NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BRIAN PIETRYLO, et al.,	
Plaintiffs,	Civil Case No. 06- 5754 (FSH)
v.	**OPINION & ORDER**
HILLSTONE RESTAURANT GROUP d/b/a HOUSTON'S,	Date: July 24, 2008
Defendant.	

HOCHBERG, District Judge

This matter having come before the Court on a motion for summary judgment (Docket #28), pursuant to Fed. R. Civ. P. 56, by Defendants Hillstone Restaurant Group and this Court having reviewed the submissions of the parties without oral argument pursuant to Fed. R. Civ. P. 78; the Defendant's motion for summary judgment is granted in part and denied in part.

I. BACKGROUND

Plaintiffs Brian Pietrylo ("Pietrylo") and Doreen Marino ("Marino") were employed by Defendant Hillstone Restaurant Group as servers. Defendant owns and operates Houston's restaurants including the Houston's at Riverside Square in Hackensack, New Jersey. Pietrylo created a group on MySpace.com ("Myspace") called the "Spec-Tator." Pietrylo stated in his initial posting that the purpose of the group would be to "vent about any BS we deal with out work without any outside eyes spying in on us. This group is entirely private, and can only be joined by invitation." Pietrylo then exclaimed "[l]et the s**t talking begin." The icon for the

group, Houston's trademarked logo, would appear only on the Myspace profiles of those who were invited into the group and accepted the invitation. Pietrylo invited other past and present employees of Houston's to join the group, including Plaintiff Marino. Once a member was invited to join the group and accepted the invitation, the member could access the Spec-Tator whenever they wished to read postings or add new postings.

Pietrylo also invited Karen St. Jean ("St. Jean"), a greeter at Houston's, to join the group; she accepted the invitation and became an authorized member of the group. While dining at the home of TiJean Rodriguez ("Rodriguez"), a Houston's manager, St. Jean accessed the group through her Myspace profile on Rodriguez's home computer and showed Rodriguez the Spec-Tator.

The details of how other managers got access to the Spec-Tator involves certain factual disputes between the parties. At some point, Robert Anton ("Anton"), a Houston's manager, asked St. Jean to provide the password to access the Spec-Tator, which she did. Although St. Jean states that she was never explicitly threatened with any adverse employment action, she stated that she gave her password to members of the management solely because they were members of management and she thought she "would have gotten in some sort of trouble." Anton used the password provided by St. Jean to access the Spec-Tator from St. Jean's Myspace page. Anton printed copies of the contents of the Spec-Tator.

The manner in which St. Jean's password was given to Robert Marano ("Marano"), a regional supervisor of operations for Houston's, is also disputed. Anton subsequently discussed the Spec-Tator with other members of senior management and human resources of Hillstone Restaurant Group. At some point, Anton may have asked St. Jean to provide the password again.

It is not clear whether Anton told St. Jean that he intended to show the Spec-Tator to other managers, but St. Jean testified that she understood that once the managers had access to the material, all of the managers would know about it.

The posts on the Spec-Tator included sexual remarks about management and customers of Houston's, jokes about some of the specifications ("specs") that Houston's had established for customer service and quality, references to violence and illegal drug use, and a copy of a new wine test that was to be given to the employees. Pietrylo explained in his deposition that these remarks were "just joking"; however, members of management, including Marano, testified that they found these postings to be "offensive." Marano also testified that he was concerned that the content of the Myspace group would affect the operations of Houston's, specifically by contradicting Houston's four core values, professionalism, positive mental attitude, aim to please approach, and teamwork. Marano subsequently terminated Pietrylo and Marino.

On November 30, 2006, Plaintiffs filed a complaint against Defendant alleging violations of the federal Wiretap Act (18 U.S.C. §§ 2510-22) (First Count), the parallel New Jersey Wiretapping and Electronic Surveillance Control Act (N.J.S.A. 2A:156A-3 and 4(d)) (Third Count), the federal Stored Communications Act (18 U.S.C. §§ 2701-11) (Second Count), the parallel provision of the New Jersey Act (N.J.S.A. 2A:156A-27) (Fourth Count), wrongful termination in violation of a clear mandate of public policy (Fifth Count), and common law tort of invasion of privacy (Sixth Count). Defendant filed a motion to dismiss on January 17, 2007, and Plaintiffs' filed a motion to amend complaint on February 20, 2007. The Court, in its Order of August 23, 2007, granted the motion to amend the complaint and denied the motion to dismiss. The Amended Complaint divided the Fifth Count into two counts of wrongful

termination in violation of a clear mandate of public policy: the new Fifth Count alleged violation of a public policy favoring freedom of speech and the Sixth Count alleged violation of a public policy against invasion of privacy. The Seventh Count (the former Sixth Count) alleged violation of the common law tort for invasion of privacy. On December 20, 2007, Defendant filed the instant motion for summary judgement. The Plaintiffs voluntarily dismissed the First Count (violation of the federal Wiretap Act) and Third Count (violation of the New Jersey Wiretapping and Electronic Surveillance Control Act) because they discovered that Defendant did not intercept any electronic communications as required by the federal and state wiretapping statutes. The Second, Fourth, Fifth, Sixth and Seventh Counts are before the Court on Defendant's summary judgment motion.

II. STANDARD OF REVIEW

Pursuant to Rule 56(c), a motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson, 477 U.S. at 248; Celotex, 477 U.S. at 322-26; Doe v. Abington Friends Sch., 480 F.3d 252, 256 (2007). All facts and inferences must be construed in the light most favorable to the non-moving party. Peters v. Delaware River Port Auth., 16 F.3d 1346, 1349 (3d Cir. 1994).

The party seeking summary judgment must initially provide the court with the basis for its motion. Celotex Corp., 477 U.S. at 323. This requires the moving party to either establish

that there is no genuine issue of material fact and that the moving party must prevail as a matter of law, or demonstrate that the nonmoving party has not shown the requisite facts relating to an essential element of an issue on which it bears the burden. Id. at 322–23. Once the party seeking summary judgment has carried this initial burden, the burden shifts to the nonmoving party. To avoid summary judgment, the nonmoving party must demonstrate facts supporting each element for which it bears the burden, and it must establish the existence of "genuine issue[s] of material fact" justifying trial. Celotex Corp., 477 U.S. at 324.

Once a moving party satisfies its initial burden of establishing a prima facie case for summary judgment under Fed. R. Civ. Pro. 56(c), the opposing party "must do more than simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving must set out specific facts showing a genuine issue for trial using affidavits or as otherwise provided in Fed. R. Civ. Pro. 56(e).

III. DISCUSSION

A. Second and Fourth Counts for violations of federal and state Stored Communications statutes

Plaintiffs allege violations of the federal Stored Communications Act, 18 U.S.C. §§ 2701-11 (Second Count), and the identical provision of the New Jersey Act, N.J.S.A. 2A:156A-27 (Fourth Count). These acts make it an offense to intentionally access stored communications without authorization or in excess of authorization. Id. Both statutes provide an exception to liability "with respect to conduct authorized . . . by a user of that service with respect to a communication intended for that user." 18 U.S.C. § 2701(c)(2); accord N.J.S.A. 2A:156A-27c(2).

Defendant argues that because St. Jean was an authorized user of the Spec-Tator who provided access on multiple occasions to Houston's management, there is no liability under these statutes based on the exception. Plaintiffs further contend that because Anton requested St. Jean's password while she was working at the workplace, St. Jean felt pressured to give Anton her password for fear of adverse employment action that may be taken if she did not comply. Plaintiffs argue that based on these circumstances, St. Jean's consent was not freely given based on an implied threat, and thus, access was not "authorized" under the meaning of the exception. Further, Plaintiffs argue that even if St. Jean gave her password to Anton, she did not give her password to Marano, who was responsible for terminating Pietrylo and Marino.

Congress and the New Jersey legislature provided little guidance on the definition of "conduct authorized" under these statutes. See Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 880 n.8 (9th Cir. 2002). Federal courts have equated "consent" under the Wiretap Act with "authorization" under the Stored Communications Act. In re DoubleClick, Inc. v. Privacy Litigation, 154 F. Supp. 2d 497, 514 (S.D.N.Y. 2001). Regarding the Wiretap Act, the First and Second Circuits have held that "Congress intended the consent requirement to be construed broadly." Griggs-Ryan v. Smith, 904 F.2d 112, 116 (1st Cir. 1990); States v. Amen, 831 F.2d 373, 378 (2d Cir. 1987).

The Ninth Circuit denied summary judgment in a case with strikingly similar facts; however, the issue there turned on whether or not the employees that authorized their employers to view the website were "users" of that website. Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 880 (9th Cir. 2002). In Konop, the plaintiff created a website that was critical of the company and provided invited two other employees to view the website. Id. at 873. These

employees never accepted their invitations to access the website until the vice president of Hawaiian Airlines asked them to provide him with access the website. Id. The Ninth Circuit reversed the District Court's grant of summary judgment because when viewing the facts in the light most favorable to the plaintiff, the two invited employees never "used" the site and therefore could not authorize access to the vice president. Id. at 880. Thus, the court there did not consider whether or not the vice president's request that the employees allow him to access the site with their names meant that his access was not authorized.

There is dearth of case law regarding what it means for authorization to be freely given under the federal and state statutes regarding stored communications. Defendant analogizes to criminal cases where consent to access is obtained from a criminal defendant with the promise of leniency in prosecution. According to this reasoning, if there is nothing involuntary in the criminal context where cooperation is rewarded, then St. Jean's cooperation with management in this context cannot be considered involuntary. Plaintiff responds that in an employer-employee relationship, there is a threat inherent in any demand made on an employee by management.

St. Jean testified[1] that if she didn't give the password to the manager who asked for it: "I knew that something was going to happen. I didn't think that I was going to get fired, but I knew that I was going to get in trouble or something was going to happen if I didn't do it." (Pisani Certif., Ex. A.) She also testified that, although no one specifically told her she would be fired, "[i]t wasn't an overwhelming feeling, but I knew. It sounds bad, but I didn't want to lose my job. . . . I didn't want to lose my job for not cooperating with them." (Id.) When asked if she was "following orders" in giving Houston's management her password, St. Jean stated, "I wasn't

[1]This deposition of Karen St. Jean was taken on August 20, 2007.

following orders. They asked me and I didn't know what else to do so I just gave it to them." (Id.) When asked if she felt pressured into giving her password, St. Jean explained "[n]o and yes," yet later explained that Houston's "would have kept on pressuring me and I'm not good under pressure." (Id.) Additionally, St. Jean testified that she "pretty much thought after I gave him [Anton] the password all the managers were going to see it. (Id.)[2]

Under these circumstances, St. Jean's testimony regarding whether her consent was voluntary demonstrates a material issue of disputed fact. If her consent was only given under duress, then the Defendants were not "authorized" under the terms of the statute. Because of this disputed factual issue, summary judgment is denied as to the Second and Fourth Count.

B. Fifth and Sixth Count for Wrongful Termination in Violation of a Clear Mandate of Public Policy

1. Freedom of Speech (Fifth Count)

Plaintiffs allege wrongful termination in violation of a clear mandate of public policy. They argue that the Spec-Tator was a private group where employees could exercise their right to free speech, and that commenting and criticizing their employers is protected speech. (Am. Compl. ¶ 30-34.) Defendant argues that Houston's is a private employer, not a state actor, and that the constitutional obligations are directed only at state action. Defendant further argues that

---

[2] In a declaration submitted in connection with the current motion, St. Jean provided additional testimony. (St. Jean Decl., Jan. 7, 2008.) St. Jean stated that she never believed high level personnel in Houston's, such as Robert Marano, Tino Ciambriello (Vice President of Operations) and Michael Lamb (Director of Human Resources), would be given access to her MySpace account. (St. Jean Decl., ¶¶ 6-9.) Additionally, St. Jean stated that she felt violated by Houston's "impermissibly" taking her information to use it to "ease drop and spy" on the Spec-Tator. (St. Jean Decl. ¶ 10.) Because the Court finds that St. Jean's deposition testimony creates a sufficient disputed issue of material fact to preclude summary judgment, the Court need not rule on Defendants' contention that the supplemental declaration submitted by St. Jean should be excluded as contradictory and self-serving. This credibility determination will be left to the jury.

even if Plaintiffs were public employees, their speech is not protected because it does not touch upon a matter of public concern. Defendant suggests that occasional references to minimum wage are insufficient to demonstrate that the speech exercised on the Spec-Tator is a matter of public concern. Moreover, Defendant points out the undisputed fact that the majority of the postings on the Spec-Tator are derogatory remarks about both customers and management, as well as references to drug abuse.

In general, at-will employees may be terminated at any time with or without cause. If, however, an at-will employee is terminated for a reason that implicates a "clear mandate of public policy," the employee may have a claim for wrongful discharge. Pierce v. Orthro Pharmaceutical Corp., 84 N.J. 58, 72 (N.J. 1980). An at-will employee has a heavy burden to prove a clear mandate of public policy that was violated by his or her termination. New Jersey courts have held that a claim for wrongful termination based on a clear mandate of public policy requires that the termination of an employee must implicate more than just the private interests of the parties. DeVries v. McNeil Consumer Products Co., 250 N.J. Super. 159 (App. Div. 1991); House v. Carter-Wallace, Inc., 232 N.J. Super. 42, 48-49 (App. Div. 1989); Warthen v. Toms River Community Memorial Hospital, 199 N.J. Super 18, 29 (App. Div. 1985). Under the United States Constitution, the First Amendment protections for freedom of speech are directed only to state action, not to private action. See Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989). New Jersey state courts have not addressed whether or not a private employee may base a wrongful termination claim based on alleged interference with freedom of speech as protected by the New

Jersey Constitution. See Wiegand v. Motiva Enters., LLC, 295 F. Supp. 2d 465, 473-74 (D.N.J. 2003).[3]

The Third Circuit has held that the freedom of speech protections are not absolute even for public employees. Azzaro v. County of Allegheny, 110 F.3d 968, 976 (3d Cir. 1997). First Amendment protections extend to a public employee who speaks about an issue of public concern, as long as the interests of the employee outweigh the government's interests in efficiency of operation. Curinga v. City of Clairton, 357 F.3d 305, 310-11 (3d Cir. 2004). The Supreme Court has stated, "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." Connick v. Myers, 461 U.S. 138, 149 (1983). See Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). Speech related to private employment matters is not considered a mater of public concern. See Connick, 461 U.S. at 146 (speech on merely private employment matters is unprotected).

The Third Circuit has also provided a three step test for a *public* employees retaliation claim based on protected activity. Baldassare v. New Jersey, 250 F.3d 188, 195 (3d Cir. 2001). First, for issues concerning freedom of speech, the employee must show that the speech involved an issue of public concern. Id. Second, a plaintiff must show that "his interest in the speech outweighs the state's countervailing interest as an employer in promoting efficiency of the public service it provides through its employees. Id. Third, the protected activity must be a substantial or the motivating factor in the retaliation. Id.

---

[3] The court decided Wiegland on other grounds and did not determine whether private employees have a cause of action for wrongful termination based on protections for freedom of speech. Moreover, the Court finds that even if Plaintiffs here were public employees, they would have no cause of action in this case; therefore, the Court need not determine whether private employees ever have a cause of action based on protections for freedom of speech.

Plaintiffs have not adduced genuine material facts to support the Fifth Count. Even if Houston's were a public employer, Plaintiffs have failed to adduce sufficient facts from which a reasonable jury could find that the speech on the Spec-Tator implicated a matter of public concern.

2. Invasion of Privacy (Sixth Count)

Plaintiffs allege wrongful termination in violation of a clear mandate of public policy based on invasion of privacy under New Jersey common law. (Am. Comp. ¶ 35-36.) Defendants argue that Plaintiffs have failed to identify a source of public policy underlying this claim.

Plaintiffs rely on two cases for their privacy-based Pierce claim. They cite to the New Jersey Supreme Court in Hennessy v. Coastal Eagle Point Oil Co. 129, N.J. 81 (1992). In Hennessy, a case claiming invasion of privacy based on the employer's urinalysis testing, the court said that privacy may serve as a source of public policy, but that courts should balance the privacy interests against the interests of the employer. Id. at 99, 102. Because the court found that the employer's interest in deterring drug use was substantial, the court found that Hennessy's discharge did not fall under the public policy exception for the general rule that an employer can terminate an at-will employee at any time for whatever reason. Id. at 107. Plaintiffs also rely on the Third Circuit's holding that requiring an employee to submit to urinalysis testing and searches of personal property as part of a new drug prevention policy may violate public policy if the employer invaded the employee's privacy. Borse v. Pierce, 963 F.2d 611, 628 (3d Cir. 1992).

A right to privacy may be a source of "a clear mandate of public policy" that could support a claim for wrongful termination; however, these privacy interests will be balanced against the employer's interests in managing the business.

Plaintiffs created an invitation-only internet discussion space. In this space, they had an expectation that only invited users would be able to read the discussion. There is a disputed issue of material fact as to whether St. Jean voluntarily provided authorization to Defendant to access the website. This disputed fact is central to central to the cause of action asserted in the Sixth Count, and summary judgment is therefore denied on the Sixth Count.

C. Seventh Count for Violation of Common Law Tort of Invasion of Privacy

Plaintiffs claim that by viewing their private website, Defendant impermissibly intruded on their "seclusion or solitude, and/or private affairs," and this intrusion would be highly offensive to a reasonable person. (Am. Compl. ¶ 37-40.) Defendant argues St. Jean, an authorized user of the Spec-Tator, authorized Defendant to view the website. Further, Defendant contends that because most of the information on the Spec-Tator was public, there was no intrusion on anything private. Defendant also argues that Plaintiffs did not have a reasonable expectation, on an objective standard, that the Spec-Tator would remain private.

To prevail on a claim for intrusion upon Plaintiffs's seclusion or private affairs, Plaintiffs must prove that their solitude of seclusion or private affairs were infringed, and that the infringement would highly offend a reasonable person. Bisbee v. John C. Conover Agency Inc., 186 N.J. Super. 335, 339 (App. Div. 1982) (citing 3 RESTATEMENT (SECOND) OF TORTS § 652B). New Jersey courts have found that where a plaintiff consents to the invasion, this negates the invasion of privacy claim. Hall v. Heavey, 195 N.J.Super. 590, 597 (App.Div. 1984). New Jersey courts have also held the invasion must highly offend a reasonable person, and that "expectations of privacy are established by general social norms." White v. White, 344 N.J.

Super. 211, 223 (Ch. Div. 2001). This expectation of privacy must be objectively reasonable and a plaintiff's subjective belief that something is private is irrelevant. Id.

Like the Second and Fourth Counts based on statutory stored communication laws, the ability of Plaintiffs to recover on this Seventh Count for invasion of privacy turns on the disputed issue of whether or not St. Jean gave "consent" for Defendant to view the Spec-Tator. Additionally, the question of the reasonableness of the Plaintiffs' expectations of privacy is a question of fact for the jury to decide. For these reasons, the Court denies Defendant's motion for summary judgment on the Seventh Count.

Therefore, **IT IS** on this 24th day of July 2008, hereby

ORDERED that Counts One and Three of the Amended Complaint are **DISMISSED WITH PREJUDICE**; and it is

ORDERED that Defendant's motion for summary judgment in **GRANTED** as to Count Five of the Amended Complaint; and it is

ORDERED that Defendant's motion for summary judgment is **DENIED** as to Counts Two, Four, Six, and Seven of the Amended Complaint; and it is

ORDERED that a date shall be set for arbitration to commence within 45 days.

/s/ Hon. Faith S. Hochberg
Hon. Faith S. Hochberg, U.S.D.J.

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BRIAN PIETRYLO, et al.,	:	
	:	
Plaintiffs,	:	Hon. Faith S. Hochberg
	:	
	:	Civil No. 06-5754 (FSH)
v.	:	
	:	**ORDER**
HILLSTONE RESTAURANT GROUP d/b/a HOUSTON'S,	:	
	:	
	:	Date: September 24, 2008
Defendant.	:	
	:	

HOCHBERG, District Judge:

This matter comes before the Court upon Defendant's Motion for Reconsideration of this Court's July 24, 2008 Opinion and Order, which granted in part and denied in part Defendant's Motion for Summary Judgment; and

it appearing that a Motion for Reconsideration is governed by Local Civil Rule 7.1(i); and

it appearing that Local Civil Rule 7.1(i) provides for the reconsideration of an order if the motion is filed within 10 days after entry of the disputed order; and

it appearing that the purpose of a motion for reconsideration is "to correct manifest errors of law or fact or to present newly discovered evidence," Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985); see also, Shoenfeld Asset Mgt. v. Cendent Corp., 161 F. Supp. 2d 349, 352 (D.N.J. 2001), Yurecko v. Port Authority Trans-Hudson, 2003 WL 22001196 at * 2 (D.N.J. Aug. 18, 2003); and

it appearing that the Rule requires that the moving party set forth "concisely the matters or controlling decision which counsel believes the [Court] has overlooked," G-69 v. Degnan, 748 F. Supp. 274, 275 (D.N.J. 1990); and

it appearing that "a party seeking reconsideration must show more than a disagreement with the Court's decision," G-69 v. Degnan, 748 F. Supp. at 275; and

it appearing that "a mere 'recapitulation of the cases and arguments considered by the court before rendering its original decision'" does not warrant reargument, Elizabethtown Water Co. v. Hartford Casualty Ins. Co., 18 F. Supp. 2d 464, 466 (D.N.J. 1998) (quoting Carteret Savings Bank F.A. v. Shushan, 721 F. Supp. 705, 709 (D.N.J. 1989)); and

it appearing that a court may grant a properly filed motion for reconsideration for one of three reasons: (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice, Database America v. Bellsouth Advertising & Publ'g., 825 F. Supp. 1216, 1220 (D.N.J. 1993) (citing Weyerhaeuser Corp. v. Koppers Co., 771 F. Supp. 1406, 1419 (D. Md. 1991)); see also, Carmichael v. Emerson, 2004 U.S. Dist. Lexis 11742 (D.N.J. May 21, 2004), Milletta v. United States, 2005 WL 1318867 (D.N.J. May 27, 2005); and

it appearing that a motion for reconsideration is improper when it is used "to ask the Court to rethink what it had already thought through -- rightly or wrongly," Ciba-Geigy Corp. v. Alza Corp., 1993 WL 90412, *1 (D.N.J. March 25, 1993); Oritani Sav. & Loan v. Fidelity & Deposit Co., 744 F. Supp. 1311, 1314 (D.N.J. 1990), rev'd on other grounds, 989 F.2d 635 (3d Cir. 1993); and

it appearing that because reconsideration of a judgment after its entry is an extraordinary remedy, motions to reconsider or reargue are granted "very sparingly," Maldonado v. Lucca, 636

F. Supp. 621, 630 (D.N.J. 1986); and

it appearing that disagreement with the Court's initial decision as the basis for bringing a motion "should be dealt with in the normal appellate process, not on a motion for reargument," Florham Park Chevron, Inc. v. Chevron U.S.A.,Inc., 680 F. Supp. 159, 163 (D.N.J. 1988); and

it appearing that (1) there has been no intervening change in controlling law; (2) Appellants have not presented new evidence that was not available for the Court to consider; and (3) there has been no clear error of law or manifest injustice;[1]

IT IS therefore on this 24th day of September, 2008,

ORDERED that Appellant's August 8, 2008 Motion for Reconsideration of the Court's July 24, 2008 Opinion and Order is **DENIED**.

/s/ Faith S. Hochberg

Hon. Faith S. Hochberg, U.S.D.J.

[1] Defendant argues that the Court's use of the word "duress" in its Opinion and Order indicates that the Court applied the legal doctrine of "duress" in reaching its decision. This argument is incorrect. As Defendant's own motion indicates, the doctrine of duress is a principle of contract law which is not applicable to the current case. By choosing to use the word "duress," the Court was not suggesting that the doctrine was applicable or formed the basis for the Opinion. Instead, the Court was simply using ordinary semantics in explaining that there remained a disputed issue of material fact concerning whether or not Ms. St. Jean voluntarily consented to and authorized Defendant's access the restricted website.

RAMP & PISANI, LLP
60 Westervelt Avenue
P.O. Box 249
Tenafly, New Jersey 07670
(201) 567-8877
Attorney for Plaintiffs,
Brian Pietrylo and Doreen Marino

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIAN PIETRYLO, et al. Plaintiffs, -v- HILLSTONE RESTAURANT GROUP d/b/a HOUSTON'S Defendant.	Hon. Faith S. Hochberg, U.S.D.J. Hon. Patty Schwartz, U.S.M.J. Civil Action No. 06-5754 (FSH) Document filed electronically.

PLAINTIFFS' TRIAL BRIEF

RAMP & PISANI, LLP
60 Westervelt Avenue
P.O. Box 249
Tenafly, New Jersey 07670
201-567-8877
Attorneys for Plaintiffs

On the Brief:

Fred J. Pisani, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes

PRELIMINARY STATEMENT

Plaintiffs respectfully submit this trial brief to address certain legal issues that may arise during the course of trial.

In March 2004, defendant, Hillstone Restaurant Group, d/b/a Houston's ("Houston's" or "Defendant") hired plaintiffs, Brian Pietrylo ("Pietrylo") and Doreen Marino ("Marino"), to work as servers at Houston's Restaurant located at the Riverside Square Mall in Hackensack, New Jersey.

During their private off time from work, Pietrylo and Marino maintained accounts on MySpace.com. In March 2006, Pietrylo set-up a "private group" on his MySpace account. Pietrylo named the group "The Spectator". It was a private group not open to the public.

Pietrylo intended The Spectator to be private. The homepage of The Spectator included the following language:

The Spec-Tator

Category: Other

Type: Private Membership

Founded: March 2, 2006

Location: Hackensack, New Jersey

Members: 2

"A place for those of us at Riverside to talk about all the crap/drama/and gossip occurring in our workplace, without have to worry about outside eyes prying in…but because the group is oh so private, only participants will stay members. Past and present employees welcomed."

The initial posting from Pietrylo included the following:

"I just thought this would be a nice way to vent about any BS we deal with at work without any outside eyes spying in on us. This group is entirely private, and can only be joined by invitation."

Pietrylo sent email invitations to other employees inviting them to become members of The Spectator. The email invitation contained a link to The Spectator and once the invitee accepted the invitation, a link to the site would permanently appear on the invitee's own homepage, also stored on the MySpace.com website. Among the invitees were plaintiff Marino, Pietrylo's live-in girlfriend, and Karen St. Jean ("Karen"), a greeter at the restaurant. Pietrylo invited no managers working at the restaurant nor did he invite any upper corporate personnel.

In May 2006, Robert Anton ("Anton"), one of Houston's on-site managers and Karen's supervisor, approached Karen while she was working a shift at Houston's Restaurant. He asked Karen for her personal email address and password so that he could access The Spectator from Karen's personal MySpace.com homepage. Since Anton was her boss and her manager, Karen gave him her personal information. If he were not her manager, Karen would not have given him her personal information. Karen has repeatedly stated that if she did not give Anton her personal information she thought something would happen to her at work. She felt pressured. She didn't want to lose her job, especially since Houston's had recently fired her husband, who worked there as a manager.

Karen did not give Anton permission to share her password with upper management personnel of Houston's, parent company, Hillstone Restaurant Group, including Robert Marano ("Marano"), the Regional Supervisor of Operations, Tino Ciambriello ("Ciambriello"), Vice-President of Operations, overseeing approximately 45 restaurants

nationwide, and Michael Lamb ("Lamb"), Director of Human Resources, responsible for approximately 6,000 employees.

Karen did not permit Anton to share her password with other managers working at the restaurant, although she did expect him to show the content of The Spectator to those managers, such as Tijean Rodriguez and Jason Sokolow.

Anton accessed The Spectator on a number of occasions. He made copies of the postings on The Spectator, although he never gave a copy of them to Marano, Ciambriello or Lamb. Anton did not fire either plaintiff, nor was he involved in the decision to fire the plaintiffs.

There are various factual versions on how Marano secured Karen's personal email address and password.

Marano admitted that he was not invited to The Spectator. He also admitted reading the words on the front page that the group was entirely private and it could only be joined by invitation. He understood what the word private meant yet he continued to read the postings on the site. He accessed The Spectator a number of times, although he knew that Pietrylo was the creator of The Spectator during his first visit to the site. In an email dated May 6, 2006, Marano shared Karen's email address and password with Ciambriello and Lamb. Both Ciambriello and Lamb work out of offices in San Francisco, California. Ciambrello is the Vice President of Operations, overseeing approximately 45 restaurants nationwide. Lamb is the Director of Human Resources, responsible for approximately 6,000 employees.

In the email, Marano gave them step-by-step instructions on how to access The Specator.

The body of that email is as follows:

"How to get into the site;

Go to www.myspace.com
Under Member Login:
karenjaochicho@yahoo.com
Under password:
Keepout1
On the far right of the main screen in a blue box you will see "my group", click on that
Then click on the Houston's Logo,
Scroll down just below the large photos and on the right of the screen click on "view all topic"

You will be able to read all of the posting listed since this site inception 8 weeks ago.

Please call me once you have had a moment to review.

Thank you,
Rob Marano"

Marano terminated Pietrylo because he created The Spectator and posted comments therein and terminated Marino because she was part of the group and posted comments on The Spectator about the restaurant and its management.

LEGAL ARGUMENT

POINT I

PLAINTIFFS WILL PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT DEFENDANT DID NOT HAVE CONSENT OR AUTHORIZATION TO ACCESS "THE SPECTATOR", IN VIOLATION OF THE STORED ELECTRONIC COMMUNICATIONS ACT- 18 USC 2701 (a) (1) (SECOND COUNT OF AMENDED COMPLAINT)

In 1986, Congress amended the Federal Wire Tap Act by enacting the Electronic Communication Privacy Act of 1986 (ECPA), which includes the Federal Stored Communications Act, 18USC §2701-11. The purpose of the amendment was to update and clarify the federal privacy protection and standards in light of dramatic changes in new computer and telecommunication technologies. *Senate Report No. 99-541, Cong., 2d Sess.1 (1986).*

In enacting the ECPA, Congress recognized that "computers are used extensively today for the storage and processing of information" and that while a first-class letter was "afforded a high level of protection against unauthorized opening" there were "no comparable…statutory standards to protect the privacy and security of communications" transmitted by new forms of telecommunications and computer technology. Id. at 3 and 5. As such, Congress adopted the ECPA, which represents a fair balance between privacy expectations of American citizens and legitimate needs of law enforcement agencies. Ibid.

Title II of the ECPA creates civil liability for one who "(1) intentionally accesses without authorization a facility thru which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters

or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system. *18 USC 2701 et seq.*

New Jersey amended its wiretap act in 1993, P.L.1993, C.29. These amendments, regulating access of stored electronic communications, were identical to the ECPA (Title II) amendments. *NJSA 2A: 156A-27(a).* Plaintiffs contend that defendant has violated both of these statutes.

One of the exceptions to liability exists when prior consent is given by an authorized used to access the site. *18USC §2701(c)(2)* accord *NJSA 2A: 156-27(c) 2*.

Defendant contends that plaintiffs' claims (Second Count and Fourth Count) should be dismissed because Karen St. Jean consented on several occasions to access by Houston's managers.

Contrary to defendant's claim, plaintiffs will prove, by a preponderance of the evidence, that Karen St. Jean did not voluntarily consent or authorize defendant to access "The Spectator."

First, she did not provide Tijean Rodrguez, a manager at Houston's Restaurant, with her email address and password to access The Spectator. Sine they were friends, she showed him the website at his home during a social evening. She did not show him the website in an employer-employee environment.

Second, she only provided Anton, another of Houston's on-site managers, with her email address and password because he asked for it as her manager. He asked for it while she working at the workplace. Karen testified that she gave it to him because he was the manager. Had he not been the manager, she would not have given it to him.

She repeatedly testified that if she did not give Anton her email address and password she thought something would happen to her at work. She felt pressured. She did not want to lose her job.

Based upon this evidence, it is clear that Karen St. Jean's consent was not freely given. Although there was no actual threat, Karen believed that there was an implied threat.

In addressing whether consent is freely given, the court would consider Karen's perception, whether accurate or not, in determining whether consent was freely given. *Erickson v. Marsh and McLennan Company*, 117 NJ 539 (1986); *Entrot v. BASF Corp.* 359 NJ Super 162 (App. Div. 2003).

The court, however, does not have to decide whether or not Karen freely consented to providing Anton with her email address and password, since Anton did not terminate the plaintiffs and was not involved at all in the decision to fire the plaintiffs. Anton testified that he did not even provide Marano, the Regional Supervisor who fired the plaintiffs, with copies of the postings he made from The Spectator.

Even if the court were to find that Karen freely consented to providing Anton with her password, Karen's consent to one is not consent to all. Karen did not give Anton carte blanche to do whatever he wanted with her personal information, such as pass it along to others, extremely high up in Houston's corporate structure.

Karen testified that she only gave her email address and password to Anton. She did not consent or permit him to pass it along to Marano, Ciambriello or Lamb. In her declaration, she declared that she did not consent or give permission to Marano, Ciambriello or Lamb to use her email address and password to access The Spectator. Until recently, she did not even know that they had used her personal information to access The Spectator.

Defendant's claim that consent to one is consent to all borders on the absurd. As an example, please consider the following hypothetical: Karen gives her home key to Anton to go pick up some Houston paperwork that she left there. Not only does Anton use the key to go to her house to pick up the paperwork, he gives the key to Marano, and Marano gives the key to Ciambriello and Lamb. One could not reasonably argue that not only was she giving consent to Anton to go to her house, but that she was giving consent to anyone else who he gave the key to, to go to her house and rummage through her belongings. This makes no logical sense and would not be supported by law.

Plaintiffs will show that Karen St. Jean did not provide Marano with her email address and password. They will further show that Anton gave Marano St. Jean's email address and password and that he used it to access "The Spectator" on a number of occasions, and later, provided Ciambriello and Lamb with St. Jean's email address and password, following their request.

Based upon the foregoing, the plaintiffs will be able to prove that defendant accessed The Spectator in violation of this federal statute.

POINT II

PLAINTIFFS WILL PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT DEFENDANT EXCEEDED IT'S AUTHORIZATION, IF ANY, TO ACCESS "THE SPECTATOR", IN VIOLATION OF THE STORED ELECTRONIC COMMUNICATIONS ACT- 18 USC 2701 (a) (2) (SECOND COUNT OF AMENDED COMPLAINT)

For all of the reasons outlined in Point I above, plaintiffs will prove, by a preponderance of the evidence, that defendant exceeded it's authorization, if any, to access "The Spectator, in violation of 18 USC 2701 (a) (2).

POINT III

PLAINTIFFS' WILL PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT THE DEFENDANT WRONGFULLY TERMINATED THEM IN VIOLATION OF A CLEAR MANDATE OF PUBLIC POLICY (INVASION OF PRIVACY)- (SIXTH COUNT OF AMENDED COMPLAINT)

It is well established that "an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy." *Pierce v. Ortho Pharmaceutical Corp.*, 84 NJ 58, 72 (1980).

Sources of public policy include the United States and New Jersey Constitutions, federal and state laws, and administrative rules, the common law and specific judicial decisions. *MacDougall v. Weichert*, 144 NJ 380, 391 (1996).

INVASION OF PRIVACY: VIOLATION OF PUBLIC POLICY

The sixth count of the amended complaint alleges that plaintiffs were wrongfully terminated in violation of the public policy guaranteeing the right to privacy. According to the New Jersey Supreme Court in *Hennessey v. Coastal Eagle Point Oil Co.*, 129 NJ 81 (1992) "both logical and ample precedence support a finding of public policy and the language and jurisprudence of the New Jersey Constitution." *Id.* at 90.

In *Hennessey*, the New Jersey Supreme Court did not find that the constitutional right to privacy governs the conduct of private actors, however, they did find that existing constitutional privacy protections form the basis for a clear mandate of public policy supporting the wrongful discharge claim. *Id.*

Additionally, in *Borse v. Pierce Goods Shop Inc.*, 963 F 2d 611 (3d. Cir. 1992), the Court of Appeals held that an invasion of privacy would give rise to a wrongful discharge action in violation of a clear mandate of public policy. *Id.* at 620.

In its holding, the *Borse* court observed that if the plaintiff could establish and sustain an action for invasion of privacy and show that the intrusion would be highly offensive to a reasonable person, then that would be sufficient to conclude that the discharge violated public policy. *Id* at 620-626.

In *Smyth v. Pillsbury Company*, 914 F. Supp. 97 (E. D. Pa. 1996) an at will employee brought an action against its former employer alleging wrongful discharge in violation of public policy claiming an invasion of his right to privacy as a result of the interception of emails sent to and from the plaintiff to his supervisor over the employer's electronic email messaging system. The court affirmed plaintiff's termination finding that he had no expectation of privacy with regard to the matter in which the email communications were transmitted specifically over defendant-employer's electronic messaging system or were sent to work computers at the defendant's workplace. The court, however, acknowledged the cause of action for wrongful discharge in violation of a clear mandate of public policy relating to an invasion of privacy claim. *Id.* at 98-100.

Based upon these holdings and the facts which will be introduced during the trial, as more fully discussed below in Point IV, plaintiffs will prove, by a preponderance of the evidence, that the defendant wrongfully discharged them in violation of a clear mandate of public policy; specifically invasion of privacy.

POINT IV

PLAINTIFFS' WILL PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT DEFENDANT VIOLATED THEIR COMMON LAW RIGHT TO PRIVACY

In today's workplace, one area of conflict is the proper balance between an employee's right to privacy and an employer's right to control and manage the workplace.

As such, New Jersey courts recognize common law tort claims for invasion of privacy. *Rumbauskas v. Canter*, 138 NJ 173 (1994). Of these, a cause of action for "unreasonable intrusion upon seclusion" is the most applicable for potential invasion of privacy in the workplace. *Id.*

In order to prevail based upon this claim, the plaintiffs must produce facts that show that (1) their solitude of seclusion or their private affairs of concerns were infringed; and (2) the infringement would be highly offensive to a reasonable person. *3 Restatement Torts* 2d §652B See also *Bisbee v. John C. Conover Agency Inc*., 186 NJ Super 335, 340-41 (App. Div. 1982).

Based upon the evidence in this record, plaintiffs will prove that the defendant violated their common law right to privacy.

First, to be actionable, the intrusion must lack consent. There is no dispute that Pietrylo and Marino never consented to any of Houston's on-site managers or it's parent company's high-level executives accessing The Spectator. As previously discussed, Karen St. Jean did not consent or authorize access to "The Spectator', either.

Plaintiffs had a reasonable expectation of privacy with regard to The Spectator. The creation, maintenance and use of "The Spectator' took place outside of the workplace. An invitation was necessary to lawfully access "The Spectator". It was Pietrylo's intention that

The Spectator be private as indicated by the language on his homepage as well as his initial posting.

A recent court decision out of New York, although not binding on this court, shed further light on the issue of a reasonable expectation of privacy regarding electronic communications in an employer-employee setting.

In *Pure Power Boot Camp, et. al. v Warrior Fitness Boot Camp, et. al., 587 F. Supp. 2d 548 (S.D. N.Y. 2008)*, a former employer brought an action seeking an injunction and damages, accusing former employees of stealing employer's business model, customers and documents. In support of their claim, the employer submitted numerous personal emails of the employee, which it had accessed and copied off of the employer's computer. The former employee claimed that the employer had violated the Electronic Stored Communications Act, 18 USC 2701.

The employees were hired by the owner of Pure Power Boot Camp to work at her fitness center. While employed, the employees improperly accessed the owner's office, retrieved a signed restrictive covenant agreement and shredded it. The employees soon left their employ, and they opened a competing fitness center. Pure Power's owner, using one of her company's computers, accessed and printed emails from three of the former employee's personal accounts: Hotmail, Gmai1 and WFBC. She stated she was able to access the hotmail account because the employee had left his username and password on the company computer so that it would automatically load when the hotmail account was accessed. She accessed one of the other accounts because the employee had given his username and password to another Pure Power employee (although the former employee denied this).

The former employee admitted using the work computer to view some of hot mail emails, but claimed that he never drafted or received any emails on these accounts while he was at work.

In addressing the issues, the court noted that accessing and obtaining emails directly from an electronic communication service provider is a violation of the Stored Communications Act if done without authorization. The employer claimed that she was authorized to access the emails because (1) the employee had no expectation of privacy in his Hot Mail email account and (2) he had impliedly consented to access by leaving the user name and password in her work computer.

The court rejected both of the employer's claims and found that she had violated the Stored Communications Act. The court began it holding by stating that courts routinely find that employees have no reasonable expectation of privacy in their workplace computers where the employer has a policy, which clearly informs employees that company computers cannot be used for personal email activity. **However,** this was not a case where an employee was using his employer's computer or email system, and then claimed that the emails contained on the employer's computers are private. In Pure Power, as in our case at bar, the employee did not store any of the electronic communications on the employer's computers, servers or systems. The employee, as in our case at bar, did not send, receive or post communications on the employer's computers or email system. The communications, as in our case at bar, were located on and accessed from third party communication service providers, there, Hot mail, here, My Space.

Based upon the foregoing, the court found that the employee had a reasonable expectation of privacy based upon his subjective belief that his personal email accounts,

stored on third party computer systems, protected (albeit ineffectively) by passwords, and would be private.

The court also rejected the claim that the employee had implied consented to access to the email account.

In the case at bar, The Spectator postings were not posted or transmitted over Houston's electronic messaging system. Plaintiffs did not use defendant's computers to access The Spectator or participate on The Spectator. All of it was done outside of work on plaintiffs' private time.

Houston's admits that it accessed The Spectator by using a participant's password. A jury will have to decide if Houston was "authorized" to use that password. The unauthorized use of an individual's private password to access the website clearly establishes that there was a reasonable expectation of privacy.

From the facts adduced during discovery, a jury could also find that defendant's conduct was highly offensive to a reasonable person.

If you believe Karen St. Jean, Marano secured her email address and personal password without her consent, knowledge or permission. Not only did he use it to access The Spectator, on a number of occasions, he shared her personal information and password with a Vice President, who oversees 45 restaurants nationwide, and the Director of Human Resources, who handles 6,000 employees. He gave them the information and told them how to access the site so that they could access the site and monitor it, if they desired.

Marano admits that he accessed The Spectator on more than one occasion, even though he discovered during his first visit to the site that Pietrylo was its creator. Did he confront Pietrylo about The Spectator before he accessed it the second time? No. Did he

speak to him at all about it before he fired him? No. Why did he continue to access The Spectator? He certainly didn't do it to continue to read the postings since reading them before had upset him. A jury could conclude that he went back onto The Spectator to spy on and continue to monitor the plaintiffs, and the other participants of The Spectator, without their knowledge.

Defendant's callous and arrogant conduct evidences a complete disregard for the rights and feelings of the plaintiffs and the other employees who worked at the restaurant and participated in The Spectator. In this case, the jury must be the ultimate arbitrator to determine whether Houston's has gone to far.

Defendant claims that they found the language used in the postings to be "offensive", "troubling" and "disgusting". Under these facts, however, a jury could easily find that Houston's actions were "offensive", "troubling" and "disgusting", as well as highly offensive to a reasonable person, when their off-site high level executives improperly accessed The Spectator and spied on a small group of their non-management employees, who worked as servers, bar tenders, and greeters, at one of their many restaurants.

POINT V

PLAINTIFFS ARE ENTITLED TO PUNITIVE DAMAGES UNDER THE STATUTE AND FEDERAL LAW

There is a specific damages provision in the plain language of the Electronic Stored Communications Act (18 USC 2707), which provides that in a civil action the court may assess punitive damages if the violation of the statute is willful or intentional. 18 USC 2707 (c). This is less of a standard to meet than in other federal statutes where punitive damages are available. In most of them, the violation must be malicious and willful. *Please see Alexander v Riga, 208 F3d 419 (2000); Kolstad v American Dental Ass'n, 527 US 526 (1999); Smith v Wade 461 US 30 (1983).* Under this statute, however, punitive damages are available if the conduct, which results in a violation of the statute, is either willful or intentional.

As stated by the Supreme Court, many years ago, in *Milwaukee & ST. Paul R. Co. v Arms, 92 US 489 (1875):* " Redress commensurate to such injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff, but they are not at liberty to go farther, unless it was done willfully or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them…" *Id.*

To assess punitive damages, there must have been some willful misconduct, or that entire want of care, which would raise the presumption of a conscious indifference to consequences. *Id. 91 US at 493.*

That conscious indifference and want of care is evident in this case. " The Spectator" was created and maintained completely outside the workplace. Participation, such as reading

and writing the postings present on "The Spectator", was not done using the defendant's computers or email system. It was done off work hours, not during work hours.

Neither plaintiff consented to or authorized Houston's managers or Hillstone's upper management personnel to access "The Spectator".

Karen St. Jean did not voluntarily consent to or authorize Rob Marano to access "The Spectator" using her email address and password. She certainly did not consent or authorize Rob Marano to provide her email address and password to Tino Ciambriello and Michael Lamb, so that they could access "The Spectator."

Rob Marano, Hillstone's Regional VP of Operations and the individual who terminated plaintiffs, knew the first time he accessed "The Spectator" that Brian Pietrylo created "The Spectator". With that knowledge in hand, what did Marano do? Did he immediately terminate the plaintiffs for creating and/or participating in "The Spectator"? No. Did he summon Pietrylo to his office and advise him that he had accessed "The Spectator"? No. Did he ask Pietrylo for his consent and authorization to continue to access "The Spectator"? No. Did he confront him with copies of the postings he made from "The Spectator"? No.

Instead, what he did was to send an email to Tino Ciambriello, Hillstone's VP of Operations, an upper management executive responsible for overseeing 45 restaurants nationwide, and Michael Lamb, Hillstone's Head of Human Resources, another upper management executive, responsible for overseeing approximately 6,000 employees nationwide, and provided them with Karen St Jean's email address and password. In the email, he gave them explicit, step-by-step instructions on how to access "The Spectator" using Karen St. John's password.

In addition, he accessed "The Spectator" on other occasions to monitor what was being posted on the site. Only later did he then terminate the plaintiffs because of "The Spectator."

Marano's conduct exhibited a conscious indifference to the rights and interests of Karen St. Jean, Doreen Marino and Brian Pietrylo.

POINT VI

THE FEDERAL STORED COMMUNICATIONS ACT: TO PREVAIL PLAINTIFFS MUST PROVE THAT DEFENDANT EITHER INTENTIONALLY OR KNOWINGLY ACCESSED THE SPEC-TATOR WITHOUT AUTHORIZATION

The Federal Stored Communications Act is a criminal statute with a civil action component. 18 USC §2707(a).

The elements necessary to establish criminal liability are intentional access without authorization. Defendant believes that in order to succeed on a civil claim under the act, not only do you have to prove these criminal elements, you also have to prove an additional element: that defendant knew the victim or user had not authorized them. This is inaccurate.

Under the statute, a criminal offense is committed if one …**intentionally** accesses without authorization a facility through which an electronic communication service is provided… and … obtains… electronic communications while it is in electronic storage in such system… 18 USC 2701 (a) (1).

Under the civil action section of the statute, …any …person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing **or** intentional state of mind, may, in a civil action, recover from the person or entity… 18 USC 2707 (a)

The key term in the civil action section is the disjunctive term "or". The statute's civil section states knowing **or** intentional. Defendant, however, uses the conjunctive term "and" in their proposed jury charge.

Knowing and intentional are synonymous terms. The Thesaurus lists knowing as a synonym for intentional, and intentional as a synonym for knowing.

The American Heritage Dictionary defines intentional as intended, done deliberately and defines knowingly as planned or deliberate.

There is no additional element necessary to establish civil liability. The claimant must prove a knowing or intentional access without authorization. In Wyatt Technology Corp. v. Smithson et al. (2006 WL 5668246(C.D. Cal.), defendant, amongst other things, filed a counterclaim against the plaintiff alleging a violation of the Federal Stored Communications Act. In rendering its decision, the court articulated what the claimant had to prove to succeed under the act. The court stated that the claimant had to prove intentional access without authorization and referenced both §2701(a)(1) and §2707(a). There was no additional "knowledge" element. Id. at 8. See also Pure Power Boot Camp v. Warrior Fitness Boot Camp, 2008 WL 4866165(S.D.N.Y.).

In both of these cases, the court found a violation of the Federal Stored Communications Act where the alleged victim left their username and password on one of the work computers which was discovered by another and was used to access electronic communications of the alleged victim stored on a third party service provider. In each of these cases, the claimant was not required to prove both that the company knew that the victim had not authorized them when they left their user name and password on the computer and that with that knowledge they intentionally accessed the information. The proof required is an intentional or knowing access without authorization.

POINT VII

THE NEW JERSEY WIRE TAPPING & ELECTRONIC SURVEILLANCE CONTROL ACT: TO PREVAIL PLAINTIFFS MUST PROVE THAT DEFENDANT EITHER KNOWINGLY OR PUPOSELY ACCESSED THE SPEC-TATOR WITHOUT AUTHORIZATION

The New Jersey Wire Tapping & Electronic Surveillance Control Act is a criminal statute with a civil action component. NJSA 2A; 156A-32 (a).

The elements necessary to establish criminal liability are knowing access without authorization. Defendant believes that in order to succeed on a civil claim under the act, not only do you have to prove these criminal elements; you also have to prove an additional element. This is inaccurate.

Under the statute, a criminal offense is committed if one …**knowingly** accesses without authorization a facility through which an electronic communication service is provided… and … obtains… electronic communications while it is in electronic storage in such system… NJSA 2A: 156A-27 (a).

Under the civil action section of the statute, …any …person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing **or** purposeful state of mind, may, in a civil action, recover from the person or entity… NJSA 2A; 156A-32 (a)

The key term in the civil action section is the disjunctive term "or". The statute's civil section states knowing **or** purposely. Defendant, however, uses the conjunctive term "and" in their proposed jury charge.

Knowing and purposely are synonymous terms. The Thesaurus lists knowing as a synonym for purposely, and purposely as a synonym for knowing.

The American Heritage Dictionary defines purposely as intended, done deliberately and defines knowingly as planned or deliberate.

There is no additional element necessary to establish civil liability. The claimant must prove a knowing or purposeful access without authorization. The proof required is a knowing or purposeful access without authorization.

Respectfully submitted,

RAMP & PISANI, LLP
Attorneys for Plaintiffs

DATE: March 4, 2009

_____s/Fred J Pisani_____
FRED J. PISANI, ESQ.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIAN PIETRYLO, et al.,	Hon. Faith S. Hochberg, U.S.D.J. Hon. Patty Shwartz, U.S.M.J.
Plaintiffs,	CIVIL ACTION NO. 06-5754 (FSH)
vs.	
HILLSTONE RESTAURANT GROUP D/B/A/ HOUSTON'S,	
Defendant.	Document Filed Electronically

TRIAL BRIEF OF DEFENDANT HILLSTONE RESTAURANT GROUP,d/b/a HOUSTON'S

McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962-2075
973-993-8100
Attorneys for Defendant,
Hillstone Restaurant Group, d/b/a/ Houston's

Of Counsel:
Donna duBeth Gardiner, Esq.

On the Brief:
Donna duBeth Gardiner, Esq.
Michael O'B. Boldt, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

STATEMENT OF FACTS

In 2006, Plaintiffs Brian Pietrylo ("Pietrylo") and Doreen Marino were employed Houston's restaurant at Riverside Square in Hackensack, New Jersey, operated by defendant Hillstone Restaurant Group, d/b/a Houston's ("Houston's" or "Defendant").

In early March 2006, Pietrylo created a group on "myspace.com" called "The Spec-Tator." The purpose was for "s**t talking" about the restaurant and its managers. Even the name, "The Spec-Tator", mocked the service and quality requirements or "specs" that Houston's required of its employees and its restaurants. The Spec-Tator also published a stolen test that a manager had designed for employees on a new wine list. The Spec-Tator contained ethnic slurs and derogatory comments about guests and managers as well as discussions about drug use and sexual acts.

Pietrylo send email invitations to other employees, inviting them to become members of The Spec-Tator. The email invitation contained a link to The Spec-Tator and once the invitee accepted the invitation, a link to the site would permanently appear on the invitee's own home page, also stored on the "myspace.com" website. Among the invitees was Karen St. Jean ("St. Jean") a greeter at the restaurant.

Plaintiffs posted offensive and derogatory comments about Houston's and its managers on The Spec-Tator. In May 2006, St. Jean, an authorized member of the group, showed the site and its content to TiJean Rodriguez ("Rodriquez"), a Houston's manager who was also St. Jean's social friend. This occurred during dinner party at the Rodriguez home. Rodriguez told another manager, Robert Anton ("Anton") about the site. Anton and his wife had been the target of sexual speculation and otherwise offensive postings on The Spec-Tator. When asked, St. Jean

gave Anton her personal email address and password that would allow him to access The Spec-Tator from Karen's personal myspace.com home page. She explained how to use it the log-in information and Anton accessed the site from his home. At no time did St. Jean express any reservations or place any conditions on his use of the password information or his access to the site.

In deposition, St. Jean testified that she was never threatened by anyone at Houston's or coerced in any way when asked for access to The Spec-Tator. She gave the information freely and stated that she knew that it would be shared with other managers.

Anton found the Spec-tator's contents to be offensive and disturbing. In addition to postings personally attacking the Antons and other managers, there were obscenities, drug references and proprietary business information that the members were not authorized to have. Pietrylo had posted a test on the new wines that had been drafted by Rodriquez and was slated to be given to the wait staff.

Anton brought the site to the attention of Robert Marano ("Marano"), a regional supervisor of operations for Houston's. Marano consulted with other senior management at Hillstone Restaurant Group, explaining that he had learned that "there is a website out there that's dedicated . . . to making a mockery of [Houston's] and [its] management staff." Marano reviewed The Spec-Tator and its contents, and also found the site disturbing and its contents were vulgar and offensive. Marano terminated Pietrylo and Marino.

In this action, plaintiffs allege that when Houston's managers accessed The Spec-Tator, Houston's violated federal and state statutes which prohibit a "knowing" "unauthorized access" to stored electronic information. Plaintiffs also claim that when its managers accessed the Spec-

tator, that access violated their right of privacy and that their termination violated New Jersey public policy. A jury trial in this matter is scheduled for March 17, 2009.

LEGAL ARGUMENT

POINT I

THERE CAN BE NO STATUTORY LIABILITY WHERE HOUSTON'S DID NOT KNOWINGLY AND INTENTIONALLY ACCESS THE SPEC-TATOR WITHOUT AUTHORIZATION FROM AN AUTHORIZED USER

Plaintiffs claim that Houston's "accessed . . . stored electronic communications," in violation of the federal Stored Communications Act, 18 U.S.C. §§ 2701-11 (Second Count), and the parallel provision of the New Jersey Act, N.J.S.A. 2A:156A-27 (Fourth Count).

A. The Stored Communications Act.

Under the Stored Communications Act, a criminal offense occurs when a person

> (1) intentionally accesses without authorization a facility through which an electronic communications service is provided . . . and thereby obtains, alters or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system.

18 U.S.C. 2701(a).

Significant to this case, there is no statutory violation when the access is authorized "by a user of that service with respect to a communication of or intended for that user." 18 U.S. C. 2701 (c)(2).

It is stipulated that St. Jean was an authorized user of the Spec-Tator. It is also not disputed that she is the one that alerted Houston's to the existence of the Spec-tator when she showed it to one Houston's manager, Rodriquez, who was also her friend.

Rodriquez read some of the content and was concerned about what was being said by employees about other managers. He told Anton about the Spec-tator and Anton went to St. Jean and asked for her password. It is undisputed that St. Jean gave Anton her password without objection and without conditions. She testified that no one ever threaten her or coereced her when asking for the password. While she "thought something would happen" if she didn't

provide the password, she never voiced those concerns to anyone. In fact, Anton went to her twice to ask for the password because he had lost it. She gave it to him the second time, again without voicing any objections or concerns.

Anton told Houston's Regional Manager, Marano, about the Spec-tator. Marano called the restaurant and spoke with Rodriquez and asked for the password. St. Jean was standing close by and, with Marano on the telephone, Rodriquez told St. Jean that Marano wanted the password and she provided it. After Marano viewed the Spec-tator, he made the decision to terminate Pietrylo and Marino because he believed the content of the postings by the employees threatened the morale of the restaurant and undermined the Core Values of the company.

The testimony conclusively proves one simple, clear and convincing fact – an authorized user of The Spec-Tator, Karen, consented on several occasions to access by Houston's managers. She first volunteered access to Rodriguez by showing him the website at his home during a social evening. Then, when asked by Anton, she twice provided him with her email address and password which would allow him to access the site. Finally, when Marano, the Regional Manager, asked for the same pass code and access, she again provided it. There is simply no liability for permissive access.

1. The Statute requires a "knowing or intentional" violation for a civil action.

The Stored Communications Act is primarily a criminal statute directed at computer hackers *Kaufman v. Nest Seekers, LLC*, 2006 U.S. Dist. LEXIS 71104, 2006 WL 2807177, at *4 (S.D.N.Y. Sept. 26, 2006). Its purpose was, in part, to protect privacy interests in personal and proprietary information and to address "the growing problem of unauthorized persons deliberately gaining access to, and sometimes tampering with, electronic or wire communications that are not intended to be available to the public." *General Board of Global*

Ministries of the United Methodist Church v. Cablevision Lightpath, Inc., 2008 U.S. Dist. LEXIS 86826 *1, *8 (Nov. 30, 2006) (emphasis added).

The statute only allows a civil action where the "conduct constituting the violation is engaged in with a knowing or intentional state of mind." 18 U.S.C. §2707(a). The requirement for a "knowing and intentional" state of mind eliminates any possibility that a plaintiff could proceed on a theory of negligent access to the "Spec-Tator." Indeed, a civil action requires the same scienter as for a criminal act. Of course, the burdens of proof are different *i.e.* preponderance of the evidence versus beyond a reasonable doubt.

Here, Plaintiffs contend that the access was not authorized because St. Jean had unspoken reservations about what would happen if she did not provide her management with her password. In her deposition, she stated that while she didn't think she would get fired, she didn't want to get into trouble and she thought "something" would happen if she didn't give her managers the password. It is plaintiffs' position that her unexpressed concerns negated her express authorization for Houston's to access the Spec-tator because her managers should have known that a subordinate employee would feel pressured. This position is not supported by the express requirement for a "knowing or intentional" violation where, as here, St. Jean provided her password without expressly voicing any conditions or reservations.

A negligence standard simply cannot be grafted onto the statute. A criminal statute that provides for civil redress must be narrowly construed and "encompasses only that conduct Congress intended to criminalize. It follows then – unless it expressly states otherwise – that when Congress created a private cause of action within this criminal statute it intended to limit that cause of action to the conduct reached by the criminal statute." *Chas. A Winner, Inc. v.*

Polistina, 2007 U.S. Dist. LEXIS 40741*1, *14 (D.N.J. June 14, 2007) (unpublished) (attached as Exhibit A).

"Knowingly" requires the actor to have actual knowledge of the elements that comprise the offense. *United States v. Dixon*, 548 U.S. 1, (2006). "Intentionally" means that the defendant had (1) a conscious desire or purpose to act in a certain way or to cause a certain result, or (2) knew that they were acting in that way or would be practically certain to cause that result. United States Court of Appeals for the Third Circuit, Model Criminal Jury Instruction 5.01, 5.03. The defendant's "knowledge" cannot be found where there is "ignorance, mistake, accident or carelessness" *Id.* at §502, Comment.

Several courts have explicitly recognized the heightened state of culpability that the statute requires to succeed on a civil claim:

> Section 2007 of the SCA provides that any person aggrieved by an SCA violation may sue the violator, provided that he or she can show that the act was violated with a "knowing or intentional state of mind." . . . Courts have settled that determining whether there was unauthorized access under the SCA is akin to determining whether there was trespass to property. . . A big distinction between committing the tort of common law trespass and violating the SCA, of course, is that intentional conduct is required to violate the SCA i.e. a highly culpable state of mind is required. "The term 'intentional in this context is narrower than the dictionary definition of 'intentional.' 'Intentional' means more than one voluntarily engaged in conduct or caused a result. Such conduct or the causing of the result must have been the person's conscious objective."

Cardinal Health 414, Inc. v. Adams, 582 F. Supp. 2d 967, 975-76 (M.D. Tenn. 2008). *See also*, *Bansal v. Server Beach*, 285 Fed. Appx. 890, (3d Cir. 2008) (dismissing plaintiff's civil claims because he failed to allege and could not adduce facts to show that "defendants accessed his account 'with a knowing and intentional state of mind.').

Therefore, unless plaintiffs can demonstrate that Houston's managers had actual knowledge that they were not authorized to access the Spec-Tator and knew they were accessing it without authorization, there can be no civil liability under the federal law. There is no provision or allowance for a "knew or should have known" standard of proof.

Under the express terms of the statute and given St. Jean's testimony, there is no doubt but that the managers at Houston's believed they had authorization, acted in good faith and are not liable under the statute's provisions.

2. The Statute's Prohibition Against Exceeding a Valid Authorization Does Not Apply Here.

Plaintiffs contend that St. Jean only authorized Anton to access the Spec-Tator and that when other Houston's managers were provided access, Houston's exceeded the authorization in violation of the statute. However, this is not the clear meaning of the law. The statute expressly prohibits a person from "intentionally exceeding an authorization to access that facility." Therefore, in order for a person to "exceed authorization" they must use that authorization to delve into other protected stored communications beyond that which was authorized. This interpretation of the statute is made clear in the legislative history in which the Senate Report stated:

> For example, a computer mail facility authorizes a subscriber to access information in their portion of the facilities storage. Accessing the storage of other subscribers without specific authorization to do so would be a violation of the act. Similarly, a member of the general public authorized to access the public portion of a computer facility would violate this section by intentionally exceeding that authorization and accessing the private portions of the facility.

Fischer v. Mt. Olive Lutheran Church, 207 F. Supp. 2d 914, 926 (W. D. Wis. 2002) (citing 1986 U.S.C.C.A.N. at 3500).

There is no factual basis for the allegation that Houston's exceeded its authorization to access the Spec-Tator. In fact, St. Jean testified that when a manager would sign-on he would actually enter her own myspace.com account where there would be a link to the Spec-tator. She also testified that someone accessing the Spec-tator in that manner would not be able to access any private pages belonging to the plaintiffs.

Furthermore, even if "exceeding authorization" could be construed to providing the password to others, St. Jean's testimony makes it clear that she knew that was part of her "authorization":

> Q. At any point at any time did Robert Anton ever ask you if it would be okay if he showed the content of [The Spec-Tator] to anyone else?
>
> * * *
>
> A. . . . Was it okay for him to show the other managers? . . . I pretty much thought after I gave him the password all the managers were going to see it.

B. Because The Statute Require "Knowing" Or "Intentional" Violations, St. John's Mental State Is Not An Issue Where There Is No Evidence Of Threats Or Coercion.

The plaintiffs contend that St. Jean's authorization was not "voluntary" because of her subjective fears. However, as discussed above, the plaintiffs must show a knowing and intentional wrongdoing by defendant. Therefore, St. Jean's internal misgivings are not at issue here. Her own testimony makes it clear that Houston's engaged in no wrongful conduct::

> Q. Had anyone at Houston's ever threatened you with being fired over anything?
>
> A. My husband actually because I was late all the time.
>
> Q. Your husband threatened you?
>
> A. Yes. I used to dislike him very much.
>
> Q. Because you were late?

A. Yes. Because I was late all the time.

Q. Other than that?

A. No.

Q. And again, no manager ever said if you don't give us the password you're going to be fired, you're going to be suspended?

A. No.

Q. No threats?

A. No. No.

It is beyond dispute that there was no coercion and no threats. Karen was an authorized user who voluntarily told Houston's management about the website; voluntarily showed managers the website and voluntarily provided her access information to them on several occasions. Houston's, therefore, cannot be liable under any of the applicable statutory provisions.

As is discussed in the Defendant's objections to Plaintiffs' proposed jury charges, in order for the jury to make a determination of "freely and voluntarily," the Court would have to turn to the law of duress and independently make a finding of some wrongful or unlawful act or threat by Houston's which forced St. Jean to do what she would not have done voluntarily in order to procure the authorization. Continental Bank of Pa. v. Barclay Riding Acad., Inc., 93 N.J. 153, 176 (1983); Wolf v. Marlton Corp., 57 N.J. Super. 278, 285 (App. Div. 1959) (where county court, sitting without a jury, rejected the builder/defendant's defense that its non-performance was justified by the plaintiff's threats, Appellate Division held that trial court's determination was not entitled to the deference accorded a fact finding). *See also*, New Jersey Civil Jury Charges, 4.10 at n.8. Defendant suggests that this is not what the SCA intended,

especially in light of the plethora of cases in which "consent" was construed as broadly for Fourth Amended purposes as the Legislature intended for "authorization" to be construed under the SCA.[1] *See, e.g.*, Kent v. United States, 272 F.2d 795, 797 (1st Cir. 1959) (members are threatened with criminal prosecution unless the accused does plead guilty); . United States v. Silva, 449 F.2d 145 (1st Cir. 1971) (the promise of leniency to one criminal defendant is not enough to establish that he did not consent to wire tapping and is not coercive unless the indictment itself was improperly brought).

In the civil arena, courts treat consent with equal liberality. *See, e.g., Sherman & Co. v. Salton Maxim Housewares, Inc.*, 94 F.Supp. 2d 817, 821 (E.D. Mich. 2000) (in light of admission that defendant was authorized to access information on computer, a viable § 2701(a) claim required an affirmative showing that authorization had been removed); *American Computer v. Jack Farrell Implement*, 763 F. Supp. 1473, 1494-95 (D. Minn. 1991) *aff'd sub nom., American Computer v. Boerbomm International, Inc.*, 967 *F.2d.* 108 (8th Cir. 1991) (finding consent to interception under the Wiretap Act and authorization for access to stored electronic communications under 18 U.S.C. § 2701(c) from the same conduct, and granting summary judgment dismissing claims).

St. Jean's unexpressed reservations are insufficient to subject Houston's to liability based upon a mere "assumption" that she might have felt pressured. She has admitted that no threats were made Therefore, the jury never gets to the issue of whether her consent was "voluntary." [2]

---

[1] Griggs-Ryan v. Smith, 904 F.2d 112, 116 (1st Cir. 1990) (" We agree with the Second Circuit that "Congress intended the consent requirement to be construed broadly.")

[2] The Court has also offered its own formulation of this issue, one that dispenses with plaintiffs' "voluntarily and freely given" language and identifies the remaining disputed issue of material

C. Authority For One Is Authority For All.

A corporation can only act through its agents. *See* Callgrove v. Behrle, 63 N.J. Super. 356, 366 (App. Div. 1960) ("it is settled that knowledge of an agent is chargeable to his principal wherever the principal, if acting for himself, would have received notice of the matters known to the agent"); *RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Insurance Co.,* 58 F. Supp. 2d 503, 538 (D.N.J. 1999) (under New Jersey law, knowledge obtained by agent is imputed to the principal when knowledge is received by the agent while acting within the course and scope of his employment). Therefore, once one manager gained access to the site, Houston's had gained access to the site and it does not matter what other managers saw it. Anton owed a fiduciary duty to his employer to ensure that Houston's was protected and that the core values of

---

fact as "whether or not Ms. St. Jean voluntarily consented to and authorized Defendant's access the restricted website." Order of September 24, 2008 at 3 n.1.

Perhaps because plaintiffs never provided any legal foundation for the "freely and voluntarily" standard they advocate, the Court's "voluntarily" language does not refer to case law that would enable the parties and the Court to address many of the vexing issues relating to the practical application of this standard, e.g., who must prove that Ms. St. Jean acted voluntarily (or involuntarily); whether a supervisor's simple request for the information needed to access the Spec-tator can in and of itself be sufficient to negate the voluntariness of Ms. St. Jean's consent and authorization, or whether it is necessary to prove that there was something wrongful and threatening about the request in order to negate this voluntariness; whether her voluntariness should be judged objectively, from the perspective of the conduct and intent of the Houston's managers to whom she gave consent and authorization, or subjectively, from her personal point of view (whether expressed to others at the time or not); whether Ms. St. Jean's unexpressed concerns and reservations should be given any weight by the jury and, if so, to what extent; whether her failure to express any restriction or limitation on her authorization and consent, and her failure ever to retract it, should be given any weight by the jury and, if so, to what extent.

These are among the issues that arise under the law of duress, which would a framework for evaluating whether a party's unexpressed reservations about that party's apparent agreement can serve to negate that agreement, but which the Court has suggested may not be the optimal starting point for the applicable legal analysis. Unfortunately, posing the issue as whether Ms. St. Jean acted "voluntarily" does not provide any other framework for analyzing these issues or providing the jury with a framework for answering them.

the Company's underlying values were upheld. Had he not taken the step that he took, he would have breached his duty of loyalty to his employer.

It is undisputed that Anton was Houston's agent and owed a fiduciary duty to Houston's to protect it from harm. Anton asked St. Jean for her password while they were both on duty at the restaurant. St. Jean assumed that by giving it to him, all managers would see it. Furthermore, it was clear from the content of their conversation that he was acting as Houston's agent:

> Q. Can you recall specifically as best you can what he said to you?
>
> A. He said it's disgusting what they're doing –talking about Brian and the group – and it's not right and that something needs to be done about it and that they needed my password to get into MySpace to get in and see the group.
>
> * * *
>
> Q. Did you say anything to him before you gave it to him?
>
> A. No.

In giving Anton the password, St. Jean gave it to Houston's and what other managers viewed the Spec-tator within the scope of their employment is irrelevant. If, as is plaintiffs contention, St. Jean did not authorize Marano, then her only possible cause of action would have been against Marano and the statute of limitations has run.

D. The New Jersey Wire Tapping and Electronic Surveillance Act.

This statute parallels the federal act and is also a criminal statute with a limited private right of action against one who "knowingly or purposely" violates the Act. N.J.S.A. 2A:156A-32a. The New Jersey statute also criminalizes accessing, without authorization, a facility through which an electronic communication service is provided in order to obtain an electronic

communication. N.J.S.A. 2A:156A:-27a. The same legal applications discussed apply equally to the state statute.

Again, the indisputable facts establish that St. Jean authorized and provided Houston's access to the Spec-Tator site on numerous occasions.

POINT II

PLAINTIFFS CANNOT PREVAIL ON A CLAIM OF INVASION OF PRIVACY

Plaintiffs claim that Houston's violated their common-law right to privacy by accessing the Spec-tator. Under New Jersey common law, there are four areas of the general tort of "invasion of privacy." These are (a) unreasonable intrusion; (b) appropriation of one's name or likeness; (c) unreasonable publicizing of another's private life; and (d) publicity placing another in a public false light. *Bisbee v. John C. Conover Agency, Inc.*, 186 *N.J. Super.* 335, 339 (App. Div. 1982), (*citing* 3 *Restatement, Torts* 2d, §562A at 376 (1977)). The plaintiffs allege the first of this quartet of harms – unreasonable intrusion. In order to prevail, the plaintiffs must adduce facts which show that Houston's (1) intentionally without authorization; (2) intruded upon the plaintiff's solitude or seclusion or their private affairs; and (3) the infringement would be highly offensive to a reasonable person. 3 *Restatement, Torts* 2d Section 652B; *see also Bisbee*, 186 N.J. Super. at 340-41. They can demonstrate neither.

First, to be actionable, the intrusion must lack consent and be an intentional invasion without consent. *Hail v. Heavey*, 195 N.J. Super. 590, 597 (App. Div. 1984). There is no provision for a negligence theory of liability. As discussed above, St. Jean, clearly gave her consent – without conditions. St. Jean, as a user of the Spec-tator had the clear right to give others access. Plaintiffs did not seclude themselves and their crude text, but rather circulated it among co-workers who were all free to share the contents of The Spec-tator with anyone they

chose. It is irrelevant that Pietrylo and Marino never consented to access by Houston's, because they did consent to St. Jean's access. St. Jean in turn authorized access by Houston's. The concept of a "reasonable expectation of privacy" in the shared content of The Spec-Tator is utterly inapplicable.

No reasonable person could expect writings on the Spec-tator to be private – regardless of whether it was called "private." Pietrylo created a website to which he invited many other people to read his postings and to respond. Marino voluntarily participated in the site knowing that her postings would be read by others. Pietrylo admits that The Spec-tator represented "private communications between me and my friends." That admission destroys any assertion that expected the writings to be private and protected from view. He also admits that no one gained access to his private email and it is not alleged that Houston's gained access to any document other than the Spec-tator. Therefore, to the extent Houston's had access to plaintiffs' "private affairs or concerns," this occurred because plaintiffs chose to air their private affairs and concerns with others, thereby removing them from plaintiffs' private realm.

Thus, as in *Bisbee*, where most of the information at issue was public, there was no intrusion into plaintiffs' solitude or seclusion, and nothing particularly private or intimate about the information in any event.

Plaintiffs must also prove that the intrusion would be highly offensive to a reasonable person. The crux of the allegation "turns on one's reasonable expectation of privacy. A 'reasonable person' cannot conclude that an intrusions is 'highly offensive' when the actor intrudes into an area in which the victim has either a limited or no expectation of privacy." *White v. White,* 344 *N.J. Super.* at 222. "A person's expectation of privacy to a room used for storage and to which others have keys and access is not reasonable. . . . [A] subjective belief that

the room was private is irrelevant." *Id.* at 223. In so observing, the *White* Court concluded that a husband had no reasonable expectation of privacy in emails stored in a computer room that the entire family used.

The Spec-tator is the same as the room analogized in *White*. Once Pietrylo gave other people a key to the Spec-tator room, he and Marino had no reasonable expectation of privacy where many people had keys and access. There was nothing reasonable about the plaintiffs' subjective expectation that The Spec-Tator would remain private. The plaintiffs invited at least 20 participants to the Spec-tator. The plaintiffs had no control over others whom those participants showed the site and could not reasonably expect privacy protections in their written words when they were already sharing those words and had no reasonable expectation that their words would not be seen by others.

Given the obscene and sexually graphic references contained in The Spec-tator postings, it is understandable plaintiffs might be embarrassed that their words were seen.. However, to claim that their privacy rights have been violated trivializes legitimate privacy interests.

Additionally, a claim for invasion of privacy is subject to the same defenses as for libel or defamation, including qualified privilege. *Dijkstra v. Westerink*, 168 N.J. Super. 128, 135-36 (App. Div. 1979) *certif. den.*, 81 N.J. 329 (1979). An employer has a qualified privilege in the plaintiffs' communications where the morale of the restaurant was being undermined, the restaurant and its managers were being mocked and undermined and even Houston's logo was misappropriated for unauthorized use. Therefore, Houston's authorized entry in to The Spec-Tator cannot be considered an actionable invasion of plaintiffs' private realm.

Plaintiffs published the information at issue in this action to other persons; one of these people provided the information to Houston's. Simply put, plaintiffs suffered no actionable

intrusion into their solitude, seclusion or private affairs, and even if they had, no reasonable person could find this to be "highly offensive."

POINT III

PLAINTIFFS WERE NOT TERMINATED IN VIOLATION OF A CLEAT MANDATE OF PUBLIC POLICY

The plaintiffs claim that their employment was terminated in violation of the public policy common law guarantee of the right to privacy. They have not articulated how their termination invaded their right to privacy. For this claim to go to the jury, the Court must first determine whether the plaintiffs have articulated a clear cause of action by balancing the interests of the public, the employer and the plaintiffs. Only if the Court determines that the termination implicates a clear interest of the public and not just a private dispute between plaintiffs and Houston's will the jury determine the factual questions.

A. The Court Must Make the Initial Determination of Whether Plaintiffs' Claim for Wrongful Discharge Goes to the Jury.

It is well established that "identifying the mandate of public policy is a questions of law, analogous to interpreting a statute or defining a duty in a negligence case." *Warthen v. Toms River Community Memorial Hospital*, 199 N.J. Super. 18, 24 (App. Div.1985).

> "[W]here a discharged at-will employee asserts wrongful discharge on public policy grounds, the trial court must, as a matter of law, determine whether public policy justified the alleged conduct. Then, assuming the pleadings raise a genuine issue of material fact, it is for the jury to determine the truth of the employee's allegations."

Id. at 25. *Accord Martinez v. Cardinal Health Partners, LLC*, 2008 U.S.Dist. LEXIS 32861 *1, *8 (3d Cir. April 21, 2008); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72 (1980) ("Absent legislation, the judiciary must define the cause of action.").

As discussed below, the plaintiffs have not articulated a "clear mandate of public policy" and their wrongful discharge claim should not be submitted to the jury.

1. Plaintiffs Have Not Articulated A Clear Mandate of Public Policy

The alleged mandate of public policy must be firmly grounded. *MacDougall v. Weichert*, 144 N.J. 380, 391 (1996). . "A vague, controversial, unsettled and otherwise problematic public policy does not constitute a clear mandate. Its alleged violation will not sustain a wrongful discharge cause of action" *Id* at 392. "More is needed that simply the breach of public policy affecting a single person's rights to constitute the breach of a 'clear mandate' of public policy that *Pierce* requires." *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81, 99 (1992).

Public policy must be determined by "weighing competing interests, " *id.,* and this Court must balance the plaintiffs' interests against the interests of the public and the employer's interests. *MacDougall, supra*, 144 N.J. at 390. When this balancing is done, it is clear that there is no mandate of public policy which precludes the plaintiffs' termination.

Here, plaintiffs claim that their employment was terminated in violation of their common-law right to privacy. This, in and of itself, is vague and problematic. The plaintiffs have never explained exactly what protected activity was impeded by their termination. Is it their right to establish a private on-line group? Or is it their right to privacy in the content of the Spec-tator? It can't be the former. The plaintiffs were not terminated for the mere fact that they created and participated in an on-line group.

It is undisputed that the plaintiffs were terminated because Houston's was distressed by the content of the Spec-tator and concerned that it was undermining employee morale and the

Four Values that defined the corporate culture.[3] Plaintiffs were terminated for initiating employee attacks upon the company, the restaurant, its managers and its customers. Had the Spec-tator's content not been directed at Houston's, the plaintiffs would not have lost their jobs.

Even assuming that under these facts, the plaintiffs had an expectation of privacy in the Spec-tator, there is no clear mandate of public policy where the plaintiffs' discharge only implicated private interests. *See, e.g., DeVries v. McNeil Consumer Prods. Co.*, 250 N.J. Super. 159, 172 (App. Div. 1991) (plaintiff's discharge for having distributed expired drugs at the employer's direction did not violate clear mandate of public policy because the discharge "implicated only the private interests of the parties."); *Schwartz v. Leasametric, Inc*, 224 N.J. Super. 21, 30 (App. Div. 1988) (no clear mandate of public policy where the employee was discharged to avoid paying him sales commissions); *Warthen*, supra, 199 N.J. Super. at 28 (discharge of nurse refusing to perform dialysis on a dying patient implicated only her personal morals.)

Balanced against the vague privacy interests articulated by the plaintiffs, the Court must weigh the interests of the employer and the public. "Employers have an interest in knowing they can run their businesses as they see fit as long as their conduct is consistent with public policy." *Pierce*, 84 N.J. at 71. Below is a sample of the Spec-tator content:

- Sarcastic comments about Houston's quality, service and standards and its managers;
- Derogatory and vulgar references to customers including references to the customers' names. *E.g.,* "Manischevitz," the "Fleggler brothers," "Mrs. Fricke" and "the Cherynobls";

[3] This Court has already dismissed plaintiff's wrongful termination claims based upon the state and federal constitutions, holding that plaintiff's speech was not a protected activity. *See* Opinion and Order at 11(July 24, 2008).

- References to workplace violence such as "The Navajo rug needs to be set on fire;" "Tonight, as one of our bosses actually rose to the occasion of doing the [W]atco [applying "Danish Oil Finish" to tabletops] himself, I had to stop Doreen from approaching the fumes with a lighter;"

- References to illegal drug use such as poll asking "If you had to drop acid with one person in Houston[']s who would it be?"; "management and cocain[e] DO NOT MIX!!!!"

- A complete copy of a new test that was to be given by Rodriguez to the entire wait staff concerning a new wine list. This was proprietary information that had been posted by Pietrylo without permission.

- "Stupid corporate f***s."

- "The pain of being born to Mr. Anton." "Who would do that? Make a baby with Robert [Anton]? Ew . . . ."

- "[M]anagement dick suckers . . . . I gave Jason a rim job for no good reason." "Jason" was the general manager of the restaurant and, as Marino explained in deposition, a "rim job" referred to a sexual act involving the anus. Gardiner Certif., Exhibit C at T72:4-9.

- "Does anyone know the new spec on fellatio?"

- " "F*** the f***ing F***s who thought this one up, ANTON! . . .

Houston's had the right and obligation to protect its employees from harassment and humiliation. It had the right and the obligation to protect its customers from religious slurs. It had the right and the obligation to protect its own core values. *See, e.g., Weigand v. Motiva Enterprises, LLC*, 295 F. Supp. 2d 465, 477 (D.N.J. 2003) (where an employee was terminated for running an on-line business selling racist and Nazi music and paraphernalia, the employer had a "strong interest in ensuring that their employees are not associate with such speech or ideals. . . and, as private employers, still had a very strong interest in regulating the speech of their convenience store supervisor to ensure that it personified their values of respect for all."). Houston's right to

protect its business runs parallel to the public's right to be protected from ridicule and the public's interest in places of public accommodation that are free from bias and hostility.

Houston's is aware of no case where a court has found that employee internet postings containing references to drug use, mocking criticisms of the company's policies and managers, and depictions of anal and oral sex with management, racial slurs and derogatory comments about the restaurant's guests are entitled to privacy protection. There are no privacy protections for the contents of The Spec-Tator that could possibly furnish the basis for a "public policy" claim.

The only cases in which courts have suggested that there might be a potentially protectable privacy interest that might be infringed by an employer dealt with compelled urine testing. See, *e.g., Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611 (3d Cir. 1992), *Hennessy, supra.* Those cases fail to support plaintiffs' privacy-based Pierce claim. The Spec-Tator is not, as a matter of law, a valid basis for a wrongful termination claim under the Pierce doctrine.

B. Even If Plaintiffs Have Articulated A Valid Public Policy, Houston's Did Not Discharge Plaintiffs Because They Exercised Their Right To Privacy.

As stated above, Plaintiffs were terminated because they exercised their right to privacy. They were terminated because of the content of The Spec-tator and not because they started or participated in it. Plaintiffs were terminated to protect Houston's business interests and the public policy was not offended. Houston's did not care whether The Spec-tator was created or continued – it cared about the potential damage that its content posed. Thus, plaintiffs were not terminated for having a semi-private on-line group, only for the content directed at Houston's, its employees and its customers.

CONCLUSION

Based on the foregoing, defendant Hillstone Restaurant Group, d/b/a Houston's, respectfully submits that it should prevail at trial and that all claims against it should be dismissed.

Respectfully submitted,

McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
Attorneys for Defendant,
Hillstone Restaurant Group, d/b/a Houston's

By /s/Donna duBeth Gardiner
DONNA DUBETH GARDINER

Dated: March 3, 2009