Jennings and the step-daughter-in-law of the plaintiff Lee Jennings.

Gail Jennings and Lee Jennings separated on June 21st of '06 when Ms. Jennings told Gail he'd fallen in love with someone else who was also married. And that's -- let me just hand up the deposition of Mr. Jennings and Holly Broom, Your Honor. That's in Mr. Jennings deposition page four line 21 through page five line 20.

Mr. Jennings told Ms. Jennings he'd fallen in love with Michelle -- and they separated on June 21st that same day and he been corresponding with Michelle via e-mail but he wouldn't tell her Michelle's last name, that's in Ms. Jennings deposition page seven lines one through 11.

Now, as I said they separated the same day and, let's see, Gail went over to Holly and her son Allen's house, Holly's husband on June the 20th. That Saturday June 24th she's very upset and said she told them that she found a flower card in Mr. Jennings car that wasn't from her and that's when he told her about Michelle and they'd

e-mailing. She stated over there all day crying. That's in Holly Broom's deposition page 12 lines one through six.

The next day Holly Broom went on Mr. Jennings's Yahoo e-mail and changed the pass word and printed out the e-mails that Mr. Jennings had opened but saved.

THE COURT: This is a computer in the family home?

MR. POPWELL: It's not, a computer at his work I think.

THE COURT: This is his wife going to his job?

MR. POPWELL: No, it's Holly Broom did that his step-daughter-in-law.

THE COURT: Okay.

MR. POPWELL: And she printed out the e-mails that had been sent back and forth between Michelle and Mr. Jennings that's been saved.

THE COURT: All right. Let me make sure I'm straight, this is like the daughter going to the daddy's?

MR. POPWELL: The daughter-in-law going to the step-father-in-law's e-mail trying to find out who the girlfriend was.

THE COURT: All right.

MR. POPWELL: And she printed out several of the e-mails between Mr. Jennings and Michelle and she went on there several more times and printed out more e-mails. And Holly and Ms. Jennings -- that's in her deposition page 13

lines 18 through page 14 lines 15. Holly and Ms. Jennings made three copies of the e-mails between Mr. Jennings and the woman, gave one copy to Tom Neal gave one copy to Brenda Cook the PI Mr. Koon's client and Ms. Jennings kept a copy.

The family court litigation initiated back on June -- July of '06 this suit followed in February of '07.

THE COURT: So the family court matter is still pending?

MR. POPWELL: It's still pending.

THE COURT: All right.

MR. POPWELL: The plaintiff alleged four causes of action, first in violation of South Carolina Code 17-30-10 which is the state version of 18-USC-22-5-10 and the second 18-USC-27-01.

The second is cause of action invasion of privacy publicizing private affairs.

Third cause of action invasion of privacy wrongful intrusion.

And the fourth cause of action is conspiracy alleging that they conspired, the defendants, conspired by intercepting and deaminating the plaintiff's e-mails.

I'm going to argue the summary judgment. And also they've alleged in the first cause of action violation 16-16-10, the computer hacking statute in South Carolina.

MR. WARNER: Your Honor, we concede that 16-10

does not apply unless there's been a conviction.

THE COURT: Yeah, that was really the first issue you raised the last time.

MR. POPWELL: That's right.

THE COURT: The one I had to stop and okay --

MR. WARNER: We concede 16-16-10 there is no such a --

MR. POPWELL: All right, sir, I'll move straight on the second cause of action, invasion of privacy -- publicizing private affairs. The plaintiff alleges that printed e-mails was put in the public record for Richland County, paragraph nine of the amended complaint. I've looked through the family court record there were no e-mails in there, if Mr. Warner can show me where the e-mails were filed and placed in the public record of family court. I think it would be his burden to show that was actually made part of he public record but because they alleged that this mounts to publicizing private affairs, only evidence in the record is that Ms. Broom printed the e-mailed and gave a copy to Ms. Jennings, Ms. Cook and Ms. Jennings give a copy to her lawyer. Under South Carolina law the cause of action for publicizing one's private affairs an essential element of that is publicity not publication but publicity. I've handed a copy of -- Croft V. Gatty and I've highlighted the relevant parts.

THE COURT: Billy, I thought they were going to provide me with a deputy with a gun this afternoon.

BAILIFF: If you need one we'll get one.

THE COURT: I don't need one.

BAILIFF: Just let me many know, I'll get you one.

THE COURT: Thank you, sir.

All right, Mr. Popwell, this is --

MR. POPWELL: This is -- Croft V. Gatty, Your Honor, and I've highlighted the relevant portions on page 124 and top of 125 publicity is an essential element of the cause of action. It has to be a public disclosure of cause of action.

THE COURT: Who all participated -- Fishburn at least, you know what --

MR. POPWELL: Right.

THE COURT: All right. Go ahead, Mr. Popwell, communications of judicial proceeding are absolute, are -- go ahead, that's where you want to look at?

MR. POPWELL: No, sir. But I'm looking at -- on this particular point about half way down communication to a single individual with a small group of people as of breach of contract, trust or other confidential relationship will not get rise to liability. There's no record that there been any publicity concern in this. As I stated I haven't seen any clocked copies of these e-mails. I've never seen

the e-mail, I don't want to see them. But they're not in family court record unless Mr. Warner can show me otherwise. So they failed on the, on the, publicity aspect which is that's the cause of action for publication, public discloser of private facts.

We move onto to the next cause of action, which is wrongful intrusion and for wrongful intrusion, I also site -- Croft V. Gatty, Your Honor, it says when a plaintiff basis an action for invasion of privacy on intrusion alone brining forth no evidence of public disclosure it is incumbent upon him to show blatant and shocking and disregards his rights and serious mental or physical injury or humiliation to himself resulting there from.

Now, in Mets the associated press, I'll hand you up a copy of that, Your Honor. Judge Shaw found on that point, Your Honor, on page 338 really it starts at the bottom of 337, it's well settled right protects on the ordinary sensibility of individual no supper sensitive. The right of privacy relevant to the customs of the time and place either determined by the norm of the ordinary manner in protected by the law this right must be -- the ordinary sense of abilities and cannot extend to supper sensible -- in order the constitute invasion and right of privacy act be of such a nature of as a reasonable man can see might probably would cause mental distress and injury to anyone

who posses ordinary -- and intelligence in like circumstance like the plaintiff.

And what we have here is, is, a man -- an ordinary man in these circumstances given the fact that he's told his wife that he's in love with somebody else and they've been e-mailing each other but he won't tell her his last name. Is it, is it, to be some what expected by an ordinary man given those circumstances somebody's going to try to find out. And I would, I would, it to if somebody tells his wife I'm leaving you for another woman, I'm in love with her and we've been writing love letters to each other. And those love letters are in my sock drawer drew but don't you look in there. Well, nobody better look in the it's a surprise. Well, he's right it's probably is a surprise. But what would a normal man expect giving these circumstances. And it does arrive to the matter of law to some extent under -- as to whether or not this is, whether or not, an ordinary man would feel that he had suffered a serious mental or physical injure given these facts and circumstances. I would say as a matter of law no ordinary man would suffer serious mental or physial injury. He had already told Ms. Jennings about the e-mails, they were going to come out anyway in the family court action, initiated that month or the month after. An ordinary man in these circumstances would expect at the very least not to be seriously shocked

and outraged to cause serious mental injure when his wife or another family member in this case a daughter-in-law went snooping and found out who his girlfriend was.

Under the fourth cause of action alleges conspiracy to injury the plaintiff by intercepting his e-mails and the contents of the e-mails Ms. Broom never intercepted any e-mails, Mr. Whiting's going to show that under the state statute and the federal statue. The federal statute -- and she stated she never intercepted any in her deposition in page 34 lines 10 through 17. The federal statue doesn't apply neither one of them has been cited to applies to these facts. I'm going to sit down and let Mr. Whitling tell you why it doesn't apply.

MR. WHITLING: Please the Court, Your Honor.

THE COURT: Yes, sir.

MR. WHITLING: Your Honor, Dick Whitling for Ms. Jennings. But as Mr. Popwell has set out we'll focus on the electronic communication privacy act. And if I may I'll refer to title one of the act as the old wiretap statue in title two of the act as the stored communication act.

Our state has adopted with very few acceptation title one wiretap state. Our state statue has a little bit different calculation, if the Court would to determine damages to be awarded to how to calculate those damages and our statue of limitation is longer than the federal statue

but other than those changes the statues are pretty much the same.

And the cause of action brought by Mr. Jennings includes a violation of title one under title one. And I have tagged behind my memorandum of law both copies of the federal tile one and the reference to the state statue. Under both the state statue and the wiretap statue you are only in violation of those statues if, in fact, you have intercepted a communication. And, of course, that's not what happened here as counsel has already pointed out and as Ms. Boom has testified in her deposition which, Your Honor, has. What this young lady did upon learning that her mother-in-law had been told by her husband that he loved someone else is parentally this your lady went to her step-father-in-law's computer and looked at e-mails that had already been sent by him and kept by him or reserved by him and kept by him. And she Holly went ahead and downloaded some of those e-mails and gave them to my client, that's the facts and I think we can all stipulate to that.

In order for there to be liability under title one there must be an intercept. And the definition of intercept means it has to be done at the time of transmission. It's virtually impossible to intercept an e-mail. I think some people have tried to figure out how to do it and some are successful but that's not what happened here. No one has

been able to show that any e-mails, in fact, was diverted, forward or recorded during the transmission. So that means and this is very clear and I have the memorandum that sets out numerous cases that intercept must be simultaneously transmission, if not you fail under title one. Therefor you fail under our state wiretap statue. Under title two the stored wire communication act what it says is that if you asceses a e-mail while it is in transmission and this has been explained to me and I hope I get it right because I'm not a computer guy. E-mails are split up into different bundles and along the internet highway they're put back together, that can happen two or three or four times during the transmission of the e-mail, but they come together at these intermedia switching stations, my words. And if you were to get an e-mail while it was in temporary storage then you would be in violation of the stored wired communication act. Another way that you can be in violation of the stored wired communication act is that if the internet service provider keeps a copy of this e-mail for backup purposes and you access that server that the service provider is keeping for backup then potentially then you could be in violation of the act as well.

Now, Mr. Warner in his memorandum has one case that says otherwise, that says if you go in someone -- I think that case is -- it says if you go into someone Yahoo

account and that person has saved their e-mail you are potentially in violation of the act, that is one district court case that has said that. I have not been able to find any other cases that did but there are other cases that say that once the transmission is completed and once the recipient has received the e-mail then unless you go into the service provider to get the backup copy you have also not violated the act.

The other important part about title two, the stored wired communication act is that the only person you can reach by bringing an action under that act is the person what actually went into the computer. The liability does not extend to anyone that you gave the e-mail to and title two also does not have a prohibition about shearing that information. So in my case, if Ms. Jennings or the neighbor across the street or whomever received a copy of an e-mail that had been secured and looked at and you realized it that is not a violation of the act, the act says that the person who has unlawfully accessed the computer and gotten these e-mails that are in temporary storage for a backup is the person you go after. So even if this court were to agree with the plaintiff's position as to what transpired there's no liability, there's no liability for Ms. Jennings. And there is also no prohibition in title two about sharing this information under title one if you intercept a communication

and that generally we're talking about telephones and oral conversations there is a prohibition but in title two no such prohibition applies so we're out there.

Now, counsel has already talked about hacking which -- agreed that that is not applicable under the statute as well.

What we have, Judge, and I setout in my memorandum is quite frankly clearly neither one of these statues apply. I haven't argued the invasion of privacy but if the court does a technical reading as I know you will of the statue, the clear language of the statue requires interception which did not take place and the clear language of the statute only allows that you go forward in a distorted wire communication act if you invade the backup protection which did not happen. I attached all the cases that I've referenced to in my memorandum, I've attached the statutes as well.

THE COURT: All right. Thank you, Mr. Whitling.

Mr. Koon.

MR. TRUITT: Thank you, Your Honor. Mr. Truitt here on behalf of Mr. Koon. I do apologize for being late.

Your Honor, I would agree with Mr. Whiting's interpretation of the statue, in fact, our client Ms. Cook the most she did was read e-mails that were given to her. She did not intercept them, she did not download them, she

did not print them, she did not go into their office to get them, they were given to her, she read a couple of them, didn't use them in anyway shape or form. So I think under any scenario she's not liable under either statue because at most she just somebody handed her an e-mail, she read it, didn't use it for investigation, she's a private investigator which is her firm is being sued as well. And she didn't intercept them. You know, I think those facts are clear and I think they're uncontradicted on the record and so I think based on the facts in the record and based on law and the way the statue reads our client should be out on summary judgment.

THE COURT: All right. You lost weight, didn't you?

MR. TRUITT: I'm trying to, the treadmill helps, it helps.

THE COURT: Anything further gentlemen before, Mr. Warner, responds?

You want, Mr. Popwell?

MR. POPWELL: No, sir, I'm done.

THE COURT: You want to respond before you make your motions, Mr. Warner?

MR. WARNER: Yes, sir, that will be fine.

THE COURT: Okay.

MR. WARNER: May it please the Court. The facts

that you been given are wrong.

THE COURT: That's a good way to start, go ahead, I'm not going stop you.

MR. WARNER: The facts are not as were stated to you Mr. and Ms. Jennings did separate. Ms. Jennings son by prior marriage is a Mr. Broom is married to Holly Broom. Ms. Jennings son by her prior marriage and Mr. Jennings used to be in business together. They had a parting of the ways and Ms. Jennings son by her prior marriage competes with Mr. Jennings in the appraisal business, okay.

THE COURT: Okay.

MR. WARNER: When these parties separated Mr. Jennings told his wife that he loved someone else and he left.

Ms. Jennings went to her son's house where her daughter-in-law and son lived. Her daughter-in-law didn't go to Mr. Jennings's computer at all. She hacked into his Yahoo account. She testified how she did it in her deposition, she went in, she made up a new password and she went into his e-mails that were stored on the Yahoo's computers. There's not stored on Mr. Jennings computer, they are stored at Yahoo. So if you have an e-mail account and you save your messages when you log into one of these free Hotmail, Gmail those message are setting out there on the server of the provider. So what Ms. Holly Broom did on

her computer is without authorization and he's testified to that in deposition went into Mr. Jennings e-mail, not once not twice but several times. She not only downloaded e-mails but downloaded photographs and testified she looked at some messages because she said he had e-mails on a computer that went back a couple of years, is what she testified in her deposition. So she looked at his private information. In the amended complaint we allege the violation of the stored communication act and there is a private cause of action that we'll get to in a minute. They took these e-mails Ms. Broom and Ms. Jennings to Mr. Neal who's a lawyer.

THE COURT: Allen Neal?

MR. WARNER: Tom Neal.

MR. WHITLING: Tom.

MR. WARNER: Tom Neal is a lawyer who put them in touch with Ms. Cook the private investigator. In our memorandum of May of '08 you will see Exhibit Number 1 is Ms. Cook's intact notes that show that there were downloaded pictures from e-mails. And on page two of that will show that another contact was Holly Broom. At that point in time when these people started getting into the matrimonial case Mr. Jennings didn't know that Holly Broom had gone into his e-mail address, didn't know that she had downloaded these things and what Ms. Cook did was took this information which

we claimed was illegally obtained for Mr. Popwell to say that Mr. Jennings should not be oversensitive about someone to go into his he e-mail address -- e-mail account which was also his business account where he kept names of customers that they had accessed to this account, they brought the matrimonial action and when we determined what had happened and began taking depositions, that's when we brought the action, we amended the complaint in June of 2008 and since we've taken the deposition of Ms. Holly Broom we've again moved to amend the complaint, Your Honor, and that amendment is dated -- we filed one April, excuse me, one in March and one of April of this year. Now, the first amended complaint is a violation of the stored communication act, the federal communications act. And it has four causes of action. The motion to amend and the superseding motion to amend alleging more and this is what is not before the court today that I think is of concern to us and why the amendment should be granted and then these motions should be taken up.

During the course of the discovery of Ms. Broom she admits she used her computer to go into and in her request to admit to go into Mr. Jennings's private e-mail account. She also testified that she gave everybody copies and she's testified that when she went to Mr. Neal with Ms. Jennings Mr. Neal suggested that she continue to go into Mr. Jennings private e-mail accounts as long as she could.

And on page 22 of her deposition she testified, Okay, so Mr. Neal's advice was for you to continue to go into his e-mail and.

Answer, Yes, if it was of help.

Question, Okay.

Answer, Uh-huh.

So based on Mr. Neal's advice you went into the e-mail five or six additional times?

Yeah. So Ms. Broom in her house continued to go into Mr. Jennings e-mail account. The amendment complaint alleges the one that we want before the court, we filed one to amend and supplement on March the 25th and then the superseding one after her deposition on April 18th, it alleges that this was a private e-mail account, he never gave her permission to go into it, she went into it multiple times and used the computer 309 Venison which is her address and possibly other computers that after reading it she took it down to gain the collaterale advantage in another case. In addition, we allege the paragraph ten of the amendment complaint that we want before this court.

THE COURT: That's technically not before me.

MR. WARNER: That's not before the court but this is the reason that we and --

THE COURT: I understand that.

MR. WARNER: Obviously amendments are liberally

granted based upon our --

THE COURT: One time I think they were liberally granted.

MR. WARNER: Yes, sir.

THE COURT: Right after that you almost got to show special compelling reason but go ahead, I'm not going to stop you.

MR. WARNER: Well, based on her testimony she had access to all of his private and proprietary business e-mails for years and had the opportunity to provide the same to her husband, defendant Broom Juror who is a competitor of the plaintiff in the real estate business, that's what we allege. Further, that she met with Mr. Neal in a non-privileged setting with Ms. Jennings what encouraged continue to illegally access these records. There's no question that these records were illegally accessed.

We allege further that Broom shared trade secrets, customer list and other information retrieved from his e-mail with her husband to help him gain a competitive advantage and caused the deterioration of plaintiff's business which is a special damage. We allege that these acts were accomplished from and including June 21st, '06 to some unknown date because we don't know when they stopped.

Our first cause of action is under the stored communications act and again title 16 we agree is out of the picture.

We allege that there is negligence pre se, we allege in here that Mr. Jennings whose deposition has been taken suffers from and paranoia for which he's receiving treatment and will continue to receive treatment, that his business has deteriorated based on what we believe is the sharing of proprietary information.

We've then alleged a second cause of action for invasion of privacy, a third for a wrongful intrusion, a fourth for conspiracy and a fifth for violation of South Carolina trade secrets act, the position being that this customer list were trade secrets and they should not have been taken out of his computer or they should not have had access to it.

Now, your Honor, we believe that the amendment --

THE COURT: Let stop you. Let me help everybody out. The only thing I'm interested in hearing today is what was before me the last time I was in court and no new matters that people don't have notice about. So be it my understanding and y'all help me if I'm wrong, what I was here to hear two months ago is what I'm here to hear today. Unless somebody has been provided with sufficient notice and an opportunity to respond I don't intend to hear anything

new. I'm here on these same matters that brought me here the first time and that's what I intend to here today first and I'm allowing you to put this on the record but I haven't gotten to that point yet and I'm not going to get to that point until I resolve the issues that were first raised before me the last time I was here. I'm not cutting you off.

MR. WARNER: I understand.

THE COURT: You understand that?

MR. WARNER: I but I want to make it clear to the court that we were here last time and our motion to amend had been filed and served, it's been out there, it was ready to be argued at the last time we were here.

THE COURT: I don't know whether it was or not.

MR. WARNER: Well --

THE COURT: I'm sure they can speak for themselves.

MR. WARNER: It was.

THE COURT: Mr. Warner, that's why I'm going to let you all put everyone on the record.

MR. WARNER: I understand.

THE COURT: And we'll sort through it.

MR. WARNER: Now, judge regarding the causes of action, I've handed the court today and we did a memorandum that's previously we Incorporated in here that cause or

excuse me, that memorandum is dated I think May of this area.

THE COURT: All right.

MR. WARNER: And that's the stuff that has a black clip on it, Your Honor. And there are three things that are --

THE COURT: Is this it?

MR. WARNER: Well, no that's his.

THE COURT: Have you seen this.

MR. WARNER: I handed you up a small one, it is a called memorandum support of --

THE COURT: This (indicating).

MR. WARNER: And in opposition to defendant's motions for summary judgment.

THE COURT: All right.

MR. WARNER: Now, in that there are three different parts one is the memorandum behind that are relevant copies, relevant portions of 18-USC-27-01 and specifically 27-02 and 27-07 which is the civil cause of action that arises under the federal stored communication acts. What we have here is a violation of the stored communications act the federal communication act.

Immediately behind that, Your Honor, in the third item back is the case of Fisher versus Mount Olive Lutheran Church. Now, Judge, the case of Fisher versus Mount Olive

Lutheran Church is out of the Wisconsin United states District Court decide in 2002. And what is compelling about this case, Your Honor, is set forth in our memorandum is as following, in the case a church secretary overheard a personal call between the church youth minister and another man concerning homosexual sex while she was trying to make an outgoing call on --

THE COURT: These are Lutheran?

MR. WARNER: Sir?

THE COURT: There were Lutheran?

MR. WARNER: These were Lutheran.

THE COURT: All right.

MR. WARNER: Yes, sir. She picked it up and she heard this going on. The church suspended the youth minister and hired a computer expert to access the church's computer for any evidence suggesting that the youth minister to have improper sexual communications with minors. The expert was able to log onto the youth minister's personal Hotmail account, which is no different that the personal Yahoo account, received e-mails from the minister's account on Hotmail's computer just like Ms. Broom did on Yahoo's computer when he guessed the youth minister's password whether as Ms. Broom said she didn't know the password, got a new one and went into it that way. Subsequently, the youth minister sued the church under both the wiretap act

for ease dropping on his personal phone call and the stored communications act for accessing his stored e-mail. Relying on the Frasier case that's cited in there, the church argued that it could not have violated the stored communications act because the e-mail messages it retrieved has already been read by the youth minister, just like they say here and this is at page seven of our memorandum. Just like they're arguing here that, okay he had read them, it's okay for us to get them and thus cannot be an electronic storage. The court rejected this arrangement because the youth minister's e-mail unlike the e-mails in the Fraiser's case were stored on Hotmail's computer just like these were stored on Yahoo's computer and thus was stored by an electronic communications service. So what Ms. Broom did in this case before the court is precisely what the computer expert did in the Lutheran case.

Now, Your Honor, if we look at 27-01-C2, 27-01-C2 which is Title 18 of the Federal Code, it allows a person to authorize third parties to access electronic communications if the person is a user of the service or if the communications is of or intended for that user. The court defined the word user and says it is one who uses the service and is duly authorized to do so. Therefore, under the cases Mr. Jennings was the only person who could have authorized the use of this and the access to it and he did

not. And in --

THE COURT: That was the Lutheran youth minister who's interested in other men?

MR. WARNER: Yes, sir.

THE COURT: Okay.

MR. WARNER: And this is a wife what was interested in seeing who his husband is, is, seeing --

THE COURT: What her husband.

MR. WARNER: Who her husband is seeing, yes, sir. That was a little confusing there.

THE COURT: That was the part of you that slipped from the Lutheran.

MR. WARNER: Now, Your Honor, in the case and I think the Fisher case is dispositive of many of the issues here because what they've saying is that because there is no -- there can't be an invasion of privacy, there can't be any of those things because of the fact that there was no real violation. And if there was a violation anybody who used this illegally obtained evidence gets a free ride. So, in other words, if I take a person with no assets and send them down to the computer and let that person get into and take illegally e-mail that belong to another person and hands it off to other people. The people who use it under their theory in this case have no responsibility, have no responsibility whatsoever for the damage that has been done.

And in the Mount Olive case, Your Honor, at page 924 where it defines an electronic storage and talks about exactly what we're dealing with here. But more importantly, Your Honor, this case and is pages 927 specifically 927 to 928 of the Mount Olive Lutheran case, basically says this, it lighten a person's private e-mail being stored on a facilities computer, like Mr. Jennings's e-mail was stored on Yahoo's computer to medical records. And on page 927 under Section E of the Fisher versus Mount Olive, it talks about envision of privacy and intrusion on the privacy of others.

On 927 it states in contrast to telephone conversation plaintiff's e-mail account is -- to the medical records filed and it cites another case.

And then on 927 the court goes further because it was disputed whether accessing the plaintiff's e-mail account is highly offensive to a reasonable person and whether plaintiff's e-mail account is a place that a reasonable person would consider private. I deny the defendant's motion for summary judgment on that claim.

Mr. Popwell has basically said here and if you take these two arguments together Mr. Whitling and Mr. Popwell they basically say, okay, she went in, she illegally did it, she handed it off nobody else has to take responsibility even though a lawyer according to our amended

complaint we'll argue it whenever you want to argue it.

THE COURT: Okay.

MR. WARNER: Told them to do it. The fact of the matter is that we have an invasion, that we have wrongful intrusion, that in the amended complaint that's before the court we have allegations of physical and economic damages, not just for going into the -- not going into it but real economic special -- we have conspiracy and what they have here is they say all these causes of action must go to the jury because they are questions of fact. Our motion for summary judgment, our motion for summary judgment, is based upon the -- and, Your Honor, that is baited and I will argue that now, if that's satisfactory.

THE COURT: That's fine with me, is that all right with you gentlemen?

MR. WHITLING: Yes, sir.

MR. POPWELL: That's fine, Your Honor.

MR. WARNER: Your Honor, our motion for summary judgment --

THE COURT: Wait a minute, let me take about five minutes, y'all can go to the restroom. I'm going to go get something to drink.

MR. WARNER: Thank you.

(Whereupon, a short recess was held.)

THE COURT: Now, Mr. Warner, you want to begin to make your arguments on your summary judgment.

MR. WARNER: Yes, Your Honor. And we've, we've, agreed even though this motion for summary judgment is dated the second of May of '07 came before the --

THE COURT: The defendant's motion.

MR. WARNER: Well, it came before the amended complaint.

THE COURT: Okay.

MR. WARNER: It came about a month before, we've agreed that this will apply to that amendment complaint.

THE COURT: Okay.

MR. WARNER: Again, Your Honor, I just want to make sure I reserve all my rights regarding my motion --

THE COURT: Oh, yeah, yeah.

MR. WARNER: Okay.

THE COURT: You know, the only thing I can do as a judge is let everybody do the best job that they can.

MR. WARNER: All right.

THE COURT: Put everything on the record, y'all know how it works. The only time I feel bad is not when I rule is when I deprive somebody an opportunity to represent their client. I never want to do that.

MR. WARNER: I appreciate that.

THE COURT: All right.

MR. WARNER: I appreciate that, Your Honor. May it please the Court. Our motion for summary judgment is there is absolutely no genuine issue of fact but that Holly Broom went into Mr. Jennings private e-mail using her computer without authorization to violate the stored communications act. We think we're entitled to a judgment as a matter of law based upon the summons and complaint of the pleadings and the admission. This is before the depositions were taken which were, Your Honor, I would like to incorporate them and sorry if I leave anything out. I would ask, Your Honor, could heard the other issues we raised because the deposition excepts are included in other portions of the record.

THE COURT: All right.

MR. WARNER: May it Please Court. In request to admit that are attached as D tab 3B, excuse me, to our motion for summary judgment dated May 2nd, 2007 here are the questions.

THE COURT: Go ahead. I'll let you talk I looked it earlier before y'all -- plaintiff's motion -- I'm trying to locate it, Mr. Warner, so I can follow along.

MR. WARNER: Your Honor, it should be filed I'm guessing the second of May.

THE COURT: All right. Just give he a second.

MR. WARNER: Yes, sir.

THE COURT: Notice of motion a motion for summary judgment, this is the one you're referring to May second?

MR. WARNER: Yes, sir, Your Honor.

THE COURT: Yes, sir, Mr. Warner, go ahead.

MR. WARNER: Your Honor, if we look at what should be 3B.

THE COURT: Exhibit 3B?

MR. WARNER: Yes, Your Honor.

THE COURT: I have exhibit 1.

MR. WARNER: Well, let's start with 3A if we could, Your Honor, and they should have been tabbed but I don't know, they have cover sheets on them.

THE COURT: Let me make sure, this is the one you're referring to right here?

MR. WARNER: May I approach?

THE COURT: Yes, sir, is this the one?

MR. WARNER: Yes, sir, that's it, Your Honor.

THE COURT: All right.

MR. WARNER: 3A, Your Honor. 3A was as to Brenda Cook signed by Mr. Koon question, Admitting you received copies of e-mails taken from plaintiff's Yahoo e-mail account on or about June 26?

Answer defendant Cook admits only that she's been provided with copies of e-mails sent by plaintiff M. Lee Jennings to his paramour this defendant is without

information as to the accounts, dates or additional information and therefor denies the remaining request.

THE COURT: All right, sir.

MR. WARNER: Admit that you had communications with Holly Broom provided to you with information contained in e-mails from plaintiff's e-mail account after June 26 of '06. The response denied except communications were involved the original of the e-mails are unknown to this plaintiff any dates are unknown to this defendant, excuse me, to the defendant.

Three admit you used information contained in the e-mails to conduct surveillance of the plaintiff, denied.

Then 3B, Your Honor, is Holly Broom's request to admit, number one, admit that you accessed and retrieved e-mails from Lee Jennings Yahoo e-mail account after June 24, 2006.

Answer, defendant -- admits that she opened, saved e-mails from Lee Jennings's Yahoo e-mail account after June 21st, 2006 after her mother-in-law informed her Defendant Jennings informed her that defendant had admitted to her that he had been having -- had been corresponding with a paramour via e-mail.

Two, admit you provided two copies of those e-mails to your mother-in-law, Gail Jennings, on or about June 25th, 2006, response admitted. Admit that you

provided information contained in those e-mails to Brenda Cook and Gail Jennings after June 20th 2000 -- 26, '06 and admitted.

Four admit that you continued monitoring Lee Jennings's e-mail account by accessing the same after June 26 and provided information contained therein. Response admitted that she opened and saved e-mails as forsaid after the date and provided information contained therein. There is no question, Your Honor, that based upon these admission request, request to admit, that there is a violation of the stored communications act. Based there on, all the other causes of action under the -- I'll just call it the Lutheran case the Mount Olive Lutheran, Fisher versus Mount Olive, all of those causes of action are in tack as a matter of law and whether or not this is conspiracy, invasion of privacy, whether it rises to the level that is necessary for an invasion of privacy is a factual question, especially light of the fact, Your Honor, of the motion to amend which includes matters that occurred after the last amendment in June of 2008. We think as a matter of law that the summary judgment should be granted with regard to all causes of action contained in the first amended complaint again subject to our motion on the second --

THE COURT: All right. Responses?

MR. WHITLING: Judge, Mr. Warner and I had an

opportunity to talk while we were on break a few moments ago and I think we do have an agreement that at this point there is no evidence of an intercept and that would take care of what I will refer to as the wiretap statue title one of the electronic communication privacy act. I believe that that has been resolved that there is not a intercept.

THE COURT: Okay.

MR. WHITLING: I think on the stored wired communication for the court to as a matter of law grant summary judgment the court will have to find that Mr. Warner's one case the Mount Olive case is now controlling. It is our position, of course, that the clear reading of the statue says otherwise.

THE COURT: Well, of course, the people in this state never thought very much about the federal government here of west of the Mississippi but like I said I'm going to be happy to sort things out. Go ahead, I ain't going to stop you.

MR. WHITLING: That's all I was going to say, Your Honor. We have attached, of course, the cases I mentioned and also the statue that the clear reading, Judge, calls for the violation to be if you have accessed storage of such communication of electronic communication service for purpose of backup protection of such communication and that is the service provider, not an individual. There cannot be

an argument that Mr. Jennings could at any moment gone into his personal folder on the Yahoo account and erased that e-mail, he could have deleted it. So you cannot argue that that was being a backup protection by the service provider, that was a document that Mr. Jennings was choosing to save for his personal use. That's all we have, Your Honor.

THE COURT: All right. Mr. Popwell, anything?

MR. POPWELL: I would just join in Mr. Whiting's comments regarding the statue. And I would also just reiterate that I seen absolutely no evidence that anything has been -- any e-mail has been filed with family court so publicized private fact in family court or any court.

THE COURT: All right.

MR. TRUITT: Your Honor, just briefly. As to Ms. Cook and the VJR International Detective Agency Inc., looking at the Fisher versus Mount Olive case on page 926 on the first collum at the bottom just for the court's reference, they actually were talking about the stored communications act when they ruled because the plaintiff conceded that the defendant Sawsman and Jania Zukesie never accessed his e-mail account I will grant defendant's motion for summary judgment as to this -- as to these two defendant's. So we would argue that Ms. Cook there's no question she never accessed the accounts and even in the Fisher case she should be entitled --

MR. WHITLING: Of course, that's true for Ms. Jennings as well.

THE COURT: All right. Anything further, gentlemen?

MR. WARNER: Your Honor, just the last matter this is a -- and I don't know if I need to really argue the amendment, I think the law is clear, Your Honor.

THE COURT: Uh-huh. But I think you made your record, it's up to me to decide whether or not --

MR. WARNER: And --

THE COURT: I think it covers it.

MR. WARNER: Okay. And, Your Honor, the only other thing is the conspiracy that utilize the allegations of the complain, there was no knowledge, no knowledge of, of who Mr. Jennings client was and we've attached that to the detective's report that we've redacted every time --

THE COURT: The client or his girlfriend?

MR. WARNER: The girl friend. There was no knowledge of what this lady's name was or what she looked like until they downloaded pictures off of the internet.

THE COURT: Well, in fact, that's true and it's not true. He knew who she was.

MR. WARNER: He knew.

THE COURT: They didn't know.

MR. WARNER: He knew.

THE COURT: Okay.

MR. WARNER: But, you know, fair is fair and everybody said and I wanted to just make this clear that Ms. Cook and everybody else said we used this information because we were trying to hold down cost and not have a big investigation. So basically they used these e-mails, they were downloaded, they were unitized, passed out to Ms. Cook as to where these people would be when she conducted surveillance. We think that's part of the conspiracy the unitization of illegally obtained records.

THE COURT: Okay.

MR. WARNER: We do stipulate that there was no intercept -- we can't prove an interception at this point and without prejudice we believe that the interception issue is, is, not really should not be before you.

THE COURT: All right.

MR. WHITLING: I understand that that would be stricken from the complaint?

THE COURT: What I'm going to advise y'all to do is this, y'all draft me a little letter saying, Well, Judge, these issues that we have resolved and these are the ones that we need you to decide on, that will be easier for me and everyone will be on the same page that was, is that fair enough?

MR. POPWELL: Yes, sir.

MR. WARNER: Yes, sir.

THE COURT: And y'all take your time. I'm not -- my only question is just curious, we got these same parties I assume a lot of these same issues pending right now in the family court, is that fair enough?

MR. POPWELL: That's correct.

THE COURT: And do y'all really want to simultaneously closely related actions to be on going at the same time?

MR. POPWELL: We --

THE COURT: And my final question is, why isn't this an exclusive matter that belongs up on the third floor rather than here, I mean, family court.

MR. WARNER: Well, Your Honor, just -- well, you know, I'm just -- the family court judge deferred -- we filed a motion in limine.

THE COURT: Yeah.

MR. WARNER: And deferred the issue of the utilization of the evidence. But this is a civil complaint and I don't believe it's in anyway -- I think this case stands on its own with regard to the damages.

THE COURT: Well, y'all can see why I have some concern. You got the same parties I would assume almost the identical issues that's going to be raised in the family court setting that are being raised here before me today. A

some point in time these issues are very closely ones -- ones very closely related are going to be decided and heard by a family court judge and resolving the domestic situation.

MR. WARNER: Well, except.

THE COURT: Well, help me out a little bit.

MR. WARNER: Except Ms. Broom is not a party in the family court, Ms. Cook is not a party in the family court, my client can't get damages in the family court with the utilization, the securing without authorization utilization. The only issue in family court is the use of evidence that we claim was illegally obtained fruit of the poisonous tree and if it's fruit of the poisonous tree --

THE COURT: Y'all -- that motion before me in these pleadings.

MR. WARNER: And we thing that's really a matter for the trial judge probably not to hear it at this point.

THE COURT: All right.

MR. WARNER: That's why we didn't argue it.

THE COURT: All right.

MR. WARNER: But Ms. Broom is not a party to the family court. And we can't get damages in the family court for that again under our second amended complaint for the lost of business that we think she's now gave to her husband and for the phycological damage that my client claims to

have sustained.

THE COURT: So he's seeing a physiatrist?

MR. WARNER: Yes, a phycologist.

THE COURT: Okay. Anyway, very interesting. I appreciate the entertainment gentleman.

(Laughter)

THE COURT: I know -- do me a letter sort of saying, Judge, we can agree to this has been resolved, this is not an issue, this is the way I put it.

MR. WARNER: Why don't we get together and draft you a joint letter.

THE COURT: Yeah, that's what I'm saying.

MR. WARNER: Okay.

MR. WHITLING: That's fine.

MR. WARNER: So you don't have four letters.

THE COURT: All right.

END OF PROCEEDINGS

COUNTY OF RICHLAND)

CERTIFICATE OF REPORTER

I, Crystal Roach, hereby certify that I reported the preceding case entitled M. Lee Jennings V. Gail Jennings et. al. Case No. 2007-CP-40-1125, at the Richland County Courthouse, June 25th, 2008.

I FURTHER CERTIFY that the foregoing pages 1 through 43 constitute a true, accurate and full transcript of said hearing.

I FURTHER CERTIFY that I am not employed by any of the parties hereto and I have no financial interest in the outcome of said case.

IN WITNESS WHEREOF, I have heretofore set my hand and seal at Richland County on this 29th day of July, 2008.

Crystal Roach, Court Reporter
and Notary Public for the
State of South Carolina my
Commission Expires:
April 21, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT

L. Casey Manning, CIRCUIT COURT JUDGE

DOCKET NO. 2007-CP-40-1125

M. LEE JENNINGS,

APPELLANT,

V.

GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOKE, individually and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,

RESPONDENTS.

FINAL BRIEF OF APPELLANT

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May 21, 2009

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STATEMENT OF ISSUES ON APPEAL

I. Did the lower court err in granting Respondents' motions for summary judgment as to Appellant's cause of action for violation of the Federal Stored Communications Act (18 USC § 2701) on the grounds that Appellant failed to allege all elements necessary to successfully plead a cause of action arising under the Act?

II. Did the lower court err in granting Respondents' motions for summary judgment on the grounds that the emails that were retrieved are not stored communications as contemplated by 18 USC § 2510(17)?

III. Did the lower Court err by not allowing Appellant to amend his Complaint so as to add Thomas Neal, attorney for Respondent Jennings, as a party Defendant?

STATEMENT OF THE CASE

In the summer of 2006, Respondent Gail M. Jennings initiated an action for divorce and separate support and maintenance in the Richland County Family Court accusing Appellant of adultery. That proceeding is still pending. Respondent Holly Broome is married to Respondent Jennings' son by prior marriage.

During the course of discovery in the matrimonial proceedings, Appellant learned for the first time that both before and after the filings of the matrimonial action (but before service), his private Yahoo email account had been "hacked" into by Respondent Broome on behalf of Respondent Jennings; that his private email communications had been retrieved and downloaded on a number of occasions without his knowledge or permission; and that this information was provided to Respondent Jennings' attorney, Thomas Neal, and to and used by Respondent Cook and BJR Detective Agency.

On February 20, 2007, Appellant filed and served upon all Respondents a Summons and Complaint naming Respondents Gail M. Jennings (Appellant's wife and "Respondent Jennings"), Holly Broome (Appellant's daughter-in-law and "Respondent Broome" hereafter), Respondent Brenda Cooke individually (a licensed private detective and "Respondent Cooke" hereafter), and the BJR International Detective Agency, Inc. ("Respondent BJR" hereafter) as Respondents. **(Feb. 20, 2007 Summons and Complaint; R. p. 0001-0011)**

The February 20, 2007 Complaint included causes of action against all Respondents for interception of electronic communications pursuant to S.C. Code Ann. § 17-30-10 and S.C. Code Ann. § 17-30-135, invasion of privacy for publication of private affairs, invasion of privacy for wrongful intrusion into private affairs, and

conspiracy.

On May 2, 2007, Appellant filed and served a Notice of Motion and Motion for Summary Judgment. **(May 2, 2007 Motion for Summary Judgment that was ignored by Judge Manning; R. p. 0026).** Counsel for Appellant received a motion for summary judgment from Respondent Cooke on May 11, 2007 **(Cooke's Motion for Summary Judgment received May 11, 2007; R. p. 0074)**; a motion for summary judgment from Respondent Broome on May 17, 2007 **(Broome's Motion for Summary Judgment received May 17, 2007; R. p. 0079)**; and a motion for summary judgment from Respondent Jennings on May 24, 2007 **(Jennings' Motion for Summary Judgment received May 24, 2007; R. p. 0083)**

On June 8, 2007, Appellant filed and served a motion to amend and supplement the February 20, 2007 Complaint so as to include causes of action for violation of not only the South Carolina Computer Crimes Act (S.C. Code Ann. § 16-16-10 et seq.), but also Title I of the Electronic Communications Privacy Act (18 U.S.C. 2510-2522) and the Federal Stored Communications Act (18 U.S.C. 2701-2712). **(Appellant's June 8, 2007 Motion to Amend and Supplement Complaint; R. p. 0086)**

Appellant filed and served his Amended Complaint dated July 12, 2007 **(July 12, 2007 First Amended Complaint; R. p. 0102)** pursuant to Consent Order to Amend filed July 13, 2007 **(July 13, 2007 Consent Order to Amend; R. p. 0111)**.

Respondents Jennings, Cooke, Broome, and BJR timely filed and served Answers to Appellant's Amended Complaint.

On February 19, 2008, counsel for Appellant received Respondent Jennings' motion for summary judgment as to Appellant's First Amended Complaint, and on

February 25, 2008 counsel for Appellant received Respondent Broome's motion for summary judgment as to Appellant's First Amended Complaint. **(Motion for Summary Judgment received February 19, 2008; R. p. 0133; Motion for Summary Judgment received February 25, 2008; R. p. 0164)**

On March 25, 2008, Appellant field and served a second Notice of Motion and Motion to Amend the first Amended Complaint **(March 25, 2008 Notice of Motion and Motion to Amend and Supplement Complaint; R. p.0168)** wherein Appellant sought to amend his Complaint so as to include Respondent Jennings' attorney, Thomas Neal, as a party to the action.

On April 18, 2008 Appellant filed and served a superseding Notice of Motion and Motion to Amend and Supplement the first Amended Complaint **(April 18, 2008 Superseding Motion to Amend and Supplement; R. p. 0182)**.

On May 8, 2008, counsel for Appellant filed and provided to counsel for Respondents a Memorandum in Opposition to Motion for Summary Judgment and in Support of Motion to Amend. **(May 8, 2008 Memorandum of Appellant with Attachments; R. p. 0358)**

On June 19, 2008, a hearing was held before The Honorable L. Casey Manning on Respondents' motions for summary judgment and Appellant's motion to amend his first Amended Complaint. At that time Appellant submitted another memorandum of law in support of his motion for summary judgment and in opposition to Respondents' motions for summary judgment. **(June 19, 2008 Memorandum of Appellant with Attachments; R. p. 0394)**

At the June 19, 2008 hearing, Appellant voluntarily withdrew his causes of action

arising under the South Carolina Homeland Security Act (S.C. Code Ann. § 17-30-10, *et seq.*), the South Carolina Computer Crimes Act (S.C. Code Ann. § 16-16-10, *et seq.*), and the Federal Electronic Communications Privacy Act (18 U.S.C. §§ 2510-2520).

By Order filed September 24, 2008, Judge Manning granted Respondent's motions for summary judgment as to Appellant's remaining causes of action and denied Appellant's motion to amend his first Amended Complaint. **(September 24, 2008 Order Granting Summary Judgment and Denying Appellant's Motion to Amend Complaint; R. p. 0404)**

On September 25, 2008 Appellant filed and timely served a notice of motion and motion to reconsider, vacate, set aside, alter or amend the September 24, 2008 order granting summary judgment. **(September 25, 2008 Motion to Reconsider; R. p. 0418)**

By way of Order dated November 7, 2008 Judge Manning denied Appellant's September 25, 2008 motion to reconsider. **(November 7, 2008 Order; R. p. 0438)**

This appeal follows. **(November 17, 2008 Notice of Appeal with attachments; R. p. 0439)**

STATEMENT OF FACTS

At all times relevant to the facts set forth herein, Appellant had a private e-mail address at Yahoo.com, an internet service provider "ISP", with the identity "leedabeatlefan@yahoo.com". At no time did Appellant give anyone permission to access or use his private e-mail account which contained not only private communications, but also customer lists that were proprietary to Appellant's business.

Respondent Jennings filed an action in the Richland County Family Court on

June 29, 2006 wherein she sought a divorce against Appellant upon the ground of adultery along with alimony, equitable division, exclusive use and possession of the marital home, and related relief.

Respondent Jennings did not serve this Complaint until shortly before an August hearing during which time she and Broome continued ongoing unauthorized access to private information from Appellant's email and provide the same to Mr. Neal and to Respondents Cooke and BJR which engaged in ongoing investigations.

In mid-January of 2007, pursuant to a production subpoena issued in the family court proceedings, Appellant's counsel received from Respondent Cooke what was represented to be her entire investigative file, including her initial information sheet dated June 26, 2006 containing two handwritten pages (**Appellants' May 8, 2008 Memorandum at Exhibit 1 – Detective Intake Form; R. p. 0374-0375**). On the first page under "S17", the investigator states that she received a photograph of the alleged paramour as follows: **"picture on E-mail."** On the second page, under "S78" the alternate contact is shown to be "Holly", who is married to Respondent Jennings' son by her prior marraige, Respondent Broome. Respondent Broome's husband was formerly employed by Appellant, and at all times has been Appellant's competitor in the real estate appraisal business.

Also provided by the private investigator were 46 pages of emails that had been surreptitiously downloaded and printed emails from Appellant's private email address **(Appellants' May 8, 2008 Memorandum at Exhibit 2 - Investigator's January 15, 2007 list of responses to production subpoena; R. p. 0377. Since the emails and their contents were secured in violation of federal law, neither the emails nor their**

contents nor information secured by reliance thereon are admissible as fruits of the poisonous tree)

At the time of her deposition taken on February 19, 2007, Respondent Jennings admitted that on the Sunday after Appellant left the home, Respondent Broome, without Appellant's permission, hacked into his private and personal email account, retrieved messages and photographs therefrom, printed copies, and distributed these copies to Respondent Jennings' attorney (Mr. Neal) and to Respondent Cooke.

Respondent Jennings also admitted that Broome continued to surreptitiously enter and retrieve Appellant's private and personal emails, with her permission, and gave them to Cooke on a continuing basis during the time of surveillance.

Defendant Jennings' testimony at her February 19, 2007 deposition in this regard is as follows:

17

Q: When did you start getting his e-mails?
A: I received the e-mails on Sunday.
Q: How did you get into his e-mail box?
A: I did not.
Q: Who got into it?
A: Holly.

18

Q: Okay. When did Holly start going into Lee Jennings e-mail?
A: Whatever that Sunday was.
Q: The Sunday after he left?
A: Yes.

19

Q: It would have been the 27th of June?
A: Yes.
Q: Okay. Did she do it at your house or at her house?
A: Her house.
Q: And then what did she do; she printed them out?
A: Yes, sir.
Q: And gave them to you?

A: No, sir.
Q: What did she do with them?
A: Made Tom a copy, well, at the time, there were two copies made because I was going to seek the advice of an attorney.
Q: Okay. There were two copies made and where were they distributed?
A: Tom.
Q: Tom Neal?
A: Yes, sir.
Q: Okay. And where did the other one go?
A: Cookie.
Q: Okay. Did you give them to Cookie on the 26th?
A: The Monday, yes, sir.
Q: Okay. So, you gave out both copies that day?
A: Yes, sir.
Q: Now, did Holly go into ... how did ... did she

go into his e-mail after that?
A: Yes, sir.
Q: Okay. How many times?
A: I do not know.
Q: Did she give you copies of what was provided?
A: No, sir.
Q: How did Cookie, Ms. Cooke get the e-mails that were after the time of the ...
A: Holly took them by there.
Q: Holly took them by there?
A: Yes, sir.
Q: Did Holly have your husband's permission to go into his e-mail box?
A: No.

*****

Q: On a free account? Did you get any information or check it out before you took these e-mails from your daughter?
A: No, sir.
Q: Did you seek any advice, and I don't want to

get into what anybody told you from any lawyer, about the use of these e-mail messages?
A: No, sir.
Q: Now, when you gave the e-mails to Ms. Cooke, why did you give them to her?
A: I felt the more information she had to background the, you know, the more expediently

she could get the information that was needed.
Q: And it would be less costly to you because you might know where you could find him?
A: Yes, sir.
Q: Is that correct?
A: Yes, sir.

22

Q: I understand. Now, did you ask the investigator to give copies of these e-mails to Mr. XXXXX? (Name redacted)
A: No, sir.
****
Q: So, she did not do that on your instruction at all; true?

23

A: Not on instruction, no.
Q: Did you at any time tell her it might be a good idea for her to give that information to him?
A: No, sir.
Q: Okay. Did your daughter tell her that?
A: No, sir, daughter in law.
****
Q: Okay. So, you don't know why she went out and stood by the stop sign and waited for him?
A: There was a conversation that she said that she felt like he should be informed and I said, ... I recall just saying, you know, that's, I, you know, I've got to take care of my life. And she said, do you think that Lee would want to know if you ... and I said, yeah. I said, you know, whatever you feel you want to do, do.
****
Q: You didn't tell her to go?
A: I didn't say, Cookie, go tell him, no. But after she pointed out that if I were doing the same thing, ...
Q: Okay.

24

A: ... that wouldn't Lee want to know and I said, yeah. I don't care what you do.

(February 19, 2007 Deposition of Respondent Jennings at pp. 17 – 24; R. p. 0461-0466)

On February 19, 2007, Appellant's counsel deposed Respondent Cooke, the private investigator, who testified under oath that both Respondent Jennings and Broome had given her emails on June 26, 2006 and thereafter during her continuing surveillance of the Appellant. Cooke admitted that she had received 46 pages of emails from Appellant's private email account, some of which predated her hiring date of June 26, 2006; and that she was aware of the content of these emails at the time she was hired as private investigator by Respondent Jennings.

Specifically, Respondent Cooke testified as follows (Names of third parties have been redacted in the interests of privacy):

22

Q: Okay. Now, let me ask you to go back a minute to page ... to the first page of your intake form. S-17 description says picture on e-mail. What does that mean?
A: Where is it?
Q: Right down here, (indicating), at the bottom. It's on that first page.
A: Oh. I was told that they had a picture on e-mail and I don't know if that was (picture-and) or (picture-or) e-mail.
Q: S-17, which would be Ms. XXXXX (name redacted), you were told by Ms. Jennings that there was a picture on e-

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mail?
A: Picture on ... I don't know if that's on or and e-mail. It's cold now.
Q: Okay. Picture on e-mail and did you find anything else about that?
A: I'm assuming that's what this is, (indicating).
Q: Okay. So, you're assuming she brought that with her?
A: I don't know if it was brought then or later, I'm not sure.

Q: Okay. So, your report then, it does not contain everything you did; is that correct?

24

A: Not unless it was pertinent to the case.

Q: Okay. When you went to Ms. XXXXX house to look at her car, that's not in your report?
A: No.
Q: Is that correct?
A: That's right.
*****
Q: Okay. It says on the first page of this, pursuant to client's request, BJR will document the activities of M. Lee Jennings. The suspected paramour is XXXXX XXXXXX. So, the first report that you made was Friday, the 6th, at 6:30 in the morning or the afternoon?
A: That's Friday the 7th.

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: All right. Where did you get the e-mails that are shown in the next Exhibit?
A: They were given to me.
Q: By whom?
A: Different people.
Q: Ma'am?
A: Different people.
Q: This is Exhibit Number Three. Would you pick

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up Exhibit Number Three?
A: Sure.
Q: All right. Now, who are the different people that gave you these e-mails?
A: The two people that came to see me.
Q: And those are?
A: Ms. Jennings and Holly.
Q: So, Holly gave you Mr. Jennings e-mails?
A: This is what was given to me right.
Q: Right. Did you read them?
A: A couple of them and then just threw it to the side.
Q: Which ones did you read?
A: I have no clue.
*****
Q: Do you have a Cookie ... let me back up. **When were these e-mails given to you?**
A: At different times.
Q: Which ones were given when?
A: I don't know.
Q: I'm looking at the first sheet of Exhibit Three

50

and it looks like April 5th, of 2006. That was

before you were hired; is it not?
A: I was hired June the 26th of 2006.
Q: So, the e-mail of April 5th, of '06, was before, predates your hiring; is that correct?
A: If it's before June, yes.
Q: The second page of May the 9th, of '06, predates your hiring; does it not?
A: Yes.
Q: The third page, May the 8th, of '06, predates your hiring?
A: Yes.
Q: The fourth page predates your hiring?
A: I don't know, I ...
Q: May the 8th, May the 8th?
A: I guess so, yeah.
Q: The sixth page, May the 18th, predates your hiring by a month and change; true?
A: Yes.
Q: Okay. May 22nd, page seven predates your hiring?
A: Yes.
Q: Page eight, May 21st, predates your hiring; true?
A: Yes.

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Q: Were these given to you before you were hired?
A: What?
Q: Were these e-mails given to you before you were hired?
A: Well, of course not.
Q: Okay. So, you never saw these until after June the 26th?
A: That's correct.
******

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Q: Were these given to you, the ones that predate June 28th, were they given to you on June the 26th?
A: No.
Q: And did you say that they came to you at different times?
A: Yes.

53

Q: Did you ask Ms. Jennings where ... and Holly where they got these e-mails?
A: No.

Q: Did it concern you that a client would give you e-mails from a spouse's e-mail box?
A: No.
Q: Why?
A: Because I don't care. I didn't care anything about the e-mails.
Q: You didn't?
A: No. The e-mails just showed me that there was an affair going on.
Q: Okay.
A: And it's my job to go out and find it.
Q: Okay. So, you knew about the e-mails when you started your case; you knew there was an affair going on?

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A: I knew there was some e-mails. I did not know, no.
Q: And you never read them?
A: I read a couple of them and they were just garbage, I mean, excuse me. It's just not something that entertained me.
Q: Okay. Are you familiar with Title 17 of the South Carolina Code?
A: No.
Q: Are you familiar with the Stored Communications Act?
A: No.

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Q: Now, you gave a set of these e-mails to Mr. XXXXXXX; did you not?
A: No, I did not.
Q: What did you give him?
A: Nothing.
Q: Did you not ...
A: Absolutely nothing. He left my house with nothing, my office with nothing.
Q: Did you show Mr. XXXXXXX these e-mails?
A: No.
Q: So, you deny that you either gave or showed Mr. XXXXXXX these e-mails?
A: That's right.

55

Q: Now, how did he get to your place; did you call him?
A: I talked with him.
Q: Did you call him?

A: No, I didn't call him. I talked with him.

*****

Q: So, he came to your ...
A: And he asked me to keep him informed which I haven't done, but he did ask me to keep him informed.
Q: So, he came to your office?
A: That's correct.
Q: Unsolicited?
A: What do you mean, unsolicited?
Q: You didn't call him?
A: I didn't call him.
Q: Did you e-mail him?
A: No.

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Q: Okay. Now, how did you first get in touch with Mr. XXXXX? (name redacted)
A: I talked to him.
Q: You called him?
A: No. I went and talked with him, face to face talked to him.
Q: You went to his house?
A: No.
Q: Did you go to his place of employment?
A: No.
Q: Where did you meet him?
A: At the stop sign.
Q: At the stop sign? You went out and followed his car?
A: I didn't follow him, no.
Q: Well, how did you find him?
A: Ms. Jennings asked me to get in touch with him. I tried to get in touch with him and I could not get in touch with him because I did not have his phone numbers.
Q: Okay.

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A: When he left the house one morning, he pulled up to the stop sign and I was standing there and I asked ... I said can I talk to you a minute and he said, sure. Get in.
Q: Okay. So, that's when you wrote down and got his work number and his ...
A: No, absolutely not, no.
Q: Okay.
A: He came ... he called me back.

10 Q: Okay.
11 A: He told me he wanted to come talk to me. He
12 came there and then he gave me these phone
13 numbers.
14 Q: Okay. And you deny that you gave him a copy of
15 these e-mails?
16 A: I certainly do.
17 Q: Okay. You deny that you told him about the e-
18 mails?
19 A: Oh, no. I didn't say that now.
20 Q: You did tell him about him about them?
21 A: Sure.
22 Q: What did you tell him?
23 A: I just said there were e-mails back and forth.
24 Q: And how did you know that?
25 A: I had them in my possession. What do you

58

1 mean, how did I know?
2 Q: And you still have them in your files?
3 A: I sent you a copy of them.
*****

59

22 Q: Okay. How many times did you talk to Holly?
23 A: I have no clue. I answer the telephone and if
24 she's there, I talk to her.
25 Q: Okay. How many times did Holly bring you e-

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1 mails?
2 A: I don't know.
3 Q: How many times did Ms. Jennings bring you e-
4 mails?
5 A: I don't know that, but I gave you what I have.
6 Q: Ma'am?
7 A: I gave you what I have.

(February 19, 2007 Deposition of Respondent Cooke at pp. 22- 60; R. p. 0467-0489)

On April 19, 2007, Appellant's counsel received Broome's Responses to Requests to Admit in which she admits "opening and saving emails from (Appellant's) yahoo email account...after (Respondent Jennings) informed her that (Appellant) had been corresponding with a paramour via email. Broome also admitted providing copies

of the emails to Respondent Jennings and Cooke (**Appellants' May 8, 2008 Memorandum at Exhibit 3– Requests to Admit and Answers from Holly Broome; R. p. 0379-0380**).

On March 13, 2008, Appellant deposed Respondent Broome who testified that the emails she illegally accessed went back for years, and that she had been involved in meetings with Respondent Jennings and her attorney, Mr. Neal, who had instructed and encouraged her to continue to improperly access Appellant's email account. **(Appellants' May 8, 2008 Memorandum at Exhibit 4 – Deposition Excerpts from Defendant Holly Broome of March 13, 2008; R. p. 0383-0387)**

Respondent Broome testified, in pertinent part, as follows:

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Q: Okay. What did you do?
A: What do you mean?
Q: Did you ...
A: **I went home.**
Q: Okay. And did you help her in any way?
A: With the divorce, no. I mean, more just like support. Just, I mean, I felt awful. I didn't ...
Q: **Did you go into Mr. Jennings e-mail account?**
A: **Yes.**
Q: Okay. When did you start going into his e-mail account?
A: I did it on Sunday, the very next day.
Q: Sunday the 25th if that's correct?
A: Uh-huh (affirmative response.)

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Q: Of June of 2006?
A: Uh-huh (affirmative response.)
Q: Okay. **Did you have permission to go into it?**
A: **No.**
Q: Did you know his e-mail address?
A: Yeah.
Q: How did you know that?
A: Well, working with him. **I knew that he had a personal e-mail account.**

Q: Okay.
A: **Under Yahoo.**
Q: **Did you know his password?**
A: **No.**
Q: Okay. **Did he give you permission to go into his account?**
A: No.
Q: Okay. So, tell me what you did?
A: I know that Yahoo is a free account and I also have a Yahoo account and you can sign on to your e-mail address and say that you have forgotten your password.
Q: Okay.
A: **You answer a certain amount of questions and they give you a new password.**
Q: Okay.

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A: And that's what I did.
Q: All right.
A: And it assigned me a password.
Q: And what did you do then?
A: **Then I got on to his e-mail and read the extent of the e-mails that he had sent to her.**

...

Q: Okay. Did you ... to whom did you give ... how many times did you go into his e-mail?
A: That I don't really remember. That first time was the bulk of it. That was the basically all the information that I needed and it was like,

15

I guess about a month before he actually got served his divorce papers. So, I mean, in that month, I would have to ... if I had to guess, it was maybe five or six times.
Q: **And every time you went in, it changed his password?**
A: Uh-huh (affirmative response.)
Q: Is that a, yes?
A: **Yes.**

(March 13, 2008 Deposition of Respondent Broome at pp. 12-15; R. p. 0502-0505)

From and including the date Respondent Jennings left the marital home (June 21, 2006), Broome admits to illegally accessing and disseminating information stored on Appellant's private e-mail address without his permission, and otherwise improperly procured his private email communications.

Broome then distributed the same to Respondent Jennings, her family court attorney (Mr. Neal), and Respondent Cooke, all of whom then used the improperly obtained communications and evidence and information derived there from in an attempt to gain an economic benefit and a collateral advantage for Respondent Jennings in the family court proceedings.

Indeed, Broome (who had continuing access to Appellant's email account) was in constant communication with Cooke, and a comparison of Cooke's investigative reports, with the records of telephone contact between her and Broome shows that Cooke was acting upon information passed on to her from directly from Broome, all in an apparent effort to save Respondent Jennings money on investigator's fees. **(Appellants' May 8, 2008 Memorandum at Exhibit 5 – Summary of Voluminous Records: Comparison of Telephone Records with Detective Records; R. p. 0389)**

As a result of Respondent Broome's continuing access to Appellant's email account that included stored customer lists and important business records and communications that would assist Respondent Broome's Husband's business, on March 25, 2008 Appellant filed and served Notice of Motion and Motion to Amend his Complaint so as to add damages to his business. **(March 25, 2008 Motion to Amend with attachments; R. p. 0168)**

On April 18, 2008, Appellant filed and served a Notice of Motion and Motion to Amend and Supplement his Complaint so as to make the forgoing amendments, and to add Thomas M. Neal, III (Respondent Jennings' family court attorney) as party defendant. **(April 18, 2008 Motion to Amend with Attachments; R. p. 0182)**

The contents of Appellant's private electronic messages (stored and otherwise) were disseminated both visually and by copies being downloaded and printed, and then provided to Respondent Cooke, BJR employees, Respondent Jennings, and Respondent Jennings' attorney (Mr. Neal) and his employees, not to mention Respondent Broome's husband.

Mr. Neal had meetings with his client, Respondent Jennings in the presence of Respondent Broome even though he had no attorney-client relationship with Broome on several occasions, and advised and encouraged Respondent Broome to continue to illegally access, retrieve, and distribute Appellant's private and confidential stored and other electronic communications when he knew or should have known that to do so was illegal. **(Deposition of Respondent Broome at p. 22; R. p. 0512)**

Neal also used the information derived from Appellant's illegally intercepted and downloaded private e-mail messages to bring and support an action against Appellant which he filed in late June 2006, but did not serve upon Appellant until more than a month later in order to secure a tactical, strategic, and collateral advantage in the Family Court proceeding. Respondent Neal encouraged Respondent Broome to illegally go into Appellant's e-mail **(Deposition of Respondent Broome at p. 22; R. p. 0512)** which also gave her access to Appellant's business records, including client lists, when Respondent Broome's husband, who had previously worked for Appellant, was in

direct competition with Appellant to cause Appellant economic harm.

STANDARD OF APPELLATE REVIEW

In *Zurich American Ins. Co. v. Tolbert*, 662 S.E.2d 606 (S.C. App. 2008) this Court set forth the appropriate standard of review in cases where summary judgment has been granted:

"When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct.App.2005). Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCivP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006)." (*Id.*)

Finally, this Court is free to decide questions of law and interpretation of statutes with no particular deference to the lower court. (See *Bostic v. American Home Mtg. Servicing, Inc.*, 650 S.E.2d 479, 375 S.C. 143 (S.C. App. 2007)).

LEGAL ARGUMENT

I. The lower court erred in granting Respondents' motions for summary judgment as to Appellant's cause of action for violation of the Federal Stored Communications Act (18 USC § 2701) on the grounds that Appellant failed to allege all elements necessary to successfully plead a cause of action arising under the Act.

Judge Manning's September 24, 2008 Order granting summary judgment incorrectly finds as follows:

> "Plaintiff has asserted a cause of action under 18 USC § 2701(a) of the Stored Communications Act, alleging that Defendant 'intentionally access[ed] without

> authorization a facility through which an electronic communication service is provided.' Amended Complaint at Paragraph 16. While this language has been taken directly from the statute, it is a fatally incomplete description of the elements of § 2701 which give rise to a cause of action. There are other elements that must be satisfied to impute liability because the statute goes on to read: 'and thereby obtains, alters, or prevents authorized access to a wire or electronic communication *while it is in electronic storage* in such system' [emphasis added]. The term 'electronic storage' is defined in the statute. 18 USC § 2510(17) of the Act clearly defines 'electronic storage' to be '(A) any *temporary, intermediate storage* of a wire or electronic communication *incidental to the electronic transmission thereof*; and (B) any storage of such communication *by an electronic communication service for the purpose of backup protection* of such communication" [emphasis added] Therefore, Plaintiff has failed to allege all the elements of the cause of action under the statute." [emphasis in original]**(September 24, 2008 Order at p. 7; R. p. 0410)**

In short, the lower court has incorrectly determined that Plaintiff did not allege all the necessary elements in order to successfully plead a cause of action arising under 18 USC § 2701(a).

There is no case law at either the Federal or state court level requiring that in order to assert a cause of action for violation of 18 USC § 2701(a), a party must also plead with specificity in his complaint that the Defendant "...obtains, alters, or prevents authorized access to a wire or electronic communication *while it is in electronic storage* in such system..."

Likewise, there is no case law at either the Federal or state court level requiring that in order to successfully assert a cause of action for violation of 18 USC § 2701(a), a party must also specifically plead in his complaint pursuant to 18 USC § 2510(17) that the wrongfully obtained electronic communication came from "(A) any *temporary, intermediate storage* of a wire or electronic communication *incidental to the electronic transmission thereof*" or "(B) any storage of such communication *by an electronic communication service for the purpose of backup protection* of such communication".

Appellant's Amended Complaint alleges as follows:

"At all times relevant herein, Plaintiff had a private e-mail address at yahoo.com with the identity "leedabeatlefan@yahoo.com". At no time did Plaintiff give anyone the permission to access or use his private e-mail account.

"Beginning after June 21, 2006, upon information and belief and Broome's admission, Defendant Broome illegally accessed Plaintiff's private e-mail address without his permission, and used a computer located at 309 Vincienne, and possibly other computers, to improperly procure Plaintiff's private electronic mail communications.

"After intercepting and accessing Plaintiff's private e-mail communications through an electronic communication system and printing the same, Defendant Broome used the improperly obtained communications in an attempt to gain an economic benefit for Defendant Jennings and Cooke and to gain a collateral advantage in the pending Family Court action.

"FOR A FIRST CAUSE OF ACTION (Violation of §17-30-10, et seq; §§16-16-10, et seq; 18 USC §§2510-2522 and 2701-2712)

"Plaintiff brings this cause of action pursuant to the South Carolina Homeland Security Act, S.C. Code Ann. §§17-30-10, *et seq.*, South Carolina Computer Crimes Act, S.C. Code Ann. §§16-16-10 *et. seq.*, Title I of the Electronic Communications Privacy Act, 18 U.S.C. §§2510-2522, **and the Federal Stored Communications Act, 18 U.S.C. §§ 2701-2712.and 18 U.S.C. and 2701-2712.**

"18 U.S.C. § 2701(a) of the Stored Communications Act makes it unlawful for anyone to 'intentionally accesses without authorization a facility through which an electronic communication service is provided.'
"Plaintiff alleges that his electronic communications have been intercepted, intentionally accessed, disclosed, and used without his authorization and in violation of the forgoing chapters and brings this civil cause of action against those persons and entities who accessed, intercepted, disclosed, used, and procured Plaintiff's private electronic communications." (Emphasis added)

(Amended Complaint at pp. 2-3; R. p. 0103-0105)

Because there is no statutory authority requiring Appellant to specifically plead that the Respondents (1) "...obtain, alter, or prevent authorized access to a wire or electronic communication *while it is in electronic storage* in such system...", and (2) that

the electronic communication electronic communication came from either "(A) any *temporary, intermediate storage* of a wire or electronic communication *incidental to the electronic transmission thereof*" or "(B) any storage of such communication *by an electronic communication service for the purpose of backup protection* of such communication", this Court must find that the allegations set forth in Appellant's Amended Complaint are sufficient to allege a cause of action arising under 18 USC § 2701(a).

II. The lower court err in granting Respondents' motions for summary judgment on the grounds that the emails that were retrieved are not stored communications as contemplated by 18 USC § 2510(17).

Judge Manning's September 23, 2008 Order incorrectly finds that there was no genuine issue of fact but that the opening, downloading and printing of private emails from Appellant's ISP service provider did not constitute access of electronic communications that are in "electronic storage" as contemplated by the Federal Stored Communications Act. **(September 23, 2008 Order at pp. 7 – 8; R. p. 0410-0411)**

In reaching this conclusion, Judge Manning relies on 18 USC § 2510(17) for a definition of "electronic storage":

> "The term 'electronic storage' is defined in the statute. 18 USC § 2510(17) of the act clearly defines 'electronic storage' to be '(A) any *temporary, intermediate storage* of a wire or electronic communication *incidental to the electronic transmission thereof*; and (B) any storage of such communication *by an electronic communication service for the purposes of backup protection* of such communication' [emphasis added]." [emphasis in original]

However, Judge Manning did not consider that whether an electronic communication that is stored on servers by an ISP provider falls within the definition of "electronic storage" is a question of law, not fact.

This Court is free to decide questions of law and interpretation of statutes with no particular deference to the lower court (See *Bostic, supra.*). Here Judge Manning totally ignored that this exact question has already been decided by numerous Federal Courts which hold that retrieving email from an ISP without authorization qualifies as improper access of stored communications as contemplated by the Federal Stored Communications Act.

For example, in *Fischer v. Mt. Olive Lutheran Church*, 207 F. Supp. 2d 914 (W.D. Wis. 2002), the United States District Court for the Western District of Wisconsin determined :

> "In 1986, Congress added the Electronic Communications Storage Act, also known as the Stored Communications Act, to the Wiretap Act.
> ...
> "The Court of Appeals for the Fifth Circuit has held that the Wiretap Act protects email messages from being intercepted during transmission. *United States v. Turk,* 526 F.2d 654, 658 (5th Cir.1976) ('intercept' does not include 'replaying of a previously recorded conversation' because acquisition was not contemporaneous with transmission); *Steve Jackson Games,* 36 F.3d at 461 (Secret Service seizure of a computer containing unread e-mail messages was not an "interception" because of lack of contemporaneity with transmission). In contrast, the Stored Communications Act indicates that an email message is protected while stored at 'a facility through which electronic communication service is provided.' 18 U.S.C. § 2701(a); *see also United States v. Moriarty,* 962 F.Supp. 217 (D.Mass.1997). Specifically, the Stored Communications Act states that it is a violation for anyone who:
>
> "'intentionally accesses without authorization a facility through which an electronic communication service is provided ... and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system' violates the act.
>
> "18 U.S.C. § 2701(a). 'Electronic storage' is defined as:
>
> "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
>
> "(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication ...

"18 U.S.C. §§ 2510(17) and 2711(1) (definitions of Wiretap Act applicable to Stored Communications Act).

"Defendants argue that defendant Mt. Olive did not violate the act when it hired Brodjieski to access plaintiff's email account on June 10, 1999. Defendants base their argument on the fact that the language in the Wiretap Act states, 'any person who ... intentionally intercepts ... or procures any other person to intercept,' 18 U.S.C. § 2511(1)(a), and the Stored Communications Act states only 'whoever ... intentionally accesses without authorization ...,' 18 U.S.C. § 2701(a). In other words, defendants argue that the absence of the language, 'or procures any other person to intercept,' in the Stored Communications Act means that hiring Brodjieski to access plaintiff's email account did not violate act. Even if defendants' interpretation of the statute were correct, it does not change the outcome. Defendant Connor, a Mt. Olive employee, was present when Brojieski accessed plaintiff's email account. Moreover, he supplied Brodjieski with plaintiff's password. In other words, defendant Connor participated in accessing plaintiff's account, making his conduct that of his employer, defendant Mt. Olive. *See also*18 U.S.C. § 2510(6) (corporation is a person under the act).

"Defendants argue that defendants Connor and Mt. Olive did not violate the act when Connor **accessed plaintiff's Hotmail account on June 11 and 12, 1999, because plaintiff's Hotmail email was not in "electronic storage" as defined under the act.** (It is unclear why defendants do not advance this argument with respect to the June 10 accessing incident involving Brodjieski and defendant Connor.) Defendants contend that the Stored Communications Act **'does not apply to the accessing of email messages in a recipient's mailbox for at that point, transmission of the messages has been completed.'** Dfts.' Mot. for Summ. J., dkt. # 17, at 8. In support of their position, defendants cite *Fraser v. Nationwide Mutual Insurance Co.,* 135 F.Supp.2d 623, 637 (E.D.Pa.2001). In *Fraser,* the defendant accessed the plaintiff's email that was located on the defendant's server after it had been downloaded by the recipient to his hard drive. *Id.* at 631. The court concluded that the defendant had accessed the plaintiff's email only after transmission was complete and that doing so did not violate the act because only communications accessed in the course of transmission are protected. *Id.* at 637.

"The Stored Communications Act defines 'electronic storage' as either temporary, intermediate storage incidental to the electronic transmission or any storage of such communication by an electronic communication service for purposes of backup protection. 18 U.S.C. § 2510(17); *see also* S.Rep. No. 99-541, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3589 (noting electronic storage includes both definitions). In *Fraser,* it was undisputed that the email message accessed was not stored by an electronic communication service but was stored on the employer's server. *Fraser,* 135 F.Supp.2d at 635. **In contrast, defendants Connor and Mt. Olive accessed plaintiff's email**

while it was stored on a remote, web-based server that is owned by Microsoft, an electronic communication service provider. *See*18 U.S.C. § 2510(15) (defining 'electronic communication service' as 'any service which provides to users thereof the ability to send or receive wire or electronic communications'). **Therefore, it is unnecessary to determine whether *Fraser* held correctly that the act could be violated only by accessing email that has not yet been downloaded to the recipient's hard drive.**

In fact, the legislative history shows that Congress intended the Stored Communications Act to cover the exact situation in this case, as illustrated by an example provided in the Senate Report:

"For example, a computer mail facility authorizes a subscriber to access information in their portion of the facilities storage. Accessing the storage of other subscribers without specific authorization to do so would be a violation of the act. Similarly, a member of the general public authorized to access the public portion of a computer facility would violate this section by intentionally exceeding that authorization and accessing the private portions of the facility.

"1986 U.S.C.C.A.N. at 3590." (emphasis added)

Likewise, in *Theofel v. Farey-Jones*, 341 F.3d 978 (9th Cir. 2003), the United States Court of Appeals for the Ninth Circuit determined:

"Defendants ask us to affirm on the alternative ground that the messages they accessed were not in 'electronic storage' and therefore fell outside the Stored Communications Act's coverage. *See 18 U.S.C. § 2701(a)(1)*. The Act defines 'electronic storage' as '*(A)* any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and *(B)* any storage of such communication by an electronic communication service for purposes of backup protection of such communication." *Id. § 2510(17)*, *incorporated by id. § 2711(1)*. Several courts have held that *subsection (A)* covers e-mail messages stored on an ISP's server pending delivery to the recipient. *See In re Doubleclick, Inc. Privacy Litig., 154 F. Supp. 2d 497, 511-12 (S.D.N.Y. 2001)*; *Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623, 635-36 (E.D. Pa. 2001)*; *cf. Steve Jackson Games, Inc. v. U.S. Secret Serv., 36 F.3d 457, 461-62 (5th Cir. 1994)* (messages stored on a BBS pending delivery).

"Because *subsection (A)* applies only to messages in 'temporary, intermediate storage," however, these courts have limited that subsection's coverage to messages not yet delivered to their intended recipient. *See Doubleclick, 154 F. Supp. 2d at 512*; *Fraser, 135 F. Supp. 2d at 636.*

"Defendants point to these cases and argue that messages remaining on an ISP's server after delivery no longer fall within the Act's coverage. But, even if such messages are not within the purview of *subsection (A)*, they do fit

comfortably within *subsection (B)*. **There is no dispute that messages remaining on NetGate's server after delivery are stored 'by an electronic communication service" within the meaning of *18 U.S.C. § 2510(17)(B)*. *Cf. Doubleclick, 154 F. Supp. 2d at 511* (holding that *subsection (B)* did not apply because the communications at issue were not being stored by an electronic communication service). The only issue, then, is whether the messages are stored 'for purposes of backup protection.' *18 U.S.C. § 2510(17)(B)*. We think that, within the ordinary meaning of those terms, they are.**

"An obvious purpose for storing a message on an ISP's server after delivery is to provide a second copy of the message in the event that the user needs to download it again -- if, for example, the message is accidentally erased from the user's own computer. The ISP copy of the message functions as a 'backup' for the user. Notably, nothing in the Act requires that the backup protection be for the benefit of the ISP rather than the user. Storage under these circumstances thus literally falls within the statutory definition." (Emphasis added)

Here, Respondent Broome illegally accessed and downloaded Appellant's emails from his Yahoo email service provide by "logging on" to his email account and then retrieving Appellant's emails stored on Yahoo's remote, web-based servers.

Judge Manning ignored the forgoing legal authorities that were presented to him, and found that while the emails retrieved by Respondent Broome had been saved by the Appellant in his personal email account, those emails fell outside the scope of 18 USC § 2510(17). **(September 23, 2008 Order of Judge Manning at pp. 7 – 9; R. p. 0410-0412; June 25, 2008 T.R. at pp. 24-30; R. p. 0576-0582; Appellant's Memorandum in Opposition to Motion for Summary Judgment at pp. 15-16; R. p. 0370-0372)**

Judge Manning's September 23, 2008 Order improperly tries to distinguish between person who, in fact, stores electronic communications. "The first requirement of § 2510(17)(B) is that the storage of the communication be 'by an electronic

communications service.' Although one may argue that the interpretation of the word 'by' could be ambiguous, its meaning becomes crystal clear when considered with the rest of the provision and the other provisions of the Stored Communications Act". **(September 23, 2008 Order at p. 9; R. p. 0412)**

In determining that Appellant's ISP (Yahoo) stores the emails, J udge Manning's September 23, 2008 Order erroneously reasons that "by", as referred to in § 2510(17)(B), is limited solely to the email service provider.

This conclusion is wrong and untenable because it is the email user (Appellant) who ultimately makes the decision of whether or not to retain or store an email or delete it. And if the user (Appellant) decides to keep or "save" his email, it is then stored by the email service provider. Therefore, emails are stored by both the user (Appellant) and service provider (Yahoo).

The September 28, 2008 Order also incorrectly finds that § 2510(17)(B) is not meant to cover personal "backup protection" by the user, and that the statute is intended to be limited solely to "backup protection" by the email service provider. No authority is cited for this proposition.

Again, this interpretation is nonsensical because it is the user (Appellant) who ultimately makes the decision of whether to store his email or delete it. Judge Manning's erroneous interpretation would leave the email service provider as the sole entity with a remedy for violations of the Federal Stored Communications Act.

Indeed, as decided by the United States District Court of Appeals for the Ninth Judicial Circuit:

> **"An obvious purpose for storing a message on an ISP's server after delivery is to provide a second copy of the message in the event that the**

user needs to download it again -- if, for example, the message is accidentally erased from the user's own computer. The ISP copy of the message functions as a 'backup' for the user. Notably, nothing in the Act requires that the backup protection be for the benefit of the ISP rather than the user. Storage under these circumstances thus literally falls within the statutory definition." (See *Theofel supra.*)

The fact that Respondents Jennings and Broome logged onto Appellant's email account, downloaded, and then printed his emails without permission is not in dispute. **(See testimony of Respondent Jennings and Respondent Broome, supra. ; R. p. 0461-0466; 0383-0387)**

Respondent Jennings testified that Broome did not retrieve the emails from Appellant's computer, but from Broome's own home computer by accessing Appellant's email service provider from there:

21 Q: Okay. When did Holly start going into Lee
22 Jennings e-mail?
23 A: Whatever that Sunday was.
24 Q: The Sunday after he left?
25 A: Yes.

19

1 Q: It would have been the 27th of June?
2 A: Yes.
3 **Q: Okay. Did she do it at your house or at her**
4 **house?**
5 **A: Her house. (R. p. 462-463)**

Based upon the forgoing, Judge Manning erred in granting summary judgment as to Appellant's cause of action for violation of the Federal Stored Communications Act.

III. The lower Court erred by not allowing Appellant to amend his Complaint so as to add Thomas Neal, attorney for Respondent Jennings, as a party Defendant.

Judge Manning's September 23, 2008 Order denies Appellant's Motions to amend his Complaint for a second time.

Appellant's March 25, 2008 Motion to Amend and Supplement his Complaint seeks to add additional damages arising from the conduct complained of in his Amended Complaint. Where he sought to include damages to his business arising from the improper use of his private business communications, customer lists, and emails that were also improperly accessed by Defendant Broome. **(March 25, 2008 Motion to Amend with attachments; R. p. 0168-0181)**

Appellant's April 18, 2008 Superseding Notice of Motion and Motion to Amend and Supplement his Amended Complaint seeks to add Thomas M. Neal, III (Respondent Jennings' attorney in the marital proceedings) as a party defendant because of additional information obtained through discovery which revealed that Mr. Neal encouraged Respondent Jennings and Broome to continue this improper access and download Appellant's private emails. **(April 18, 2008 Superseding Motion to mend with Attachments; R. p. 0182-0200)**

Judge Manning denied Appellant's motions to amend on the grounds that (1) Appellant had already been given leave to amend his complaint and should therefore not be allowed to do so a second time, and (2) that because summary judgment had been granted, it was unnecessary to allow Appellant to amend his complaint.

Rule 15, SCACR, provides:

> "A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; **and leave shall be freely given when justice so requires and does not prejudice any other party**."

Assuming Appellant prevails in his appeal with respect to summary judgment,

Appellant should be given leave to amend his complaint because there will be no prejudice to any party.

In *Parker v. Spartanburg Sanitary Sewer Dist.*, 607 S.E.2d 711, 362 S.C. 276 (S.C. App. 2005) this Court provided:

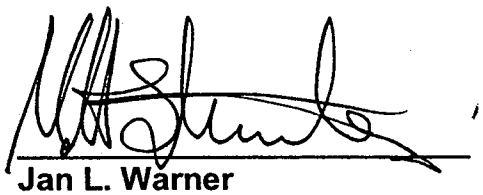
> "Leave to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and freely given when justice so requires and does not prejudice any other party. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1997); *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct.App.1998). The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999); *Lewis-Davis*, 360 S.C. at 232, 599 S.E.2d at 465. The party opposing the amendment has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 431 S.E.2d 587 (1993); *Pruitt*, 330 S.C. at 489, 499 S.E.2d at 253. This rule strongly favors amendments and the court is encouraged to freely grant leave to amend. *Jarrell v. Seaboard Sys. R.R.*, 294 S.C. 183, 363 S.E.2d 398 (Ct.App.1987)."

Here, Respondents did not show that they would suffer prejudice if the amendments were allowed or that they would not receive appropriate notice that a new issue would be tried and a lack of opportunity to refute it.

Based upon the forgoing, the lower court erred by not allowing Appellant to amend his amended complaint so as to include damages to his business and to add Mr. Neal as a party-defendant.

CONCLUSION

Based upon the forgoing, the lower court erred in granting summary judgment and not allowing Appellant to amend his amended complaint based upon the newly discovered evidence.



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May 21, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas For the Fifth Judicial Circuit

L. Casey Manning, Circuit Court Judge

Case No. 2007-CP-40-1125

M. Lee Jennings, ... Appellant,

v.

Gail M. Jennings, Holly Broome,
Brenda Cooke, Individually and BJR
International Detective Agency, Inc. ..... Respondents.

FINAL BRIEF OF RESPONDENT BROOME

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STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO THE APPELLANT'S CAUSE OF ACTION FOR VIOLATION OF THE FEDERAL STORED COMMUNICATIONS ACT (18 U.S.C. §2701) IN LIGHT OF THE EVIDENCE IN THE RECORD AND THE LACK OF EVIDENCE IN THE RECORD?

II. DID THE LOWER COURT ERR IN GRANTING RESPONDENTS' MOTON FOR SUMMARY JUDGMENT AS TO THE APPELLANT'S CAUSE OF ACTION FOR VIOLATION OF THE FEDERAL STORE COMMUNICATIOS ACT (18 U.S.C. §2701) ON THE GROUNDS THAT THE EMAILS THAT WERE RETRIEVED WERE NOT STORED COMMUNICATIONS AS CONTEMPLATED BY 18 U.S.C. §2510 (17)?

III. DID THE LOWER COURT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON THE APPELLANT'S CAUSE OF ACTION FOR VIOLATION OF THE FEDERAL STORED COMMUNICATIONS ACT (18 U.S.C. §2701) ON THE ADDITIONAL SUSTAINING GROUNDS THAT THE APPELLANT PRESENTED NO EVIDENCE THAT THE EMAILS THAT WERE RETRIEVED WERE STORED COMMUNICATIONS AS CONTEMPLATED BY 18 U.S.C. §2510 (17)?

IV. DID THE LOWER COURT ERR BY DENYING APPELLANT'S MOTION TO AMEND HIS COMPLAINT FOR THE SECOND TIME TO ADD RESPONDENT JENNINGS' FAMILY COURT ATTORNEY AS A PARTY DEFENDANT AND ALLEGE DAMAGE TO HIS BUSINESS?

STATEMENT OF THE CASE

This case was initiated by the Appellant on February 20, 2007 by filing and serving a Summons and Complaint against the Respondents alleging causes of action for interception of electronic communications pursuant to §17-30-10 and §17-30-135, S.C. Code Ann. (1976, as amended), and for invasion of privacy for publication of private affairs, invasion of privacy for wrongful intrusion into private affairs and conspiracy to intercept and disseminate the Appellant's private electronic communications. (Summons and Complaint filed February 20, 2007, R. pp. 1-10). The Complaint was answered by the Respondent. (Answer of Respondent Broome filed March 30, 2007, R. pp. 17-19). Subsequently, the Respondents consented to amendment of the Complaint by way of consent order. The Complaint was then amended by the Appellant to include causes of action for alleged violations of §16-16-10, *et seq.*, S.C. Code Ann. (1976, as amended), 18 U.S.C. §§2510-2522 and 18 U.S.C. §§2701-2712. (Amended Complaint filed July 25, 2007, R. pp. 102-108). Respondent Broome filed an Answer to the Amended Complaint. (Answer of Respondent Broome filed August 7, 2007, R. pp. 115-117). After discovery, all parties moved for summary judgment and the Appellant moved to amend his Complaint again to include additional parties and additional causes of action. A hearing was held before the Honorable L. Casey Manning on June 19, 2008 on all parties' Motions for Summary Judgment and on the Appellant's Motion to Amend his Complaint for the second time. At the hearing, counsel for the Appellant stipulated that there was no interception of the e-mails which are the subject of this suit by the Respondents and he was, therefore, no

longer pursuing the causes of action under §17-30-10, *et seq.* and 18 U.S.C. §§2510-2520, *et seq.* (Transcript of June 25, 2008 Hearing, R. pp. 587-588). He also stipulated that he was no longer pursuing the cause of action under §16-16-10, *et seq.* S.C. Code Ann. (1976, as amended) as there had been no conviction under that statute. (Transcript of June 25, 2008 Hearing, R. pp. 559-560). He also stipulated that the Appellant was no longer pursuing the cause of action for conspiracy to intercept the Appellant's e-mails because there had been interception under the above-referenced statutes. Therefore, the issues before the Court at the June 19, 2008 hearing were the Motions for Summary Judgment on the Appellant's cause of action alleging violation of the Federal Stored Communications Act, 18 U.S.C. §§2701-2712, the common law invasion of privacy claims for publicizing private affairs and wrongful intrusion, and the Appellant's Motion to Amend his Complaint to add an additional party defendant and an additional cause of action for damage to his business.

The Court issued an Order filed September 24, 2008 granting the Respondent's Motions for Summary Judgment as to the Appellant's cause of action alleging violation of the Federal Stored Communications Act and the Appellant's causes of action for common law invasion of privacy for publicizing private affairs and wrongful intrusion. The Court denied the Appellant's Motion to Amend his Complaint to add an additional party defendant and an additional cause of action for damage to his business. (Order filed September 24, 2008 Granting Defendants' Motion for Summary Judgment Denying Plaintiff's Motion to Amend Complaint, R. pp. 404-415). A Motion to Reconsider was filed by the Appellant

and denied by the Court. This appeal followed. The portion of the Circuit Court Order granting Respondents' Motions for Summary Judgment as to Appellant's common law invasion of privacy claims have not been appealed and the only issues under appeal are the Circuit Court's granting Respondents' Motions for Summary Judgment as to the cause of action alleging violation of the Federal Stored Communications Act and the denial of the Appellant's Motion to Amend the Complaint for a second time.

STATEMENT OF THE FACTS

This matter stemmed from a marital breakup between the Appellant and Respondent Gail Jennings. Mr. Jennings fell in love with someone he met at the gym and informed Mrs. Jennings of this occurrence on June 21, 2006 and they immediately separated. (Depo. of Appellant M. Lee Jennings, R. pp. 533-535). Respondent Gail Jennings went to her daughter-in-law's home, Respondent Holly Broome, and informed her and Respondent Jennings' son Allen (Holly's husband) of the separation on June 24, 2006. (Depo. of Respondent Broome, R. pp. 498-501). As Respondent Broome had been informed that Mr. Jennings was corresponding with his paramour via e-mail, she subsequently went into his e-mail account by changing his password and obtained copies of the e-mails which he had sent and received and opened, but had not deleted. (Depo. of Respondent Broome, R. pp. 502-506). She later made copies of the e-mails and gave one to Respondent Jennings, one to a private investigator and one to Respondent Jennings' attorney. (Depo. of Respondent Broome, R. pp. 508-509). She later went back onto Appellant's e-mail account on several more occasions, but did not

print those e-mails. (Depo. of Respondent Broome, R. p. 512). During the Family Court litigation in the summer of 2006, Appellant later learned that Respondent Broome had gone into his e-mail account and this action followed.

ARGUMENTS

I. THE CIRCUIT COURT PROPERLY GRANTED RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT AS TO THE CAUSE OF ACTION ALLEGING VIOLATON OF THE FEDERAL STORED COMMUNICATIONS ACT.

The Federal Stored Communications Act, 18 U.S.C. §2701, *et seq.* is a criminal statute which can impose civil liability. 18 U.S.C. §2707. As such, the statute is to be strictly construed, One who seeks to recover a penalty for the failure on the part of the defendant to discharge some duty imposed by law, must bring his case clearly within the language and meaning of the statute awarding the penalty. Such laws are to be expounded strictly against the offender and liberally in his favor ... And it is immaterial, for the purpose of the application of the rule of strict construction whether the proceedings for the enforcement of the penal law, be criminal or civil ... *South Carolina Department of Revenue v. Collins Entertainment Corp.*, 340 S.C. 77, 530 S.E.2d 635 (S.C. 2000). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and the court must apply the statute according to its literal meaning. *Paschal v. The State Election Commission*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *Paschal, supra.*

The Circuit Court properly held that under the facts of this particular case, the emails at issue were in a post-transmission state; i.e., they had been sent and received by the Appellant and saved by the Appellant at his discretion. The e-mails at issue were not in "temporary, intermediate storage incidental to the electronic transmission thereof" and they were not stored "by an electronic communication service for purposes of back-up protection", while in that temporary, intermediate storage prior to receipt by the Appellant. This construction of the Federal Stored Communications Act fully comports with the reasoning of the U.S. District Court for the Eastern District of Pennsylvania in *Fraser v. Nationwide Mutual Insurance Company*, et al., 135 F.Supp.2d 623 (2001), *aff'd on other grounds*, 352 F.3d 107 (2003). The court in *Frazier* analyzed 18 U.S.C. §2701, *et seq.*, (the Stored Communications Act) and noted that it prohibits unlawful access to stored communications by intentionally accessing without authorization a facility through which an electronic service is provided or intentionally exceeds an authorization to access that facility and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system. 18 U.S.C. §2701(a). Definitions to be used in interpreting the Federal Stored Communications Act as used in that chapter are the same definitions as found in 18 U.S.C. §2510. (18 U.S.C. §2711 - Definitions for chapter.) The term electronic storage is clearly defined in 18 U.S.C. §2510(17). "Electronic storage" means (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof, and (B) any

storage of such communication by an electronic communication service for purposes of back-up protection of such communication. (*emphasis added*). The District Court in *Fraser* and the Circuit Court in the instant case thus correctly determined that under the clear definition of electronic storage, emails in the post transmission state (i.e., e-mails which had been sent and received and then not deleted by a user) do not fall within the definition of electronic storage as provided for in the statute. The court in *Fraser* noted, "The phrase "for purposes of backup protection of such communication" in the statutory definition makes clear that messages that are in post transmission storage, after transmission is complete, are not covered by Part "B" of the definition of electronic storage." The facts of Fraser were that Nationwide received Fraser's e-mail from storage after the e-mail had already been sent and received by the recipient. Nationwide acquired Fraser's e-mail from post-transmission storage. Therefore, Nationwide's conduct was not prohibited under the Stored Communications Act. *Fraser, supra* at 635, 636.

This is the exact situation concerning the emails at issue in this case. Respondent Broome opened e-mails which had been sent and received by the Appellant and not deleted by the Appellant. (Depo. of Respondent Broome, pp. 33-35, Responses to Request to Admit of Broome). Therefore, the Circuit Court correctly ruled that the e-mails in question fall outside the scope of the Federal Stored Communications Act pursuant to the reasoning found in *Fraser* and the clear language of the statute.

Under the construction of the Stored Communications Act urged by the Appellant, the act would apply to all e-mails sent by a user and subsequently saved

by that user who chose not to delete them, and to all e-mails received by a user and opened by a user and subsequently saved by that user who chose not to delete them. That is clearly outside of the definition of electronic storage as stated in the plain language of the Federal Stored Communications Act. The Act uses the adjective "such" to describe the communications to which it applies. "Such" is defined as "having a quality already or just specified or of the character, quality or extent previously indicated or implied". (Webster's New Collegiate Dictionary, 7th ed. 1971). In a legal context, "such" is defined as "Of that kind, having the particular quality or character specified. Identical with, being the same as what has been mentioned." (Black's Law Dictionary, 5th ed. 1979).

Thus, the term "any storage of <u>such</u> communication by an electronic communication services for purposes of backup protection of <u>such</u> communication" clearly refers to the communications just specified and previously indicated in subsection (A) which relates to temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof. There is no evidence and it is not alleged by the Appellant that the e-mails in question were in temporary, intermediate storage incidental to the electronic transmission thereof at the time they were accessed by Respondent Broome. It is uncontested that the e-mails had been sent and received, opened and not deleted by the Appellant at the time they were accessed. Therefore, the communications fall outside the clear language of the Federal Stored Communication Act. There is absolutely no evidence in the record and the Appellant does not allege that the e-mails in question had been stored by Yahoo

for purposes of backup protection while they were in temporary, intermediate storage incidental to the electronic transmission thereof.

Therefore, the Circuit Court correctly granted the Respondents' Motions for Summary Judgment on the grounds that the e-mails in question did not meet the definition of being in electronic storage as found in the Federal Stored Communications Act as set forth in 18 U.S.C. §2510(17). To hold otherwise would mean that the Federal Stored Communications Act refers to all e-mails stored temporarily while awaiting opening by a user and any backup storage of such communications by an electronic communication service for purposes of backup protection prior to being received by a user and to all e-mails sent and saved by a user at his discretion and all e-mails received and saved by a user at his discretion. This basically means that under such construction, the Electronic Stored Communications Act applies to all e-mails saved by whatever entity at whatever time for whatever reason. The Respondents urge that this Court should not adopt so broad a construction of the Act, especially in light of the rules of statutory construction as clearly set forth in this jurisdiction.

Respondents are mindful of the Appellant's reliance on *Fisher v. Mt. Olive Lutheran Church*, 207 F.Supp.2d 914 (W.D. Wis. 2002). Respondents respectfully submit that the District Court in *Mt. Olive* and the Ninth Circuit cases cited by the Appellant ignore the plain, unambiguous language of the Act and incorrectly extend its scope to all e-mails transmitted and received by a user and then saved at the user's discretion in an electronic communications service. If Congress had intended that to be the scope of the Federal Stored Communications

Act, then it clearly would have used the indefinite article "a" in place of the adjective "such" and added the words "or by a user" to 18 U.S.C. §2510(17)(B).

Therefore, the Circuit Court in the instant case properly construed "stored communication" as defined in the Federal Stored Communications Act and granted summary judgment to the Respondents.

II. THE CIRCUIT COURT CORRECTLY GRANTED RESPONDENTS' SUMMARY JUDGMENT ON THE CAUSE OF ACTION ALLEGING VIOLATION OF THE STORED COMMUNICATIONS ACT ON THE GROUNDS THAT THERE WAS NO EVIDENCE IN THE RECORD THAT THE RESPONDENTS' CONDUCT FELL WITHIN THE SCOPE OF THE ACT.

Appellant presented no evidence that the Respondents accessed an electronic communication while it was in electronic storage as that term is defined in the Act and, therefore, the Circuit Court properly granted summary judgment pursuant to Rule 220(c) SCACR. The Appellant presented no evidence at the hearing on Respondents' Motions for Summary Judgment that the e-mails at issue were in temporary, intermediate storage incidental to the electronic transmission thereof. The only evidence in the record was that the e-mails in question had been sent and/or received by the Appellant. Therefore, there was no evidence presented that fell within the definition of electronic storage as defined in 18 U.S.C. §2510(17)(a). There was no evidence presented by the Appellant which showed or tended to show that any such e-mails were stored for purposes of backup protection. The only evidence in the record was that the e-mails in question were the actual e-mails opened by the Appellant and then not deleted. The record is void of any evidence, documentary or testimonial, that the e-mails in question

were stored for purposes of backup protection of those e-mails. Therefore, there was no evidence presented to the Circuit Court which showed or tended to show that the e-mails in question would fall within the definition of electronic storage as defined under the Act under either subsection (A) or subsection (B).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact; the moving party may discharge the burden or demonstrate the absence of a genuine issue of material fact by pointing out the absence of evidence to support the non-moving party's case. Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. The non-moving party must come forward with specific facts showing there is a genuine issue for trial. *Bennett v. Investors Title Insurance Company*, 370 S.C. 571, 635 S.E.2d 660, (S.C. Ct. App. 2006). No such evidence was presented by the Appellant in this case. Therefore, even if the definition of electronic storage refers to e-mails received by the Appellant and intentionally left on his e-mail at his discretion in his account with an electronic communication service, there must be some evidence that the e-mails in question were stored there for purposes of back-up protection. No such evidence was presented and, therefore, the Circuit Court correctly granted Respondents' Motions for Summary Judgment as to the Appellant's cause of action for alleged violation of the Federal Stored Communications Act.

III. THE CIRCUIT COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO AMEND HIS COMPLAINT TO ADD AN ADDITONAL PARTY DEFENDANT, RESPONDENT GAIL JENNINGS (FAMILY COURT ATTORNEY), AND ALLEGE DAMAGE TO HIS BUSINESS.

The Appellant had already amended his Complaint to add several additional causes of action by way of consent order and filed his First Amended Complaint in July, 2007. (See First Amended Complaint). Of the numerous causes of action and statutory violations contained in the First Amended Complaint, three alleged statutory violations were dismissed by stipulation at the hearing and the conspiracy cause of action under the Federal Wire Tap statute was dismissed by stipulation as well. The common law causes of action for invasion of privacy were disposed of by way of summary judgment and the portion of the Circuit Court's Order disposing of those causes of action has not been appealed. Therefore, of the numerous causes of action and the alleged statutory violations contained in the First Amended Summons and Complaint, the only remaining cause of action in contention is the alleged violation of the Federal Stored Communications Act for which summary judgment was also granted. In light of the prior amendment and the disposition of the allegations and causes of action of the First Amended Complaint by way of stipulation and/or Order of the Court which has not been appealed, the Circuit Court's denial of Appellant's Motion to add an additional party defendant and allege damage to his business was proper. The Appellant admitted in his deposition that he had suffered no damage to his

business as a result of the actions of which he complained. (Depo. of Appellant Lee Jennings, R. p. 575).

CONCLUSION

The Circuit Court correctly granted the Respondents summary judgment under the Stored Communications Act, 18 U.S.C. §2701, *et seq.* The allegations made by the Appellant did not fall within the scope of the definition of "stored communications" as contained in the Act and even if the Court construed "stored communications" as broadly as urged by the Appellant, there was absolutely no evidence in the record which showed or tended to show that the e-mails at issue in this case fell within the broader definition.

Respectfully submitted,

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May 15, 2009.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas For the Fifth Judicial Circuit

L. Casey Manning, Circuit Court Judge

Case No. 2007-CP-40-1125

M. Lee Jennings, ... Appellant,

v.

Gail M. Jennings, Holly Broome,
Brenda Cooke, Individually and BJR
International Detective Agency, Inc. ..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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The Honorable L. Casey Manning, Circuit Judge

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M. Lee Jennings,

Appellant,

v.

Gail M. Jennings, Holly Broome,
Brenda Cook, individually, and
BJR International Detective Agency, Inc.,

Respondents.

Final Brief of Respondent Gail Jennings

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STATEMENT OF THE ISSUES ON APPEAL

Appellant Gail Jennings would restate the issues presented on appeal as:

I. Did the Trial Court properly grant summary judgment to Defendant Gail Jennings on Plaintiff's claim for violation of the Federal Stored Communications Act, 18 U.S.C. § 2701 because:

   A. The Defendant Gail Jennings did not access the emails saved by the Plaintiff in his personal Yahoo account; and

   B. The emails accessed by Defendant Holly Broome were not in "electronic storage" as defined in 18 U.S.C. § 2510(17)?

II. Did the Trial Court properly refuse to allow the Plaintiff/Appellant to amend his complaint to add the Defendant's attorney, Thomas Neal, as a party defendant?

STATEMENT OF THE CASE

This civil action alleging violation of the Federal Stored Communications Act, 18 U.S.C. § 2701-2712, arises out of the break-up of the marriage between Plaintiff M. Lee Jennings and Defendant Gail Jennings. The Jennings separated in June 2006, when the Plaintiff told his wife that he had fallen in love with another woman who he refused to identify. After the separation, Gail Jennings' daughter in law, Holly Broome, accessed Lee Jennings' Yahoo email and discovered several emails to/from Lee Jennings and his girlfriend which he had received/sent and saved on his personal Yahoo account. Mrs. Broome printed copies of the emails which she gave to Gail Jennings and Brenda Cooke, of BJR Detective Agency, Inc., a private investigator Gal Jennings had hired to investigate her husband. Holly Broome and/or Gail Jennings also gave a copy of the emails to Gail Jennings' domestic attorney. However, the emails have never been filed in the divorce action pending in family court.

Plaintiff Lee Jennings commenced this action on February 20, 2007, by filing a summons and complaint in the Court of Common Pleas for Richland County, naming Gail Jennings, Holly Broome and Brenda Cooke and her agency as defendants. [ROA 1; Complaint.] He alleged common law causes of action for invasion of privacy – publicizing private affairs, invasion of privacy – wrongful intrusion, conspiracy, and a cause of action for violation the S.C. Homeland Security Act, S.C. Code Ann. §§ 17-30-10, et seq..

Defendant Gail Jennings served an answer on April 2, 2007, generally denying the allegations of wrongful conduct and also asserting a Rule 12(b)(6), SCRCP, defense of failure to state facts sufficient to state a cause of action, and an equitable defense of

unclean hands. [ROA 21; Gail Jennings Answer, filed May 2, 2007.] Defendant Brenda Cooke and her agency (referred to collectively as Cooke) served and filed an answer on March 28, 2007, and Defendant Holly Broome served an answer on March 30, 2007, also denying the allegations of wrongful conduct and asserting the same defenses. [ROA 11, 17; Answers.]

On June 8, 2007, the Plaintiff served a motion to amend his complaint, which was granted with consent of the defendants by order filed July 13, 2007. [ROA 86, 11; Motion to Amend, Consent Order to Amend.] The Plaintiff filed an amended complaint on July 25, 2007, adding allegations of violation of other state and federal statutes: the S.C. Computer Crimes Act, S.C. Code Ann. §§ 16-16-10, et seq.; the Federal Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; and the Federal Stored Communications Act, 18 U.S.C. §§ 2701-2712. [ROA 102; First Amended Complaint.]

Defendant Gail Jennings filed an answer to the First Amended Complaint on September 25, 2007. [ROA 124; Answer.] Defendants Broome and Cooke also filed answers to the First Amended Complaint. [ROA 120, 115; Cooke Answer, served August 13, 2007; Broome Answer, filed March 30, 2007.]

All the parties filed motions for summary judgment. ROA 26, 83, 133, 74, 79, 164; Plaintiff motion for summary judgment, filed May 2, 2007; Jennings motions for Summary Judgment, filed May 24, 2007, refiled February 19, 2008; Cooke Motion for summary judgment, dated May 7, 2007; Broome Motion for summary judgment, dated May 14, 2007, refiled February 20, 2008.] [See ROA 555; Hearing Tr. p. 3.]

Plaintiff also filed another set of motions to amend his complaint again, seeking to allege damage to his business, and to add Gail Jennings' attorney, Thom Neal, as a party

defendant. [ROA 168, 182; Motion filed March 25, 2008, Superseding Motion, filed April 18, 2008.]

At the motions hearing, the Plaintiff stipulated that the Defendants did not intercept the emails at issue and voluntarily withdrew his claims under the state statutes and the Federal Electronic Communication Privacy Act. [ROA 559-60, 591; Hearing Tr. p. 7/25 – 8/1 (conceding that S.C. Code Ann. §16-16-10 does not apply because no conviction); Tr. p. 39/12-15 (stipulating that there was no intercept).]

The Trial Court granted summary judgment to all the Defendants on all four causes of action:

- As to the First Cause of Action for violation of the Stored Electronic Communications Privacy Act, 18 U.S.C. § 2701(a), there is no evidence tending to establish that the emails were in "electronic storage" as defined in §2501(17) of the Act. In addition, as to Defendants Gail Jennings and Brenda Cooke, there is no evidence that they accessed the Plaintiff's emails.
- As to the Second Cause of Action for public disclosure of private facts, there was no evidence showing that the emails had been disclosed to the public or were the subject of publicity.
- As to the Third Cause of Action for invasion of privacy – wrongful intrusion, there was no basis to conclude that an ordinary husband of ordinary sensibilities would be so shocked and outraged under the particular facts and circumstances – where he had already informed his wife that there was another woman and having separated -- so as to suffer severe mental or physical injury.

- As to the Fourth Cause of Action for conspiracy to intercept the Plaintiff's email, Plaintiff stipulated that there was no interception so there is no factual foundation for a conspiracy claim.

The Trial Court also denied the Plaintiff's motion(s) to amend, on the grounds that the Plaintiff had already been allowed to amend once and summary judgment had been granted on all the causes of action. [ROA 404; Order Granting Defendants' Motion for Summary Judgment and denying Plaintiff's Motion to Amend Complaint, filed September 24, 2008.]

Plaintiff filed a motion to reconsider on September 25, 2008, which was denied by order filed November 7, 2008. [ROA 418,438; Plaintiff's motion to reconsider, Order.] Thereafter, the Plaintiff timely served filed a notice of appeal on November 17, 2008. [ROA 439; NOA.]

Plaintiff does not present any issue on appeal challenging the Trial Court's rulings granting summary judgment to the Defendants on the second, third or fourth causes of action.

STATEMENT OF THE FACTS

Based on the admissions and deposition testimony produced during discovery, the Trial Court made the following finding of fact, none of which the Appellant has challenged in his statement of the issues presented on appeal[1]:

1. The Plaintiff, Lee Jennings, is the husband of the Defendant Gail Jennings. The Defendant Holly Broome is the daughter-in-law of the Defendant Gail Jennings and the step daughter-in-law of the Plaintiff Lee Jennings.

[1] With the exception of the Plaintiff's challenge to the legal conclusion in ¶ 8 regarding whether the emails were in electronic storage.

2. Gail Jennings and Lee Jennings separated on June 21, 2006 when the Plaintiff told Gail that he had fallen in love with someone else, who was also married. The Plaintiff told Gail Jennings that he had been corresponding with the woman with whom he had fallen in love via email, but he would not tell her the woman's name.

3. Defendant Gail Jennings told Defendant Holly Broome about the separation when Holly and her husband came over to Defendant Jennings' house on Saturday, June 24, 2006, and explained that the Plaintiff had told her that he had fallen in love with someone else and that they had been corresponding by email after Defendant Jennings had found a card for flowers in Plaintiff Jennings' care and realized the flowers were not for her. Defendant Gail Jennings was extremely upset.

4. The next day Defendant Broome, using her computer at her home, went onto Plaintiff's Yahoo email account and changed his password, therefore giving her access to the saved emails which Mr. Jennings had received and not deleted, and had sent and not deleted. She printed emails which the Plaintiff had sent to his girlfriend, and which he girlfriend had sent to him. The Defendant Broome subsequently went on the email account several more times and printed out other emails which Plaintiff had sent his girlfriend, and which his girlfriend had sent him and which had been opened and saved by Plaintiff Jennings.

5. Defendant Broome and Defendant Jennings made three copies of the emails, which Defendant Broome had printed and gave one to Plaintiff's domestic attorney and one to Defendant Cooke, the private investigator hired by Defendant Jennings and Defendant Jennings kept one copy.

6. Family Court litigation was initiated in the summer of 2006 by Defendant Gail Jennings. That litigation is still pending. There is no evidence in the record that the emails between the Plaintiff and his girlfriend, which had been printed by Defendant Broome, were ever filed with the Family Court and those emails have not been filed with this Court.

****

8. There is no evidence in the record that the emails in question which were sent between the Plaintiff and his girlfriend and saved by the Plaintiff were temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof, nor is there any evidence that they were stored by any electronic communication service for purposes of back-up protection of those communications. The emails were saved on Plaintiff's personal account where they were kept at Plaintiff's discretion.

9. The Plaintiff learned that the emails in question had been accessed without his permission on or about January 3, 2007. He saw a counselor in June, 2007.

10. The Plaintiff's business has not suffered since his discovery that his saved emails had been printed and he started counseling.

The foregoing facts as found by the Trial Court are fully supported by the evidence adduced in discovery:

Holly Broome testified in deposition that she accessed Lee Jennings' email account without his permission on June 25, 2006. Holly Broome admitted that "she opened saved emails from Lee Jennings' yahoo email account after June 25, 2006, after her mother-in-law, Defendant Jennings, informed her that the Plaintiff admitted to her

that he had been corresponding with a paramour via email." However, Holly Broome also testified that she did not tell Gail Jennings what she was going to do before she initially accessed the account. Holly Broome also admitted that she provided copies of those emails to Gail Jennings on or about June 25, 2006, and that she provided information contained in those emails to Brenda Cooke as well as Gail Jennings after June 26, 2006. She further admitted that she opened saved emails after June 26, 2006, and also provided information contained in those emails. [ROA 157-58; Broome's Responses to Plaintiff's First Requests to Admit, dated April 17, 2007 –Exhibit 3 to Jennings motion for summary judgment.] [ROA 186-190; Broome Deposition Excerpts, pp. 12-22.]

Gail Jennings testified in deposition that she was not with Holly Broome when she accessed Plaintiff's email, but she admitted that she did receive copies of the emails from Holly Broome on June 25, 2007. Gail Jennings also admitted/testified that she gave one of the copies to her attorney Thom Neal and another copy to the private detective, Brenda Cooke, on Monday June 26, 2007, and that she kept a copy. She also testified that when Holly Broome later obtained other emails, Holly delivered them to the private detective. [ROA 160-61; Exhibit 4 to Gail Jennings' Motion for Summary Judgment, Gail Jennings Deposition Excerpts, pp. 17, 19, 20, 21.]

ARGUMENT

Standard for Summary Judgment and Appellate Review

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Baird v. Charleston County, 33 S.C. 519, 511 S.E.2d 69 (1999); Rule 56(c), S.C.R.C.P. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). In ruling on a summary judgment motion, the Court should consider the pleadings, depositions, interrogatory answers, admissions, and affidavits in determining whether there is a genuine issue of fact for trial. See Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994).

When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857, 860 (2002); David v. McLeod Regional Medical Center, 367 S.C. 242, 626 S.E.2d 1 (2006). However, interpretation of a statute is a question of law, which is subject to de novo appellate review. Town of Summerville v. City of North Charleston, 378 S.C. 107, 662 S.E.2d 40, 41 (2008) (citing Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)).

I. The Trial Court properly granted summary judgment to Defendant Gail Jennings on the claim for violation of the Federal Stored Communications Act, 18 U.S.C. § 2701, because Defendant Gail Jennings did not intentionally access an electronic communication while it was in electronic storage with an electronic communication service.

The Wiretap Act of 1968 was amended by the Electronic Communications Privacy Act of 1986 to deal with the new world of Internet communications and address concerns of how the traditional Fourth Amendment doctrines protecting our homes would apply to the virtual world created by the Internet. Kerr, Orin S., *A User's Guide To The Stored Communications Act, And A Legislator's Guide To Amending It*, 72 Geo. Wash. L. Rev. 1208, 1209-13 (August 2004). Currently emails – as electronic communications – may be protected under Title I (commonly referred to as the Wiretap Act) which makes it unlawful to intentionally intercept emails in transit and Title II (the Stored Communications Act) which prohibits the unauthorized access to emails while they are in electronic storage with a network service provider. 18 U.S.C. §§ 2701-2712.

The Plaintiff stipulated that there was no interception resulting in the voluntary dismissal of his Title I claim along with corresponding state statutory and conspiracy claims. The only remaining claim being pursued by the Plaintiff is under Title II, of which 18 U.S.C. § 2701 provides that:

> (a) Offense.--Except as provided in subsection (c) of this section whoever -
>
> (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
>
> (2) intentionally exceeds an authorization to access that facility;
>
> and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

Section 2707, 18 U.S.C., provides a corresponding civil remedy:

> (a) Cause of action.--Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

The applicable definitions of terms used in these statutes are found in 18 U.S.C. § 2510[2], which includes definitions of "electronic storage" and "electronic communication service":

> (15) "electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;
>
> ****
>
> (17) "electronic storage" means—
>
> (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
>
> (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication; ....

In granting summary judgment to all the Defendants, the Trial Court held that storage of emails by the Plaintiff on his personal email account falls outside the scope of "electronic storage" as defined by Section 2510(17). As an alternative ground for granting summary judgment to the Defendants Gail Jennings and Brenda Cooke, the Trial Court held that no recovery can be had against them under Section 2707 because they did not engage in the alleged violation of Section 2701. [ROA 414; Order.]

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[2]See 18 U.S.C. § 2711: "As used in this chapter— (1) the terms defined in section 2510 of this title have, respectively, the definitions given such terms in that section...."

A. The Defendant Gail Jennings did not access the emails.

The Trial Court dismissed the Section 2707 cause of action against Gail Jennings on the additional, alternative holding that Plaintiff only alleged [and submitted evidence] that Holly Broome -- not Gail Jennings --- accessed his private email account. [ROA 414; Order, p. 11 citing Tucker v. Waddell, 83 F.3d 688, 691 (4th Cir. 1996) ("Persons aggrieved by violations of the [§2707 of the Electronic Communications Privacy] Act can only assert a cause of action against the person or entity that 'engaged in that violation.'"). Appellant has not presented any issue on appeal challenging this holding.[3]

Rule 208(b)(1)(B), SCACR, provides that: "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." This point is not set forth in the Appellant's Statement of the Issues on Appeal. Nor does the Plaintiff/Appellant attempt to raise any argument challenging this holding in the argument sections of his brief.

Accordingly, the Plaintiff/Appellant has abandoned this issue and the grant of summary judgment to Defendant Gail Jennings should be affirmed on this independent ground. Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 623 S.E.2d 387, 392 (2005) (any argument as to dismissal of cause of action deemed abandoned where plaintiff did not argue any error); Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 342 S.C. 34, 535 S.E.2d 642, 647 (2000); see also First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal).

[3] In addition, it may be observed that the Plaintiff did not raise that issue in his motion for reconsideration. [ROA 418-20; Motion for reconsideration.]

B. The emails accessed by Defendant Holly Broome were not in "electronic storage" as defined in 18 U.S.C. § 2510(17).

The Stored Communications Act has been described as "dense and confusing," Kerr, 7 GWLR at 1208, which terms might also reasonably be used to describe the subject matter of the Internet and the virtual world it has created. However, the Trial Court carefully analyzed the statutory provisions as they pertain to the undisputed facts of this case and correctly concluded, as a matter of law, that since the emails were in a post-transmission, stored state, they fall outside the scope of Section 2510(17) definition of "electronic storage."

In responding to the Appellant's challenge on this issue, the Respondent Gail Jennings would first address to two preliminary points. **One** -- the essential facts are undisputed. Acting without the Plaintiff's permission, Holly Broome, using her home computer, logged in to the Plaintiff's Yahoo email account and changed his password; she then retrieved emails that the Plaintiff had sent to his girlfriend and saved to his personal Yahoo account as well as emails that the Plaintiff had received from his girlfriend, opened and read, and then saved to his personal Yahoo account. **Two** -- although the Plaintiff/Appellant presents and argues, as a separate issue, the contention that the Trial Court erred in granting summary judgment because he failed to allege all the necessary elements of an action under Section 2701, review of the order establishes that, although the Trial Court refers to the inadequacy of the Plaintiff's allegations, summary judgment was granted on the facts and lack of evidence that the emails were in electronic storage.

Moving to the merits of the question of whether the emails were in "electronic storage" under § 2510(17), it is important to understand – as the Plaintiff clearly does not

-- the narrow scope of the Stored Communications Act and the distinctions in the Act between providers of electronic communication services (ECS) and providers of remote communication services (RCS).

"First, there are many problems of Internet privacy that the SCA does not address. The SCA is not a catch-all statute designed to protect the privacy of stored Internet communications; instead it is narrowly tailored to provide a set of Fourth Amendment-like protections for computer networks." Kerr, 7 GWLR at 1214.

The Act provides different protections to "customers" and "subscribers" of network service providers in information held by two particular types of providers: providers of electronic communication service (ECS) and providers of remote computing service (RCS). As set forth above, Section 2510(15) defines an ECS as "any service which provides to users thereof the ability to send or receive wire or electronic communications," this includes electronic mail companies such as Yahoo. Kerr, 7 GWLR at 1214 n. 38 (citing S. Rep. No. 99-541, at 14, reprinted in 1986 U.S.C.C.A.N. at 3568). A remote communication service (RCS) is defined as "the provision to the public of computer storage or processing services by means of an electronic communications system." 18 U.S.C. § 2711(2).

As Professor Kerr explains in his comprehensive, authoritative law review article, most network service providers are multifunctional and the key is the provider's role with respect to a particular copy of a particular communication. Kerr, 7 GWLR at 1215. "Files held in intermediate "electronic storage" are protected under the ECS rules;

meanwhile, files held for long-term storage by that same provider are protected by the RCS rules." *Id.* (footnotes omitted).[4]

When an email is sitting in an personal email account mailbox unopened, the ISP is acting as a provider of ECS with respect to that e-mail and such an email falls in the provisions of Section 2510(17)(A). The Trial Court correctly found that since the Plaintiff had already opened the emails and saved them, Section 2510(17)(A) does not apply.[5]

The Trial Court also correctly found that Section 2510(17)(B) does not apply because the emails were not stored "by an electronic communication service for purposes of backup protection." As Professor Kerr explains this type of transaction,

> when a customer creates a document and sends it to a commercial long-term storage site for safekeeping, the storage site is acting as a provider of RCS with respect to that file. The traditional understanding has been that a copy of opened e-mail sitting on a server is protected by the RCS rules, not the ECS rules. The thinking is that when an e-mail customer leaves a copy of an already-accessed e-mail stored on a server, that copy is no longer "incident to transmission" nor a backup copy of a file that is incident to transmission: rather, it is just in remote storage like any other file held by an RCS.
>
> An example can help explain how the rules fit together under this traditional understanding. Imagine that I send an e-mail to my friend Jane who has an account at a commercial ISP. When the message first arrives at the ISP, the ISP acts a provider of ECS with respect to the e-mail. The e-mail is in "electronic storage" awaiting Jane's retrieval of the message. Once Jane retrieves my e-mail, she can either delete the message from the ISP's server or leave the message stored on the ISP's server for

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[4] In contrast, emails saved on a person's own computer or server do not come within the provisions of §2510(17). Fraser v. Nationwide Mutual Ins. Co., 135 F.Supp.2d 623 (E.D.Pa. 2001).

[5] The Plaintiff does not appear to challenge this holding, and in fact, the Trial Court's ruling on Section 2510(17)(A) is supported by the opinion of Theofel v. Farey Jones, 341 F.3d 978 (9th Cir. 2003), *superseded on rehearing*, 359 F.3d 1066 (9th Cir. 2004), as cited by the Plaintiff.

> safekeeping. If Jane chooses to store the e-mail with the ISP, the ISP now acts as a provider of RCS (and not ECS) with respect to that copy of the e-mail so long as the ISP is available to the public. The role of the ISP has changed from a transmitter of the e-mail to a storage facility available to the public, from an ECS to an RCS.

7 GWLR at 1216 (footnotes omitted).

In looking at Section 2510(17)(B), the Trial Court properly noted that the first requirement is that the communication must stored "***by*** an electronic communication service" and the second requirement is that the storage be "for purposes of backup protection of such communication." The Trial Court's interpretation is consistent with the statutory provisions for backup preservation found in Section 2704 which uses the term "backup copy" in a very technical way to mean a copy made by the service provider for administrative purposes. Kerr, 7 GWLR at 1217 n. 6; see also Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623, 635-38 (E.D. Pa. 2001) (concluding that e-mails taken from post-transmission storage are not in "electronic storage"), *aff'd on other grounds*, 352 F.3d 107 (3d Cir. 2003); H.R. Rep. No. 99-647, at 64-65 (1986) (noting that opened e-mail stored on a server are protected under provisions relating to remote computing services).

In support of his argument that the emails he saved in his person Yahoo account were in "electronic storage," the Plaintiff relies upon the Ninth Circuit's opinion in analysis in Theofel v. Farey Jones, 341 F.3d 978 (9th Cir. 2003), *superseded on rehearing*, 359 F.3d 1066 (9th Cir. 2004), and a district court opinion in Fischer v. Mt. Olive Lutheran Church, 207 F.Supp.2d 914 (W.D. 2002). As Professor Kerr comments, the opinion in Theofel is "quite implausible and hard to square with the statutory text," 7 GWLR at 1217, as is the district court' opinion in Fischer. Neither opinion addressed the

point that the storage must be "by" the ESC, and they glossed over (or ignored) the concept of the purpose of the storage for "backup" as it relates to other provisions of the Act. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690, 692 (1996) ("The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole.") (citations omitted).

Beyond Professor Kerr's view of the faulty analysis in Theofel, the Ninth Circuit opinion upon which the Plaintiff hinges his argument, in fact, defeats his position. Although the Plaintiff quotes at length from the Ninth Circuit opinion, he overlooks or fails to acknowledge that the following quoted statement, in fact, defeats his argument:

> An obvious purpose for storing a message on an ISP's server after delivery is to provide ***a second copy*** of the message in the event that the user needs to download it again-if, for example, the message is accidentally erased from the user's own computer. The ISP copy of the message functions as a "backup" for the user.

359 F.3d at 1075 (emphasis added). That distinction has been observed and followed by the district court in Flagg v. City of Detroit, 252 F.R.D. 346, 363 (E.D.Mich. 2008), noting that "messages are not stored for backup purposes" if a computer repository is 'the only place' where they are stored."

The undisputed fact is that Plaintiff, not Yahoo, saved the emails to his personal account. Thus, the emails were not stored ***by*** an Yahoo as an ESC. On the other hand, there is no evidence or allegation that the Plaintiff saved the emails anywhere else, and thus, the storage of the only copies of his emails on his personal Yahoo account was not "for purposes of backup protection". Accordingly, the emails do not fall within Section

2510(17)(B), and the Trial Court properly granted summary judgment to the Defendants.

II. The Trial Court properly exercised his discretion in denying the Plaintiff's motion to amend his complaint.

After having already been granted leave to amend his complaint once to assert additional causes of action and after the Defendants had moved for summary judgment, the Plaintiff moved to amend his complaint yet again to assert a claim for damages to his business and to add Gail Jennings' domestic lawyer, Thom Neal, as a party defendant. The Trial Court denied the motion(s) because Plaintiff had already amended once, and because summary judgment was being granted as a matter of law.

Rule 15, SCRCP, gives a trial court the power to amend pleadings beyond the time allowed for an amendment when to do so does not prejudice another party. The decision whether or not to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal unless manifest injustice has occurred. Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794, 802 (Ct. App. 1997) (citing Anders v. Nash, 256 S.C. 102, 180 S.E.2d 878 (1971); Mylin v. Allen-White Pontiac, Inc., 281 S.C. 174, 314 S.E.2d 354 (Ct.App.1984)).

Here, as a threshold matter, the Respondent submits that the Appellant has not properly preserved any challenge to the denial of his motions to amend. As noted above, Rule 208(b)(1)(B), SCACR, provides that: "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(D), SCACR, also requires that each issue be separately argued with discussion and citations of authority. Where an issue is not set forth in the statement it will be deemed abandoned. Similarly, short, conclusory statements made without supporting authority

also are deemed abandoned on appeal.

The issue as found in the Appellant's Statement of the Issues on Appeal is:

> Did the lower Court err by not allowing Appellant to amend his Complaint so as to add Thomas Neal, attorney for Respondent Jennings, as a party Defendant?

Accordingly, any issue as to the denial of Plaintiff's motion to amend to assert damages to his business is deemed abandoned.[6] To the extent that the Plaintiff makes a conclusory statement at the close of his argument that: "Based on the foregoing the lower court erred by not allowing the Appellant to amend his amended complaint so as to include damages to his business...." [Appellant's Brief p. 31], the issue still should be deemed abandoned. *See* Brown v. Theos, 338 S.C. 305, 526 S.E.2d 232, 235 n. 2 (Ct.App.1999), *aff'd,* 345 S.C. 626, 550 S.E.2d 304 (2001) (holding that a one sentence paragraph raised in an appellant's brief was insufficient to preserve the issue for appeal).

In addition, the Plaintiff/Appellant has not stated or argued any issue relating to the Trial Court's Finding of Fact No. 10: "The Plaintiff's business has not suffered since his discovery that his saved emails had been printed and he started counseling." In the face of that unchallenged fact, any amendment to assert business damages would be futile and denial of that motion should be affirmed.

Although the Plaintiff/Appellant has stated an issue challenging the denial of his motion to add Gail Jennings' attorney as a party, that issue should also be deemed abandoned because it is only raised in a short conclusory statement. Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485, 496 (Ct. App. 2004) ("where an issue is not

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[6] In addition, it may be observed that the Plaintiff did not raise any issue regarding the denial of his motion to amend his claim for damages in the lower court when he made his motion for reconsideration. [ROA 418; Motion for reconsideration.]

argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal") (citations omitted). The Plaintiff does not challenge, with any specific explanations or reasoning, the Trial Court's decision to deny the motion to amend because he had had already been granted leave to amend once. On the other hand, the appellate court has upheld the denial of a motion to amend a complaint a third time. Berry v. McLeod, supra.

In addition, the Plaintiff acknowledges that he would not be entitled to amend unless he prevails in overturning the grant of summary judgment: "Assuming Appellant prevails in his appeal with respect to summary judgment, Appellant should be given leave to amend his complaint because there will be no prejudice to any party." [Appellant's Brief p. 30.] However, even if this Court were to find that the emails were in "electronic storage" under Section 2510(17), any attempt to add the attorney as a defendant would be futile because there is no allegation or evidence that the attorney engaged in a violation of § 2701[7]; rather, the Plaintiff has left unchallenged Trial Court's finding that Broome was the only person who actually accessed the Plaintiff's email. Higgins v. Medical University of South Carolina, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (holding that a motion to amend may properly be denied where the proposed amendment would be futile because the cause of action fails as a matter of law).

[7] ROA 414; Order, p. 11 citing Tucker v. Waddell, 83 F.3d 688, 691 (4th Cir. 1996) ("Persons aggrieved by violations of the [§2707 of the Electronic Communications Privacy] Act can only assert a cause of action against the person or entity that 'engaged in that violation.'").

CONCLUSION

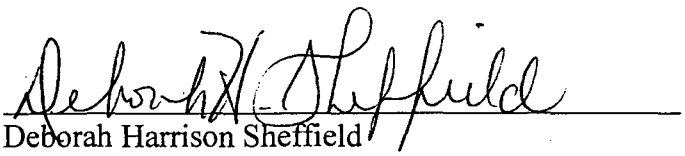
The Plaintiff attempted to assert a cause of action under 18 U.S.C. §2707 against Defendant Gail Jennings for accessing the emails he saved on his Yahoo account without authorization in violation of 18 U.S.C. § 2701(a). However, the Trial Court properly granted summary judgment to Defendant Gail Jennings on the ground that she did not access the emails saved by the Plaintiff in his personal Yahoo account. The Plaintiff has not raised any issue on appeal challenging this holding, and accordingly, the judgment should be affirmed.

In the alternative, judgment in favor of Defendant Gail Jennings should be affirmed because the Trial Court correctly held that the emails accessed by Defendant Holly Broome were not in "electronic storage" as defined in 18 U.S.C. § 2510(17) because the emails had already been opened/read/saved, and they were not stored ***by*** Yahoo or for purposes of ***backup*** protection.

In addition, Defendant submits that the Plaintiff has not adequately preserved or pursued any challenge to the Trial Court's denial of his motion(s) to amend his complaint a second time. However, the Trial Court acted within its discretion in denying the Plaintiff's motion to amend his complaint to add the Defendant's attorney, Thomas Neal, as a party defendant because any amendment would be futile in view of the dismissal of the §2707 claim on the merits, and the fact that, like his client, Mr. Neal did not access the Plaintiff's emails.

Wherefore, based on the foregoing, the Defendant Gail Jennings respectfully requests that the Court affirm the judgment entered in her favor.

Respectfully submitted,



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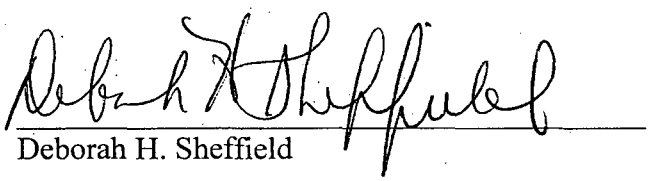
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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT

L. Casey Manning, CIRCUIT COURT JUDGE

DOCKET NO. 2007-CP-40-1125

M. LEE JENNINGS,

APPELLANT,

V.

GAIL M. JENNINGS, HOLLY BROOME, BRENDA COOK, individually and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,

RESPONDENTS.

FINAL BRIEF OF RESPONDENTS BRENDA COOK AND BJR DECTECTIVE AGENCY, INC.

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STATEMENT OF ISSUES ON APPEAL

I) **That the lower Court was correct in finding no basis for relief or recovery against Defendant Cooke, as Defendant Cooke is not a person who potentially engaged in alleged violation of 18 USC § 2701.**

II) **That the Appellant's Statement of Issues on Appeal fails to contest the lower Court's finding of no basis for relief or recovery against Defendant Cooke or BJR International Detective Agency, and therefore this issue should not be considered or reviewed on appeal.**

STATEMENT OF FACTS

At no time did Respondent Cooke or BJR International Detective Agency (hereinafter Respondents) access Appellant's email. Only Respondent Holly Broome accessed Appellant's email, and at no time did Brenda Cooke or BJR International Detective Agency Inc. request the emails retrieved by Holly Broome.

Chief Administrative Judge L. Casey Manning in his September 23, 2008th's Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion to Amend Complaint **(R. pp. 404-407)**, found the following findings of fact:

1. Gail Jennings and Lee Jennings separated on June 21, 2006 when the Appellant told Gail that he had fallen in love with someone else, who was also married. The Appellant told Gail Jennings that he had been corresponding with the woman with whom he had fallen in love via email, but he would not tell her the woman's name.
2. Defendant Gail Jennings told Defendant Holly Broome about the separation when Holly and her husband came over to Defendant Jennings' house on Saturday, June 24, 2006, and explained that the Plaintiff had told her that he had fallen in love with someone else and that they had been corresponding by email after Defendant Jennings had found a card for flowers in Plaintiff Jennings' car and realized the flowers were not for her. Defendant Gail Jennings was extremely upset.
3. The next day Defendant Broome, using her computer at her home, went onto the Plaintiff's Yahoo email account and changed his password, therefore giving her

access to the saved emails which Mr. Jennings had received and not deleted, and had sent and not deleted. She printed emails which the Plaintiff had sent to his girlfriend, and which his girlfriend had sent to him. The Defendant Broome subsequently went on the email account several more times and printed out other emails which Plaintiff had sent his girlfriend, and which his girlfriend had sent him and which had been opened and saved by Plaintiff Jennings.

4. Defendant Broome and Defendant Jennings made three copies of the emails, which Defendant Broome had printed and gave one to Plaintiff's domestic attorney and one to Defendant Cooke, the private investigator hired by Defendant Jennings and Defendant Jennings kept one copy.

5. Family Court litigation was initiated in the summer of 2006 by Defendant Gail Jennings. That litigation is still pending. There is no evidence in the record that the emails between the Plaintiff and his girlfriend, which had been printed by Defendant Broome, were ever filed with the Family Court and those emails have not been filed with this Court.

6. There is no evidence in the record that the emails in question which were sent between the Plaintiff and his girlfriend and saved by the Plaintiff were temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof, nor is there any evidence that they were stored by an electronic communication service for purposes of back-up protection of those communications. The emails were saved on Plaintiff's personal account where they were kept at Plaintiff's discretion.

7. The Plaintiff learned that the emails in question had been accessed without his permission on or about January 3, 2007. He saw a counselor in June, 2007.

8. The Plaintiff's business has not suffered since his discovery that his saved emails had been printed and he started counseling.

STANDARD OF REVIEW

In *Zurich American Ins. Co. v. Tolbert,* 662 S.E.2d 606 (S.C. App. 2008) this Court set forth the appropriate standard of review in cases where summary judgment has been granted:

"When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. *Cowburn v. Leventis,* 336 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct.App.2005). Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c) SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light mist favorable to the non-moving party. *Law v. S.C. Dep't of Corr.,* 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006)." (*Id).*

Finally, this Court is free to decide questions of law and interpretation of statutes with no particular deference to the lower court. (See *Bostic v. American Home Mtg. Servicing, Inc.,* 650 S.E.2d 479, 375 S.C. 143 (S.C. App. 2007)).

LEGAL ARGUMENT

I) **That the lower Court was correct in finding no basis for relief or recovery against Defendant Cooke, as Defendant Cooke is not a person who potentially engaged in alleged violation of 18 USC 2701.**

The Appellant does not provide any basis that Respondent Brenda Cooke and BJR International Detective Agency [hereinafter Defendants] have violated 18 USC § 2701. 18 USC § 2701 provides that it an offense to intentionally access without authorization a facility through which an electronic communication service is provided; or intentionally exceed an authorization to access that facility and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage. 18 USC § 2701. Even if a violation of 18 USC § 2701 occurred, the lower Court was correct in ruling that Ms. Cooke is not a person who potentially engaged in such violation and therefore not liable **(R. pp. 414-415).** 18 USC § 2707 (a).

The record shows that it was Holly Broome who accessed the Appellants email account and that at no time did Defendant Cooke access Appellant's email account. Ms. Cooke testified that neither she nor BJR International Detective Agency, Inc. accessed the Appellant's emails between him and his paramour. Ms. Cooke stated that "this [the emails] is what was given to me." **(R. p.483, line 9)**. Furthermore, Ms. Jennings also testified that Defendants had no part in procuring the e-mails from the Yahoo account of Mr. Jennings:

Q: How did you get into his e-mail box?
A: I did not.
Q: Who got into it?
A: Holly.

(R. p.462, lines 14-17). In addition, Ms. Jennings testified that it was herself and her daughter-in-law, Holly, who voluntarily brought the e-mails to Defendants stating "I felt the more information she had to background the, you know, more expediently she [Ms. Cooke] could get the information that was needed." **(R. p. 464, lines 4-8)**. When asked if she knew where the e-mails came from, Ms. Cooke testified that that she was not aware of how the e-mails came into Holly's possession. **(R. p. 485, lines 9-11)**. Defendants only obtained these e-mails after Ms. Jennings provided the e-mails without request. Defendants did not intentionally access any e-mails between Mr. Jennings and his paramour, and therefore Defendants cannot be alleged to be in possible violation of 18 USC § 2701.

As observed in Judge Manning's Order Granting Defendant's Motion for Summary Judgment, the Fourth Circuit has considered circumstances similar to the case at bar and ruled that the plain language of the statute only authorizes a cause of action against the "person or entity . . . which engaged in the violation." 18 USC 2701(a). *See Tucker v Waddell,* 83 F.3d 688, AT691 (4TH Cir,1996) **(R. p. 414)**. Defendants did not engage in the potential violation, and therefore are not potential violators of 18 USC § 2701. Because they are not potential violators of 18 USC § 2701, they cannot be held liable under 18 USC § 2707.

II) **That the Appellant's Statement of Issues on Appeal fails to contest the lower Court's finding of no basis for relief or recovery against Defendant Cooke or BJR International Detective Agency, and therefore this issue should not be considered or reviewed on appeal.**

The lower Court ruled that regardless of any findings as to whether any violation of 18 USC § 2701 occurred, Plaintiff cannot obtain any relief or recovery against Defendant Cooke (and consequently not BJR International Detective Agency, Inc.), as Defendant Cooke is not a person who potentially engaged in such alleged violation. 18 USC § 2707 (a). **(R. pp. 414-415)**. The lower Court further states that, "Plaintiff has not asserted or provided any basis that Defendant Jennings or Defendant Cooke engaged in a violation of the Stored Communications Act, he merely asserts in Paragraph 7 of his amended Complaint that Defendant Broome accessed his private email account; thus, the cause of action against Defendant Jennings and Defendant Cooke under 18 USC § 2707 is dismissed as a matter of law." **(R. pp. 414-415)**. (18 USC § 2707 allows civil action against violations of 18 USC § 2701). This ruling must also apply to BJR International Detective Agency Inc. because all BJR's actions are synonymous with the actions of Brenda Cooke.

Meanwhile, Appellant's Statement of Issues on Appeal only contests the lower Court's rulings on three separate issues; first, the Court's dismissal of the Appellant's cause of action under 18 USC § 2701 on the grounds that Appellant failed to allege all the elements necessary, second, whether emails retrieved were stored

communication, and third, whether the lower court should have allowed Appellant to amend his Complaint to allow attorney Thomas Neal as a party Defendant. **(Appellant's Statement of Issues on Appeal, p.1).** The Appellant does not include in his Statement of Issues on Appeal the question of whether the court erred in dismissing the cause of action against Defendant Cooke because she is not a person who potentially engaged in alleged violation. Because this issue is not included on the Appellant's statement of the issues on appeal, the lower Court's ruling on this issue should stand.

"In order for an issue to be properly presented for appeal, the Appellant's brief must set forth the issue in the statement of issues on appeal." *Langehans v. Smith,* 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct.App.2001); *State v. Culbreath* 377 S.C. 326, 332, 659 S.E.2d 268, 271 (S.C.App, 2008). *see also* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). The Appellant's brief did not set forth that the lower Court erred in its judgment dismissing the cause of action against Defendant Cooke because she was not a person who potentially engaged in alleged violation of the Stored Communications Act.

It is error for the appellate court to consider an issue not properly raised to it. *First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). *State v. Culbreath* 377 S.C. 326, 332, 659 S.E.2d 268, 271 (S.C.App, 2008). Therefore, this court should

limit this appeal to the three issues raised to it on the Appellant's Statement of Issues on Appeal. Thus, the lower Court's dismissal of the cause of action against Defendant Cooke (and BJR International Detective Agency, Inc) should not be considered on appeal, and thereby must stand.

CONCLUSION

Based on the forgoing, we ask this Court to uphold the lower Court's dismissal of the cause of action against Defendant Cooke and BJR International Detective Agency, Inc.

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May 18, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT

L. Casey Manning, CIRCUIT COURT JUDGE

DOCKET NO. 2007-CP-40-1125

M. LEE JENNINGS,

APPELLANT,

V.

GAIL M. JENNINGS, HOLLEY BROOME, BRENDA COOKE, individually and BJR INTERNATIONAL DETECTIVE AGENCY, INC.,

RESPONDENTS.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCAR.

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RESPONDENTS.

APPELLANT'S FINAL REPLY BRIEF IN RESPONSE TO BREIF OF RESPONDENT HOLLY BROOME

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May 21, 2009

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STATEMENT OF ISSUES ON APPEAL

II. RESPONDENT BROOME DID NOT RAISE TO THE LOWER COURT ANY ARGUMENT WITH RESPECT TO APPLICATION OF THE WORD "SUCH" TO THE FEDERAL STORED COMMUNICATIONS ACT

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Appellant relies upon his statement of the case and his statement of facts as set forth in his initial brief.

LEGAL ARGUMENT

II. RESPONDENT BROOME DID NOT RAISE TO THE LOWER COURT ANY ARGUMENT WITH RESPECT TO APPLICATION OF THE WORD "SUCH" TO THE FEDERAL STORED COMMUNICATIONS ACT

Respondent Broome attempts to raise for the first time on appeal the argument that interpretation of the Federal Stored Communications Act requires that the word "such", as used in the statute, refers to emails that are in temporary or intermediate storage.

Respondent Broome failed to make this argument in the lower court, and the same is therefore not properly before this Court. (See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."). Therefore the forgoing argument has not been properly preserved for appellate review.

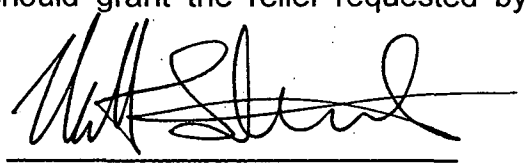
Respondent Broome also argues that Appellant failed to allege in his complaint that the emails that were improperly obtained were "...in temporary, intermediate storage incidental to the electronic transmission thereof."

This is a pleading requirement argument, not a summary judgment argument, and there is no case law requiring that in order to successfully plead a cause of action for violation of the Stored Communications Act, a party must specifically allege that the improperly obtained email was "...in temporary, intermediate storage incidental to the

electronic transmission thereof."

CONCLUSION

Based upon the forgoing, this Court should grant the relief requested by the Appellant.



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May 21, 2009

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RESPONDENTS.

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STATEMENT OF ISSUES ON APPEAL

I. APPELLANT HAS PROPELY PRESERVED FOR APPEAL THE ISSUE OF WHETHER THE LOWER COURT ERRED IN GRANTING SUMARY AS TO ALL DEFENDANTS

STATEMENT OF FACTS

Appellant relies upon his statement of facts and statement of the case as set forth in his initial brief.

LEGAL ARGUMENT

I. APPELLANT HAS PROPELY PRESERVED FOR APPEAL THE ISSUE OF WHETHER THE LOWER COURT ERRED IN GRANTING SUMARY AS TO ALL DEFENDANTS

Respondents Cooke and BJR argue that Appellant has not raised as one of the issues on appeal the determination of the lower court that Appellant "...**has not asserted or provided any basis** that Defendant Jennings or Defendant Cooke engaged in a violation of the Stored Communications Act, he merely **asserts** in paragraph 7 of his amended complaint that Defendant Broome accessed his private email account; thus, the cause of action against Defendant Jennings and Defendant Cooke under 18 U.S.C. § 2707 is dismissed as a matter of law." (September 23, 2008 Order at pages 11-12)(Emphasis Added)

However, Appellant specifically raises as one of his issues on appeal that summary judgment was improper as to "...Appellant's cause of action for violation of the Federal Stored Communications Act (18 USC § 2701) on the grounds that Appellant failed to allege **all elements** necessary to successfully plead a cause of action arising under the Act."

The question of whether Appellant has "asserted" all the necessary elements to successfully plead a cause of action for Violation of the Federal Stored Communications Act is the same question as whether the Appellant has "alleged" all the elements necessary to plead a cause of action for violation of the Stored Communications Act.

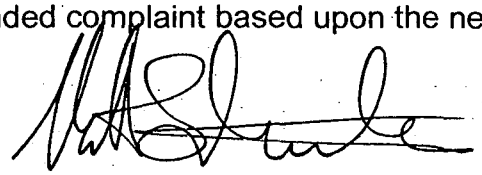
Indeed, Appellant's Amended Complaint specifically alleges:

> "Plaintiff alleges that his electronic communications have been intercepted, intentionally accessed, disclosed, and used without his authorization and in violation of the forgoing chapters and brings this civil cause of action against those persons and entities who accessed, intercepted, disclosed, used, and procured Plaintiff's private electronic communications.
> ...
> "By improperly intercepting and disseminating Plaintiff's private electronic communications, Defendants have caused Plaintiff to suffer special damages." (Amended Summons and Complaint)

Based upon the forgoing, the Appellant has not only raised as an issue on appeal the question of whether Appellant has successfully alleged all the elements necessary to plead a cause of action for violation of the Stored Communications Act, but he has also alleged all the elements necessary.

CONCLUSION

Based upon the forgoing, the lower court erred in granting summary judgment and not allowing Appellant to amend his amended complaint based upon the newly discovered evidence.



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Matthew E. Steinmetz
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May 21, 2009

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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October 13, 2011

Gary W. Popwell, Jr., Esquire
Lee Eadon Isgett & Popwell, PA
P. O. Box 1505
Columbia, SC 29202

Max N. Pickelsimer, Esquire
Carrie A. Warner, Esquire
Warner, Payne & Black
Post Office Box 2628
Columbia, SC 29202

Re: Jennings, M. Lee v. Broome, Holly

Dear Counsel:

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows:

Petitioner	10 minutes
Respondent	10 minutes
Petitioner in Reply	5 minutes

This case is scheduled for hearing on Tuesday, October 18, 2011 at 10:00 a.m.

Very truly yours,

Daniel E. Shearouse, Clerk

By Debbie N. Hopkins

Administrative Assistant

DES/dmh

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
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August 18, 2011

Gary W. Popwell, Jr., Esquire
Lee Eadon Isgett & Popwell, PA
Post Office Box 1505
Columbia, SC 29202

Max N. Pickelsimer, Esquire
Carrie A. Warner, Esquire
Warner, Payne & Black
Post Office Box 2628
Columbia, SC 29202

Re: Jennings, M. Lee v. Broome, Holly

Dear Counsel:

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise the following case will probably be reached for hearing at the October 2011 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in this case.

Court will meet the days of October 4, 5, 6, 18 and 19. Please notify this office of any changes or additions of counsel that should be made to the record for the purpose of argument.

Very truly yours,

Daniel E. Shearouse

CLERK

DES/dmh

cc: Deborah Harrison Sheffield, Esquire
John K. Koon, Esquire
Richard Giles Whiting, Esquire

Hopkins, Debbie

From: Max N. Pickelsimer <max@wpb-law.net>
Sent: Wednesday, August 17, 2011 5:09 PM
To: Hopkins, Debbie
Subject: FW: Jennings Supreme Court oral argument

Dear Ms. Hopkins,

I am writing to clarify Ms. Warner's email to you prior to writing the Court, as I am not sure whether your inquiry to her was whether I had conflicts with priority or whether I had any conflicts at all. I do not have any conflicts with priority over the Supreme Court on October 4, 5, or 6. I do, however, have conflicting hearings that week including a trial certain in a Common Pleas jury trial on October 3 in Greenville County, a Family Court temporary hearing in Clarendon County on October 4, 2011, a Family Court final hearing in Laurens County on October 5, 2011, and a show cause hearing in Family Court in York County on October 6, 2011.

If your inquiry was whether I had any conflicts with priority on the dates listed, I do not. And I apologize for any miscommunication.

Please let me know if a formal letter is required.

Thank you so much,

Max

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AUG 17 2011
S.C. Supreme Court

Max N. Pickelsimer
Attorney at Law
WARNER, PAYNE & BLACK, LLP
1122 Lady Street, Suite 1200 (29201)
Post Office Box 2628
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E-Mail Confidentiality Notice: This message is intended for the exclusive use of the individual or entity named above and may contain information that is privileged or confidential. If you are not the named addressee or an employee or agent responsible for delivering this message to the named addressee and received this message in error, please notify us by e-mail and then delete the message without reading or disseminating it. Thank you.

Circular 230 Disclosure: U.S. Treasury Department Regulations require us to advise you that unless otherwise expressly indicated, any federal tax advice contained in this communication, including attachments, is not intended to be used and should not be used to avoid tax-related penalties under the Internal Revenue Code or to promote to third person any tax-related matters that may be addressed herein.

From: Carrie Warner
Sent: Wednesday, August 17, 2011 4:51 PM
To: Max N. Pickelsimer
Subject: Fwd: Jennings Supreme Court oral argument

Sent from my iPhone

Begin forwarded message:

> **From:** "Hopkins, Debbie" <DHopkins@sccourts.org>
> **Date:** August 17, 2011 3:54:07 PM EDT
> **To:** Carrie Warner <carriewarner@wpb-law.net>
> **Subject: RE: Jennings Supreme Court oral argument**
>
> Ms. Warner,
>
> It appears from this correspondence, Mr. Pickelsimer has conflicts on October 4, 5 and 6. Please send a letter to the Court advising of the nature of the conflict.
>
> Thank you.

From: Carrie Warner [mailto:carriewarner@wpb-law.net]
Sent: Wednesday, August 17, 2011 3:47 PM
To: Hopkins, Debbie
Cc: kristina; Max N. Pickelsimer
Subject: RE: Jennings Supreme Court oral argument

Dear Ms. Hopkins

Max Pickelsimer will be arguing the Jennings matter and he is available on October 18 or October 19

Let me know if there is anything else you need

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AUG 17 2011
S.C. Supreme Court

Attorneys
LEE, EADON, ISGETT, POPWELL AND REARDON, P.A.

LUTHER M. LEE (1923-1996)
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August 17, 2011

VIA E-MAIL
Ms. Debbie Hopkins
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: M. Lee Jennings v. Gail Jennings, et al.
Case No.: 07-CP-40-1125

Dear Ms. Hopkins:

Per your conversation with my paralegal, this is to confirm that I am available on October 4, 5, 6, 18 and 19 for the scheduling of a hearing in the above referenced matter.

Thank you for your attention to this matter.

Yours very truly,

GARY W. POPWELL, JR.

GWPJr/cs
Enclosures

The Supreme Court of South Carolina

M. Lee Jennings, Respondent,

v.

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and BJR International Detective Agency, Inc. of whom Holly Broome is, Petitioner.

The Honorable L. Casey Manning
Richland County
Trial Court Case No. 2007-CP-40-1125

ORDER

For good cause having been shown, the time for serving and filing the Reply Brief of Petitioner out of time in the above entitled matter is hereby extended until May 20, 2011.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda L. Healy
Chief Deputy Clerk

Columbia, South Carolina

May 20, 2011

cc: Gary W. Popwell, Jr.
Max N. Pickelsimer, Esquire
Carrie A. Warner, Esquire
Deborah Harrison Sheffield, Esquire
John K. Koon, Esquire
Richard Giles Whiting, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAY 20 2011
S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Opinion No. 4711
Heard April 15, 2010 - Filed July 14, 2010

M. Lee Jennings,. ..... Respondent,

v.

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and as BJR International Detective Agency, Inc., Defendants, of whom Holly Broome is,..... Petitioner.

MOTION TO FILE REPLY BRIEF OF PETITIONER BROOME OUT OF TIME

Pursuant to Rule 240, SCACR Petitioner Broome moves this Honorable Court to allow Petitioner Broome to file and serve her Reply Brief out of time. This extension requested makes Petitioner Broome's Reply Brief due on May 20, 2011. This Motion is based on the grounds that counsel for Petitioner Broome calculated the due date of this document as being May 19, 2011 as the Brief of Respondent was received on May 9, 2011 and date stamped on that date and that no prejudice has resulted.

May 20, 2011

GARY W. POPWELL, JR.
ATTORNEYS LEE, EADON, ISGETT,
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Attorney for Petitioner Holly Broome

Attorneys

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May 20, 2011

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RECEIVED
MAY 20 2011
S.C. Supreme Court

Re: M. Lee Jennings v. Gail Jennings, et al.
Case No.: 07-CP-40-1125
Opinion No.: 4711

Dear Mr. Shearouse:

Please find enclosed for filing the original and six (6) copies of Petitioner Broome's Motion to File Reply Brief of Petitioner Broome Out of Time, in the above matter. We respectfully request that the requested extension be granted.

Also enclosed is our check for the prescribed filing fee of $25.00.

Hoping this letter finds you well, I am,

Yours very truly,

GARY W. POPWELL, JR.

GWPJr/gsr
Enclosures

cc: Max N. Pickelsimer, Esquire
Carrie A. Warner, Esquire
John K. Koon, Esquire
Deborah H. Sheffield, Esquire
Richard G. Whiting, Esquire

Check #49784
$25.00

Attorneys

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May 19, 2011

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

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MAY 19 2011
S.C. Supreme Court

Re: M. Lee Jennings v. Gail Jennings, et al.
Case No.: 07-CP-40-1125
Opinion No.: 4711

Dear Mr. Shearouse:

Please find enclosed for filing fifteen (15) copies of the Reply Brief of Petitioner, along with the Proof of Service, in the above-referenced matter. Please return clocked-in copies with my courier.

By copy of this letter and as evidenced by the attached Proof of Service, I am serving counsel of record with a copy of the Reply Brief of Petitioner.

Hoping this letter finds you well, I am,

Yours very truly,

GARY W. POPWELL, JR.

GWPJr/gsr
Enclosures

cc: Max N. Pickelsimer, Esquire
Carrie A. Warner, Esquire
John K. Koon, Esquire
Deborah H. Sheffield, Esquire
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PLEASE REPLY TO:
COLUMBIA OFFICE
POST OFFICE BOX 2628
COLUMBIA, SOUTH CAROLINA 29202

May 4, 2011

RECEIVED
MAY - 4 2011
S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29211

Re: M. Lee Jennings v. Gail Jennings, et al
Case No.: 2007-CP-40-1125
Opinion No.: 4711

Dear Mr. Shearouse:

I am having hand delivered for filing original and sixteen (16) copies of Brief of Respondent along with Certificate of Service upon counsel of record in the above-entitled matter. I would appreciate your filing the original and returning the additional "filed-stamped" copy to my courier.

By copy of this correspondence, I am serving the same upon counsel for record.

Thank you very much.

Yours truly,

Max N. Pickelsimer
MNP/is
Enclosures: As Stated
cc: Gary W. Popwell, Jr., Esquire
John K. Koon, Esquire
Deborah H. Sheffield, Esquire
Richard G. Whiting, Esquire
M. Lee Jennings

*† †Lifetime Fellow, American Academy of Matrimonial Lawyer; † †Lifetime Member, National Academy of ElderLaw Attorneys; *Member, National Academy of ElderLaw Attorneys; †Member, Academy of Special Needs Planners; ‡Former Asst. General Counsel, SC DHHS; ElderLaw Services of S.C., P.A. is a member of the National Network of Boutique Law Firms*

Attorneys

LEE, EADON, ISGETT, POPWELL AND REARDON, P.A.

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April 4, 2011

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RECEIVED
APR - 4 2011
S.C. Supreme Court

Re: M. Lee Jennings v. Gail Jennings, et al.
Case No.: 07-CP-40-1125
Opinion No.: 4711

Dear Mr. Shearouse:

Please find enclosed for filing fifteen (15) copies of the Brief of Petitioner, thirteen (13) copies of the Appendix, along with the Proof of Service, in the above-referenced matter. Please return clocked-in copies with my courier.

By copy of this letter and as evidenced by the attached Proof of Service, I am serving counsel of record with a copy of the Brief of Petitioner.

Hoping this letter finds you well, I am,

Yours very truly,

GARY W. POPWELL, JR.

GWPJr/gsr
Enclosures

cc: Max N. Pickelsimer, Esquire
Carrie A. Warner, Esquire
John K. Koon, Esquire
Deborah H. Sheffield, Esquire
Richard G. Whiting, Esquire

Attorneys

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April 4, 2011

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RECEIVED
APR - 4 2011
S.C. Supreme Court

Re: M. Lee Jennings v. Gail Jennings, et al.
Case No.: 07-CP-40-1125
Opinion No.: 4711

Dear Mr. Shearouse:

Please find enclosed for filing fifteen (15) copies of the Initial Brief of Petitioner, thirteen (13) copies of the Appendix, along with the Proof of Service, in the above-referenced matter. Please return clocked-in copies with my courier.

By copy of this letter and as evidenced by the attached Proof of Service, I am serving counsel of record with a copy of the Initial Brief of Petitioner.

Hoping this letter finds you well, I am,

Yours very truly,

GARY W. POPWELL, JR.

GWPJr/gsr
Enclosures

cc: Max N. Pickelsimer, Esquire
Carrie A. Warner, Esquire
John K. Koon, Esquire
Deborah H. Sheffield, Esquire
Richard G. Whiting, Esquire

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
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FAX (803) 734-1499

March 30, 2011

Gary W. Popwell, Jr.
Lee Eadon Isgett & Popwell, PA
P O Box 1505
Columbia, SC 29202

Re: Broome, Holly v. Jennings, M. Lee

Dear Counsel:

This is to advise that the title in the above matter has been changed to read as follows:

M. Lee Jennings, Respondent,

v.

Gail M. Jennings, Holly Broome, Brenda Cooke,
Individually and BJR International Detective Agency,
Inc. of whom Holly Broome is, Petitioner.

All future records in this matter should be changed to reflect this title. If you have any questions, please do not hesitate to contact this office.

Very truly yours,

CLERK

DES/lda

cc: Max N. Pickelsimer, Esquire
Carrie A. Warner, Esquire
Deborah Harrison Sheffield, Esquire
John K. Koon, Esquire
Richard Giles Whiting, Esquire

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
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March 3, 2011

Gary W. Popwell, Jr.
Lee Eadon Isgett & Popwell, PA
P O Box 1505
Columbia, SC 29202

Re: Broome, Holly v. Jennings, M. Lee

Dear Counsel:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before April 4, 2011. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,

CLERK

DES/lda

Enclosure

cc: Max N. Pickelsimer, Esquire
Carrie A. Warner, Esquire
Deborah Harrison Sheffield, Esquire
John K. Koon, Esquire
Richard Giles Whiting, Esquire

The Supreme Court of South Carolina

M. Lee Jennings, Respondent,

v.

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually, and BJR International Detective Agency, Inc., of whom Holly Broome is, Defendants, Petitioner.

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *Jennings v. Jennings,* 389 S.C. 190, 697 S.E.2d 671 (Ct. App. 2010). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

C. J.

J.

J.

J.

J.

Columbia, South Carolina

March 3, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 24 2010
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Opinion No. 4711
Heard April 15, 2010 - Filed July 14, 2010

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and as BJR International Detective Agency, Inc. of whom Holly Broome is,..... Petitioner,

v.

M. Lee Jennings,. .....Respondent.

PETITION FOR A WRIT OF CERTIORARI

GARY W. POPWELL, JR.
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Attorney for Petitioner Holly Broome

Other Counsel of Record:

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CARRIE A. WARNER
WARNER, PAYNE & BLACK
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Phone: (803) 799-0554
Attorney for Respondent M. Lee Jennings

[Additional Counsel of Record on Next Page]

DEBORAH H. SHEFFIELD
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Attorney for ~~Respondent~~ Gail M. Jennings

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Attorney for ~~Respondents~~ Brenda Cooke, Individually and BJR International Detective Agency, Inc.

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I. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE PETITIONER WAS ENTITLED TO SUMMARY JUDGMENT AS HELD BY THE CIRCUIT COURT AS THE EMAILS IN QUESTION DID NOT FALL WITHIN THE DEFINITION OF ELECTRONIC STORAGE AS STATED IN THE PLAIN LANGUAGE OF 18 U.S.C. SECTION 2510(17).

II. THE COURT OF APPEALS SHOULD HAVE AFFIRMED THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT TO THE PETITIONER UNDER THE STORED COMMUNICATIONS ACT, 18 U.S.C. SECTION 2510 AS THERE WAS NO EVIDENCE IN THE RECORD THAT THE EMAILS IN QUESTION WERE IN FACT STORED FOR PURPOSES OF BACK-UP PROTECTION BY ANY PERSON OR ENTITY WHATSOEVER.

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TABLE OF AUTHORITIES

CASES

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Kerr, Orin S., *User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1209-13 (August, 2004).....5
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STATUTES

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 27, 2010.

QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS ERR IN REVERSING THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT FOR THE PETITIONER ON THE GROUNDS THAT THE EMAILS IN QUESTION DID NOT MEET THE DEFINITION OF ELECTRONIC STORAGE AS STATED IN THE CLEAR AND UNAMBIGUOUS LANGUAGE OF 18 U.S.C. 2510(17)(B)?**

II. **DID THE COURT OF APPEALS ERR IN REVERSING THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT TO THE PETITIONER ON THE GROUNDS THAT THERE WAS NO EVIDENCE IN THE RECORD THAT THE EMAILS IN QUESTION WERE IN FACT STORED FOR PURPOSES OF BACK-UP PROTECTION BY ANY PERSON OR ENTITY?**

STATEMENT OF THE CASE

This action was brought by the Appellant on February 20, 2007 by filing and serving a Summons and Complaint against Respondents alleging numerous causes of action for violation of federal statutes and common law causes of action for invasion of privacy. The Complaint was subsequently amended and amended answers were filed by the Defendants. After discovery, all parties moved for summary judgment and the Appellant moved to amend his complaint again to include additional parties and additional causes of action. A hearing was held before the Honorable L. Casey Manning on June 19, 2008 on all parties' motions

for summary judgment and the Appellant's motion to amend his complaint for a second time. At the summary judgment hearing, the Appellant abandoned his cause of action alleging interception of the emails in question under Section 17-30-10, et seq., S.C. Code Ann. (1976, as amended) and 18 U.S.C. Sections 2510-2520, et seq. He also abandoned his cause of action alleging violation of Section 16-16-10, et seq., S.C. Code Ann. (1976, as amended). He also abandoned his cause of action alleging conspiracy. Therefore, the issues before the court at the June 19, 2008 hearing were the motion for summary judgment on the Appellant's cause of action alleging violation of the Federal Stored Communications Act, 18 U.S.C. Sections 2701-2712, and the common law invasion of privacy claims for publicizing private affairs and wrongful intrusion, and the Appellant's motion to amend his complaint to add an additional party defendant and an additional cause of action for damage to his business.

The Circuit Court issued an order granting Petitioner's motion for summary judgment on the common law claims and on the cause of action alleging violation of the Federal Stored Communications Act. Summary judgment for those causes of action was also granted to the co-Defendants in this case. The court also denied the Appellant's motion to amend his complaint to add an additional party defendant and an additional cause of action for damage to his business. The Appellant appealed to the South Carolina Court of Appeals which issued its opinion on July 14, 2010 affirming the grant of summary judgment on all causes of action to Defendants, Gail M. Jennings, Brenda Cooke and BJR International

Detective Agency, Inc. and reversing the grant of summary judgment to the Petitioner under the Federal Stored Communications Act, 18 U.S.C. Section 2701, et seq. and remanding that case for trial.

The Court of Appeals held that the actions of the Petitioner fell within the definition of electronic storage as stated in Section 2510(17)(B). A petition for rehearing was filed by the Petitioner with the Court of Appeals on July 28, 2010. The petition for rehearing was denied on August 27, 2010.

This case stems from marital break up between the Appellant and Respondent Gail Jennings after Mr. Jennings informed his wife that he had fallen in love with someone he met at a gym and Mr. and Mrs. Jennings immediately separated. (R. pp. 533-536). Gail Jennings went to her daughter-in-law's home, Petitioner Holly Broome, and informed Holly and Gail Jennings' son, Allen (Holly's husband), of the separation on June 24, 2006. (R. pp. 498-501). Appellant had informed Gail Jennings that he was corresponding with his paramour by email and Mrs. Jennings informed Petitioner Broome of this fact. Petitioner Holly Broome subsequently went into Appellant Jennings' email account by changing his password and obtained copies of the emails which he had sent to his paramour and received from his paramour, and had opened but not deleted. (R. pp. 502-506). She gave copies of the emails to Respondent Gail Jennings and to Respondent's private investigator, Brenda Cooke. (R. pp. 508-509). Petitioner Broome later went back onto Appellant's email account on several more occasions, but did not print those emails. During the family court

litigation during the summer of 2006, Appellant Jennings learned that Respondent Broome had gone into his email account and this action followed.

ARGUMENTS

I. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE PETITIONER WAS ENTITLED TO SUMMARY JUDGMENT IN HER FAVOR AS HELD BY THE CIRCUIT COURT AS THE EMAILS IN QUESTION DID NOT FALL WITHIN THE DEFINITION OF ELECTRONIC STORAGE AS STATED IN THE PLAIN LANGUAGE OF 18 U.S.C. SECTION 2510(17).

This is a case of first impression in this state. At issue is proper construction of the term "electronic storage" as contained in the Federal Stored Communications Act, which is found at 18 U.S.C. Section 2510(17)(B).

It is respectfully submitted that the Court of Appeals did not apply the plain language of the statute, which clearly states that electronic storage means "(a) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof, and (b) any storage of such communication by an electronic communication service for purposes of back-up protection of such communication." Under the plain language of the statute, emails in a post-transmission state (i.e., emails which have been sent and received and then not deleted by a user) do not fall within the definition of electronic storage as provided in the statute. Use of the term "any storage of <u>such</u> communication by an electronic communication service for purposes of back-up protection of such communication" clearly refers to the communications just specified in subsection (A) which relates to temporary, intermediate storage of a wire or electronic communication incidental to

the electronic transmission thereof. There is no evidence and it is not alleged by the Appellant that the emails in question were in temporary, intermediate storage incidental to the electronic transmission thereof at the time they were accessed by Respondent Broome. The emails in question had been sent and received, opened and not deleted by the Appellant at the time they were accessed. There is absolutely no evidence in the record and the Appellant does not allege that the emails in question had been stored by Yahoo for purposes of back-up protection while they were in temporary, intermediate storage incidental to the electronic transmission thereof.

This was the construction of the statute of the District Court in *Fraser v. Nationwide Mutual Insurance Company*, et al. 135 F. Supp.2d 623 (2001), *affirmed on other grounds*, 352 F.3d 107 (2003).

Instead, the Court of Appeals adopted the construction of the statute adopted by the Ninth Circuit in *Theofel v. Farey-Jones*, 359 F.3d 1066 (Ninth Cir. 2004). Such a construction of the statute "is quite implausible and hard to square with the statutory text." Kerr, Orin S., *User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1209-13 (August, 2004); analyzing *Theofel v. Farey-Jones*, 359 F.3d 1066 (Ninth Cir. 2004). The construction by the Court of Appeals basically finds that the Stored Communications Act applies to any electronic communication whatsoever whether received or not, accessed or not, and stored by any entity whatsoever. This clearly is not the intent of the statute. Under the construction of the statute adopted by the Court of Appeals, any husband or wife who looks at the text messages saved on their spouse's cell

phone without permission and reads those messages is in violation of the Federal Stored Communications Act. Clearly the Federal Stored Communications Act does not apply to messages which have been sent, received and opened by the intended recipient and then saved at the discretion of the recipient.

II. THE COURT OF APPEALS SHOULD HAVE AFFIRMED THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT TO THE PETITIONER UNDER THE STORED COMMUNICATIONS ACT, 18 U.S.C. SECTION 2510 AS THERE WAS NO EVIDENCE IN THE RECORD THAT THE EMAILS IN QUESTION WERE IN FACT STORED FOR PURPOSES OF BACK-UP PROTECTION BY ANY PERSON OR ENTITY WHATSOEVER.

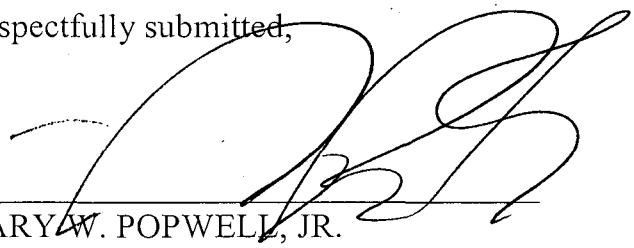
Additionally, Respondent contends that the court misapprehended and overlooked the complete absence of any evidence whatsoever in the record that the emails in question were in fact stored for purposes of back-up protection by any person or entity whatsoever. It is respectfully submitted that the Court of Appeals wrongly assumed the emails in question were stored for purposes of back-up protection by the Appellant or by Yahoo without any evidence whatsoever which supports that assumption. The Appellant was charged with the obligation of coming forward with specific facts showing there was a genuine issue for trial (in this case facts showing or tending to show that the emails in question were stored for purposes of back-up protection). There is absolutely no evidence in the record concerning this issue. The only testimony was that the emails had been opened and not deleted. There was absolutely no evidence they had been stored for purposes of back-up protection by any entity. Therefore, summary judgment was appropriate. *Bennett v. Investors Title Insurance Company*, 370 S.C. 571, 635

S.E.2d 660 (S.C. Ct. App. 2006).

CONCLUSION

For the reasons stated, the Petitioner asks that this Court grant this Petition for Writ of Certiorari to consider this novel question of law in this jurisdiction.

Respectfully submitted,



GARY W. POPWELL, JR.
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Post Office Box 1505
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Phone: (803) 799-9811
Attorney for Petitioner

September 24, 2010.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Opinion No. 4711
Heard April 15, 2010 - Filed July 14, 2010

RECEIVED
SEP 24 2010
S.C. SUPREME COURT

Gail M. Jennings, Holly Broome, Brenda Cooke, Individually and as BJR International Detective Agency, Inc. of whom Holly Broome is, ...Petitioner,

v.

M. Lee Jennings,. .....Respondent.

PROOF OF SERVICE

The undersigned employee of Attorneys Lee, Eadon, Isgett, Popwell & Reardon, P.A., attorneys for the Petitioner, does hereby certify that service of the ***Petition for Writ of Certiorari***, in the above-referenced action, was made upon the Clerk of the South Carolina Court of Appeals by hand delivery and counsel of record through the United States Mail with sufficient postage affixed thereto, at the below listed addresses this the 24th day of September, 2010 as follows:

Hand Delivered
THE HONORABLE JEANETTE F. BARBER
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Max N. Pickelsimer, Esquire
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Post Office Box 2628
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September 24, 2010.

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The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

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September 28, 2010

Gary W. Popwell, Jr.
Lee Eadon Isgett & Popwell, PA
P O Box 1505
Columbia, SC 29202

Re: Broome, Holly v. Jennings, M. Lee

Dear Counsel:

This office has received your Petition for Writ of Certiorari and Appendix in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

CLERK

DES/lda

Enclosure

cc: Max N. Pickelsimer, Esquire
Carrie A. Warner, Esquire
Deborah Harrison Sheffield, Esquire
John K. Koon, Esquire
Richard Giles Whiting, Esquire
The Honorable Tanya Gee

Attorneys

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September 28, 2010

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SEP 28 2010
S.C. SUPREME COURT

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: M. Lee Jennings v. Gail Jennings, et al.
Case No. 07-CP-40-1125
Opinion No.: 4711

Dear Mr. Shearouse:

Pursuant to the Court's instructions, please find enclosed for filing the original and seven (7) copies of the corrected cover page of the ***Petition for Writ of Certiorari,*** two (2) copies of the corrected cover page of the ***Appendix,*** and corrected ***Proofs of Service*** of the Petition and Appendix, in the above referenced matter. Please return clocked-in copies to me by way of my courier.

By copy of this letter, I am providing counsel of record with a copy of same as well as the Clerk of the Court of Appeals.

Yours very truly,

GARY W. POPWELL, JR.

GWPJr/gsr
Enclosures

cc: The Honorable Jeanette F. Barber *(w/Petition Only)*
South Carolina Court of Appeals Clerk of Court

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September 24, 2010

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The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
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Columbia, South Carolina 29201

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S.C. SUPREME COURT

Re: M. Lee Jennings v. Gail Jennings, et al.
Case Nos. 07-CP-40-1125
Opinion No.: 4711

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven (7) copies of the ***Petition for Writ of Certiorari*** in the above referenced matter. Please return a clocked-in copy to me by way of my courier. Additionally, please find enclosed for filing two (2) copies of the ***Appendix.*** I have also enclosed my law firm's check in the amount of $100.00 for the filing fee.

By copy of this letter and as evidenced by the ***Proof of Service***, I am serving a copy of the Petition on counsel of record as well as the Clerk of the Court of Appeals.

Thank you for your assistance in this matter.

Yours very truly,

GARY W. POPWELL, JR.

GWPJr/gsr
Enclosures

2008-108226
9-23-08
11-07-08
pub

cc: The Honorable Jeanette F. Barber *(w/Petition Only)*
South Carolina Court of Appeals Clerk of Court

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Carrie A. Warner, Esquire
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VIA HAND DELIVERY
The Honorable Jeanette F. Barber
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: M. Lee Jennings v. Gail Jennings, et al.
Case Nos. 07-CP-40-1125
Opinion No.: 4711

Dear Ms. Barber:

Please find enclosed for filing two copies of the ***Petition for Writ of Certiorari*** and ***Proof of Service***, in the above referenced matter that have been filed with the South Carolina Supreme Court.

Please provide me with a clocked-in copy by way of my courier.

Thank you for your assistance in this matter.

Yours very truly,

GARY W. POPWELL, JR.

GWPJr/gsr
Enclosures

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