

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

COUNCIL ON AMERICAN-ISLAMIC	)	
RELATIONS,	)	
	)	Civil Action No. _____
Plaintiff,	)	
	)	Judge: _____
v.	)	
	)	Date: _____
PAUL DAVID GAUBATZ; CHRIS	)	
GAUBATZ, a.k.a. "David Marshall"; and	)	
JOHN AND JANE DOE NOS. 1-10,	)	
	)	
Defendants.	)	

**PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

Pursuant Federal Rule of Civil Procedure 65, Plaintiff, the Council on American-Islamic Relations (CAIR) hereby moves the Court for a temporary restraining order and for a preliminary injunction enjoining Defendants from making any further use, disclosure, or publication of documents taken from CAIR's offices and recordings of meetings and conversations made by Defendants without consent or authorization and requiring Defendants to return promptly to CAIR all documents, recordings, and other materials so obtained and any copies thereof within their possession or control. In addition, Plaintiff also requests that the Court schedule a hearing on Plaintiff's request for a preliminary injunction at the earliest available date.

CAIR's motion is supported by the Complaint filed with the Court and the memorandum of points and authorities submitted to the Court along with the declarations of Raabia Wazir and Nadhira F. Al-Khalili and the certification of Daniel Marino.

Respectfully submitted,

Dated: October 29, 2009

  
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Relations*

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Defendants.	)	

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiff, the Council on American-Islamic Relations (CAIR), submits this memorandum in support of its application for a temporary restraining order and motion for a preliminary injunction enjoining Defendants from making any further use, disclosure, or publication of documents taken from CAIR’s offices and recordings of meetings and conversations made by Defendants without consent or authorization and requiring Defendants to return promptly to CAIR all documents, recordings, and other materials so obtained and any copies thereof within their possession or control.

**FACTS**

In 2008, Defendant Chris Gaubatz obtained an internship with CAIR, first in the organization’s Maryland-Virginia chapter office and, beginning in June 2008, at CAIR’s national office in the District of Columbia. (Exh. 1, Declaration of Raabia Wazir (hereinafter “Wazir Decl.”) ¶¶ 3-4; Exh. 2, Declaration of Nadhira Al-Khalili (hereinafter “Al-Khalili Decl.”) ¶¶ 2-4.) In seeking an internship, Defendant Chris Gaubatz made a number of representations to CAIR (including by email transmission over interstate wires) which turned out to be false or

misleading, including that his name was “David Marshall,” that his father was “in construction,” that he was a student at Ferrum College, and that he was majoring in sociology. (Wazir Decl. ¶¶ 3, 5; *see also* Al-Khalili Decl. ¶¶ 2-3.)

In fact, though, Defendant Chris Gaubatz had applied for a position with CAIR for the purpose of spying on CAIR and other Muslim organizations; accessing, copying, and/or removing documents belonging to CAIR; and recording surreptitiously meetings and conversations. (Al-Khalili Decl. ¶¶ 6-8; Wazir Decl. ¶ 6.) Defendant Chris Gaubatz’s father was not “in construction” at all, but rather was Defendant Paul David Gaubatz, who claims to be a counterterrorist operative and who seeks donations of money from the public in return for “exposing” terrorist organizations. (Wazir Decl. ¶ 6.) Defendant Paul David Gaubatz seeks donations in exchange for posting documents he obtains as part of his work and has published a book claiming that CAIR and other organizations are associated with and/or supportive of terrorist organizations. (Wazir Decl. ¶ 6; Al-Khalili Decl. ¶ 14.)

Had Defendant Chris Gaubatz, a.k.a., “David Marshall” told CAIR that, in fact, (a) his name was Chris Gaubatz, (b) his father was not in construction but was rather engaged in a private investigative effort directed at CAIR and other Muslim organizations, or (c) he did not intend to work for CAIR and to advance its interests but instead to access, copy, and/or remove CAIR documents and to record meetings and conversations with and among CAIR officials and employees, CAIR would not have hired him or allowed him access to its premises. (Wazir Decl. ¶ 7; Al-Khalili Decl. ¶ 5.)

When he was hired, in accordance with the policies and procedures then in place at CAIR’s national office, CAIR’s Internship Coordinator, Raabia Wazir, required Chris Gaubatz,

a.k.a, “David Marshall,” to sign a Confidentiality and Non-Disclosure Agreement.<sup>1</sup> (Wazir Decl. ¶¶ 8-9, Exh. A.) In this agreement, Defendant Chris Gaubatz, a.k.a. “David Marshall,” agreed, among other things:

- “[T]hat I shall not at any time after the termination of my internship with CAIR, use for myself or others, or disclose or divulge to others ... any trade secrets, confidential information, or any other proprietary data of CAIR in violation of this agreement ....”;
- “[T]o take and protect the secrecy of, and to avoid disclosure or use of, [CAIR’s] ‘Confidential Information’ in order to prevent it from falling into public domain or into the possession of persons not bound to maintain the confidentiality of the Confidential Information.”;
- “[T]o return any originals or copies of confidential and proprietary information obtained during the course of internship, whether tangible or intangible, to CAIR immediately upon termination regardless of whether said termination is involuntary or not.”; and
- “[T]o not distribute this information in any medium (i.e., faxes, voicemail, electronic mail systems, or computer systems).”

(Wazir Decl., Exh. A.) Had Chris Gaubatz, a.k.a, “David Marshall,” not completed and signed the Confidentiality and Non-Disclosure Agreement or refused to do so, CAIR would not have hired him. (Wazir Decl. ¶ 11.)

Chris Gaubatz, a.k.a, “David Marshall,” worked for CAIR from June 2008 until August 2008. In addition, he returned to perform additional work over the Labor Day holiday weekend in 2008. (Wazir Decl. ¶ 12.) CAIR did not authorize Chris Gaubatz or any of CAIR’s other interns to access, copy, keep, take home, or otherwise remove from CAIR’s premises or computer systems any of CAIR’s documents. (Wazir Decl. ¶ 14; Al-Khalili Decl. ¶ 17.) Neither did CAIR authorize Chris Gaubatz or any of CAIR’s other interns to access any of CAIR’s password-protected email or computer systems. (Al-Khalili Decl. ¶ 18.) CAIR interns,

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<sup>1</sup> Wazir placed the signed and completed non-disclosure agreement in a file bearing the name “David Marshall” which was maintained in a file drawer in her office along with similar files for each of the other CAIR interns. (Wazir Decl. ¶ 10.) A recent review of those files has shown the file for “David Marshall” to be missing. (Al-Khalili Decl. ¶ 23.) CAIR is continuing to search for this intern file, but notes that neither the file drawer in which Wazir placed it nor her office was kept locked during the time Defendant Chris Gaubatz worked as an intern at CAIR. (Wazir Decl. ¶ 10.)

including Chris Gaubatz were given limited access to CAIR's computers and computer systems so that they could access the Internet and save documents they were working on to desktop space on a computer. (Al-Khalili Decl. ¶ 19.) However, CAIR interns were not given CAIR email addresses or provided with access to CAIR's computer and email networks, which require a username and password. (Al-Khalili Decl. ¶ 19.) Further, CAIR did not authorize Chris Gaubatz or any of CAIR's other interns to record any meetings, conversations, or other events. (Al-Khalili Decl. ¶ 20.) Finally, CAIR did not authorize Chris Gaubatz or any of CAIR's other interns to transfer or deliver to any third party any of CAIR's internal documents (Al-Khalili Decl. ¶ 21; Wazir Decl. ¶ 15) or to disclose or publish any documents, recordings, or other information obtained or made during their internships at CAIR. (Al-Khalili Decl. ¶ 22.)

During the summer of 2008, CAIR was in the process of cleaning out a number of files and records. Because some of these files contained personal information about CAIR employees and/or donors and because of a general desire to avoid any risk of persons outside the organization rummaging through CAIR's old files and records, CAIR's office manager, Jumana Kamal, requested assistance from the organization's interns in an effort to dispose of numerous documents, by shredding them. Chris Gaubatz was one of the interns who assisted in this effort. (Wazir Decl. ¶ 13.) Neither Chris Gaubatz nor any other intern was authorized to keep, take home, or transfer to any third party the documents that they were given to shred. (Wazir Decl. ¶¶ 14-15.) CAIR gave the interns access to these files and records solely for the purpose of shredding them in accordance with CAIR's instructions. They were not authorized to make any other use of the documents. (Wazir Decl. ¶ 16.)

In October 2009, a book was released entitled *Muslim Mafia: Inside the Secret Underworld That's Conspiring to Islamize America* by Defendant Paul David Gaubatz and Paul

Sperry. In that book, Defendant Paul David Gaubatz admits that the individual CAIR had known as “David Marshall” was in fact Chris Gaubatz, his son. (Al-Khalili Decl. ¶ 6.) Defendant Paul David Gaubatz admits that “David Marshall” was Chris Gaubatz’s “*nom de guerre*” and that instead of working as an intern for CAIR, Chris Gaubatz worked as the “chief field investigator” in his so-called counterintelligence operation. (Al-Khalili Decl. ¶ 7.)

Defendant Paul David Gaubatz describes the internship of “David Marshall” as “a six-month counterintelligence operation” during which he “routinely load[ed] the trunk of his car with boxes of sensitive documents and deliver[ed] them into the custody of investigative project leader P. David Gaubatz who in turn stockpiled them at his office in Richmond, Virginia.” (Al-Khalili Decl. ¶ 8.) Indeed, Defendant Paul David Gaubatz references, cites, characterizes, and/or quotes from numerous of the documents Defendant Chris Gaubatz obtained, including confidential internal memoranda, proprietary minutes of board meetings, budget reports, real estate records, strategy papers, agendas, long-term goals, employee evaluations, emails, wire transfers and other bank statements, proposals, handwritten notes, letters, brochures, spreadsheets, and visitors logs along with other sensitive documents. In an appendix, the book reproduces in whole or in part at least 19 of the stolen documents. (Al-Khalili Decl. ¶ 9.) Many of the documents, Defendant Paul David Gaubatz admits, are expressly marked for confidential treatment with such designations as “Company Proprietary” and “Not for Distribution—For Board Members Only.” (Al-Khalili Decl. ¶ 10.) Defendant Paul David Gaubatz also cites, quotes, characterizes, and/or references numerous emails by, to, and between CAIR officials and employees as well as electronic or computer-generated documents, including a “digital rolodex” of Corey P. Saylor, CAIR’s Legislative Director. (Al-Khalili Decl. ¶ 11.)

The book also cites, quotes from, and characterizes emails and/or memoranda by or involving attorneys who are or have been employed or retained by CAIR. (Al-Khalili Decl. ¶ 12.) Three specific examples are (1) a January 3, 2007 “interoffice email” from Arasalan Iftikhar, an attorney and CAIR’s former Legal Director, to CAIR officials; (2) an August 7, 2006 memorandum regarding a potential lawsuit authored by Omar T. Mohammedi, an attorney in New York and sent to CAIR officials; and an April 20, 2007 email from a CAIR official to Arasalan Iftikhar, an attorney and CAIR’s former Legal Director regarding an ongoing litigation matter. (Al-Khalili Decl. ¶ 12.)

Defendant Paul David Gaubatz also maintains an Internet blog, which can be found at <http://dgaubatz.blogspot.com>. (Al-Khalili Decl. ¶ 13.) On his blog, Defendant Paul David Gaubatz solicits donations from the public and has posted documents stolen from CAIR by his son, Defendant Chris Gaubatz, as well as video and audio recordings made surreptitiously by his son during his CAIR internship. (Al-Khalili Decl. ¶¶ 14-15.) Among these are an October 20, 2009 post disclosing the names, addresses, telephone numbers, and email addresses of former CAIR employees and an October 26, 2009 post disclosing the names, addresses, telephone numbers, and email addresses of persons who have made donations to CAIR. (Al-Khalili Decl. ¶ 16.) CAIR considers its list of contributors to be valuable and proprietary, and keeps it confidential. (Al-Kahlili Decl. ¶ 27.)

CAIR has been the subject of threats and harassment following the release of Defendant Paul David Gaubatz’s book. On October 15, 2009, CAIR’s national office in Washington, D.C. received a threatening fax. (Al-Khalili Decl. ¶ 24, Exh. A.) The fax is addressed to “Muslim Neanderthal Dougie Hooper (AKA Ibrahim Hooper).” (*Id.*) Ibrahim Hooper is CAIR’s Communications Director. (*Id.*) The fax header contains the words “PISS ON ISLAM,” states



“Will be soon hanged for treason against The United States” and depicts a hangman’s noose with “Dougie Hooper” on it. (*Id.*) CAIR reported this threat to the Federal Bureau of Investigation, who referred the matter to the Washington, D.C. Police. (*Id.*)

On October 19, 2009, Nadhira Al-Khalili, CAIR’s Legal Counsel, received a message on her personal voicemail from an unidentified individual making harassing comments. (Al-Kahlili Decl. ¶ 25.) The caller stated, among other things, that “You people are finally being discovered” and “I can’t wait until the systematic removal of you from our culture.” (*Id.*) In nearly two years of experience working at CAIR, Ms. Al-Kahlili has never before received any communication or message of that nature. (*Id.*) A number of other CAIR officials and employees have received similar telephone calls, emails, and messages in recent weeks and CAIR has experienced a dramatic increase in the number of such communications since the release of Defendant Paul David Gaubatz’s book, *Muslim Mafia*. (Al-Kahlili Decl. ¶ 26.)

#### **STANDARD FOR RELIEF**

To obtain injunctive relief through either a temporary restraining order or a preliminary injunction, the moving party must show: (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006); *Hall v. Daschle*, 599 F. Supp. 2d 1, 6 n. 2 (D.D.C. 2009) (“[t]he same standard applies to both temporary restraining orders and to preliminary injunctions”). Here, each of the four factors weigh in favor of CAIR’s request for a temporary restraining order and preliminary injunction. However, even if the Court finds CAIR’s showing as to any of the factors more minimal than the others, the Court must balance the strengths of CAIR’s arguments in each of

the four required areas. “If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak. An injunction may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury.” *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995); *see also Vo Van Chau v. U.S. Dept. of State*, 891 F. Supp. 650, 656 (D.D.C. 1995) (“[A] court’s decision to award preliminary injunctive relief is not a wood exercise. A court may award injunctive relief where the potential for irreparable injury is high and the possibility of success on the merits somewhat lower, or vice versa.”).

## ARGUMENT

### A. **There Is a Substantial Likelihood CAIR Will Prevail on the Merits**

There is a substantial likelihood that CAIR will prevail on the merits of its claims for conversion, breach of fiduciary duty, breach of contract, trespass, and violation of the Electronic Communications Privacy Act. In his book, Defendant Paul David Gaubatz *admits* that he conspired with Defendant Chris Gaubatz to seek and obtain an internship with CAIR under false pretenses and for the concealed purpose of accessing and taking possession of CAIR documents, surreptitiously recording meetings and conversations, and generally acting as a spy or undercover operative. As a result of this admission (and as detailed more fully with respect to each individual count below), there is a substantial likelihood that CAIR will prevail on the merits.

#### 1. **Conversion**

“Conversion has generally been defined as any unlawful exercise of ownership, dominion or control over the personal property of another in denial or repudiation of his rights thereto.” *Chase Manhattan Bank v. Burden*, 489 A.2d 494, 495 (D.C. 1985) (quoting *Shea v. Fridley*, 123

A.2d 358, 361 (D.C. 1956)). Here, Defendant Chris Gaubatz exercised dominion and control over boxes and boxes of CAIR documents when he removed those documents from CAIR's offices and delivered them to a third party, Defendant Paul David Gaubatz. Defendant Chris Gaubatz did not receive authorization from CAIR to remove any of those documents or to transfer them to any third party, therefore, his exercise of dominion and control over the documents was in denial or repudiation of CAIR's property rights.

Further, even if Defendant Chris Gaubatz was authorized to access some of the documents in the first instance, that authorization was limited to such access as was necessary to carry out CAIR's instructions (*e.g.*, to shred the documents according to CAIR's practices and procedures). Moreover, CAIR in no way authorized Defendant Chris Gaubatz to transfer or deliver its documents to a third party. The use or transfer of property entrusted to a person without authorization and in contravention of the owner's express instructions as to what is to be done with the property constitutes conversion. *See Fotos v. Firemen's Ins. Co. of Washington, DC*, 533 A.2d 1264, 1267 (D.C. 1987) ("A bailee's unauthorized transfer of goods in breach of a bailment contract is an 'exercise of ownership, dominion and control' inconsistent with the bailor's rights, and thus constitutes conversion.") (citing *Lipman v. Petersen*, 575 P.2d 19, 21 (Kan. 1978) (when person is entrusted with goods of another, putting goods in hands of third person without authorization constitutes conversion)); *see also* Restatement (Second) Torts § 228 (1965) ("One who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated.").

## **2. Breach of Fiduciary Duty**

Common law principles and basic agency law recognize that an employee owes "an

undivided and unselfish loyalty” to his or her employer “such that ‘there shall be no conflict between duty and self interest.’” *PM Servs. Co. v. Odoi Assoc.*, 2006 WL 20382, at \*27 (D.D.C. Jan. 4, 2006) (quoting *Mercer Mgmt. Consulting v. Wilde*, 920 F. Supp. 219, 233 (D.D.C.1996)). Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters concerned with his agency. *See id.* (quoting Restatement (Second) of Agency § 387). Defendant Chris Gaubatz was entrusted with general access to CAIR’s facilities and, according to Defendant Paul David Gaubatz’s book, was even specifically entrusted with the organization and/or shredding of certain documents according to CAIR’s policies and procedures. Defendant Chris Gaubatz, however, failed to abide by the instructions and directives given him by CAIR and exceeded the scope of any authority conferred upon him to access CAIR’s internal documents by removing those documents from CAIR’s premises and delivering them to a third party, Defendant Paul David Gaubatz, to be used in a manner adverse to CAIR’s interests. Defendant Chris Gaubatz further breach his fiduciary duties to CAIR by surreptitiously recording meetings and conversations and similarly delivering those recordings to his father to be used in a manner adverse to CAIR’s interests. Accordingly, Defendant Paul David Gaubatz failed to honor his duties of confidentiality and loyalty to CAIR.

Defendant Paul David Gaubatz is likewise liable by virtue of his having induced and/or aided and abetted Defendant Chris Gaubatz’s breach his fiduciary obligations to CAIR. *See International Underwriters, Inc. v. Boyle*, 365 A.2d 779, 784 (D.C. 1976) (“[Defendant] is liable as a third party for [co-defendant’s] alleged breaches of fiduciary duty if it can be shown to have induced this conduct.”).

### 3. Breach of Contract

The Confidentiality and Non-Disclosure Agreement between CAIR and Defendant Chris Gaubatz prohibited precisely the sort of actions in which he engaged. Specifically, Defendant Chris Gaubatz agreed, *inter alia*, that he would not “use for myself or others, or disclose or divulge to others ... any trade secrets, confidential information, or any other proprietary data of CAIR,” that he would “take and protect the secrecy of, and ... avoid disclosure or use of, [CAIR’s] ‘Confidential Information’ in order to prevent it from falling into public domain or into the possession of persons not bound to maintain the confidentiality of the Confidential Information,” that he would “return any originals or copies of confidential and proprietary information obtained during the course of internship ... to CAIR immediately upon termination,” and that he would “not distribute this information in any medium (i.e., faxes, voicemail, electronic mail systems, or computer systems).” (Wazir Decl., Exh. A.) The attached declarations demonstrate, and the admissions by his co-conspirator in the book *Muslim Mafia*, demonstrate that Defendant Chris Gaubatz did all of these things.

### 4. Trespass

Trespass is “the intentional intrusion of a person or thing upon property that invades and disrupts the owner’s exclusive possession of that property.” *Daily v. Exxon Corp.*, 930 F. Supp. 1, 2 (D.D.C. 1996) (citing *Carrigan v. Purkhiser*, 466 A.2d 1243, 1244 (D.C. 1983)). Though consent may serve as a defense to a trespass action, any such consent is vitiated where it is obtained by the use of pretense, subterfuge, misrepresentation and concealment or where the defendant exceeds the scope of the consent given. *United States v. Kearney*, 498 F.2d 61, 66 (D.C. Cir. 1974) (holding consent to entry obtained by defendants’ misrepresentation of identity and intentions was “not with the will of the occupants”); *see also Shiffman v. Empire Blue Cross*

& *Blue Shield*, 681 N.Y.S.2d 511, 512 (App. Div. 1998) (reporter who gained entry to medical office by posing as potential patient using false identification and insurance cards could not assert consent as defense to trespass claim ‘since consent obtained by misrepresentation or fraud is invalid’); Restatement (Second) of Torts § 892B(2) (1965) (“If the person consenting to the conduct of another ... is induced [to consent] by the other’s misrepresentation, the consent is not effective for the unexpected invasion or harm.”).

Here, Defendants conspired to have Defendant Chris Gaubatz gain access to CAIR’s premises by means of misrepresentation and deceit. Because the consent CAIR gave to Defendant Chris Gaubatz to work with it and be present at its facilities was based on such false pretenses, that consent is ineffectual and his presence there constituted a trespass. Further, once having gained access to CAIR’s property by false pretenses, Defendant Chris Gaubatz proceeded unlawfully to convert CAIR’s personal property, breach his fiduciary and contractual obligations to CAIR, and to violate the Electronic Communications Privacy Act by accessing CAIR email and computer systems without, and/or in excess of, any authorization. Accordingly, even if the misrepresentations made in order to gain entry to CAIR’s premises did not alone make Defendant Chris Gaubatz’s presence there a trespass, his subsequent wrongful conduct did serve to render his presence a trespass. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 518 (4th Cir. 1999) (affirming verdict in favor of plaintiff on trespass claim where defendants’ surreptitious filming adverse to plaintiff while on plaintiff’s premises was wrongful act in excess of defendants’ authority to enter plaintiff’s premises as employees).

##### **5. Electronic Communications Privacy Act**

The Electronic Communications Privacy Act (ECPA),<sup>2</sup> 18 U.S.C. §§ 2701, *et seq.*, makes it a criminal offense to “intentionally access[ ] without authorization a facility through which an

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<sup>2</sup> Some courts have also referred to 18 U.S.C. § 2701 as the Stored Communications Act (SCA).

electronic communication service is provided, or intentionally exceed[ ] an authorization to access that facility; and thereby obtain[ ], alter[ ], or prevent[ ] authorized access to a wire or electronic communication while it is in electronic storage.” 18 U.S.C. § 2701(a). Further, 18 U.S.C. § 2707 permits any person aggrieved by a knowing and intentional violation of the ECPA to bring a civil cause of action.

Here, CAIR did not give Defendant Chris Gaubatz a username and password by which he could access CAIR email or computer systems, yet he nonetheless obtained and delivered to his father a number of email communications of others at CAIR as well as computer-generated documents. (Al-Khalili Decl. ¶¶ 11-12.) “A defendant violates the [ECPA] when he intentionally accesses his co-worker’ email accounts without authorization.” *Bloomington-Normal Seating Co., Inc. v. Albritton*, 2009 WL 1329123, at \*4 (N.D. Ill. May 13, 2009); *see also Cardinal Health 414, Inc. v. Adams*, 582 F. Supp. 2d 967, 976 (M.D. Tenn. 2008) (“[W]here the facts indisputably present a case of an individual logging onto another’s email account without permission and reviewing the material therein, a summary judgment finding of an [ECPA] violation is appropriate.”) (internal citation omitted). In addition, a defendant also violates the ECPA when he accesses information that he was not entitled to see on a password-protected computer system, network, or database. *See State Analysis, Inc. v. Am. Fin. Servs. Assoc.*, 621 F. Supp. 2d 309, 318 (E.D. Va. 2009) (holding claim stated against defendant who, without any authorization from plaintiff, had accessed password-protected areas of plaintiff’s website using password given it by authorized user); *see also Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 875-76 (9th Cir. 2002) (similar). CAIR, therefore, is likely to prevail on the merits as Defendant Chris Gaubatz violated the ECPA in obtaining emails and other electronic or computer-generated documents from CAIR’s computer networks and systems, as did Defendant

Paul David Gaubatz who conspired with him and/or aided and abetted in the violation.

**B. Plaintiff Will Suffer Irreparable Injury if Injunctive Relief Is Not Awarded**

A harm is “irreparable” if it ‘cannot be prevented or fully rectified by the final judgment after trial.’” *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1089 (7th Cir. 2008) (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984)). Here, unless preliminary injunctive relief is granted, Defendants will continue to have access to and use of documents and recordings which they were never entitled to obtain, only increasing the harm to CAIR. The confidential and internal—and, in certain instances, proprietary or privileged—nature of the documents taken by Defendants makes monetary damages and/or injunctive relief at the conclusion of the litigation an inadequate remedy.

Defendants’ conduct to date has already infringed, if not vitiated, CAIR’s reasonable expectations of confidentiality. The only way to halt that injury and prevent any further damage is through preliminary injunctive relief. Further, Defendants have disclosed a donor list of CAIR’s which it considers valuable and proprietary. (Al-Khalili Decl. ¶¶ 16, 27.) That value, however, is irreparably diminished if Defendants are permitted to leave that information in the public domain or to make further uses or disclosures of such information. *See CTC Communications, Inc. v. Bell Atlantic Corp.*, 14 F. Supp. 2d 133, 146 (D. Me. 1998) (holding sufficiently irreparable harm shown to justify injunction against any future use of confidential information obtained by defendant during course of agency relationship with plaintiff).

Defendants have also cited, quoted from, and characterized emails and/or memoranda by or involving attorneys who are or have been employed or retained by CAIR. (Al-Khalili Decl. ¶ 12.) These documents are protected by the attorney-client privilege and/or work product doctrine and no amount of monetary damages could adequately compensate the violation of



CAIR's attorney-client privilege and work product doctrine rights. *See Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 955, 960-62 (3d Cir. 1984) (affirming district court's grant of preliminary injunction ordering return of documents seized from plaintiff's offices which were potentially protected by attorney-client privilege or work product doctrine). CAIR's privilege is irreparably infringed so long as its privileged documents remain in the possession of Defendants and/or in the public domain.

Further, if the use of CAIR's property is not halted and the property returned to CAIR, it risks suffering additional losses—namely, the potential harm to relationships with employees and contributors by virtue of the theft and public disclosure of their private, personal information from CAIR and the associated loss of manpower, funds, and goodwill. (*See Al-Khalili Decl.* ¶ 28.) Such harms are both real and irreparable. *Girl Scouts of Manitou Council*, 549 F.3d at 1090 (reversing district court's denial of preliminary injunction because simple return of intangible property in form of organizational territory to plaintiff following trial would not account for incalculable losses risked by plaintiff to property, employees, business, and goodwill).

Further, the nature of the injuries which CAIR has suffered to date and continues to suffer from Defendants' use, disclosure, and publication of unlawfully obtained documents and recordings are such that damages may be difficult to calculate as a monetary matter. (*See Al-Khalili Decl.* ¶ 29.) The harm to CAIR's operations, its relationships with its employees, and its reputation and goodwill with donors, supporters, and the public at large will necessarily escape accurate measurement in a determination of the amount of recoverable damages as an element of CAIR's ultimate legal relief in this action, therefore, permitting Defendants to continue to use, disclose, publish, and benefit from the unlawfully obtained documents and recordings only serves to exacerbate the harm to CAIR. *See Roland Mach.*, 749 F.2d at 386 (noting that while

law was capable of monetizing plaintiff's lost profits, "in practice it may be very difficult to distinguish the effect of the termination from the effect of other things happening at the same time"). In order to be adequate, a legal remedy "must not only be plain, speedy and adequate, but as adequate to meet the ends of justice as that which the restraining power of equity is competent to grant." *Harris Stanley Coal & Land Co. v. Chesapeake & O. Ry. Co.*, 154 F.2d 450, 453 (6th Cir. 1946). A mere award of damages would be inadequate in this case, in large part, because of the difficulty of ascertaining them.

Finally, the continued disclosure of CAIR's internal documents and the personal information of its employees and donors continues invasions of privacy, places CAIR's donor list in the public domain, and enhances the risk of threats and harassment directed at both CAIR and third parties. CAIR has already received harassing and threatening communications as a result of the actions of Defendants to date. (Al-Khalili Decl. ¶¶ 24-26 & Exh. A.) The Court should act now to minimize the risk of any future such occurrences.

Moreover, even if the Court finds the irreparable injury to Plaintiff to be only minimal, Plaintiff's high likelihood of success on the merits of its claims would still justify preliminary injunctive relief. *See CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) ("An injunction may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury.").

**C. Defendants Will Not Be Harmed If the Restraining Order and Preliminary Injunction Are Granted, but Plaintiff Will Be Harmed If They Are Not Granted**

As explained above, Plaintiff will suffer immediate and irreparable harm if the requested equitable relief is not granted. Defendants, however, *will not* suffer any harm if the limited restraining order and preliminary injunction sought are granted. At this point in the proceedings,

Plaintiff only seeks to prevent Defendants from making any further use or disclosure of the unlawfully-obtained documents and recordings and to secure their return. This relief does not present any risk of economic or other harm to Defendants. Plaintiff only requests that Defendants return and make no further use or disclosure of that which they admit to stealing from CAIR.<sup>3</sup>

**D. The Public Interest Favors Plaintiff**

The public interest is served by a temporary restraining order and preliminary injunction in this case because Defendants' conduct has resulted in the disclosure of the private personal and financial information of third parties, namely CAIR's employees and donors. Further, Defendants' conduct has resulted in the theft, use, and disclosure of information protected by the attorney-client privilege and/or work product doctrine. As recognized by the Third Circuit in *Klitzman*, "[t]he attorney-client privilege is the oldest confidential communications privilege known to the common law" and "[d]ocuments within the scope of the attorney-client privilege are 'zealously protected.'" 744 F.2d at 960 (citing 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2017 (1970)); see also *Chore-Time Equipment, Inc. v. Big Dutchman, Inc.*, 255 F. Supp. 1020, 1021 (W.D. Mich. 1966) ("[I]t generally is acknowledged that the attorney-client privilege is so sacred and so compellingly important that the courts must, within their limits, guard it jealously.")

Additionally, it is in the public interest for the courts to refuse to permit violations of employees' contractual and fiduciary obligations to continue unabated during the pendency of a lawsuit by the employer. Nor is it in the public interest to encourage, sanction, or reward the obtainment of employment through deceptive means and false pretenses or the theft of internal

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<sup>3</sup> Further, for these same reasons the Court should not require CAIR to post any bond as a condition of receiving preliminary equitable relief, as no damages could be suffered from the limited relief sought.

documents from an employer.

### CONCLUSION

For the foregoing reasons, Plaintiff requests that the Court enter a Temporary Restraining Order in the proposed form submitted by Plaintiff, schedule a hearing on Plaintiff's request for a preliminary injunction at the earliest available date, and, after such hearing, enter a preliminary injunction in the form proposed by Plaintiff.

Respectfully submitted,

Dated: October 29, 2009



Daniel Marino (DC Bar No. 416711)  
Tillman Finley (DC Bar No. 477737)

LUQUE GERAGOS MARINO LLP  
910 17<sup>th</sup> Street N.W., Suite 800  
Washington, D.C. 20006  
Tel: 202.223.8888

*Attorneys for Plaintiff Council on American-Islamic  
Relations*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COUNCIL ON AMERICAN-ISLAMIC	)	
RELATIONS,	)	
	)	
Plaintiff,	)	Civil Action No. _____
	)	
v.	)	Judge: _____
	)	
PAUL DAVID GAUBATZ; CHRIS	)	Date: _____
GAUBATZ, a.k.a. "David Marshall"; and	)	
JOHN AND JANE DOE NOS. 1-10,	)	
	)	
Defendants.	)	

**LCvR 65.1 CERTIFICATION**

I, Daniel Marino, do hereby certify pursuant to LCvR 65.1 as follows:

1. I am over the age of 18 and an attorney licensed to practice law in the District of Columbia. I am a partner in the law firm of Luque Geragos Marino LLP, which represents Plaintiff the Council on American-Islamic Relations (CAIR) in the above-captioned matter.

2. On Tuesday, October 27, 2009 at approximately 2:30 p.m., I called Chris Gaubatz at the telephone number 571-839-2653. No one answered the call and it was directed to a voice mail box. The voice mail greeting indicated that a message could be left for "David Marshall." I left a message for Chris Gaubatz at this number indicating that I was an attorney who represented CAIR and that I intended to file a complaint and a request for a temporary restraining order with the federal court in the District of Columbia the following day, Wednesday, October 28, 2009. I provided my office and cell phone numbers and asked that either Chris Gaubatz or his attorney contact me so that I could provide a copy of the papers I intended to present to the Court and/or coordinate with Chris Gaubatz or his attorney so as to allow either or both of them to appear before the Court at the same time I did.

3. On Tuesday, October 27, 2009, at approximately 2:35 p.m., I attempted to contact Paul David Gaubatz at the telephone number 804-836-4572. No one answered the call and it was directed to voicemail. The voicemail greeting stated that I had reached the telephone number of "Dave Gaubatz," but stated that the voicemail box was full and could not accept any new messages.

4. On Tuesday, October 27, 2009, at approximately 2:44 p.m., I sent the email attached hereto as Exhibit A to [davegaubatz@gmail.com](mailto:davegaubatz@gmail.com). In the banner appearing at the top of the website <http://dgaubatz.blogspot.com>, this email address was provided. Specifically, it stated "Contact: [davegaubatz@gmail.com](mailto:davegaubatz@gmail.com)."

5. On Wednesday, October 28, 2009, at approximately 2:44 p.m., I again called Chris Gaubatz at the telephone number 571-839-2653. No one answered the call and it was directed to a voice mail box. The voice mail greeting indicated that a message could be left for "David Marshall." I left a detailed message for Chris Gaubatz indicating that I was an attorney who represented CAIR and that I intended to file a complaint and a request for a temporary restraining order with the federal court in the District of Columbia the following day, Thursday, October 29, 2009, at 1:00 p.m.. I gave him the address for the courthouse and asked him to meet us in the Clerk's Office at 1:00 p.m. I provided my cell phone number and asked that either Chris Gaubatz or his attorney contact me so that I could provide a copy of the papers I intended to present to the Court and/or coordinate with Chris Gaubatz or his attorney so as to allow either or both of them to appear before the Court at the same time I did. I also left my office number and the name of my associate, Tillman Finley.

6. On Wednesday, October 28, 2009, at approximately 2:48 p.m., I again attempted to contact Paul David Gaubatz at the telephone number 804-836-4572. No one answered the call

and it was directed to voicemail. The voicemail greeting stated that I had reached the telephone number of "Dave Gaubatz," but stated that the voicemail box was full and could not accept any new messages.

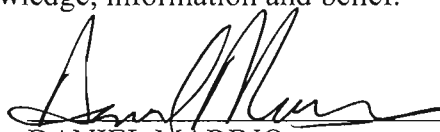
7. On Wednesday, October 28, 2009, at approximately 3:51 p.m., I sent the email attached hereto as Exhibit B to [davegaubatz@gmail.com](mailto:davegaubatz@gmail.com). In that email, I advised him that we were planning to file a lawsuit the following day at 1:00 p.m., with a motion for a temporary restraining order and application for a preliminary injunction. I stated that we were finalizing the papers and would email them to him this evening.

8. On Wednesday, October 28, 2009, at approximately 8:51 p.m., my associate, Tillman Finley, sent the email attached hereto as Exhibit C to [davegaubatz@gmail.com](mailto:davegaubatz@gmail.com). Mr. Finley confirmed my earlier email of that same day and attached courtesy copies of CAIR's complaint, CAIR's motion for temporary restraining order and preliminary injunction, the memorandum in support of that motion, the two declarations to be exhibits to that motion, and the two proposed orders granting a temporary restraining order and a preliminary injunction.

9. As of Thursday, October 29, 2009, at 12:35 p.m., I had not received any response to the above-described communications nor had I been contacted by either Paul David Gaubatz or Chris Gaubatz or any attorney claiming to represent them.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information and belief.

Date: October 29, 2009

  
DANIEL MARINO

# **EXHIBIT A**



**Tillman Finley**

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**From:** Dan Marino  
**Sent:** Tuesday, October 27, 2009 2:44 PM  
**To:** davegaubatz@gmail.com  
**Cc:** Tillman Finley; Melissa Sheridan; Ben Meiselas  
**Subject:** CAIR v. Gaubatz et al.

Mr. Gaubatz: I represent the Council for American-Islamic Relations (CAIR). Tomorrow, I am planning to file a complaint and an application for a temporary restraining order on behalf of CAIR, against you and you son Chris, aka, "David Marshall," in the United States District Court for the District of Columbia. The complaint will allege certain torts and other misconduct by your son and you which led to the wrongful acquisition and use of documents and information belonging to CAIR, and the TRO motion and preliminary injunction application will ask the Court to enjoin you and others from posting those documents on the internet and other unauthorized uses of CAIR's documents and information.

I tried to call your telephone number--804-836-4572--but got your voicemail and a message saying the box was full. I also left a message for your son on his cell phone--571-839-2653.

I would like to provide you as soon as possible with a copy of the papers we will be filing tomorrow and keep you apprised of when we will be seeing the Court so that you can be present.

I would appreciate it if you would call me at the below numbers or respond to this email, or have your counsel do so, as soon as possible. Thank you.

Daniel Marino  
Luque Geragos Marino LLP  
910 17th Street, N.W.  
Ste. 800  
Washington, D.C. 20006  
[dmarino@luquegeragos.com](mailto:dmarino@luquegeragos.com)  
Tel: 202-223-8888  
Fax: 202-223-8677  
Cell: 202-841-5484

## **EXHIBIT B**

**Tillman Finley**

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**From:** Dan Marino  
**Sent:** Wednesday, October 28, 2009 3:51 PM  
**To:** davegaubatz@gmail.com  
**Cc:** Tillman Finley  
**Subject:** CAIR v. Gaubatz

Mr. Gaubatz: Following up on my email of yesterday, I tried to call you again on 804-836-4572, but got voicemail and it said the voicemail box was full again. I wanted to advise you that we are planning to file the lawsuit tomorrow at 1:00 p.m. tomorrow, with a motion for a temporary restraining order and application for a preliminary injunction. We are finalizing the papers we are prepared to file tomorrow, and we will email them to you this evening. I request that you contact me to coordinate so that you, or your counsel can be present, when we seek the temporary restraining order and schedule the hearing on the preliminary injunction request. I can be reached most readily on my cell phone. Thank you.

Daniel Marino  
Luque Geragos Marino LLP  
910 17th Street, N.W., Ste. 800  
Washington, D.C. 20006  
[dmarino@luquegeragos.com](mailto:dmarino@luquegeragos.com)  
Tel: 202-223-8888  
Fax: 866.345.9997  
Cell: 202-841-5484

# **EXHIBIT C**

**Tillman Finley**

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**From:** Tillman Finley  
**Sent:** Wednesday, October 28, 2009 8:51 PM  
**To:** davegaubatz@gmail.com  
**Cc:** Dan Marino  
**Subject:** RE: CAIR v. Gaubatz  
**Attachments:** 2009-10-29 CAIR v. Gaubatz, et al. Complaint UNSIGNED.pdf; 2009-10-29 CAIR v. Gaubatz, et al. Complaint Exh A.pdf; 2009-10-29 CAIR v. Gaubatz et al. Motion for TRO and Preliminary Injunction UNSIGNED.pdf; 2009-10-29 CAIR v. Gaubatz, et al. Memorandum ISO Mtn TRO-PI UNSIGNED.pdf; 2009-10-29 CAIR v. Gaubatz et al. Motion for TRO and Preliminary Injunction Exhibit 1 - Wazir Declaration.pdf; 2009-10-29 CAIR v. Gaubatz et al. Motion for TRO and Preliminary Injunction Exhibit 2 - Al-Khalili Declaration UNSIGNED.pdf; 2009-10-29 Proposed TRO Order.pdf; 2009-10-29 Proposed Preliminary Injunction.pdf

Mr. Gaubatz,

Per Mr. Marino's email earlier today, please find attached the following:

1. Complaint and Jury Demand with Exhibit A thereto;
2. Motion for Temporary Restraining Order and Preliminary Injunction;
3. Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction;
4. Exhibits 1 and 2 to the Motion for Temporary Restraining Order and Preliminary Injunction;
5. A Proposed Temporary Restraining Order; and
6. A Proposed Preliminary Injunction.

These are unsigned, courtesy copies of documents that, as Mr. Marino previously indicated, we will be executing and filing with the United States District Court for the District of Columbia tomorrow at approximately 1:00 p.m. At that time, we will be requesting that the assigned judge take up the matter of the requested Temporary Restraining Order as soon as he is available to do so thereafter.

If you or your counsel desire to be present, you may coordinate with Mr. Marino, who can be reached most readily on his cell phone at 202-841-5484.

We have left voicemail messages for your son, Chris Gaubatz, who is also named as a defendant, but have not received any responses. We do not have an email address for him. If you would, please make these documents available to him as well.

Tillman Finley  
Luque Geragos Marino LLP  
910 17th Street, N.W. Suite 800  
Washington, D.C. 20006  
[tfinley@luquegeragos.com](mailto:tfinley@luquegeragos.com)  
Tel: 202-223-8888  
Fax: 877-235-3666  
Cell: 202-281-9191

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**From:** Dan Marino  
**Sent:** Wednesday, October 28, 2009 3:51 PM  
**To:** davegaubatz@gmail.com

**Cc:** Tillman Finley  
**Subject:** CAIR v. Gaubatz

Mr. Gaubatz: Following up on my email of yesterday, I tried to call you again on 804-836-4572, but got voicemail and it said the voicemail box was full again. I wanted to advise you that we are planning to file the lawsuit tomorrow at 1:00 p.m. tomorrow, with a motion for a temporary restraining order and application for a preliminary injunction. We are finalizing the papers we are prepared to file tomorrow, and we will email them to you this evening. I request that you contact me to coordinate so that you, or your counsel can be present, when we seek the temporary restraining order and schedule the hearing on the preliminary injunction request. I can be reached most readily on my cell phone. Thank you.

Daniel Marino  
Luque Geragos Marino LLP  
910 17th Street, N.W., Ste. 800  
Washington, D.C. 20006  
[dmarino@luquegeragos.com](mailto:dmarino@luquegeragos.com)  
Tel: 202-223-8888  
Fax: 866.345.9997  
Cell: 202-841-5484

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COUNCIL ON AMERICAN-ISLAMIC	)	
RELATIONS,	)	
	)	
Plaintiff,	)	Civil Action No. _____
	)	
v.	)	Judge: _____
	)	
PAUL DAVID GAUBATZ; CHRIS	)	Date: _____
GAUBATZ, a.k.a. "David Marshall"; and	)	
JOHN AND JANE DOE NOS. 1-10,	)	
	)	
Defendants.	)	

**[PROPOSED] TEMPORARY RESTRAINING ORDER**

Based upon the Motion for Temporary Restraining Order and Preliminary Injunction filed by Plaintiff, the Council on American-Islamic Relations (CAIR), and the declarations of Raabia Wazir and Nadhira F. Al-Khalili and the LCvR 65.1 Certificate of counsel for CAIR, Daniel Marino, the Court finds as follows:

1. It clearly appears from the specific facts shown that immediate and irreparable injury, loss, or damage will result to CAIR before Defendants Paul David Gaubatz and Chris Gaubatz or their respective attorneys can be heard in opposition; and
2. CAIR has made all reasonable efforts under the circumstances to furnish to Defendants Paul David Gaubatz and Chris Gaubatz or their respective attorneys at the earliest practicable time prior to the hearing on CAIR's motion for a temporary restraining order actual notice of the hearing on CAIR's motion and copies of all pleadings and other papers filed to date in this action and presented to the Court at the hearing;
3. CAIR has suffered and continues to suffer injury, specifically the continued possession by Defendants Paul David Gaubatz and Chris Gaubatz of CAIR's internal documents

and recordings of meetings and conversations and said Defendants' ongoing use, disclosure, and publication of said documents.

4. CAIR's injury is irreparable because Defendants Paul David Gaubatz and Chris Gaubatz have and continue to disclose personal information of CAIR's employees and contributors and the harm from such disclosures cannot be fully remedied because monetary damages will be difficult to ascertain and the public disclosure will have been made.

5. Likewise, the injury from the disclosure of CAIR's other internal documents and emails and the surreptitiously recorded meetings and conversations is also irreparable because the harm from public disclosure of such materials cannot be fully remedied because monetary damages will be difficult to ascertain and the public disclosure will have been made.

6. Further, CAIR has received threatening and harassing communications from individuals as a result of Defendants' use, disclosures, and characterizations of CAIR's internal documents and emails and the surreptitiously recorded meetings and conversations.

7. This Order is entered to preserve the status quo until a hearing can be held on CAIR's motion for a preliminary injunction

Accordingly, the Court hereby **ORDERS** as follows:

1. Defendants Paul David Gaubatz and Chris Gaubatz, along with any and all of their agents, employees, or associates, are hereby **ENJOINED** from making any use, disclosure, or publication of any document (including emails and other electronic documents) or copy thereof obtained from any office or facility of CAIR.

2. Defendants Paul David Gaubatz and Chris Gaubatz, along with any and all of their agents, employees, or associates, are hereby **ENJOINED** from making any use, disclosure, or publication of any recording (or copy thereof), whether audio or video, of meetings of or



conversations involving CAIR officials or employees.

3. Defendants Paul David Gaubatz and Chris Gaubatz, along with any and all of their agents, employees, or associates, are hereby **ORDERED** to promptly remove from any blog or other Internet site under their control any use, disclosure, or publication of (a) any document (including emails and other electronic documents) or copy thereof obtained from any office or facility of CAIR, or (b) any recording (or copy thereof), whether audio or video, of meetings of or conversations involving CAIR officials or employees.

4. Defendants Paul David Gaubatz and Chris Gaubatz, along with any and all of their agents, employees, or associates, are hereby **ORDERED** to promptly return to the below-identified counsel for CAIR any and all documents (including emails and other electronic documents), along with any all copies made thereof, obtained from any office or facility of CAIR and any recording (along with any and all copies made thereof), whether audio or video, of meetings of or conversations involving CAIR officials or employees.

5. On \_\_\_\_\_ at \_\_\_\_\_ in \_\_\_\_\_, the Court will hold a hearing on CAIR's motion for preliminary injunction.

6. This Order shall expire shall expire upon the entry of a subsequent Order by this Court so stating or upon the passage of ten (10) days from the entry of this Order, unless within such time, for good cause shown, the term of this Order is extended for a like period or unless Defendants Paul David Gaubatz and Chris Gaubatz consent that it may be extended for a longer period.

Date: \_\_\_\_\_

Time: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE