

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

FROM THE COURT OF COMMON PLEAS FOR RICHLAND COUNTY

Appeal No.: 2016-002040  
Civil Action No.: 2015-CP-40-3502

**RECEIVED**

OCT 20 2016

SC Court of Appeals

Peter G. Oliver,.....Plaintiff,

v.

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

**PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION BY DEFENDANT MARTIN  
GOODMAN TO SUPPRESS AUDIO RECORDING PURSUANT TO SOUTH  
CAROLINA CODE § 17-30-110**

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Plaintiff, Peter G. Oliver (“Plaintiff”), by and through his undersigned counsel, hereby responds to the Motion by Defendant Martin Goodman to Suppress Audio Recording Pursuant to South Carolina Code Ann. § 17-30-110.

**I. INTRODUCTION**

This is an employment case. Plaintiff filed this action on June 16, 2015, in the Court of Common Pleas, County of Richland, South Carolina. Plaintiff subsequently filed his First Amended Complaint on October 30, 2015. The First Amended Complaint names three separate Defendants: (1) the University of South Carolina; (2) Martin Goodman (“Goodman”); and (3) Nancy Williamson (“Williamson”). Defendant Goodman, who brings the instant motion, has only been individually named in the cause of action for civil conspiracy.<sup>1</sup>

Following the filing of an Answer, the parties began extensive discovery in the matter. Most recently, the parties conducted the deposition of the Plaintiff on August 11, 2016, and of fact witnesses, including, Sarah Hines on August 12, 2016, Pamela Young on August 12, 2016, and Defendant Nancy Williamson on August 15, 2016. Defendant Goodman’s deposition was also scheduled for August 15, 2016; however, the parties were unable to conduct his deposition on that date. Defendant Goodman’s deposition was subsequently rescheduled – but did not occur – on September 1, 2016.

The Honorable DeAndrea Gist Benjamin, Chief Administrative Judge for the Court of Common Pleas in the Fifth Judicial Circuit, conducted a status conference with the parties’ counsel on August 22, 2016. Pursuant the status conference, Judge Benjamin placed the case on the trial roster for the term of court beginning October 3, 2016.

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<sup>1</sup> His actions, in his professional capacity, are relevant to Plaintiff’s claims against USC.

The instant motion was filed with this Court on September 30, 2016. In accordance with S.C. Code Ann. § 17-30-110(A), the circuit court matter was stayed pending the determination of this motion.

**II. FACTS SURROUNDING THE RECORDING OF THE CONVERSATION BETWEEN GOODMAN AND GREGORICH ON AUGUST 24, 2016**

**A. RELATIONSHIP(S) BETWEEN PLAINTIFF, GOODMAN, AND GREGORICH**

The Plaintiff is employed as the Columbia Area Manager for the South Carolina Small Business Development Centers (“SCSBDC”), which is housed within the Darla Moore School of Business at the University of South Carolina (“USC”).

The SCSBDC is a University of South Carolina Darla Moore School of Business Research Center that is managed by a State Director, Michele Abraham, whose office is located in the Moore School of Business at the University of South Carolina.<sup>2</sup> The SCSBDC is divided into four regions, each of which is further supported by a major university – USC, South Carolina State University, Clemson University, and/or Winthrop University. Since Plaintiff serves as the Columbia Area Manager through USC, he is deemed to be a USC employee.<sup>3</sup>

Defendant Goodman is also employed by the SCSBDC but his office is located on the campus of USC-Beaufort. Defendant Goodman serves as Plaintiff’s direct supervisor and is the Manager of the USC Region of the SCSBDC.

Earl Gregorich (“Gregorich”) is also employed by the SCSBDC and is located at the same Columbia office as Plaintiff. Gregorich serves as a Senior Business Consultant, a position he has held for approximately one year. In their affidavits, Defendant Goodman and Gregorich assert that

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<sup>2</sup> Plaintiff’s office is located at an annex location off of Laurel Street in Columbia, South Carolina.

<sup>3</sup> It is Plaintiff’s understanding that SCSBDC employees housed through Clemson University would

Defendant Goodman serves as Gregorich's supervisor. Such a position is directly contrary to statements previously made by Defendant Goodman while discussing Gregorich's employment. A recorded discussion between Plaintiff and Defendant Goodman is attached hereto as Exhibit A. Plaintiff is indisputably a party to this conversation and while the recording is a total of forty-one (41) minutes, the final approximate six (6) minutes contains a discussion regarding Gregorich and his role. Notably, Defendant Goodman informs Plaintiff in the recording that Gregorich reports to Plaintiff "for day-to-day operations" and that Plaintiff is tasked with handling his time cards. Defendant Goodman also states that he believes Plaintiff is the primary supervisor.<sup>4</sup> Plaintiff urges that this discrepancy is relevant.<sup>5</sup> See *infra*.

#### **B. CREATION OF THE AUGUST 24, 2016 RECORDING**

The Plaintiff, as Gregorich's supervisor for day-to-day operations, at a minimum, had access to Gregorich's shared calendar. Sometime prior to the meeting itself, Gregorich placed an entry onto his Google Calendar indicating a meeting with Defendant Goodman for August 24, 2016, from 10:00 a.m. to 12:00 p.m. at the McDonald's located at 2064 Homestead Road, Bowman, South Carolina 29018.<sup>6</sup> A copy of the calendar entry has been attached hereto as Exhibit B. Because the calendar entry was public, and Gregorich reported to Plaintiff in some capacity, Plaintiff learned of the meeting while reviewing Gregorich's schedule. Indeed, Gregorich admits in his affidavit that he was aware others could view the meeting note.<sup>7</sup>

Based upon the peculiar scheduling of this meeting, including, but not limited to, the fact it

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be classified as Clemson University employees, etc.

<sup>4</sup> See minute 37.25.

<sup>5</sup> Based on Defendant Goodman's own statements it should be called into question how he would be in a position to provide Gregorich an EPMS.

<sup>6</sup> The McDonald's is located within the Pilot Travel Center off Exit 159 on I-26.

<sup>7</sup> Gregorich Affidavit, ¶¶ 16-17.

was being conducted in public at a McDonald's, that Defendant Goodman's deposition was impending while other depositions had already been completed, and that Plaintiff had previously brought a civil conspiracy claim against Defendant 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. The Affidavit of Investigator Vaughn is attached hereto as Exhibit C. Investigator Vaughn traveled to the subject McDonald's the following day and arrived around 9:30 a.m. Shortly thereafter, around 9:50 a.m., Investigator Vaughn was able to identify Gregorich enter the McDonald's. Investigator Vaughn thereafter sat at a table beside the table occupied by Defendant Goodman and Gregorich. Notably, Investigator Vaughn sat down after Gregorich arrived – a discrepancy noted from Defendant Goodman's motion and the associated affidavits. Investigator Vaughn placed an Olympus digital recorder, Model VN-6200 PC, on his table. This digital recorder, and nothing more, recorded the conversation between Defendant Goodman and Gregorich – a conversation that took place in a public McDonald's, at a truck stop just of I-26, during public hours.<sup>8</sup>

**C. DISCLOSURE OF THE AUGUST 24, 2016 RECORDING**

Following the meeting, Investigator Vaughn attempted to send the audio recording to Plaintiff's counsel via email on August 28, 2016. Plaintiff's counsel was unable to open the attachment and the audio recording was not received until Monday, August 29, 2016. Upon receipt,

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<sup>8</sup> Photos of the subject McDonald's have been attached hereto as Exhibit D. These photos were taken Plaintiff's undersigned counsel during an unrelated trip to Charleston on Monday, October 17, 2016.

Plaintiff's undersigned counsel briefly skimmed through the audio recording but did not listen to it in its entirety.<sup>9</sup> Because Plaintiff's counsel was occupied with other matters, as well as Plaintiff and his counsel's position that the audio recording was obtained in a completely permissible manner, Plaintiff's counsel did not immediately notify Defendant's counsel.

Notwithstanding the foregoing, on the afternoon of August 31, 2016, during a break in the current deposition he was handling, Plaintiff's counsel contacted Defendant's counsel as a professional courtesy and advised him of the existence of the recording and the intention to use it in the deposition of Defendant Goodman scheduled for the following day, September 1, 2016. Based upon the discussion between counsel concerning the audio recording, as well as the fact the deposition was scheduled to be conducted at USC-Beaufort where there was impending weather, counsel agreed to postpone the deposition.

Because the deposition was scheduled to take place at USC-Beaufort and that weekend was Labor Day, Plaintiff's undersigned counsel had coordinated for his family to travel with him to Beaufort so that following the conclusion of the deposition his family could spend the weekend at Edisto Beach, South Carolina. Since Plaintiff's counsel schedule was already held open for Thursday and Friday, Plaintiff's counsel completed his unrelated deposition on Wednesday and did not return to the office. Plaintiff's undersigned counsel left the morning of September 1, 2016, and traveled to Edisto Beach with his family, and did not return until the evening of Monday, September 5, 2016 (Labor Day).<sup>10</sup> As evidenced in Exhibit 7 to Defendant Goodman's motion, on Tuesday, September 6, 2016, at 9:54 a.m., Plaintiff's counsel sent a Dropbox link to Defendant's counsel containing the

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<sup>9</sup> The Plaintiff's counsel had other matters that required his immediate attention. In pertinent part, Plaintiff's counsel was involved in mediation on another matter on Tuesday, August 30, 2016, as well as a deposition in yet another matter on Wednesday, August 31, 2016.

<sup>10</sup> Plaintiff's counsel sets forth this sequence of events as an Officer of the Court. If the Court deems

recording.<sup>11</sup>

#### **D. CONTENT OF THE AUGUST 24, 2016 RECORDING**

As set forth above, after receiving the audio recording on August 29, 2016, Plaintiff's counsel only listened to brief excerpts. [Defendant motion, p. 4]. Plaintiff, as Defendant Goodman has acknowledged in his motion, is aware that a portion of the meeting is devoted to discussion surrounding Gregorich's Employee Personnel Management System ("EPMS") review. Upon information and belief, Defendant Goodman and Gregorich also discuss Plaintiff's employment and this lawsuit. Notably, throughout his motion, Defendant Goodman only proffers that a "majority" of the discussion concerned the EPMS. Such an acknowledgment makes clear that the conversation also addressed other matters.

Notwithstanding, after learning that Defendant's counsel took issue with the audio recording, Plaintiff and his counsel have refrained from listening to the audio. Moreover, because Defendant'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.

#### **III. THE SOUTH CAROLINA HOMELAND SECURITY ACT**

The South Carolina Homeland Security Act, often referred to as the "Wiretap Act", was enacted in 2002 and was modeled after the Federal Omnibus Crime Control and Safe Streets Act of 1968 ("Federal Act"). S.C. Code Ann. § 17-30-10, *et seq.* In brief, the Wiretap Acts sets forth the manner(s) in which a wire, electronic, or oral communication may be "intercepted."

Pursuant the Wiretap Act, to "Intercept" means the aural or other acquisition of the contents

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it necessary to have it placed into an affidavit, Plaintiff's counsel will gladly do so.

<sup>11</sup> Plaintiff's counsel takes extreme exception to Defendant's counsel implying that he purposely refrained from providing the audio recording. Plaintiff's counsel simply did not return to the office until the following Tuesday, after the Labor Day holiday, at which time he promptly provided the

of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.” S.C. Code Ann. § 17-30-15(3). S.C. Code Ann. § 17-30-110, the statute Defendant’s instant motion relies upon, permits an aggrieved person to move to “suppress the contents of any intercepted **wire, oral, or electronic communication**, or evidence derived therefrom, on the grounds the: (1) communication was unlawfully intercepted.” S.C. Code Ann. § 17-30-110(A)(1) (**emphasis added**). Of material importance to these provisions, as well as the Wiretap Act as a whole, is that a ‘communication’ transpired. If no communication as defined by the Wiretap Act exists, then the Act does not apply.

It should go undisputed in the instant matter that the meeting between Defendant Goodman and Gregorich does not constitute a wire or electronic communication as defined in the Wiretap Act. See S.C. Code Ann. §§ 17-30-15(1), (13). An analysis is therefore necessary to determine whether the meeting constitutes an “oral communication” under the Wiretap Act.

#### A. ORAL COMMUNICATION

The Wiretap Act defines an “oral communication as follows:

“Oral Communication” means 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.

S.C. Code Ann. § 17-30-15(2) (**emphasis added**).

Notably, Defendant Goodman does nothing more than assert throughout his motion that “[he] reasonably expected that his ‘oral communication’ to Gregorich on August 24, 2016 would not be ‘subject to interception’ by a recording device...” [Defendant motion, p. 13]. Defendant Goodman did not, and cannot, establish that his meeting constitutes an “oral communication” for the purposes

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recording.

of the Wiretap Act; his argument(s) are nothing more a subjective, self-serving position that his meeting would not be intercepted. Simply put, Defendant Goodman cannot establish that his August 24<sup>th</sup> meeting with Gregorich constitutes an “oral communication.”

**i. “PUBLIC MEETING”**

As acknowledged by Defendant Goodman, the Wiretap Act does not define what is meant by the term “public meeting.” In an attempt to detract from the common sense analysis that the meeting between Defendant 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, Defendant Goodman seeks refuge under the Freedom of Information Act statute. [Defendant motion, p. 14]. Defendant Goodman’s argument is misguided.

S.C. Code Ann. § 17-30-65 is titled: “Admissibility of contents of, or evidence derived from, intercepted communications; contents as public record.” S.C. Code Ann. § 17-30-65. Subsection (A) simply provides that no communication, or evidence derived therefrom, intercepted in violation of the Wiretap Act may be used as evidence. S.C. Code Ann. § 17-30-65(A). Subsection (B) provides in its entirety:

The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter and the contents of any application for an order and an order of authorization issued pursuant to this chapter are not included in the definition of a public record contained in Section 30-4-20(c), and may only be disclosed in a manner provided in this chapter.

S.C. Code Ann. § 17-30-65(B).

What must be understood is the Wiretap Act provides for means in which a ‘communication’ may be intercepted in a permissible manner. See S.C. Code Ann. §§ 17-30-25, 17-30-30, 17-30-35. In essence, the Wiretap Act provides the government and/or government entities, including law enforcement, means within which to intercept ‘communications’ in a manner authorized by law. *Id.*

S.C. Code Ann. § 17-30-70 further addresses government entities, namely SLED, seeking an Order authorizing interception from the Attorney General or his designee which authorizes/approves the interception of wire, oral, or electronic communications in a permissible manner. S.C. Code Ann. § 17-30-70.

The scope and purpose of S.C. Code Ann. § 17-30-65(B) is clear: to provide the government protection from having to produce any intercepted ‘communication’ as well as any order and/or order of authorization as a “public record” when responding to a Freedom of Information Act request. See S.C. Code Ann. § 30-4-20(c). Stated differently, this provision of the Wiretap Act specifically precludes these records from being designated a “public record” under FOIA and otherwise necessary to produce in response to a FOIA request. S.C. Code Ann. § 17-30-65(B) reference to the FOIA statute is in no way meant to invoke the definitions within the statute as suggested by Defendant Goodman.<sup>12</sup>

To the contrary, the term “public meeting” is to be interpreted by its plain meaning. The cardinal rule of statutory interpretation is to ascertain the intent of the legislature. *State v. Scott*, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002); *City of Camden v. Brassell*, 326 S.C. 556, 560, 486 S.E.2d 492, 494 (Ct. App. 1997). A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 484 S.E.2d 471 (1997). The legislature’s intent should be ascertained primarily from the plain language of the statute. *State v. Morgan*, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002). “Words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring different interpretation.” *Santee Cooper Resort v.*

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<sup>12</sup> Defendant Goodman goes one step further and even tries to combine two separately defined terms within the FOIA statute to formulate its argument.

*South Carolina Pub. Serv. Comm'n*, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989). Most importantly, if a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and there is no need to look to impose a contrary meaning. *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995).

The Wiretap Act simply provides that an "oral communication" does not include "any public oral communication uttered in a public meeting..." S.C. Code Ann. § 17-30-15(2). The plain meaning of what constitutes a public meeting is simple: a meeting between persons – as defined by the Wiretap Act – that takes place in public. S.C. Code Ann. §17-30-15(5). Such a clear and plain meeting is in line with the requirement an "oral communication" possess a justified expectation. 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."

The term "public meeting" is clear and unambiguous, and it is not for the Court to change the meaning of the statute.<sup>13</sup> See *Timmons v. South Carolina Tricentennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805 (1970). If the legislature had intended "public meeting" to be limited to the convoluted circumstances as urged by Defendant Goodman, it would have certainly defined the same. Indeed, the Wiretap Act defines over twenty terms. It did not, and the legislative intent is clear that the term "public meeting" is to mean just that – a meeting that takes place in public.

Because it is undisputed that the meeting on August 24, 2016, between Defendant Goodman and Gregorich was a public meeting as it took place in a public place during operating hours, said meeting does not constitute an "oral communication" for the purposes of the Wiretap Act and Defendant Goodman's motion must be denied on this basis alone.

## B. SOUTH CAROLINA'S APPLICATION OF THE WIRETAP ACT

Assuming *arguendo* that Defendant 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." Despite Defendant Goodman's bald assertion that he maintained a subjective expectation his meeting would not be recorded and therefore it is protected by the Wiretap Act, his position is not determinative.

Although acted in 2002, the Wiretap Act has rarely been addressed by South Carolina courts, let alone in the civil context.<sup>14</sup> In citing South Carolina cases, Defendant Goodman principally relies upon *Whitner*. *State v. Whitner*, 399 S.C. 547, 732 S.E.2d 861 (2012). In *Whitner*, the mother and stepfather of a minor female child (the "victim") recorded a telephone conversation between the victim and her biological father – the appellant. *Whitner*, 399 S.C. at 550, 732 S.E.2d at 862. In pertinent part, the mother and stepfather recorded the appellant admit to sexual abuse of the victim when she was five or six years old. *Id.* The mother and stepfather did not have consent to record the conversation from either the victim or appellant. *Id.* After the recording was provided to law enforcement, the appellant was arrested and charged with CSC with a minor in the first degree. *Id.* at 863.

First and foremost, the primary issue raised during the motion to suppress hearing was whether a parent can consent on behalf of a minor with respect to a recording. *Id.* at 552, 863. Since the Wiretap Act closely models the Federal Act, the Court looked to other jurisdictions in considering whether vicarious consent – parental consent on behalf of a minor – was intended to be an exception to the Wiretap Act. *Id.* at 554, 864. Ultimately, the Court joins the majority of other

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<sup>13</sup> Defendant Goodman admits the Wiretap Act is clear and unambiguous. [Defendant motion, p. 18].

<sup>14</sup> Title 17 of the South Carolina Code of Laws is Criminal Procedure.

state courts and recognized vicarious consent as an exception. *Id.* at 556, 865.<sup>15</sup>

As Defendant Goodman fails to point out to the Court here, the *Whitner* Court was specifically looking at vicarious consent. See *supra*. That is not even an issue before this Court and Defendant Goodman's arguments and simple resuscitation of the *Whitner* Court is misguided.<sup>16</sup>

Ultimately, very few cases in South Carolina have addressed the Wiretap Act. Since the State's Wiretap Act is patterned after the Federal Act, the Court should look to federal cases analyzing the comparable provision(s) of the Federal Act. See *State of South Carolina v. Guerrero-Flores*, 402 S.C. 530, 534, 741 S.E.2d 577, 580 (Ct. App. 2013); see also *Whitner*, 399 S.C. at 553, 732 S.E.2d at 864.

#### **IV. THE FEDERAL OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 ("FEDERAL ACT")**

The Federal Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C.A. § 2510, *et seq.* is often referred to as the Federal Wiretap Act. 18 U.S.C.A. § 2511 provides:

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.

18 U.S.C.A. § 2511. A cursory review reveals the South Carolina Wiretap Act sets forth similar language. See S.C. Code Ann. § 17-30-30(C). More importantly, what must be recognized is just as the South Carolina Wiretap Act, the Federal Act requires a "wire, oral, or electronic communication." *Id.* If no such 'communication' exists, then this statutory provision – and in fact the

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<sup>15</sup> The remaining matters addressed by the *Whitner* Court involved consent by a minor, reasonableness, and other matters not relevant to the instant motion.

<sup>16</sup> Defendant Goodman's arguments also fail to acknowledge that the *Whitner* case involves an admitted "wire communication" or "electronic communication" and not a disputed "oral

Federal Act as a whole – is not applicable.

18 U.S.C.A. § 2510(2) provides the definition of “oral communication” for the purposes of the Federal Act. It provides:

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.

18 U.S.C.A. § 2510(2). Again, a cursory review reveals the South Carolina Wiretap Act sets forth similar language. See *supra*. Both require a justified expectation and specifically exclude any “electronic communication.” The South Carolina Wiretap Act, however, specifically identifies a ‘public meeting exception.’ See *supra*.

#### **A. DECISIONS BY THE FOURTH CIRCUIT COURT OF APPEALS**

Similar to South Carolina Courts having rarely addressed the South Carolina Wiretap Act, the Fourth Circuit Court of Appeals has rarely addressed the Federal Act. Notably, the Fourth Circuit does not appear to have analyzed the Federal Act in a case that presents an issue remotely similar to the instant matter. Notwithstanding, much like he did in citing *Whitner*, Defendant Goodman again cites excerpts from the Fourth Circuit decision in *Abraham* that are out of context and simply not relevant to the disposition of his motion. *Abraham v. County of Greenville*, 237 F.3d 386 (4th Cir. 2001).

In *Abraham*, several state court judges brought suit under the Federal Act in response to recorded telephone calls made from their County office(s) located at the Detention Center. *Id.* at 388. When building the new Detention Center, the County installed a recording system that recorded incoming and outgoing telephone calls to the Detention Center. *Id.* While it did not record calls from certain telephones, including the pay phones and those often used by inmates and attorneys, it did

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communication” as here.

record telephone calls made and received within the Judicial Corridor where the judges offices were located. *Id.* In or around 1998, the County acknowledged that calls to and from the Judicial Corridor were being recorded but that such recordings were within the investigative or law enforcement exception(s) found in 18 U.S.C.A. § 2510(5)(a)(ii). *Id.* at 589. The Fourth Circuit, in what it described as a **narrow holding**, held that the County’s recording of the judges was not a legitimate surveillance activity as it did not occur in the ordinary course of law enforcement activities. *Id.* at 391 (**emphasis added**).

As a principal matter, the *Abraham* case involved “wire communications” and not “oral communications.” Unlike this matter, the incoming and outgoing telephone calls that were recorded were admittedly “wire communications” and therefore the Federal Act was applicable.<sup>17</sup> Correspondingly, the holding in *Abraham* was identified as narrow and only addressed the application of the ‘law enforcement exception.’ *Id.* While the Defendant Goodman accurately quotes *Abraham*, he makes a giant inferential step to conclude that the narrow holding of *Abraham* “affords” him conversational privacy in his meeting with Gregorich at a public McDonald’s. [Defendant motion, p. 21]. To the contrary, *Abraham* stands for the narrow proposition that it is not within the law enforcement exception to records incoming and outgoing calls made by judges within offices located as the Detention Center as a matter of course under the ‘law enforcement exception.’ *Id.* The “wiretapping” in *Abraham* was the actual tapping of wire phone lines within the Judicial Corridor of the Detention Center for no other purpose than the fact that those phone lines were attached to a single trunk line and they could not be isolated from the recording system. *Id.* The facts under which Defendant Goodman’s instant motion is filed are not even within the realm of *Abraham*.

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<sup>17</sup> Not only is the definition of “wire communication” defunct of reference to a ‘public meeting’ exception, *supra*, it also does not possess a ‘justified expectation analysis’ as required in

Much like in *Abraham*, the Fourth Circuit Court of Appeals in *Crabtree*, also cited by Defendant Goodman, addressed a “wire communication” and a specific exception identified in the Federal Act, both of which are not applicable here. *U.S. v. Crabtree*, 565 F.3d 887 (4th Cir. 2009). In *Crabtree*, Crabtree was sentenced to twenty-four months imprisonment for violating the terms of his supervised release. *Id.* at 888. In pertinent part, Crabtree’s conviction relied upon some recordings of telephone calls that were made by Crabtree’s girlfriend and later provided to law enforcement. *Id.*

Again, Crabtree is another case that involves a “wire communication” and not an “oral communication” as in this matter. As set forth above, there is not a ‘public meeting exception’ or ‘justified expectation’ requirement when analyzing a “wire communication” under the Federal Act. Accordingly, rather than analyzing whether a communication subject to the Federal Act exists, as must be done in this matter, the question in *Crabtree* was whether 18 U.S.C.A. § 2515 contemplated a ‘clean hands provision.’ *Id.* at 889. Stated differently, whether an exception to the exclusionary rule should exist under the Federal Act when the government was not involved in the interception. *Id.* The government argued that because it was not involved in the interception, which was effectuated by the girlfriend who taped conversations of Crabtree made from her home telephone without consent of the parties and when she was not a party to the same, it should be permitted to introduce the recordings as evidence. *Id.* Crabtree argued that the government should not be able to introduce otherwise inadmissible evidence simply because it was not involved in the interception. *Id.*

Despite this case not presenting a “wire communication” issue, there is no argument here concerning the applicability of a ‘clean hands exception.’ Notwithstanding, the Fourth Circuit held that the a clean hands exception does not permit an exception to the exclusionary rule. *Id.* at 888. The Defendant Goodman again tries to construe this holding to the facts of this case and his bald

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establishing an “oral communication.”

assertion that his protection of privacy was paramount. Mere resuscitation of Fourth Circuit case law taken out of context is without merit.

Based on the foregoing, Plaintiff respectfully submits that the Fourth Circuit Court of Appeals has not previously addressed the true matter before this Court and that it is appropriate to look to other Circuits for guidance.

**B. DECISIONS BY THE SECOND CIRCUIT COURT OF APPEALS**<sup>18</sup>

**C. DECISIONS BY THE SIXTH CIRCUIT COURT OF APPEALS**

In *Huff*, the Sixth Circuit Court of Appeals recently addressed “whether a person who listens to and subsequently electronically records a conversation from an inadvertent ‘pocket dial’ call violates [the Federal Wiretap Act.]” *Huff v. Spaw*, 794 F.3d 543, 544 (6th Cir. 2015). In pertinent part, James Huff inadvertently placed a pocket-dial call to Carol Spaw while on a business trip. *Id.* Spaw remained on the line and subsequently overheard as well as recorded conversations between Jams Huff and a colleague, Larry Savage, as well as a separate conversation between James Huff and his wife, Bertha Huff. *Id.* This Sixth Circuit Court of Appeals worked through its analysis of the issues as follows:

As a threshold question, we consider whether the Huffs’ conversations were protected under Title III, which covers only wire, oral, or electronic communication as those terms are defined by the statute. *In re Askin*, 47 F.3d 100, 102–03 (4th Cir.1995). Title III defines an oral communication for its purposes as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” 18 U.S.C. § 2510(2). The language makes clear that Congress did not

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<sup>18</sup> Defendant Goodman only cites the Second Circuit’s decision in *Mankini. 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 Defendant 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 *Katz* test. *Id.* at 542. See *infra*.

enact Title III to protect every face-to-face conversation from interception. We have held that a person engages in protected oral communication only if he exhibited “an expectation of privacy that is both subjectively and objectively reasonable.” *Dorris v. Absher*, 179 F.3d 420, 425 (6th Cir.1999). This assessment parallels the reasonable-expectation-of-privacy test articulated by Justice Harlan in *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). Other courts have also applied *Katz’s* reasonable-expectation test to assess whether a communication is protected under Title III. See *Kee v. City of Rowlett*, 247 F.3d 206, 211–12 (5th Cir.2001); *United States v. Turner*, 209 F.3d 1198, 1200 (10th Cir.2000); *United States v. McKinnon*, 985 F.2d 525, 527 (11th Cir.1993); *United States v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir.1978). The statutory history of Title III also supports such an application. S.Rep. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N 2112, 2178. In articulating his well-known test, Justice Harlan wrote that, in order to demonstrate a reasonable expectation of privacy,

[t]here is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation [must] be one that society is prepared to recognize as “reasonable.” Thus a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the “plain view” of outsiders are not “protected” because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

*Katz*, 389 U.S. at 361, 88 S.Ct. 507 (Harlan, J., concurring).

Courts generally refer to *Katz’s* reasonable-expectation test as having a subjective part and an objective part, but the division of labor between these two parts is ill-defined in the Title III context. Some courts, including ours, limit the subjective part to the issue of whether a person held an internal belief in an expectation of privacy from interception. See *Dorris*, 179 F.3d at 425 (“In the present case, the frank nature of the employees’ conversations makes it obvious that they had a subjective expectation of privacy. After all, no reasonable employee would harshly criticize the boss if the employee thought that the boss was listening.”) (emphases [sic] added); see also *McIntyre*, 582 F.2d at 1223 (“There is no question that McGann had a subjective expectation of privacy ... [because] he believed that normal conversations in his office could not be overheard, even when the doors to his office were open.”) (emphases [sic] added). Other courts, including the Tenth Circuit in *Kee*, ask whether plaintiffs “‘exhibited a subjective expectation of privacy that [their communications] would remain free from governmental [or private] intrusion’ and whether they ‘took normal precautions to maintain privacy[.]’ ” 247 F.3d at 213 (first alteration in original) (emphasis added).

*Id.* at 548-59.

“This approach effectively bifurcates the objective part of the reasonable-expectation test into two subparts. First, did the employee exhibit a (subjective) expectation of privacy by taking precautions? Second, was that expectation objectively reasonable.” *Id.* at 549. Proceeding on with its analysis, the Court continued:

The question of whether a person had an *internal belief* in an expectation of privacy—the only aspect of the subjective part under *Dorris*—is irrelevant because it is subsumed by the exhibited-an-expectation inquiry. If a person lacked an internal belief in privacy, then he would not have exhibited an expectation of privacy and so would fail the reasonable-expectation test. If the person held an internal belief but did not exhibit that belief in an outward manner, he would also fail the reasonable-expectation test due to his inability to satisfy the first objective subpart. Therefore the only relevant inquiries are the two objective subparts: (1) whether a person exhibited an expectation of privacy and (2) whether that expectation was reasonable. These were the same two relevant inquiries for the *Kee* court, except that court categorized the first inquiry under the subjective part of the reasonable-expectation test. These two inquiries track Title III's statutory text that first, a person “exhibit[ed] an expectation that such communication is not subject to interception” and second, “under circumstance justifying such expectation.” 18 U.S.C. § 2510(2). We therefore bifurcate *Katz*'s reasonable-expectation test—at least in the Title III context—into these two inquiries.

The first part of the test requires more than an internal belief in privacy. Rather, one must *exhibit* an intention to keep statements private. **A person fails to exhibit an expectation of privacy under the *Katz* test if he exposes those statements to the “plain view” of outsiders,** 389 U.S. at 361, 88 S.Ct. 507 (Harlan, J., concurring), or if he fails to take steps to prevent exposure to third parties, *Kee*, 247 F.3d at 216–17 (holding that plaintiffs did not engage in oral communication under Title III because “they failed to present evidence demonstrating any affirmative steps taken to preserve their privacy,” and “point to no reasonable safeguards or common-sense precautions taken to preserve their expectation of privacy”). The second part of the *Katz* test is satisfied if the expectation of privacy exhibited by the person is reasonable under the circumstances. *Katz*, 389 U.S. at 361, 88 S.Ct. 507 (Harlan, J., concurring). The operative question is whether society is prepared to recognize an exhibited expectation as legitimate. *Ibid.* It is essential to consider the two-part *Katz* test with respect to James Huff and Bertha Huff separately.

*Id.* at 549–50 (**emphasis added**).

In analyzing whether James Huff possessed a reasonable expectation of privacy, the Court opined:

The district court found that James Huff “unquestionably did not expect that [his] face-to-face conversations would be intercepted” for two reasons. *Huff*, 995 F.Supp.2d at 731. First, he would not have discussed sensitive, Airport-related matters with Savage and with Bertha Huff if he had known that others might be listening. *Ibid.* **This establishes only that James Huff likely intended his statements to be private, not that he exhibited an expectation of privacy.** Second, “[a] significant portion of the intercepted communications took place in two places: a private balcony and a hotel bedroom.” *Ibid.* **While a person generally exhibits an expectation of privacy when he seeks out a private location to speak, if he also exposes his statements to an outsider “no intention to keep them to himself has been exhibited.”** *Katz*, 389 U.S. at 361, 88 S.Ct. 507 (Harlan J., concurring). Because James Huff placed the pocket-dial call to Spaw, he exposed his statements to her and therefore failed to exhibit an expectation of privacy with respect to those statements. Exposure need not be deliberate and instead can be the inadvertent product of neglect. Under the plain-view doctrine, if a homeowner neglects to cover a window with drapes, he would lose his reasonable expectation of privacy with respect to a viewer looking into the window from outside of his property. *People v. Wright*, 41 Ill.2d 170, 242 N.E.2d 180, 184 (1968); see \*551 also *California v. Ciraolo*, 476 U.S. 207, 214–15, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) (holding that policemen who observed the inside of a defendant's fenced-in property from a location that was open to the public did not violate the defendant's reasonable expectation of privacy). The doctrine applies to auditory as well as visual information. *United States v. Fisch*, 474 F.2d 1071, 1077 (9th Cir.), cert. denied, 412 U.S. 921, 93 S.Ct. 2742, 37 L.Ed.2d 148 (1973) (holding that defendants did not exhibit an expectation of privacy to statements that were “audible to the naked ear” of police in an adjoining hotel room).

*Id.* at 550–51 (**emphasis added**). Importantly, the Court noted: “The principle that a person does not exhibit a reasonable expectation of privacy when he knew or should have known that the operation of a device might grant others access to his statements or activities is applicable in the Title III context as well.” *Id.* at 551. Ultimately, the Court held that James Huff failed to exhibit an expectation of privacy. *Id.* at 552.

Turning to Bertha Huff, the Court opined that “speaking to a person who may carry a device capable of intercepting one’s statements does not constitute a waiver of the expectation of privacy in those statements. *Id.* at 553. Of material importance to the Court was the fact that Bertha Huff’s

statements were made in a hotel room – akin to having a conversation in one’s home where generally there is an expectation of privacy. *Id.* “Therefore, Bertha Huff exhibited an expectation of privacy in statements she made to her husband in the hotel room, unless she exposed those statements to an outside as her husband did.” *Id.* The Court went on to hold that Bertha Huff exhibited an expectation of privacy and that she did not engage in an oral communication. *Id.* at 554.

Despite Defendant Goodman’s best efforts, the facts surrounding the recording of his meeting with Gregorich do not place in him in a like position to Bertha Huff. [Defendant motion, pp. 29-31]. First and foremost, unlike Bertha Huff, Defendant Goodman exposed his statements to numerous individuals who visited public McDonald’s as compared to a potentially private hotel room. Defendant Goodman took no attempts to exhibit an expectation of privacy and his actions are in line with those of James Huff. Specifically, although Defendant Goodman asserts that he intended his meeting be private, he exhibited no expectation of the same. *Id.* at 550. Defendant Goodman did not seek out a private location and openly and willingly exposed himself to outsiders and the public at large. Moreover, it is very likely the McDonald’s itself contained recording and/or surveillance of its own for monitoring purposes and to preclude crime.<sup>19</sup> 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. *Id.* at 551. See also *infra*.

#### **D. DECISIONS OF THE SEVENTH CIRCUIT COURT OF APPEALS**

In *McLeod*, the Seventh Circuit Court of Appeals had an opportunity to address the Federal Act and the analysis of what constitutes an “oral communication.” *United States v. McLeod*, 493 F.2d 1186 (7th Cir. 1974). In that case, McLeod challenged “the court’s denial of her motion to

suppress all evidence the government obtained by overhearing her speak into a public telephone in Las Vegas.” *Id.* at 1188. On four separate occasions, a government agent stood about four feet from McLeod and overheard her conversations. *Id.* Just as in *McLeod*, Defendant Goodman knowingly exposed his conversation to the public by engaging in the same in a public restaurant. *Id.* “What a person knowingly exposes to the public. . . is not a subject of Fourth Amendment protection.” *Id.* (citing *Katz*, 389 U.S. at 351). Additionally, the Court agreed with the Second Circuit Court of Appeals that “conversations carried on in a tone of voice quite audible to a person standing outside . . . are conversations knowingly exposed to the public.” *Id.* (citing *United States v. Llanes*, 398 F.2d 880 (2nd Cir. 1968)).

Again, Defendant Goodman engaged in his conversation with Gregorich in a public place and it was heard by several patrons, one of which was Investigator Vaughn. Although Investigator Vaughn did utilize a basic audio recorder to capture the conversation, no amplification device of any type was used. *Id.*

#### **E. OTHER DISTRICT COURT OPINIONS**

In *Gennusa*, an arrestee and his attorney brought an action against the county sheriff’s office for recording their attorney-client conversations in an interview room at the sheriff’s office. *Gennusa v. Shoar*, 879 F.Supp.2d 1337 (United States District Court – Middle District of Florida 2012). In pertinent part; during an interview by the sheriff’s department of an arrestee, the department proceeded to record and actively monitor attorney-client communications between the arrestee and his lawyer while sheriff’s department personnel were outside the interview room. *Id.* at 1342. The plaintiffs, the arrestee and his attorney, were given no indication the recording was taking place. *Id.* As identified by the district court, the Federal Wiretapping Act as well as the Fourth Amendment

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<sup>19</sup> See Exhibit D.

address the recording of such conversations. *Id.* at 1343. “The Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements.” *Id.* (citing *Katz v. United States*, 386 U.S. 347, 352, 88 S.Ct. 507 (1967)). “The constitutional question is whether the person invoking its Fourth Amendment protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government action. *Id.* (citation omitted).

In reviewing the Federal Wiretapping Act, the district court went on to identify “oral communication” and cited the Eleventh Circuit’s holding that “courts should apply the Fourth Amendment’s reasonable expectation of privacy test to determine whether the ‘oral communication’ requirement under the Act has been met.” *Id.* (citing *United States v. McKinnon*, 985 F.2d 525, 527-28 (11th Cir. 1993)) (“Hence, the statutory and constitutional test is whether a reasonable or justifiable expectation of privacy exists.”). “To prove a violation, a plaintiff therefore must show both that he had a subjective expectation of privacy and that his ‘subjective expectation of privacy is one that society is willing to recognize as reasonable.’” *Id.* (citing *McKinnon*, 985 F.2d at 527-28).

In *Pattee*, Pattee’s meeting with a Georgia Ports Authority (“GPA”) officer in a GPA interrogation room was overheard by two other officers by and through a speaker-phone that had been turned on in the interrogation room. *Pattee v. Georgia Ports Authority*, 512 F.Supp.2d 1372, 1374 (United States District Court – Southern District of Georgia 2007). In holding that the eavesdropping of Pattee’s conversation did not run afoul of the Federal Act, the district court identified the definition of “oral communication” and its requirement that there must be “an expectation that such communication is not subject to interception under circumstances justifying such expectation.” *Id.* at 1376 (citing 18 U.S.C.A. § 2510(2)). “Courts have interpreted this requirement to mean that the speaker must have a reasonable expectation of privacy in the

conversation. *Id.* (citing *McKinnon*, 985 F.2d at 527; *Kee v. City of Rowlett, Tex.*, 247 F.3d 206, 211 (5th Cir. 2001). The district court held Pattee failed to address “the seemingly patent unreasonableness of expecting answers to a superior’s questioning in an internal investigation of misfeasance to remain private. *Id.* at 1377. Such a holding is influential here, where Defendant 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.<sup>20</sup>

In *Reynolds*, the United States District Court – Northern District of California addressed the privacy expectation of an “oral communication” in the context of a motion to dismiss. *Reynolds v. City & County of San Francisco*, 2009 WL 3569288, \*4 (United States District Court – Northern District of California 2009). Importantly, the court reiterated that an “oral communication” is only protected if there is a reasonable expectation of privacy that it will not be intercepted. *Id.* “The Court in *Katz* held that despite a subjective expectation of privacy that a plaintiff may hold, to be worthy of protection, that expectation must also be objectively reasonable.” *Id.* (citing *Katz*, 389 U.S. 347, 360-61). In *Reynolds*, the recorded conversation was the telephone call of a police officer that occurred in the open squad room by a co-worker approximately 20-25 feet away. *Id.* at \*1.

The court opined:

Courts in this Circuit have looked to a number of factors to determine whether a reasonable person would possess an expectation of privacy in an oral conversation, including the “nature of the location where the[ ] conversation [ ] w[as] seized,” *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1116 (9th Cir.2005) (holding

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<sup>20</sup> Assuming the “majority” of the conversation concerned Gregorich’s EPMS, that is a business matter and not private. Additionally, since Plaintiff was at least the day-to-day supervisor of Gregorich it should be called into question on why he was not privy and/or involved in the meeting in the first place. Defendant Goodman has failed to set forth any evidence or argument that the meeting concerned private matters for which he had an expectation of privacy, and it must be left to conclude the meeting addressed the EPMS, Plaintiff, Plaintiff’s employment, and this lawsuit.

corporate officers of company had reasonable expectation of privacy with respect to conversations made in the small corporate office over which they exercised full access); whether the conversation could be overheard with the naked ear, *Kemp v. Block*, 607 F.Supp. 1262, 1263–64 (D.Nev.1985); whether the conversation took place out in the open, *Siripongs*, 35 F.3d at 1320 (holding the telephone conversation conducted in the middle of a police department was not protected); and whether the conversation involved business or private matters, see *Medical Lab. Mgmt. Consultants v. Am. Broad. Co., Inc.*, 306 F.3d 806, 814 (9th Cir.2002) (finding plaintiff's discussion of business operations and corporate-related topics rather than personal and private affairs does not create a reasonable expectation of privacy in the contents of the conversation); see also *Kee v. City of Rowlett*, 247 F.3d 206, 213–15 (5th Cir.2001) (holding that factors to consider are: “(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.”).

Many of the factors in the instant case—including the unaided overhearing of plaintiff's conversation, the large and open community office space in which it took place and the business-related nature of its substance—favor holding that plaintiff's conversation was not protected by the Act. Although it is a close issue, such a ruling is not, however, appropriate at this stage of the litigation.

*Id.* at \*4-5.

#### V. DEFENDANT GOODMAN DID NOT ENGAGE IN AN “ORAL COMMUNICATION”

In *Katz*, the United States Supreme Court squarely addressed the scope of the Fourth Amendment with respect to surveillance and the ‘right to privacy.’ *Katz v. United States*, 389 U.S. 347, 351 (1967). “For the 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.” *Id.* at 351 (citations omitted). Moreover,

No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more

narrowly is to ignore the vital role that the public telephone has come to play in private communication.

*Id.* at 352 (footnotes omitted). Accordingly, the United States Supreme Court held “The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.” *Id.* at 353.

As has been discussed herein, courts across the United States have continually turned to *Katz* when analyzing the Federal Act. Based upon the same, it has become abundantly clear that in order to establish an “oral communication,” there must be both a subjective expectation of privacy as well as an objective expectation – that is to say an expectation that society is willing to recognize. In the instant matter, the question is whether or not Defendant Goodman engaged in an “oral communication” when he met with Gregorich on August 24, 2016, at a McDonald’s. Simply put, he did not, and therefore the Wiretap Act does not support the audio recording of that conversation being suppressed as evidence.

The law in the United States is well settled that in order to establish an “oral communication” one must establish both a subjective and objective expectation of privacy. It is not enough for Defendant Goodman to simply assert that he maintained a subjective expectation. See *Huff*, 794 F.3d at 549-50. While Defendant Goodman urges that he *intended* his conversation with Gregorich to be private, he has failed to **exhibit** any such expectation. *Id.* Defendant 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.

First and foremost, 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. Second, Defendant Goodman conveniently fails to note that the SCSBDC maintains offices at South Carolina State University located in Orangeburg. Since Defendant Goodman asserts that the public McDonald's was used because it was conveniently located in Orangeburg – half way between Columbia and Beaufort – it must be called into question why he did not use offices located at the Orangeburg SCSBDC office – a location that would have provided privacy.<sup>21</sup> Most importantly, however, Defendant 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. Not only is McDonald's the world's second largest employer, it serves around 68 million customers daily in 119 countries. McDonald's billboards often identify it having served over 1 billion people. See [www.mcdonalds.com](http://www.mcdonalds.com); see also McDonald's, <https://en.wikipedia.org/wiki/McDonald%27s>. There is nothing within such figures that support an “expectation of privacy.”

The Fifth Circuit Court of Appeals factors identified in *Kee* also do not support such an expectation. *Kee*, 247 F.3d at 213-215. 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. Defendant Goodman was located in a booth at the McDonald's located in a truck stop where patrons were constantly coming and going. Third, potential of the meeting being recorded was abundant. Again, this meeting took place in a public not private location and, upon information and belief, McDonald's maintained its own surveillance system that would have captured the meeting. Fourth,

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<sup>21</sup> Pursuant Google Maps, it appears these locations are less than fifteen (15) miles apart and are both conveniently located along I-26.

Defendant Goodman nor Gregorich took any affirmative action to shield their privacy. 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. Fifth, 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. Sixth, the location of the meeting was patently public – arguably as public as public can be. A McDonald’s restaurant located within a truck stop just off a major highway such as I-26 is hardly private.

#### **VI. SANCTION BY THE COURT IS NOT WARRANTED**

As a final effort to support his position that the audio recording should be suppressed, Defendant Goodman moves this Court to “sanction” Plaintiff by excluding the audio recording. Defendant Goodman’s arguments are no more than an attempt to taint the circumstances giving rise to the recording and are without merit.

Defendant Goodman first cites *Spates*. *Spates v. S.C. Dep’t of Employment and Workforce, et al*, 2015 WL 4716705 (SCAJD July 31, 2015).<sup>22</sup> Frankly, Defendant Goodman cites *Spates* for no more than inserting the parenthetical by the Administrative Law Court that “South Carolina law permits the use of recordings made by one party (excluding attorneys)...” *Id.* at \*5. [Defendant motion, p. 33]. Defendant Goodman gives no background as to *Spates* or articulates how it is relevant here, other than his self-serving quotation. More importantly, however, is that “South Carolina law” does not identify such an “excluding attorneys” provision. Indeed, Title 17, Chapter,

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<sup>22</sup> Defendant’s motion incorrectly identifies the Westlaw citation.

30, the State Wiretap Act itself, fails to identify any such language. Correspondingly, the opinion fails to cite any authority to support such a law.<sup>23</sup>

Defendant Goodman's reference to *Matter of Anonymous Member of South Carolina Bar* is likewise unpersuasive. *Matter of Anonymous Member of South Carolina Bar*, 304 S.C. 342, 404 S.E.2d 513 (1991).<sup>24</sup> In that case, the Court was presented with the question of "whether an attorney may utilize a recording device without prior knowledge and consent of all parties to the conversation, as an alternative means of taking notes." *Id.* at 343, 514. 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.

The South Carolina Supreme Court had previously addressed the recording of conversations by attorneys in *In re Anonymous. In re Anonymous Member of the South Carolina Bar*, 283 S.C. 369, 322 S.E.2d 667 (1984).<sup>25</sup> In *In re Anonymous*, an attorney was retained by a family member in response to an automobile accident. *Id.* at 371, 668. In response, the attorney contacted the driver of the other vehicle, who was not represented by counsel, and identified himself merely as the family member's cousin; he made no reference to being an attorney. *Id.* The attorney recorded the otherwise private telephone conversation and subsequently sought to introduce it as evidence two years later. *Id.* The Court held that the attorney only identifying himself as a cousin ran afoul of DR 1-102(A)(4). *Id.* at 371, 669. "The family relationship, however, cannot be equated with an attorney-client

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<sup>23</sup> The ALC cites *Mays v. Mays*, 267 S.C. 490, 229 S.E.2d 725 (1976). First, the *Mays* decision was issued well before the Wiretap Act was codified. Notwithstanding, the Court addressed the recording of a conversation between a private investigator and witness. *Id.* at 494, 726.

<sup>24</sup> This opinion is before the Wiretap Act was codified.

relationship.” *Id.* Again, Plaintiff’s 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.

Likewise, *In re Warner*, the South Carolina Supreme Court addressed another factual situation involving an attorney recording. *In re Warner*, 286 S.C. 459, 335 S.E.2d 90 (1985).<sup>26</sup> In *In re Warner*, the lawyer was charged with engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. *Id.* at 460, 90. Although convoluted, in an an attempt to uncover judicial misconduct, it appears the attorney provided his client with a concealed recording device located within a briefcase as well as a smaller concealable recorder for a pocketbook. *Id.* The client thereafter recorded a conversation(s) that transpired with a family court judge in the Judge’s chambers. *Id.* The Court opined it was clear the attorney had an ill-will for the judge, which was the basis for his actions. *Id.* at 461, 90. As set forth on numerous occasions herein, Plaintiff’s attorney(s) did not record any conversation. Moreover, the recording at issue is not a private meeting and/or discussion, but rather a public meeting in a public location. The recording is also not for the purpose of some ill-will or personal motive; instead it is being sought to be utilized as evidence in a employment litigation matter that includes claims of civil conspiracy, defamation, and violation of the Whistleblower law. As this Court is fully aware, these claims are often based on circumstantial and/or speculative evidence. Upon information and belief, this audio recording provides just the opposite and is relevant, discoverable evidence.

In its entirety, Rule 8.4 provides:

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<sup>25</sup> This opinion is before the Wiretap Act was codified.

<sup>26</sup> This opinion is before the Wiretap Act was codified.

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the act of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) commit a criminal act involving moral turpitude;
- (d) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (e) engage in conduct that is prejudicial to the administration of justice;
- (f) state or imply an ability to influence improperly a government agency or official to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

South Carolina Appellate Court Rule 407, Rule of Professional Conduct 8.4. As an initial matter, it is without question that subsections (b), (c), (e), (f), and (g) do not apply. In looking at subsection (a), there is no other provision of the Rules of Professional Conduct that should be contemplated as being violated.<sup>27</sup> Plaintiff's attorney(s) did not violate or attempt to violate the Rules of Professional Conduct; Defendant Goodman only addresses subsection (d) of Rule 8.4.

In considering the facts and circumstances of this motion, as presented by both Defendant Goodman and Plaintiff, respectively, there is no evidence that Plaintiff's counsel engaged in any form of dishonesty, fraud, deceit, or misrepresentation as contained in Rule 8.4(d). The facts give rise to nothing more than: (1) Defendant 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

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<sup>27</sup> Defendant Goodman tries to attach the "knowingly assist or induce another to do so" language of subsection (a) to his argument that Plaintiff's attorney(s) violated subsection (d). To do so is misguided as the subsections are to be read separately and not together.

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) the Defendant 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 Defendant 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.

Curiously, Defendant Goodman repeatedly identifies a "bug" and that his conversation was recorded as a result of a "bugging." [Defendant 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 Defendant Goodman.

Finally, Defendant 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 the Defendant, 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 the Defendant Goodman at his deposition and trial on whether he engaged in acts support the civil conspiracy and/or defamation claim.<sup>28</sup> The purpose of discovery, trial, and ultimately a verdict is to get to the

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<sup>28</sup> 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

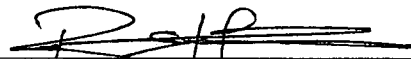
facts of the case; this audio recording does just that and because it is contrary to Defendant Goodman's interest(s) he seeks to have it excluded.

Ultimately, the audio recording was obtained in a permissible manner, not in violation of any South Carolina Statute, Rule of Civil Procedure, Rule of Appellate Procedure, or Rule of Professional Conduct.

## VII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court deny Defendant Goodman's motion in its entirety, and allow the audio recording of the August 24, 2016 meeting between Defendant Goodman and Gregorich be used as evidence in all further proceedings associated with the litigation currently pending in the Court of Common Pleas for Richland County.

J. LEWIS CROMER & ASSOCIATES, LLC



J. Lewis Cromer (#1470)  
Ryan K. Hicks (#100941)  
1418 Laurel Street, Suite A (29201)  
Post Office Box 11675  
Columbia, South Carolina 29211  
Phone 803-799-9530  
Fax 803-799-9533

*Attorneys for Plaintiff*

Columbia, South Carolina  
October 19, 2016

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is not admissible, that should have no effect as to the original recording being admissible as discussed herein.

1/23

Wed 1/24

8:00 - 8:30  
8:30 - 9:00

8:00 - 10:00  
10:00 - 12:00  
12:00 - 1:00  
1:00 - 3:00  
3:00 - 4:00

8:00 - 5:00  
5:00 - 6:00

8:00 - 8:30  
8:30 - 9:00

8 - 10  
Travel

8 - 5p  
CANO  
Hill  
Rock H  
Rd. Ro

9 - 10  
Carolyn  
Huesdale

10 - 11  
Robin O'Neil

10 - 12p  
Mtg. Martin  
McDonald's

10 - 11  
Joe Seel -  
803-465-5559

11 - 12p  
Mallory  
Baldwin - 803-

12:00 - 1:00

12p - 1p  
Travel

1:00 - 3:00

1p - 3p  
Pat Stone

3:00 - 4:00

3:00 - 4:00  
Travel

2:30p - 3:30p  
Travel  
803-565-1346



JUNE

Discard changes

Delete

More Actions

Mtg. Martin



6/24/2016

10:00am

to 12:00pm

6/24/2016

Time zone

All day

Repeat

Event details

Find this event

Where

McDonald's, 2064 Horwood Rd, Bowman, SC 29016, USA

Add guests

Add

Video call

Add video call

Calendar

Event Organizer

Guests can

modify event

send invites

see guest list

Description

mtg 159 re 26

Attachments

Add attachment

Event color



Notifications

Add notification

Show me as

Available



Busy

Visibility

Public

Private

Private

Event details: [View details](#) [Share](#) [Print](#) [Export](#)

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

FROM THE COURT OF COMMON PLEAS FOR RICHLAND COUNTY

Civil Action No.: 2015-CP-40-3502  
Appeal No.: 2016-002040

Peter G. Oliver,.....Plaintiff,

v.

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

**AFFIDAVIT OF ANTHONY VAUGHN**

1. My name is Anthony Vaughn, and I am a resident of Orangeburg County, South Carolina.

2. I am currently employed as a Private Investigator for Vaughn Private Investigation located in Orangeburg, South Carolina.

3. I am a practicing South Carolina Private Investigator and have over ten (10) years of law enforcement experience.

4. On Tuesday, August 23, 2016, I was contacted by Ryan K. Hicks of J. Lewis Cromer & Associates, LLC and asked if I could conduct some surveillance of an in-person meeting to take place on Wednesday, August 24, 2016.

5. I was provided the location of the meeting and a description of the two individuals expected to attend.

6. 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.

7. At or around 9:50 a.m. I was able to identify Earl Gregorich arrive at the McDonald's and enter the building. Mr. Gregorich sat at a table with gentleman identified as Martin Goodman.

8. At or around 10:00 a.m. I ordered a coffee and Danish and sat at the table next to the two men.

9. I sat down shortly after Goodman and Gregorich.

10. I place 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.

11. I did not use any amplification and/or any other recording devices.

12. At or around 11:30 a.m., the two men concluded their meeting and exited the McDonald's.

13. I attempted to provide a copy of the audio recording retrieved from the Olympus digital recorder to Mr. Hicks on Sunday, August 28, 2016.

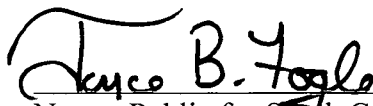
14. Mr. Hicks contacted me on Monday, August 29, 2016, regarding his inability to open the audio recording. I then resent the recording to Mr. Hicks that same day.

15. Further affiant sayeth not.

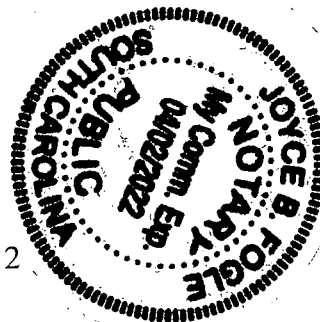
  
ANTHONY VAUGHN

Sword to and subscribed before me

This the 17<sup>th</sup> day of October 2016.

  
Notary Public for South Carolina

My Commission Expires: 04/02/22



OLYMPUS

STOP  
01.18.11.50

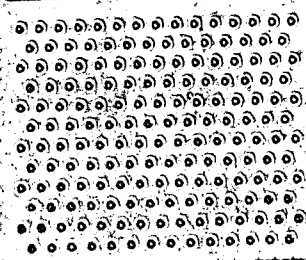
DIGITAL VOICE RECORDER VN-722PC

MENU SCENE CALENDAR

STOP REC

ERASE

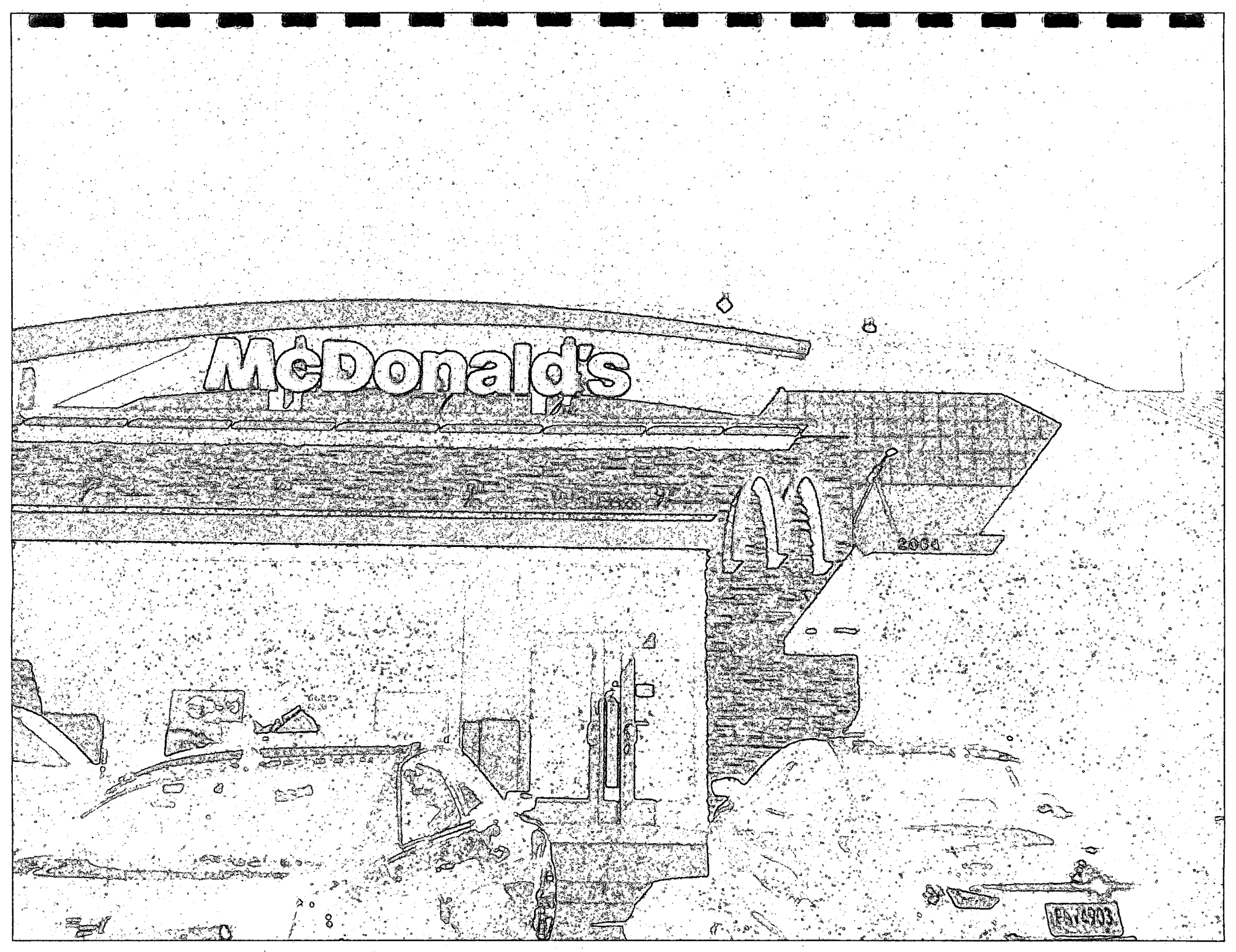
FOLDER INDEX

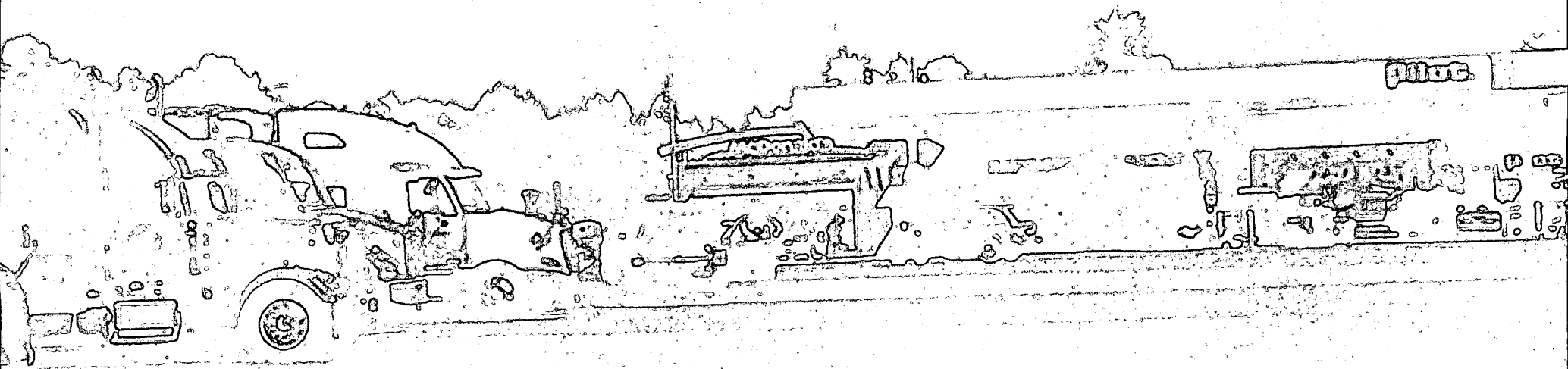


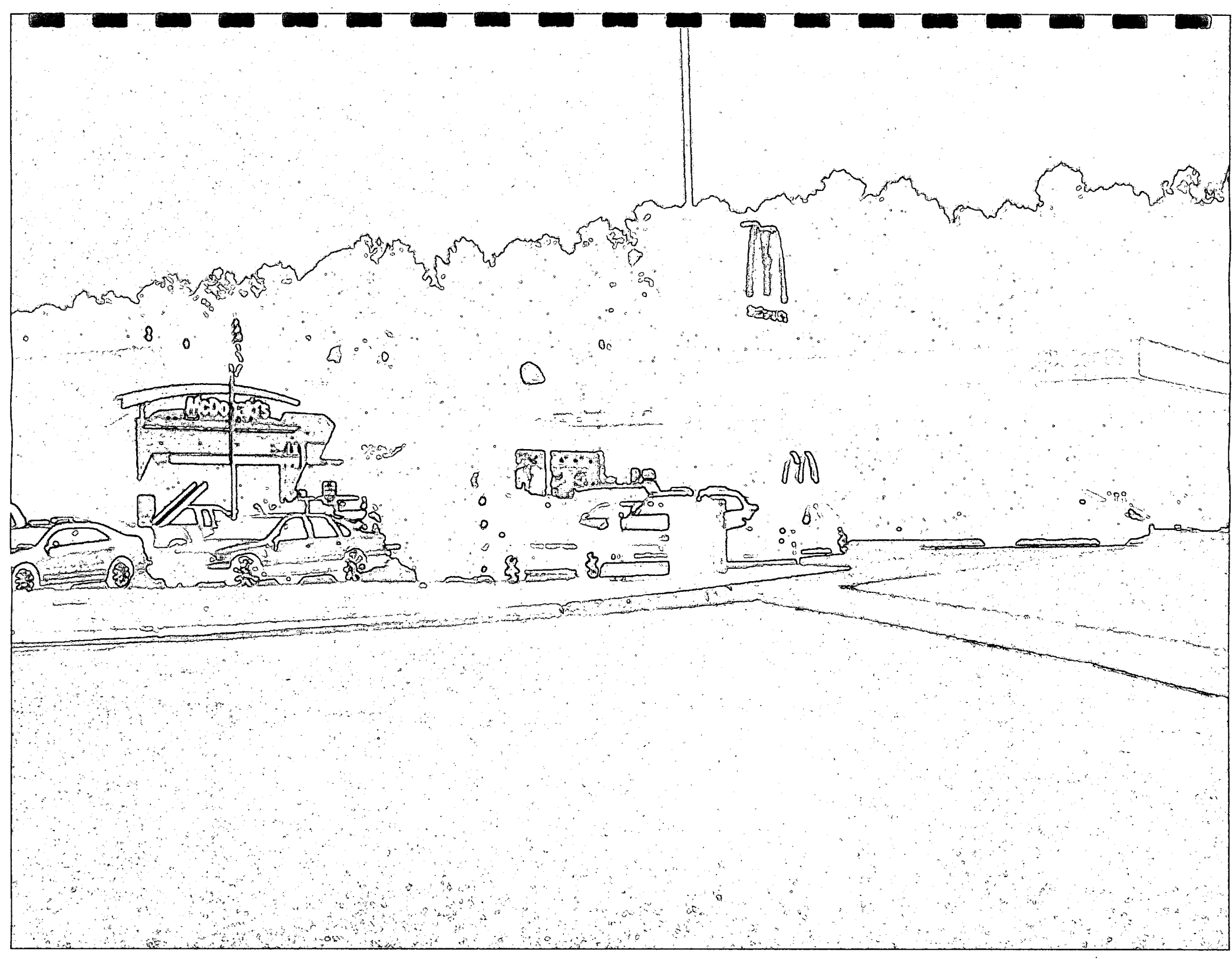
McDonald's

2004

PA 14903







THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

FROM THE COURT OF COMMON PLEAS FOR RICHLAND COUNTY

Appeal No.: 2016-002040  
Civil Action No.: 2015-CP-40-3502

**RECEIVED**

OCT 20 2016

SC Court of Appeals

Peter G. Oliver,.....Plaintiff,

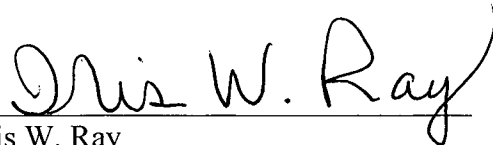
v.

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

**PROOF OF SERVICE**

I certify that I have served the **PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION BY DEFENDANT MARTIN GOODMAN TO SUPPRESS AUDIO RECORDING PURSUANT TO SOUTH CAROLINA CODE § 17-30-100** on the above-named Defendants by having a copy to his counsel of record, hand-delivered, at the following address:

Lake E. Summers, Esquire  
Malone, Thompson, Summers & Ott, LLC  
339 Heyward Street, Suite 200  
Columbia, South Carolina 29201

  
Iris W. Ray  
Litigation Paralegal

**J. LEWIS CROMER  
& ASSOCIATES L.L.C.**

ATTORNEYS AND COUNSELORS AT LAW

J. Lewis Cromer  
Julius W. Babb, IV · J. Paul Porter  
Ryan K. Hicks · Shannon M. Polvi

**RECEIVED**

OCT 20 2016

SC Court of Appeals

October 20, 2016

**HAND-DELIVERED**

Hon. Jenny Abbott Kitchings  
SC Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

**Re: *Peter G. Oliver vs. University of South Carolina, South Carolina Small  
Business Development Centers, Martin Goodman, and Nancy Williamson  
Appeal No.: 2016-002040***

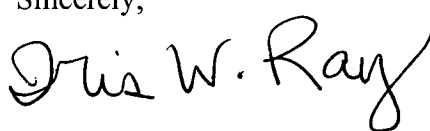
Dear Ms. Kitchings:

Enclosed please find the original and nine (9) copies of Plaintiff's Return in Opposition to Defendant Martin Goodman's Motion by to Suppress Audio Recording Pursuant to South Carolina Code § 17-30-110 on the above referenced matter. Also, enclosed please find the original and two (2) copies of the Proof of Service. Please file and return the copies to our law clerk.

Thank you in advance for your kind assistance. If you have any questions or concerns, please do not hesitate to contact me.

With kind regards, I remain

Sincerely,



Iris W. Ray  
Litigation Paralegal

/iwr  
Enclosures

cc w/enclosures:  
Lake E. Summers, Esq.  
Peter Oliver