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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

FROM THE COURT OF COMMON PLEAS FOR RICHLAND COUNTY

Appellate Case No. 2016-002040
Civil Action No. 2015-CP-40-3502

Peter G. Oliver, ... Plaintiff,

v.

The University of South Carolina, Martin Goodman, and Nancy Williamson, ... Defendants.

REPLY BY DEFENDANT MARTIN GOODMAN TO THE PLAINTIFF'S RETURN TO HIS MOTION TO SUPPRESS AUDIO RECORDING PURSUANT TO SOUTH CAROLINA CODE ANN. § 17-30-110

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Defendant Martin Goodman ["Goodman"], by and through his undersigned counsel, respectfully submits his instant reply to the Plaintiff's October 20, 2016 return to Goodman's September 30, 2016 motions to suppress and/or exclude an audio recording from use in all further proceedings in the suit filed by the Plaintiff in circuit court.

I. THIS COURT SHOULD SANCTION CONDUCT COMMITTED ON THE PLAINTIFF'S BEHALF DURING DISCOVERY BY EXCLUDING BOTH VERSIONS OF THE AUDIO RECORDING

Goodman begins his instant reply by first addressing the arguments and analysis offered by the Plaintiff in opposition to Goodman's motion to sanction conduct committed during discovery on the Plaintiff's behalf by excluding the audio recording.

In his return, the Plaintiff explained the decision to hire a private investigator to record the August 24, 2016 conversation between Goodman and Gregorich as follows:[1]

> Based upon the peculiar scheduling of this meeting, including, but not limited to, the fact it was being conducted in public at a McDonald's, that [Goodman's] deposition was impending while other depositions had already been completed, and that Plaintiff had previously brought a civil conspiracy claim against [Goodman], the Plaintiff notified his undersigned counsel of the same on August 23, 2016. Based upon discussions between Plaintiff and his counsel, it was decided to contact a private investigator.
>
> Anthony Vaughn, a Private Investigator with Vaughn Private Investigation, was contacted on the afternoon of August 23, 2016, and asked whether he would be able to travel to the subject McDonald's the following morning.

In the above-quoted passages, the Plaintiff failed to clearly articulate who hired Vaughn to travel to the McDonald's to record Goodman's conversation with Gregorich.

Vaughn, however, clarified who hired him in his affidavit, which the Plaintiff submitted as a supporting exhibit to his return:[2]

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[1] *See* the Plaintiff's Return, pp. 4 – 5.

[2] *See* Exhibit C (Vaughn Affidavit) to the Plaintiff's Return, ¶¶ 4 – 5.

> On Tuesday, August 23, 2016, **I was contacted by [the Plaintiff's counsel] and asked** if I could conduct some surveillance of an in-person meeting to take place on Wednesday, August 24, 2016.
>
> I was provided the location of the meeting and a description of the two individuals expected to attend **[by the Plaintiff's counsel]**.

[emphasis supplied].

In his affidavit, Mr. Vaughn described his actions after the Plaintiff's counsel hired him:[3]

> On Wednesday, August 24, 2016, I traveled to McDonald's located at or around 2064 Homestead Road, Bowman, South Carolina 29018, and arrived around 9:30 a.m.
>
> At or around 10:00 a.m. I ordered a coffee and Danish and sat at the table next to the two men.
>
> I sat down shortly after Goodman and Gregorich.[4]
>
> I [placed] an Olympus digital recorder, Model VN-6200 PC, on the table at which I was seated and began recording. A picture of the device used is attached hereto as Exhibit A.[5]

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[3] *See* Exhibit C (Vaughn Affidavit) to the Plaintiff's Return, ¶¶ 6 – 14.

[4] In his return, the Plaintiff asserted that Vaughn "sat down after Gregorich arrived – a discrepancy noted from [Goodman's] motion and the associated affidavits." *See* the Plaintiff's Return, p. 5. Goodman respectfully submits that this "discrepancy" may be resolved at the hearing contemplated by § 17-30-110(A) should this Court, in its discretion, determine that such a hearing is warranted. Irrespective of its resolution, this "discrepancy" in no way alters the stark reality that Vaughn recorded Goodman's conversation with Gregorich without the knowledge and consent of either Goodman or Gregorich.

[5] The picture of the recorder Vaughn included with his affidavit did not include any scaled object by which the recorder's size could be determined. Likewise, the Plaintiff did not provide the recorder's dimensions in his return. The failure by Vaughn and the Plaintiff to do so supports Goodman's assertion that the recorder was small enough for Vaughn to easily hide or shield from plain view. In his affidavit, Gregorich stated that he "saw what appeared to be a book bag that had been placed near the very edge of the table occupied" by a man whom the Plaintiff identified as Vaughn. *See* Goodman's Motion, p. 8 and Exhibit 3 (Gregorich Affidavit), ¶ 23. In his affidavit, Goodman stated that he saw the man seated at the table next to him, now identified as Vaughn, "place some kind of object, which was dark in color and which could have been a book bag or other type of bag," near the very edge of his table. *See* Goodman's Motion, p. 8 and Exhibit 2 (Goodman Affidavit), ¶ 26. Neither Vaughn in his affidavit nor the Plaintiff in his return denied that Vaughn placed a book bag or other type of bag on his table while he recorded Goodman's conversation with Gregorich. Neither Vaughn nor the Plaintiff discussed or mentioned any other objects Vaughn may have placed on his table aside from the small recorder. Their failure to do so supports the conclusion that Vaughn placed a book bag, another type of bag, and/or other items on his table to hide or shield his small recorder from plain view. As discussed in note 4 above, such a "discrepancy" may be resolved at the hearing contemplated by § 17-30-110(A) should this Court, in its discretion, determine that such a hearing is warranted. Again, this "discrepancy" does not alter the stark reality that Vaughn recorded Goodman's conversation with Gregorich without the knowledge or consent of either Goodman or Gregorich.

> I did not use any amplification and/or any other recording devices.[6]
>
> At or around 11:30 a.m., the two men concluded their meeting and exited the McDonald's.
>
> I attempted to provide a copy of the audio recording retrieved from the Olympus digital recorder to [**the Plaintiff's counsel**] on Sunday, August 28, 2016.
>
> **[The Plaintiff's counsel]** contacted me on Monday, August 29, 2016, regarding his inability to open the audio recording. I then resent the recording to [**the Plaintiff's counsel**] that same day.

[emphasis supplied].

Despite the repeated references to him as "Investigator Vaughn" in the Plaintiff's return and despite the assertion by Vaughn in his affidavit that he is a "practicing South Carolina Private Investigator and [has] over ten (10) years of law enforcement experience,[7]" Vaughn did not act under color of law at any point on or after the Plaintiff's counsel hired him on August 23, 2016 to record Goodman's conversation with Gregorich.

Nowhere in Vaughn's affidavit or, for that matter, nowhere in the Plaintiff's return did either Vaughn or the Plaintiff admit, assert, state, or otherwise imply that the Plaintiff himself hired Vaughn or that the Plaintiff himself supervised Vaughn's actions.

The Plaintiff, ignoring the above-quoted declarations from Vaughn's affidavit, ultimately offered the following chronology of the events which resulted in the production of the audio recording of Goodman's conversation with Gregorich:[8]

> In considering the facts and circumstances of this motion, as presented by both [Goodman] and Plaintiff, respectively, there is no evidence that Plaintiff's counsel engaged in any form of dishonesty, fraud, deceit, or

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[6] As discussed in note 17 below, Vaughn's assertion that he "did not use any amplification" in no way negates the reality that the audio recording he surreptitiously made was artificially enhanced.

[7] *See* the Plaintiff's Return, pp. 5 and 22, and Exhibit C (Vaughn Affidavit) to the Plaintiff's Return, ¶ 3.

[8] *Id.*, pp. 31 – 32.

> misrepresentation as contained in Rule 8.4(d). **The facts give rise to nothing more than**: (l) [Goodman] coordinating a meeting with Gregorich at a public location; (2) Gregorich posting the location and time of the meeting on his Google Calendar; (3) a private investigator making himself present at the public location during the course of the public meeting; (4) a recording of the conversation being obtained by way of an audio recorder placed on a restaurant table; (5) the contents of the recording including statements against interest or otherwise Plaintiff friendly evidence; and (6) [Goodman] now desperately trying to have the recording suppressed because it does not benefit his position in the litigation. **Unlike the cases addressed above and cited by [Goodman], Plaintiff's attorney(s) were never dishonest, misinformed, misrepresented, or seek to obtain the recording by fraud or deceit.** The recording was obtained by a private investigator simply placing an audio recorder on a table in McDonald's. [emphasis supplied].

The above-quoted chronology is absurd, and its absurdity results from the glaring refusal by the Plaintiff's counsel to candidly and accurately include his own actions in the sequence of events which resulted in Vaughn recording Goodman's conversation with Gregorich.

This chronology makes it appear that Vaughn learned of the date, time, and location of the meeting between Goodman and Gregorich, not to mention the physical descriptions by which Vaughn could identify them, by divine intervention. Likewise, this chronology makes it appear that the same divine intervention prompted Vaughn to travel to the McDonald's at Exit 159 so he could miraculously position himself right next to Goodman and Gregorich. Finally, this chronology makes it appear that the same divine intervention prompted Vaughn to bring an easily hidden recording device to the McDonald's so that once he miraculously found himself next to Goodman and Gregorich, he could record their conversation.

Again, as Vaughn admitted in his affidavit, the Plaintiff's counsel hired him to record Goodman's conversation with Gregorich, and the Plaintiff's counsel provided Vaughn with the location of the meeting and their physical descriptions. As confirmed by the return, the Plaintiff's counsel hired Vaughn after the Plaintiff tipped off the Plaintiff's counsel about the

meeting. As he also admitted in his affidavit, Vaughn performed the job for which he was hired by traveling to the McDonald's and recording the entirety of Goodman's conversation with Gregorich. Vaughn then e-mailed the recording to the Plaintiff's counsel.

Of profound impact is the reality that the Plaintiff's counsel never asserted, stated, or otherwise implied in the above-quoted chronology or anywhere else in the Plaintiff's return that either Goodman or Gregorich consented to having their conversation recorded. Likewise, Vaughn never asserted, stated, or otherwise implied in his affidavit that either Goodman or Gregorich consented to him recording their conversation.

The reality that the Plaintiff's counsel, acting on the Plaintiff's behalf, hired Vaughn to surreptitiously record Goodman's conversation with Gregorich demonstrates the folly of not only the above-quoted chronology, but also the following assertions from the Plaintiff's return:

> **Plaintiff's attorney(s) did not record any conversation of the parties.** To the contrary, a recognized private investigator, and an individual who was otherwise permitted to be in the public McDonald's at the same time of Defendant Goodman recorded the conversation. **This recording was admittedly turned over to Plaintiff's counsel to be used in this litigation.**[9]
>
> ...
>
> **Again, Plaintiffs attorney(s) did not themselves record a private conversation**; nor did Plaintiff's attorney(s) engage in any form of fraud or deceit in identifying themselves to other individuals. A private investigator was used to record a public conversation in a public place. This public conversation is relevant to the instant litigation and is otherwise discoverable.[10]
>
> ...
>
> As set forth on numerous occasions herein, **Plaintiff's attorney(s) did not record any conversation.**[11]

[9] *See* the Plaintiff's Return, p. 29.

[10] *Id.*, p. 30.

[11] *Id.*

As Goodman explained in his motion,[12] our Supreme Court held as follows in *Matter of Anonymous Member of South Carolina Bar*, 404 S.E.2d 513, 514 (S.C. 1991):

> However, we reaffirm our prior rulings that **an attorney shall not** record a conversation or any portion of a conversation of any person whether by tape or other electronic device, without the prior knowledge and consent of all parties to the conversation. [*See Matter of Anonymous Member of South Carolina Bar,* 322 S.E.2d 667 (S.C. 1984), *supra; In re Warner,* 335 S.E.2d 90 (S.C. 1985), *supra.*] Henceforth, this rule shall be applied **irrespective** of the purpose(s) for which such recordings were made, the intent of the parties to the conversation, whether anything of a confidential nature was discussed, and whether any party gained an unfair advantage from the recordings. [emphasis supplied].

As Goodman noted in his motion,[13] our Supreme Court, 404 S.E.2d at 514, offered the following stark observation in *Matter of Anonymous Member of South Carolina Bar*:

> The Court also **unequivocally stated** that **it was "reprehensible and impermissible for an attorney to secretly record another attorney or, indeed, another person.**" [*In re Warner,* 335 S.E.2d at 91]. [emphasis supplied].

As Goodman illustrated in his motion,[14] our Supreme Court, in the sole footnote to its decision in *Matter of Anonymous Member of South Carolina Bar*, 404 S.E.2d at 513, n. 1, invoked Rule of Professional Conduct 8.4(d), which declares that is it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

As Goodman observed in his motion,[15] the first sentence of the first comment to Rule 8.4 provides that "[l]awyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, **knowingly assist or induce another to do so** or **do so through**

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[12] *See* Goodman's Motion, p. 34.

[13] *Id.*, p. 34, n. 49.

[14] *Id.*, p. 34.

[15] *Id.*, p. 35. On the same page, Goodman quoted Rule 8.4(a), which declares that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, **knowingly assist or induce another to do so**, or **do so through the acts of another**." [emphasis supplied]. The Plaintiff's counsel offered a meager response to Goodman's invocation of Rule 8.4(a) in his return. *See* the Plaintiff's Return, p. 31, n. 27.

the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf." [emphasis supplied].

Under *Matter of Anonymous Member of South Carolina Bar*, the Plaintiff's counsel would have engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, as established by Rule 8.4(d), had he personally traveled to the McDonald's on the morning of August 24, 2016 and recorded Goodman's conversation with Gregorich without their prior knowledge and consent. Obviously, the Plaintiff's counsel did not undertake such conduct, and Goodman never asserted, stated, or implied in his motion that the Plaintiff's counsel did so.

Instead, as admitted by Vaughn in his affidavit, the Plaintiff's counsel hired Vaughn to travel to the McDonald's on the morning of August 24, 2016 to record Goodman's conversation with Gregorich without their prior knowledge or consent.

By hiring Vaughn (i.e. an agent) and then facilitating Vaughn's performance of the job for which he was hired (i.e. providing the location of Goodman's meeting with Gregorich and physical descriptions of both them), the Plaintiff's counsel knowingly assisted and induced Vaughn to, under Rule 8.4(a), take acts that the Plaintiff's counsel could not take on his own under *Matter of Anonymous Member of South Carolina Bar* and Rule 8.4(d).

Stated more plainly, the Plaintiff's counsel cannot demonstrate that he abided by rulings from our Supreme Court and the applicable Rules of Professional Misconduct by hiring Vaughn as his agent to commit acts that the Plaintiff's counsel did not – and could not – perform himself. By hiring Vaughn to serve his agent, the Plaintiff's counsel clearly ran afoul of Rule 8.4(a), as well as Rule 8.4's first comment.

In his motion,[16] Goodman offered the following enlightening paragraph from *In re Anonymous Member of the South Carolina Bar*, 552 S.E.2d 10, 18 (S.C. 2001):

> Depositions are widely recognized as one of the "most powerful and productive" devices used in discovery. *See* A. Darby Dickerson, *The Law and Ethics of Civil Depositions,* 57 Md. L.Rev. 273, 277 (1998). Since depositions are so important in litigation, **attorneys face great temptation to cross the limits of acceptable behavior in order to win the case at the expense of their ethical responsibilities to the court and their fellow attorneys. Claiming that any such improper behavior was merely "zealous advocacy" will not justify discovery abuse.** [emphasis supplied].

At the end of his return, the Plaintiff offered the following argument:[17]

> Finally, [Goodman] proffers to this Court that the recording constitutes some form of unfair advantage or **abuse of discovery**. To the contrary, it is exactly the opposite; an indisputable recount of factual issues that are at issue in this litigation. **The Plaintiff, nor [Goodman], nor this Court, are ignorant of the fact that defendants are not often inclined to admit to engaging in a civil conspiracy or of defaming someone's character. The existence of the same is almost always patently denied by the alleged perpetrator. The purpose of the audio recording and evidence in general, is to address such a denial head on. This audio recording is imperative in the questioning [Goodman] at his deposition and trial** on whether he engaged in acts [supporting] the civil conspiracy and/or defamation claim.[18] **The purpose of discovery, trial, and ultimately a verdict is to get to the facts of the case;** this audio recording does just that and because it is contrary to [Goodman's] interest(s) he seeks to have it excluded. [emphasis supplied].

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[16] *See* Goodman's Motion, pp. 36 – 37.

[17] *See* the Plaintiff's Return, pp. 32 – 33.

[18] In the footnote associated with the above-quoted sentence from the Plaintiff's return, the Plaintiff's counsel offered the following explanation of the reason why, as evidenced from his September 6, 2016 e-mail to Goodman's counsel, he sent the recording surreptitiously made by Vaughn to a local recording studio: "The purpose of removing the background noise was to simply allow for a cleaner ease of hearing rather than having to work through the recording at a slower pace. Even if the recording studio audio is not admissible, that should have no effect as to the original recording being admissible as discussed herein." *See* the Plaintiff's Return, pp. 32 – 33, n. 28, and Exhibit 7 to Goodman's Motion. Goodman addresses the significance of this footnote further below.

The above-quoted paragraph from the Plaintiff's return ironically supports Goodman's motion to sanction the conduct of the Plaintiff's counsel by excluding both the "unedited" and artificially enhanced versions of the recording.[19]

The Plaintiff's counsel effectively argued in the above-quoted paragraph that Goodman and, for that matter, Gregorich must have met outside the office on August 24, 2016 to discuss the claims articulated by the Plaintiff in his suit or, more sinisterly, to further the on-going conspiracy purportedly being perpetrated against the Plaintiff by Goodman, Williamson, and others. Only by surreptitiously recording their conversation, the Plaintiff's counsel clearly implied, could the existence and expanse of the conspiracy be confirmed.

Therefore, as an extension of his zealous advocacy on the Plaintiff's behalf, the ends of hiring Vaughn by the Plaintiff's counsel (i.e. the recording) justified how Vaughn made the recording (i.e. recording Goodman and Gregorich without their consent when the Plaintiff's counsel himself didn't take – and couldn't have taken – such action). By literally arguing that the ends justify the means, Goodman respectfully asserts that the Plaintiff's counsel crossed the limits of acceptable behavior.

The Plaintiff's counsel also observed in several of the return's footnotes that our Supreme Court issued its decisions in *Matter of Anonymous Member of South Carolina Bar*, 404 S.E.2d 513 (S.C. 1991), *Matter of Anonymous Member of South Carolina Bar*, 322 S.E.2d 667 (S.C. 1984), and *In re Warner*, 335 S.E.2d 90 (S.C. 1985) before our legislature codified our state's Wiretap Act.[20] By so observing, the Plaintiff's counsel clearly implied that conduct purportedly compliant with our State's Wiretap Act should not be considered conduct that runs afoul of our Rules of Professional Conduct.

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[19] *See* note 18 above.

[20] *See* the Plaintiff's Return, p. 29, n. 24; pp. 29 – 30, n. 25; and p. 30, n. 26.

However, our Supreme Court issued each of these three (3) decisions well *after* the enactment of the Federal Wiretap Act, and, accordingly, Goodman safely presumes that our Supreme Court was fully cognizant of the Federal Wiretap Act's provisions when it issued each of the three (3) decisions. Thus, the implied argument signaled by these footnotes from the Plaintiff's return, like the remaining arguments offered by the Plaintiff's counsel, fails.

Moreover, the entirety of the return demonstrates that neither the Plaintiff nor the Plaintiff's counsel understand that the conduct exhibited by the Plaintiff's counsel constituted any abuse of discovery or was otherwise problematic.

Goodman, therefore, respectfully urges this Court to powerfully demonstrate to both the Plaintiff and the Plaintiff's counsel that such discovery abuse shall not be tolerated by granting Goodman's motion and excluding both the "unedited" version and the artificially enhanced version of the recording from use in all further proceedings associated with the Plaintiff's suit.

II. GOODMAN'S REQUEST FOR THE ARTIFICALLY ENHANCED VERSION OF THE "UNEDITED" AUDIO RECORDING

In his motion,[21] Goodman described an e-mail transmitted September 6, 2016 by the Plaintiff's counsel to his counsel, the first paragraph of which read as follows:

> See the attached dropbox link for the **unedited** audio file. **I have had a local recording studio remove as much background noise as possible and compile the audio file into smaller tracks**; I will send those over to you momentarily. [emphasis supplied].

This e-mail conclusively demonstrates that the recording of Goodman's August 24, 2016 conversation with Gregorich, which Vaughn surreptitiously recorded without their consent, was artificially enhanced, and the Plaintiff confirmed as much in his return.[22]

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[21] *See* Goodman's Motion, p. 6 and Exhibit 7.

[22] *See* note 18 above.

Goodman stated in his motion that his counsel had not yet received copies of the "smaller tracks" discussed by the Plaintiff's counsel in the e-mail.[23] The Plaintiff did not include as exhibits in support of his return any of these "smaller tracks" compiled by the "local recording studio" when it artificially enhanced the recording surreptitiously made by Vaughn. Likewise, the Plaintiff did not identify in his return the "local recording studio" which artificially enhanced the recording pursuant to the request made by the Plaintiff's counsel.

Instead, the Plaintiff stated as follows:[24]

> Notwithstanding, after learning that [Goodman's] counsel took issue with the audio recording, Plaintiff and his counsel have refrained from listening to the audio. Moreover, because [Goodman's] counsel informed Plaintiff's counsel of his intent to file this instant motion, **Plaintiff's counsel has refrained from distributing and/or listening to the recording prepared by the local recording studio**. [emphasis supplied].

Thus, as of the date of Goodman's instant reply, neither Goodman nor his counsel have received copies of these "smaller tracks," and neither Goodman nor his counsel know the identity of the "local recording studio" to which the Plaintiff's counsel sent the "unedited" version of the recording for artificial enhancement.

Goodman, as an "aggrieved person" under § 17-30-15(10), respectfully asserts that under § 17-30-110(A), he is entitled to receive the "smaller tracks" complied by the unidentified "local recording studio" when it artificially enhanced the "unedited" version of the recording.

In pertinent part, § 17-30-110(A) provides as follows:

> After reviewing the materials, the reviewing authority must first determine **whether all materials otherwise discoverable under South Carolina law were made available to the aggrieved person**. If a majority of the members of the reviewing authority determines **that not all of the necessary materials were made available, the reviewing authority may order that those additional portions be made available** and allow the

[23] *See* Goodman's Motion, p. 6, n. 6.

[24] *See* the Plaintiff's Return, p. 7.

> aggrieved person appropriate time to review the materials. The aggrieved person may then amend his motion to include any additional grounds derived from the additional materials. [emphasis supplied].

As the "smaller tracks" compiled by the unidentified "local recording studio" are materials clearly discoverable under South Carolina law, as well as the South Carolina Rules of Civil Procedure, and as these "smaller tracks" have not yet been made available to Goodman by the Plaintiff, Goodman respectfully asks this Court to order the Plaintiff to produce these "smaller tracks" to him.

Goodman also respectfully asks this Court to order the Plaintiff to precisely identify the "local recording studio" to which the Plaintiff's counsel submitted the "unedited" version of the recording for artificial enhancement, and Goodman respectfully asks this Court to order the Plaintiff to provide the identities and contact information for all employees of the "local recording studio" with whom the Plaintiff's counsel communicated.

Goodman further respectfully asks this Court to order the Plaintiff to produce copies of all written correspondence and e-mails exchanged between the Plaintiff's counsel and all employees of the "local recording studio" with whom the Plaintiff's counsel communicated concerning the artificial enhancement of the "unedited" version of the recording.

Goodman respectfully asserts that all such information and materials are clearly discoverable under South Carolina law, as well as the South Carolina Rules of Civil Procedure.[25]

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[25] While he didn't include any of the "smaller tracks" compiled by the "local recording studio" as exhibits supporting his return, the Plaintiff did include another audio recording as a supporting exhibit. As Exhibit A to his return, the Plaintiff included a 41-minute long recording, which the Plaintiff described as a "recorded discussion" between the Plaintiff and Goodman. The Plaintiff did not confirm in his return whether he had previously provided Exhibit A to Goodman. The Plaintiff also did not provide any information concerning the date, time, and/or location at which Exhibit A had been produced. A comparison of Exhibit A to one of the recordings the Plaintiff previously provided to Goodman seems to confirm that the Plaintiff did, in fact, previously provide Exhibit A. Exhibit A appears to have identical content to a recording previously provided to Goodman labeled as "Oct 26 2015." However, the recording labeled "Oct 26 2015" is 45 minutes and 50 seconds long while Exhibit A is 41 minutes and 11 seconds long. Though Exhibit A is not relevant to this Court's adjudication of his motion, Goodman notes the differences between the two (2) recordings out of an abundance of caution and for future reference.

III. VAUGHN'S INTERCEPTION AND RECORDING OF GOODMAN'S "ORAL COMMUNICATIONS" VIOLATED OUR STATE'S WIRETAP ACT

A. THE IMPACT OF THE RECORDING'S ARTIFICIAL ENHANCEMENT

In his motion,[26] Goodman argued that the artificial enhancement of the recording of Goodman's August 24, 2016 conversation with Gregorich, the product of Vaughn's effort to "bug" their conversation after the Plaintiff's counsel retained his "surveillance" services on the Plaintiff's behalf,[27] "profoundly influences how this Court should assess the interception of the conversation." Goodman so argued in reliance on the following guidance from Second Circuit Court of Appeals' decision in *United States v. Mankani*, 738 F.2d 538, 543 (2nd Cir. 1984):

> First, of critical concern in deciding whether a reasonable right to privacy exists, is **the type of surveillance employed.**[28] For example, a phone tap in a public telephone booth, bug in a hotel room, detectorscope or other sensitive electronic listening device requires a court order issued by a neutral magistrate. *See* Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510, *et seq.* (1982). Here, defendants' conversations were overheard by **the naked human ear,** unaided by any of these sensory enhancing devices. **This distinction is significant because the Fourth Amendment protects conversations that cannot be heard except by means of artificial enhancement.** 1 W. LaFave, *Search and Seizure* § 2.2, at 270 – 72 (1978) (LaFave). **The reason for this is evident. The risk of being overheard is a given in modern life, and any time people speak to one another they necessarily assume that risk.** [*Hoffa v. United States,* 385 U.S. 293, 303 (1966)]. **"But as soon as electronic surveillance comes into play, the risk changes crucially.**

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[26] *See* Goodman's Motion, p. 25.

[27] *See* note 2 above.

[28] In his return, the Plaintiff asserted that "it is very likely the McDonald's itself contained recording and/or surveillance of its own for monitoring purposes and to preclude crime." He also asserted that, "upon information and belief," McDonald's maintained its own surveillance system that would have [captured] the meeting." *See* the Plaintiff's Return, pp. 21 and 27. The Plaintiff introduced no evidence of any kind whatsoever to support these assertions. Vaughn offered no statements in his affidavit to support them, and the Plaintiff offered no photographs taken by Vaughn in Exhibit D to his return which confirmed the existence of such a system. If such a system exists at the McDonald's, one is left to wonder why the Plaintiff's counsel didn't simply serve the restaurant's proprietor with a subpoena to produce its contents for the hours of 9:30 a.m. to 11:30 a.m. on August 24, 2016, the window of time during which Goodman and Gregorich met. Even if such a surveillance system exists, Goodman possessed a reasonable expectation that Vaughn, a private investigator hired by the Plaintiff's counsel on the Plaintiff's behalf, would not hide a small recording device on the table immediately next to the table occupied by Goodman and Gregorich to record only their conversation in a targeted fashion.

> **There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy."** [*Lopez v. United States,* 373 U.S. 427, 465 – 66 (1963)] (Brennan, J., dissenting). [emphasis supplied].

The Plaintiff barely acknowledged *Mankani's* existence in his return, and he articulated no substantive analysis of the decision. Instead, the Plaintiff offered only the following response to *Mankani*, which appeared in a footnote:[29]

> [Goodman] only cites the Second Circuit's decision in *Mankini.*[30] *U.S. v. Mankini,* 738 F.2d 538 (2nd Cir. 1984). In an attempt to minimize the length of this memorandum, Plaintiff has refrained from fully briefing this case even though it is distinguishable and provides direction in this case not identified by [Goodman] in his motion. Specifically, *Mankini* involves the eavesdropping of conversations that occurred in a hotel room, not in a public restaurant. *Id.* at 541. Moreover, the Court in *Mankini* addresses the expectation of privacy, utilizing the [test in *Katz v. United States*, 369 U.S. 347 (1967)]. *Id.* at 542. See *infra.*

The Plaintiff devoted the remainder of his 33-page return toward arguing that Goodman did not engage in "oral communications" during his conversation with Gregorich, because they met in a public place. Before examining the remainder of the Plaintiff's return, Goodman takes the opportunity to fully develop *Mankani's* impact, and the following paragraphs from the Plaintiff's return serve as the focus of Goodman's analysis:

> Again, [Goodman] engaged in his conversation with Gregorich **in a public place and it was heard by several patrons, [one] of which was [Vaughn]**. Although [Vaughn] did utilize a basic audio recorder to capture the conversation, no amplification device of any type was used.[31]
>
> ...
>
> First, **the volume of the communication was the ordinary voice of two individuals** that were meeting in a public location. No whispering or otherwise attempts to private discussion occurred. Second, the proximity of other individuals was abundant. [Goodman] was located in a booth at

[29] *See* the Plaintiff's Return, p. 17, n. 18.

[30] The Plaintiff obviously misspelled *Mankani* in the only instance in his return in which he addressed the case. The Plaintiff also misspelled *Mankani* in his table of authorities.

[31] *See* the Plaintiff's Return, p. 22.

> the McDonald's located in a truck stop **where patrons were constantly coming and going.**[32]
>
> ...
>
> ... there was no need for **technological enhancements.** A standard digital audio record was used to capture the meeting. No amplification device or specialized recording equipment was used. Indeed, **the recorder captures a litany of conversations and background noise.**[33]
>
> ...
>
> Curiously, [Goodman] repeatedly identifies a "bug" and that his conversation was recorded as a result of a "bugging." [Goodman's motion, pp. 35 – 38]. **There was no bug**; there was no wire; there was no wiretap, there was no switchboard. **There was an Olympus digital recorder placed on a dinner table in plain view. It recorded the contents of all actions that occurred in the McDonald's, not just [Goodman].**[34]

[emphasis supplied].

Contrary to the fourth of the above-quoted paragraphs, a "bug" existed, and it consisted of Vaughn's small digital recording device. Since neither Vaughn nor the Plaintiff disputed or even addressed the recollections of Goodman and, most precisely, Gregorich that Vaughn arrayed several items on the table at which he sat, Goodman disputes the assertion that Vaughn placed the "bug" in plain view.

Vaughn would not have arrayed items on the table at he which he sat, including a book bag or some other kind of bag, for any reason other than to hide his "bug" or otherwise shield it from view.[35] Vaughn's ability to record Goodman's conversation with Gregorich at the McDonald's without raising their suspicions depended entirely upon Vaughn's ability to blend in with the other patrons. For Vaughn to sit next to Goodman and Gregorich completely by himself with nothing more than a small digital recording device on top of his table would have, at some point, attracted the attention of Goodman, Gregorich, another McDonald's patron, or a

[32] *See* the Plaintiff's Return, p. 27.

[33] *Id.*, p. 28.

[34] *Id.*, p. 32.

[35] See note 5 above.

McDonald's employee. To complete the ruse which facilitated his surreptitious recording of Goodman's conversation with Gregorich, Vaughn undoubtedly arrayed several items on top of his table to prevent them for realizing they were being recorded.

Turning to the first of the above-quoted paragraphs, the Plaintiff asserted that several McDonald's patrons, including Vaughn, overheard Goodman's conversation with Gregorich. However, the Plaintiff produced no affidavit from any McDonald's patron in which the patron confirmed that he or she overheard any part of Goodman's conversation with Gregorich. Vaughn, who sat right next to Goodman and Gregorich, did not state in his affidavit that he overheard any part of their conversation. Therefore, the key assertion from the first of the above-quoted paragraphs lacks any evidentiary support.

The Plaintiff asserted in the second of the above-quoted paragraphs that the volume of Goodman's conversation with Gregorich consisted of their "ordinary" voices. The Plaintiff again produced no affidavit from any McDonald's patron in which the patron described their perception of the volume at which either Goodman or Gregorich spoke. Vaughn did not describe in his affidavit his perception of the volume at which either of them spoke. Therefore, the key assertion from the second of the above-quoted paragraphs lacks any evidentiary support.

Returning to the fourth and final of the above-quoted paragraphs, the Plaintiff asserted that Vaughn's small digital device "recorded the contents of all actions that occurred in the McDonald's." In the third of the above-quoted paragraphs, the Plaintiff asserted that Vaughn's small digital device captured "a litany of conversations and background noise." In the second of the above-quoted paragraphs, the Plaintiff asserted that "patrons were constantly coming and going" inside the McDonald's. Goodman *agrees* with each of these assertions, and, consequentially, *Mankani's* impact is fully revealed.

The "unedited" recording that the Plaintiff's counsel produced to Goodman's counsel on September 6, 2016 consisted of the recording made by Vaughn. Vaughn admittedly sat very close to Goodman and Gregorich, and *Vaughn sat exceedingly close to his "bug."* Vaughn's "bug" logically captured the sound of "all actions that occurred" *within earshot of Vaughn*, including the constant "coming and going" of other patrons, a "litany" of conversations involving other patrons, and "background noise."

The nearly 84-minute long recording speaks for itself; neither Goodman nor Gregorich can be heard. The constant "coming and going" of other patrons, a "litany" of conversations involving other patrons, and all other "background noise," drowns out the voices of both Goodman and Gregorich.

The Plaintiff's counsel advised Goodman's counsel in his September 6, 2016 e-mail that he "had a local recording studio **remove as much background noise as possible** and **compile the audio file into smaller tracks.**" [emphasis supplied].[36] The Plaintiff's counsel, in a footnote toward the end of the Plaintiff's return,[37] offered the following explanation of his decision to enlist the local recording studio's assistance:

> The **purpose of removing the background noise was to simply allow for a cleaner ease of hearing** rather than having to work through the recording at a slower pace. Even if the recording studio audio is not admissible, that should have no effect as to the original recording being admissible as discussed herein." [emphasis supplied].

The precise meaning of the phrase "cleaner ease of hearing" is elusive. However, the impact of the admissions by the Plaintiff's counsel in his e-mail and the above-quoted footnote remains the same no matter how one parses the phrase.

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[36] *See* Exhibit 7 to Goodman's Motion.

[37] *See* note 18 above.

The Plaintiff's counsel didn't send just excerpts from the "unedited" recording to the local recording studio for artificial enhancement; *he sent the whole "unedited" recording to the local recording studio for artificial enhancement.* If Vaughn's recording of Goodman's conversation with Gregorich was inaudible and unintelligible, then Vaughn, who was within earshot of Goodman and Gregorich, *did not hear their conversation with his naked ear.* The Plaintiff's counsel, therefore, commissioned the local audio studio to salvage the "unedited" and unintelligible recording by artificially enhancing it into audible and intelligible "smaller tracks."

Under *Mankani*, 738 F.2d at 543, "the Fourth Amendment protects conversations that cannot be heard **except by means of artificial enhancement.**" [emphasis supplied]. Goodman' conversation with Gregorich, therefore, is deserving of such protection.

As evidenced by second and final sentence from the above-quoted footnote, the Plaintiff's counsel is willing to sacrifice the artificially enhanced version of the recording to save the "unedited" version. In other words, the Plaintiff's counsel will sacrifice the fruit of the poisonous tree (i.e. the artificially enhanced version) to save the tree itself (i.e. the "unedited" version). However, the tree itself remains poisonous.

In *Kee v. City of Rowlett, Tex.*, 247 F.3d 206, 209, n. 3. (5th Cir. 2001), a decision upon which the Plaintiff relied significantly in his return, [38] the Fifth Circuit observed as follows:

> In general, [the Federal Wiretap Act], "has as its dual purpose (1) **protecting the privacy of ... oral communications**, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of ... oral communications may be authorized." *Forsyth v. Barr,* 19 F.3d 1527, 1534 (5th Cir. 1994) (quoting [*Gelbard v. United States,* 408 U.S. 41, 48 (1972))]. [emphasis supplied].

[38] *See* the Plaintiff's Return, pp. 18 – 19, 24 – 25, and 27 – 28.

The *Kee* Court, *Id.*, at 213 – 15, crafted six (6) factors to consider in evaluating one's "subjective expectation of privacy in oral communications in publically accessible spaces:[39]"

> (1) the volume of the communication or conversation; (2) the proximity or potential of other individuals to overhear the conversation; (3) the potential for communications to be reported; (4) the affirmative actions taken by the speakers to shield their privacy; (5) the need for technological enhancements to hear the communications; and (6) the place or location of the oral communications as it relates to the subjective expectations of the individuals who are communicating. [footnotes omitted].

In the footnote provided with its fifth factor, the *Kee* Court, *Id.* at 214, n. 16, relied upon *Katz v. United States*, 389 U.S. 347 (1967):

> The Court in *Katz* recognized this tension. On one hand Justice Harlan explained that **persons having 'conversations in the open could not be protected from being** *overheard,*' **but that same person holding a conversation in a telephone booth did have a reasonable expectation not to have that conversation electronically 'intercepted.'** *See* [*Katz,* 389 U.S. at 361]." [italicized emphasis supplied by the Court; bold emphasis supplied].

The federal district court in *Kemp v. Block*, 607 F.Supp. 1262, 1263 – 64 (D.Nev. 1985), another case which appeared in the Plaintiff's return,[40] considered the plaintiff's claim under the Federal Wiretap Act, and, in doing so, it considered the definition of "oral communication." In considering whether the plaintiff possessed a reasonable expectation of privacy in his oral communications, the *Kemp* court observed as follows, *Id.*, at 1264 – 65:

> One of the tests used is to ascertain **whether the defendant overheard the communication with the naked ear under uncontrived circumstances**. [citations omitted]. If the answer is affirmative, as here, there was no justifiable expectation of privacy. The communication is protected only if the speaker had a subjective expectation of privacy that was objectively reasonable. [citations omitted]. The legislative history of [18 U.S.C. § 2510] notes that **an expectation that an oral communication will not be intercepted is unwarranted where the**

[39] See the Plaintiff's Return, 27 – 28.

[40] *Id.*, p. 25.

> **speaker talks too loudly**. 1968 U.S. Code Cong. & Ad. News 2112, 2178. [emphasis supplied].

As demonstrated by his return, the Plaintiff simply doesn't grasp the tension recognized by the United States Supreme Court in *Katz* and acknowledged by the Fifth Circuit in *Kee*, namely that a profound difference exists between one's expectation that their conversation in the open may be overheard and one's expectation that the same conversation may be *intercepted, recorded, and then artificially enhanced.*

A realistic analysis of the six (6) factors fashioned by the Fifth Circuit in *Kee*, 247 F.3d at 213 – 15, supports Goodman's reasonable expectation that his conversation with Gregorich would not be *intercepted, recorded, and then artificially enhanced.* As persuasively shown below,[41] the Plaintiff primarily if not exclusively relied upon the sixth factor from *Kee*, namely that Goodman and Gregorich met at a McDonald's, to rebut Goodman's motion.

However, at least four (4) of the other *Kee* factors (i.e. the first, second, third, and fifth) fatally undercut the Plaintiff's analysis. As explained above, Vaughn sat right next to Goodman and Gregorich for the sole purpose of recording their conversation (i.e. the second *Kee* factor). Neither Goodman nor Gregorich reasonably expected that Vaughn would record their conversation and then report their conversation to the Plaintiff's counsel, who hired him for the job (i.e. the third *Kee* factor). As conclusively demonstrated above, the "bug" deployed by Vaughn served as the surrogate for Vaughn's naked ear. As evidenced by "unedited" recording, the volume of Goodman's conversation with Gregorich was so low and so drowned out by "background noise" that a local recording studio had to artificially enhance the recording to make it audible and intelligible (i.e. the first and fifth factors).

[41] *See* notes 45 – 56 below.

The *Kee* factors clearly dovetail with the test discussed by the federal district court in *Kemp*, 607 F.Supp. at 1264 – 65, namely whether Vaughn, who acted on the Plaintiff's behalf after being hired by the Plaintiff's counsel, could overhear Goodman's conversation with Gregorich under uncontrived circumstances. Again, Goodman's conversation with Gregorich was inaudible and unintelligible to Vaughn's naked ear. The Plaintiff introduced no affidavit from any McDonald's patron attesting that Goodman or Gregorich talked "too loudly," Vaughn did not state in his affidavit that either of talked "too loudly." Finally, Goodman, under *Kemp*, possessed a reasonable expectation that his oral communications to Gregorich would not be intercepted in accordance with the legislative history of 18 U.S.C. § 2510.

Again, the *Kee* Court, 247 F.3d at 209, n. 3, observed that the first of Federal Wiretap Act's dual purposes is to protect the privacy of oral communications. The Fifth Circuit's observation echoes the Fourth Circuit's observation in *Abraham v. County of Greenville, South Carolina*, 237 F.3d 386, 389 (4th Cir. 2001), that the Act "commands respect for conversational privacy by requiring resort to the same system of warrants and neutral and detached review that has historically been used to safeguard the integrity of the person and of property.[42]"

Thus, the Second Circuit's guidance in *Mankani* intuitively, logically, and compelling ties in with *Kemp*, *Kee*, *Abraham*, and *Katz*, and, accordingly, Goodman conveyed "oral communications" to Goodman during their conversation in satisfaction of § 17-30-15(2).

Under *Mankani*, Goodman possessed no security from the interception of his "oral communications" to Gregorich by "bug" Vaughn deployed, and Goodman possessed no way of mitigating the risk of being overheard at the McDonald's when Vaughn used the "bug" as his surrogate ear.

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[42] *See* Goodman's Motion, pp. 20 – 21, and the Plaintiff's Return, p. 15.

The interception, recording, and artificial enhancement of Goodman's "oral communications" to Gregorich deprived Goodman of "even a residuum of true privacy" as contemplated under *Mankani*, and Goodman respectfully asserts that these acts violated § 17-30-30(C) of our State's Wiretap Act.

Therefore, Goodman respectfully urges this Court to grant his motion under § 17-30-110(a) and suppress both the artificially enhanced version of the recording (i.e. the fruit of the poisonous tree) and the "unedited" version of the recording (i.e. the poisonous tree itself).

B. THE PLAINTIFF'S CONCLUSION THAT GOODMAN DID NOT CONVEY "ORAL COMMUNICATIONS" TO GREGORICH DURING THEIR AUGUST 24, 2016 MEETING IS DEFECTIVE

Exception for two (2) footnotes,[43] the Plaintiff devoted the entirety of his return toward arguing that Goodman did not convey "oral communications," as defined under § 17-30-15(2), to Gregorich during their conversation, because Goodman met with Gregorich in a public place, namely a McDonald's restaurant.

Along with other passages previously quoted by Goodman in his instant reply, the Plaintiff invoked the location of Goodman's meeting with Gregorich in the following instances:

> This digital recorder, and nothing more, recorded the conversation between [Goodman] and Gregorich – a conversation that took place **in a public McDonald's**, at a truck stop just [off] I-26, **during public hours.**[44]
>
> ...
>
> There is no justified expectation when meeting in a **public place** and therefore public meetings are to be specifically excluded from being deemed an "oral communication.[45]"
>
> ...
>
> While [Goodman] accurately quotes *Abraham,* he makes a giant inferential step to conclude that the narrow holding of *Abraham* "affords"

[43] *See* the Plaintiff's Return, p. 17, n. 18, and pp. 32 – 22, n. 28.

[44] *Id.*, p. 5.

[45] *Id.*, p. 11.

him conversational privacy in his meeting with Gregorich **at a public McDonald's**. [Goodman's motion, p. 21].[46]

...

First and foremost, unlike Bertha Huff, [Goodman] exposed his statements to numerous individuals who visited **[a] public McDonald's** as compared to a potentially private hotel room.[47]

...

Because Goodman cannot exhibit a reasonable expectation of privacy and he knew or should have known that his meeting **in a public McDonald's** might grant others access to his conversation with Gregorich, he did not engage in an "oral communication" potentially protected by the Wiretap Act. [*Huff v. Spaw*, 794 F.3d 543, 551 (6th Cir. 2015)]. See also *infra*.[48]

...

Just as in [*United States v. McLeod*, 493 F.2d 1186 (7th Cir. 1974)], [Goodman] knowingly exposed his conversation **to the public** by engaging in the same **in a public restaurant**. *Id.* [49]

...

Such a holding is influential here, where [Goodman] engaged in a communication **in a public place**, during operating hours, on matters that are believed to be concerning the facts of a lawsuit for which he is not only a witness but a named party. [footnote omitted].[50]

...

[Goodman's] meeting with Gregorich, which took place during a workday, during work hours, **at a public McDonald's restaurant**, located at a truck stop, during operating hours, fails to exhibit any expectation of privacy.[51]

...

Gregorich posted the scheduled meeting on his shared Google calendar, including that it was to take place **at a McDonald's**, and admitted in his affidavit that others, including Plaintiff, would be able to see the calendar entry. This fact establishes that Defendant Goodman and Gregorich were willing to share their statements **to the public**.[52]

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[46] *See* the Plaintiff's Return, p. 15. On page 21 of his instant reply, Goodman addressed the Plaintiff's argument regarding the Fourth Circuit's discussion of "conversational privacy" in *Abraham*.

[47] *Id.*, p. 21.

[48] *Id.*

[49] *Id.*, p. 22.

[50] *Id.*, p. 24.

[51] *Id.*, p. 26.

[52] *Id.*, pp. 26 – 27. The Plaintiff conflates Gregorich posting notice of his meeting with Goodman on a virtual calendar for the sole purpose of notifying others of his whereabouts on the morning of August 24, 2016 with inviting others, like the Plaintiff, to attend the meeting.

...

> Most importantly, however, [Goodman] simply fails to acknowledge that he agreed to meet **at a McDonald's restaurant; one in which is located within a truck stop along a major interstate.**[53]
>
> ...
>
> The meeting was posted on a public Google Calendar, **they met in the restaurant**, not in a vehicle, office, hotel, or otherwise private location, during normal operating hours.[54]
>
> ...
>
> ... the location of the meeting was **patently public** – arguably **as public as public can [be]**.[55]

[emphasis supplied].

A side-by-side comparison of 18 U.S.C. § 2510(2) and § 17-30-15(2) is helpful:

18 U.S.C. § 2510(2) "Oral Communication"	§ 17-30-15(2) "Oral Communication"
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.* [italicized emphasis supplied].	Any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation *and does not mean any public oral communication uttered at a public meeting or any electronic communication.* [italicized emphasis supplied].

As the term "public meeting" does not appear in 18 U.S.C. § 2510(2), no so-called "public meeting exception" appears in the definition of "oral communication" from the Federal Wiretap Act.

While the term "public meeting" obviously appears in § 17-30-15(2), the Plaintiff conceded that the term is not defined anywhere in our state's Wiretap Act.

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[53] *See* the Plaintiff's Return, p. 27. The Plaintiff also asserted that "[n]ot only is McDonald's the world's second largest employer, it serves around 68 million customers daily in 119 countries," and that "McDonald's billboards often identify it having served over 1 billion people." According to the Plaintiff, "[t]here's nothing within such figures that support an 'expectation of privacy.'" Not to be flippant, but McDonald's does not list "surreptitious recording by private investigators" on the menu it offers its customers.

[54] *Id.*, p. 28.

[55] *Id.*

Despite his concession, the Plaintiff nonetheless assailed the analysis of § 17-30-15(2) provided by Goodman in his motion by arguing as follows:[56]

> In an attempt to detract from the common sense analysis that the meeting between [Goodman] and Gregorich, **which took place in a public location, a McDonald's restaurant within a truck stop, with patrons present**, is a public meeting, [Goodman] seeks refuge under the Freedom of Information Act statute. [Goodman's motion, p. 14]. [Goodman's] argument is misguided.

In his motion,[57] Goodman turned to our state's Freedom of Information Act to render a definition of the term "public meeting" as it appears in § 17-30-15(2), because § 17-30-65(B) explicitly references § 30-4-20(c) of our state's Freedom of Information Act. By comparison, the Plaintiff, in foisting his interpretation of the so-called "public meeting exception" upon this Court in his return,[58] offered nothing more than a flawed and self-serving analysis of the term "public meeting" from § 17-30-15(2) completely unsupported by any other authority whatsoever. Suffice it to say that Goodman respectfully asserts that this Court should embrace the analysis of the term "public meeting" from § 17-30-15(2) he offered in his motion.

The Plaintiff continually assailed Goodman's decision to meet and converse with Gregorich in a public place even after he acknowledged that the so-called "public meeting exception" may not apply.[59] The Plaintiff did so to defeat Goodman's sound and persuasive argument that Goodman conveyed "oral communications" to Gregorich during their August 24,

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[56] *See* the Plaintiff's Return, p. 9.

[57] *See* Goodman's Motion, pp. 13 – 15.

[58] *See* the Plaintiff's Return, pp. 9 – 11.

[59] *Id.*, p. 12. ("Assuming *arguendo* that [Goodman's] meeting with Gregorich is not subject to the '**public meeting exception**' to the Wiretap Act, further analysis is necessary to determine whether the meeting actually constitutes an 'oral communication.'" [emphasis supplied]). *See also Id.*, p. 14. ("The South Carolina Wiretap Act, however, specifically identifies a '**public meeting exception**.'" [emphasis supplied].

2016 meeting as contemplated by § 17-30-15(2). Toward that end, the Plaintiff cited and analyzed several federal court decisions which purportedly supported his argument.

As first mentioned above, the Plaintiff significantly relied upon *Kee* and *Katz* in his return.[60] In formulating its set of six (6) factors by which to evaluate whether a subjective expectation of privacy exists public oral communications, the *Kee* Court, 247 F.3d. at 213, considered the United States Supreme Court's decision in *Katz*:

> In fact, *Katz* clearly shifts the constitutional protection beyond conceptions based on property to focus on the individual's privacy interests. *See* [*Katz,* 389 U.S. at 351] ("**[T]he Fourth Amendment protects people, not places**. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. **But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected**." (citations omitted)); *see also United States v. Jackson,* 588 F.2d 1046, 1052 (5th Cir. 1979) ("**No matter where an individual is, whether in his home, a motel room, or a public park, he is entitled to a 'reasonable' expectation of privacy**." (citing [*Katz,* 389 U.S. at 359]) (Douglas, J., concurring)). [emphasis supplied].

The *Kee* Court, *Id.*, continued its contemplation of "the more difficult questions arising from oral communications, especially those communications that occur in areas accessible to the public" by relying on both *Katz* and *United States v. Smith,* 978 F.2d 171 (5th Cir. 1992):

> *See* [*Katz,* 389 U.S. at 352] ("[W]hat [Katz] sought to exclude when he entered the booth was not the intruding eye – **it was the uninvited ear**. He did not shed his right to do so simply because he made his calls from a place where he might be seen."); *see also* [*Smith,* 978 F.2d at 179] ("**Courts should bear in mind that the issue is not whether it is** *conceivable* **that someone could eavesdrop on a conversation but whether it is** *reasonable* **to expect privacy**."). [italicized emphasis supplied by the Court; bold emphasis supplied].

As he declined to offer any substantive rebuttal to the Second Circuit's decision in *Mankani*, the Plaintiff left himself no alternative other than to persuade this Court that by

[60] *See* notes 38 and 39 above.

meeting in a public place, Goodman completely sacrificed his expectation of conversational privacy, and, therefore, he did not convey "oral communications" to Gregorich.

The Plaintiff's insistence that Goodman completely sacrificed his expectation of conversational privacy merely by meeting with Gregorich in a public place, however, is flatly contradicted by the Fifth Circuit in *Kee*. In reliance upon *Katz*, the Fifth Circuit in *Kee* observed that "an individual is, whether in his home, a motel room, or a public park, he is entitled to a 'reasonable' expectation of privacy." Thus, under *Kee* and *Katz* and contrary to the Plaintiff's entire argument, Goodman was entitled to a reasonable expectation of privacy as he sat in the McDonald's talking to Gregorich.

The Plaintiff expansively analyzed the Sixth Circuit's decision in *Huff v. Spaw* in his return, and he did so in response to Goodman's analysis of the same decision in his motion.[61] While he fleetingly tried to distinguish Bertha Huff's claim from Goodman's claim,[62] the Plaintiff intensively tried to connect James Huff's claim to Goodman's claim. The Plaintiff specifically asserted the following:[63]

> [Goodman] took no attempts to exhibit an expectation of privacy and his actions are in line with those of James Huff. Specifically, although [Goodman] asserts that he intended his meeting be private, he exhibited no expectation of the same. [*Huff*, 794 F.3d at 550].

However, the Sixth Circuit ruled that Mr. Huff possessed no expectation of privacy from the interception his "oral communications," because Mr. Huff took the affirmative act, albeit inadvertently, of initiating the pocket-dial call to Carol Spaw from Mr. Huff's own cell phone, part of which Ms. Spaw intentionally intercepted and recorded via her iPhone. 794 F.3d at 550.

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[61] *See* notes 47 and 48 above. *See also* the Plaintiff's Return, pp. 17 – 21, and Goodman's Motion, pp. 26 – 31.

[62] *See* note 47 above.

[63] *See* the Plaintiff's Return, p. 21.

As illustrated below, nothing offered by the Plaintiff in his return alters the assessment that Goodman's claim is in line with Bertha Huff's claim. After attempting to tie Goodman's claim to Mr. Huff's claim, the Plaintiff invoked *United States v. McLeod.*[64]

The subject of the suppression motion considered by the Seventh Circuit in *McLeod* consisted not of an audio recording, but the proposed trial testimony of a government agent who, with his own ear, overheard the moving party's side of a telephone call the moving party placed from a public telephone in Las Vegas. 493 F.2d at 1118.

The Plaintiff also invoked *Pattee v. Georgia Ports Authority*, 512 F.Supp.2d 1372 (S.D.Ga. 2007).[65] Like *McLeod*, the subject of the suppression motion considered by the federal district court in *Pattee* consisted not of an audio recording, but the proposed trial testimony of two officials who overheard statements made by the moving party during a meeting via a speaker-phone. 512 F.Supp.2d at 1375 – 76.

In both *McLeod* and *Pattee*, no "oral communications" made by the moving parties had been *intercepted and recorded.* In contrast to both *McLeod* and *Pattee*, the Plaintiff intends to introduce only the audio recording made by Vaughn at Goodman's deposition and at trial; the Plaintiff has not indicated any intent to elicit trial testimony from Vaughn during trial.

The Plaintiff next invoked *Gennusa v. Shoar*, 879 F.Supp.2d 1337 (M.D.Fla. 2012).[66] However, the federal district court in *Gennusa*, 879 F.Supp.2d at 1349, held that the "plaintiffs had a reasonable expectation of privacy in the attorney-client conversations held in the police interview room" and that "the surreptitious recording of these conversations thus violated the

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[64] *See* note 49 above.

[65] *See* the Plaintiff's Return, pp. 22 – 23.

[66] *Id.*, pp. 23 – 24.

Fourth Amendment and constituted an actionable interception of an 'oral communication' under the Wiretapping Act."

The Plaintiff also invoked *Reynolds v. City & County of San Francisco*, 2009 WL 3569288 (N.D.Ca. 2009).[67] In *Reynolds*, the defendants moved the federal district court to dismiss the claim articulated by the plaintiff under the Federal Wiretap Act. After analyzing the definition of "oral communication" under 18 U.S.C. § 2510(2), as well as *Kemp* and *Kee*, the federal district court in *Reynolds* denied the defendants' motion to dismiss by ruling that sufficient evidence existed to support the plaintiff's claim that the defendants intercepted his oral communication in violation of the Federal Wiretap Act. 2009 WL 3569288, **4 – 5.

Thus, in both *Gennusa* and *Reynolds*, the presiding courts issued rulings that support Goodman's position regarding the suppression of the audio recording made by Vaughn which captured Goodman's conversation with Gregorich.

Like *Kemp*, the Ninth Circuit's decision in *Medical Lab. Mgmt. Consultants v. Am. Broad. Co., Inc.*, 306 F.3d 806 (9th Cir. 2002), appeared in the Plaintiff's return.[68] While it concerned a variety of issues very closely related to the provisions of the Federal Wiretap Act, the appeal considered by the Ninth Circuit did not involve any claims under the Act. That said, the Ninth Circuit offered the following relevant observations of California law, 306 F.2d at 815:

> ... although Devaraj **lacked an expectation of complete privacy** in his conversation with three strangers during a business meeting, **he could have reasonably expected that the conversation would be confined to them for the most part, and not widely exposed to the public at large.** In imparting information to strangers, one inevitably risks its secondhand repetition. ... However, as the California Supreme Court has observed, there is "a substantial distinction ... between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an

[67] *See* the Plaintiff's Return, pp. 24 – 25.

[68] *Id.*, p. 25.

> unannounced second auditor, whether that auditor be a person or a mechanical device." [citations omitted and emphasis supplied].

Of particular relevance to Goodman's motion, the Ninth Circuit in *Medical Lab. Mgmnt. Consultants* referenced the Sixth Circuit's decision in *Boddie v. Am. Broad. Cos.*, 731 F.2d 333, 339, n. 5 (6th Cir. 1984), and the Ninth Circuit summarized *Boddie* by stating that "under the federal wiretap statute, **a person may reasonably expect that an oral communication is not being intercepted through the use of electronic devices even though the person does not have an expectation of complete privacy.**" [emphasis supplied].

In *Huff*, 794 F.3d at 554, the Sixth Circuit relied upon its earlier holding in *Boddie* to uphold the claim under the Federal Wiretap Act advanced by Bertha Huff.[69] Regarding *Boddie*, the Sixth Circuit in *Huff* stated as follows, 794 F.3d at 554:

> We held in [*Boddie*] that **someone who knowingly converses with a person who may be carrying an interception-capable device can nonetheless enjoy a reasonable expectation of privacy from interception.** [731 F.2d at 338–39]. Boddie agreed to an interview with a TV reporter but refused to give consent to being recorded. *Id.* at 335. The reporter nonetheless **secretly recorded the conversation**, and Boddie sued under Title III. *Ibid.* In reversing the district court's summary judgment for the defendant, we held that, although "Boddie was aware that she was speaking to a reporter from ABC," "it remain[ed] an issue of fact for the jury whether Boddie had an expectation that the interview was not being recorded and whether that expectation was justified under the circumstances." *Id.* at 338–39. In reaching this conclusion, we noted that **there are "some circumstances where a person does not have an expectation of *total* privacy, but still would be protected by [Title III] because he was not aware of the specific nature of another's invasion of his privacy**." *Id.* at 339 n. 5 (emphasis added).[70] Similarly, **we do not require Bertha Huff to exhibit an expectation of total privacy**—e.g., by searching her husband and forcing him to turn off his phone—in order to be protected under Title III. [emphasis supplied].

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[69] *See* note 48 above.

[70] The courts in both *Huff* and *Medical Lab. Mgmnt. Consultants* relied upon the identical footnote from *Boddie*.

Goodman again respectfully asserts while he didn't possess an expectation of total conversational privacy when he met Gregorich on August 24, 2016 at the McDonald's, he, like Ms. Huff, still possessed a reasonable expectation of privacy subject to protection by our state's Wiretap Act when he conveyed "oral communications" to Gregorich during their meeting.

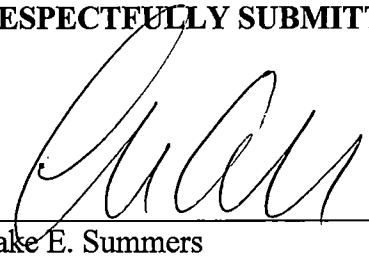
It is undisputed that Vaughn, a private investigator hired by the Plaintiff's counsel and acting on the Plaintiff's behalf, traveled to the McDonald's on the morning of August 24, 2016 for the sole purpose of *intercepting and recording* the "oral communications" Goodman conveyed to Gregorich during their conversation. It is undisputed that Vaughn surreptitiously *intercepted and recorded* the "oral communications" Goodman conveyed to Gregorich during their conversation. It is undisputed that Vaughn was "not acting under color of law" when he did so. It is undisputed that the Vaughn was not a party to the "oral communications" conveyed by Goodman to Gregorich during their meeting. It is undisputed that neither Goodman nor Gregorich consented to the *interception* of any part of their "oral communications" by the "bug" used by Vaughn to *record* their conversation and which served as Vaughn's surrogate ear.

Accordingly, Goodman respectfully asserts that Vaughn, acting on the Plaintiff's behalf after being hired by the Plaintiff's counsel, violated § 17-30-30(C) by intercepting and recording Goodman's August 24, 2016 conversation with Gregorich, and Goodman respectfully urges this Court to grant his motion to suppress the recording made by Vaughn under § 17-30-110.

IV. CONCLUSION

For all of the foregoing reasons, as well as the analysis and argument he provided in his September 30, 2016 motion, Goodman respectfully urges this Court to reject the arguments offered by the Plaintiff in opposition to Goodman's motions, and Goodman further respectfully urges this Court to suppress and/or exclude from all further proceedings in the Plaintiff's suit both the original "unedited" version of the audio recording of Goodman's August 24, 2016 conversation with Gregorich and the artificially enhanced version of the recording.

RESPECTFULLY SUBMITTED:



November 1, 2016

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

FROM THE COURT OF COMMON PLEAS FOR RICHLAND COUNTY

Appellate Case No. 2016-002040
Civil Action No. 2015-CP-40-3502

Peter G. Oliver, ... Plaintiff,

v.

The University of South Carolina, Martin Goodman, and Nancy Williamson, ... Defendants.

PROOF OF SERVICE

I certify that I have served the **REPLY BY DEFENDANT MARTIN GOODMAN TO THE PLAINTIFF'S RETURN TO HIS MOTION TO SUPPRESS AUDIO RECORDING PURSUANT TO SOUTH CAROLINA CODE ANN. § 17-30-110** on the above-named Plaintiff by mailing a copy to his counsel, first class postage pre-paid, at the following address:

Ryan K. Hicks, Esquire
J. LEWIS CROMER & ASSOCIATES, LLC
1418 Laurel Street – Suite A
Columbia, South Carolina 29201

November 1, 2016

LAKE E. SUMMERS