APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 19-2364, *Cindy Gamrat v. Edward McBroom, et al*
Originating Case No. : 1:16-cv-01094

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

NOT RECOMMENDED FOR PUBLICATION
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No. 19-2364

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CINDY GAMRAT, Plaintiff-Appellant, v. EDWARD MCBROOM; TIM L. BOWLIN; KEITH ALLARD; BENJAMIN GRAHAM; JOSHUA CLINE; KEVIN G. COTTER; BROCK ALLEN SWARTZLE; NORM SAARI; HASSAN BEYDOUN, in their individual capacities, Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

Before: GRIFFIN, KETHLEDGE, and THAPAR, Circuit Judges.

KETHLEDGE, Circuit Judge. The Michigan House of Representatives expelled one of its members, Cindy Gamrat, from office. Gamrat thereafter sued several people involved in that process. The district court dismissed her suit for failure to state a claim. For substantially the same reasons stated by the district court, we affirm.

We accept as true all factual allegations in Gamrat's complaint. *See DiGeronimo Aggregates, LLC v. Zemla*, 763 F.3d 506, 509 (6th Cir. 2014). In January 2015, Cindy Gamrat began a term as a member of the Michigan House of Representatives. She agreed to share three employees—Keith Allard, Benjamin Graham, and Joshua Cline (referred to here as the staff members)—with Todd Courser, a fellow representative. At some point, Gamrat and Courser, both married, began an affair.

The staff members soon reported that there were problems with Gamrat and Courser's combined office to the Speaker of the House (Kevin Cotter) and two of his staff (Norm Saari and Brock Swartzle). Cline quit in April. Over the next two months, Graham secretly recorded several conversations between himself, Gamrat, and Courser, in which the representatives discussed their affair and strategies to cover it up.

The House fired Allard and Graham on July 6. Later that day, they reported their concerns about Gamrat and Courser's behavior to the Business Director for the House, Tim Bowlin. When the House leadership did not act, the staff members then went to the *Detroit News*, which published a story about the affair and Courser's attempted cover-up. Immediately thereafter, Speaker Cotter directed Bowlin to investigate Gamrat and Courser's misconduct. The House also formed a Select Committee, chaired by Representative Edward McBroom, to investigate. Before the committee hearings started, Gamrat met with Majority Legal Counsel Hassan Beydoun, who opined that censure (rather than expulsion) would be appropriate. But on September 10, the Select Committee nonetheless recommended expulsion, and the next morning the House expelled Gamrat.

Gamrat thereafter sued the staff members; Beydoun, Bowlin, Cotter, McBroom, Saari, and Swartzle (referred to here as the House Defendants); her ex-husband; and two of his associates. She claimed, among other things, that the House Defendants had violated her due process rights, and that all the defendants violated eavesdropping, civil-stalking, and civil-conspiracy statutes. On March 15, 2018, the district court dismissed Gamrat's claims against the House Defendants and staff members Allard and Graham. Over a year later, the district court granted Cline's motion for judgment on the pleadings. The court also denied Gamrat's motions to amend her complaint for the second time and for relief from judgment. (The other defendants in the case were also dismissed, in separate orders.) This appeal followed.

We review de novo the district court's dismissals under Civil Rules 12(b)(6) and 12(c). *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 761 (6th Cir. 2006). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Gamrat argues that the House Defendants are not entitled to legislative immunity on her procedural due process claim. State legislators, as well as their aides and counsel, are immune from suit for "all actions taken in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998); *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 507 (1975); *see also* U.S. Const. art. I, § 6, cl. 1; Mich. Const. 1963 art. IV, § 11. That activity includes actions that are "an integral part of the deliberative and communicative processes" by which lawmakers participate in matters within their jurisdiction. *Gravel v. United States*, 408 U.S. 606, 625 (1972).

Here, the House Defendants investigated Gamrat, recommended expelling her, and then voted to do so—all of which are integral parts of the expulsion process. *See id.* at 624–25. And that process is within the legislature's sole jurisdiction. *See* Mich. Const. 1963 art IV, § 16. Gamrat says that the House Defendants acted in bad faith, but "whether an act is legislative turns on the nature of the act," rather than on motive or intent. *Bogan*, 523 U.S. at 54. The House's expulsion of Gamrat was legislative activity, regardless of any bad faith, and Gamrat cannot sue the House Defendants for participating in that process. *Accord Whitener v. McWatters*, 112 F.3d 740, 742–44 (4th Cir. 1997).

Gamrat also argues that the district court should not have dismissed her wiretapping, eavesdropping, civil-stalking, and civil-conspiracy claims against the House Defendants and the staff members. Gamrat must put forth more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements[.]" *Iqbal*, 556 U.S. at 678. For each of

Gamrat's claims, we take as true the facts alleged in both the amended and the proposed second amended complaint, for neither states a claim upon which relief may be granted.

Gamrat's first claim is that the defendants violated 18 U.S.C. § 2511, which "criminalizes the intentional interception of an electronic communication." *Luis v. Zang*, 833 F.3d 619, 626 (6th Cir. 2016). Federal law provides a cause of action for "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation" of § 2511. 18 U.S.C. § 2520. Gamrat alleged nowhere that any House Defendant acquired one of her communications during transmission; she made only the conclusory allegation that they received recordings that violated § 2511. That does not give rise to a claim under § 2520. *See Luis*, 833 F.3d at 629. For the staff members, the only specific, relevant allegation is that Graham illegally recorded private conversations between Gamrat and Courser. Gamrat points to her exhibits for support, and they suggest that she is referring to recordings that Graham made of several meetings between himself, Courser, and Gamrat in May and June 2015. The recordings' transcripts, however, show that Graham participated in all those conversations. As a participant, he did not violate the law by recording the conversations. *See* 18 U.S.C. § 2511(2)(d). The exhibits do not show that Graham recorded any other conversations. Thus, Gamrat fails to allege that any defendant violated the federal law against wiretapping.

Gamrat also claims that the defendants violated Michigan's eavesdropping laws, which prohibit using a device to eavesdrop on a conversation. *See* Mich. Comp. L. § 750.539 *et seq*. But under that law, participants in private conversations likewise may record those conversations. *See Sullivan v. Gray*, 324 N.W.2d 58, 60 (Mich. App. 1982) (per curiam). Her claims under this law fail for the same reasons as her claims under the federal law.

Gamrat's next claim is that the defendants stalked her. *See* Mich. Comp. L. § 600.2954(2). To state a civil-stalking claim, "there must be two or more acts of unconsented contact that actually cause emotional distress to the victim and would also cause a reasonable person such distress." *Nastal v. Henderson & Assocs. Investigations, Inc.*, 691 N.W.2d 1, 7 (Mich. 2005). Most of Gamrat's allegations do not actually assert that the defendants contacted her. *See* Mich. Comp. Laws § 750.411h. Gamrat says that she received anonymous threatening texts, but none of the House Defendants or staff members sent those texts. She also alleges that the staff members followed her, but she does not allege that this caused her emotional distress. Thus, Gamrat does not plausibly allege a violation of Michigan's civil-stalking law.

Gamrat's final claim is for civil conspiracy. "[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Early Detection Ctr., PC v. N.Y. Life Ins. Co.*, 403 N.W.2d 830, 836 (Mich. App. 1986) (per curiam). Gamrat fails to state a plausible claim for any other actionable tort, so she also fails to state a claim for civil conspiracy.

Gamrat argues that the district court erred when it denied her motion for leave to file a second amended complaint on the ground that the amended complaint still failed to state a claim. We review that legal conclusion de novo. *See Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 461 (6th Cir. 2017). Gamrat moved to file a second amended complaint five months after the court's deadline to amend the pleadings, and ten months after the March 15 dismissal. Despite this delay, the motion merely repeated conclusory statements and cited entire lengthy documents (with scant reference to specific statements therein) in an attempt to revive claims that the district court had dismissed ten months prior. That information gave the court no cause to allow Gamrat to amend her complaint.

Finally, Gamrat asserts that the district court abused its discretion because it refused to revise its March 15 order under Civil Rule 54(b). That Rule allows a court to revise an interlocutory order "at any time" if, among other things, "new evidence" is available. *Luna v. Bell*, 887 F.3d 290, 297 (6th Cir. 2018). The district court recognized that it had the authority to revise its order, but it chose not to do so for the same reason that it denied Gamrat leave to amend her complaint: the allegedly new information was conclusory. The court was well within its discretion to decline to revise its order.

The district court's judgment is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CINDY GAMRAT,

Plaintiff,

v. Case No. 1:16-CV-1094

KEITH ALLARD, et al., HON. GORDON J. QUIST

Defendants.
_____/

OPINION

Plaintiff, Cindy Gamrat, a former Michigan legislator, has sued a number of Defendants alleging various claims arising out of her expulsion from the Michigan House of Representatives and events preceding and following her expulsion. Defendants include (among others) the Michigan House of Representatives, Edward McBroom, Tim Bowlin, Kevin Cotter, Brock Swartzle, and Hassan Beydoun (collectively referred to as the "House Defendants"); Norm Saari; and Keith Allard and Benjamin Graham. Gamrat alleges a claim under 42 U.S.C. § 1983 for violation of her right to procedural due process, a claim for violation of the Electronic Communications Privacy Act (federal wiretapping act), 18 U.S.C. §§ 2511 and 2520, and various state law claims. The House Defendants and Saari have moved to dismiss Gamrat's claims pursuant to Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction and pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Allard and Graham move to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

In the course of the briefing, Gamrat has agreed to dismiss her defamation claim against all Defendants and to dismiss her malicious prosecution/abuse of process claims against Saari,

Allard, and Graham. Therefore, those claims will be dismissed with prejudice against the appropriate Defendants.

The Court heard oral argument on the motions to dismiss on March 5, 2018. For the following reasons, the Court will grant Defendants' motions and dismiss all claims, except those against Defendants Joseph Gamrat and David Horr.

I. BACKGROUND

On November 4, 2014, Gamrat won the general election for State Representative of Michigan's 80th District and Todd Courser won the general election for State Representative of Michigan's 82nd District. Gamrat and Courser ran as Tea Party candidates on conservative platforms that included "advocating for lower taxes, less spending, and transparency in government." (ECF No. 20 at PageID.115.)

During the period in question, Defendants Cotter and McBroom were State Representatives, and Cotter was also the Speaker of the House. Defendant Bowlin was the Business Director and Chief Financial Officer for the House. Defendant Swartzle was General Counsel for the House and Cotter's Chief of Staff. Defendant Saari was Cotter's Chief of Staff until approximately August 2, 2015. Defendant Beydoun was the House Majority Legal Counsel. Defendants Allard, Graham, and Cline had served on Gamrat's and Courser's campaigns as volunteers or paid political consultants and, following the election, served as staffers in Gamrat's and Courser's offices. (*Id.* at PageID.116–17.) Defendant Joe Gamrat was Gamrat's husband, and Defendants David Horr and Vincent Krell are two individuals whom Gamrat alleges were conducting surveillance on her.[1]

[1] Gamrat previously voluntarily dismissed Krell from the case without prejudice. (ECF No. 42.)

Following the election, Gamrat and Courser agreed to a staff sharing arrangement in which Allard, Graham, and Cline served as staff members in both districts and worked out of both Gamrat's and Courser's separate offices. (*Id.* at PageID.117.) In addition, at some point Gamrat and Courser, both of whom were married, began a sexual affair. On several occasions between January 2, 2015, and July 6, 2015, Allard, Graham, and Cline began reporting perceived misconduct by Gamrat and Courser to members and staff of the House leadership, including Defendants Saari, Swartzle, and Cotter. One such report included an incident in which Courser asked Graham to send a "false flag" email that would serve as a "controlled burn" to "inoculate the herd"—in other words, to serve as cover for the affair. The email that Courser or someone on his behalf had authored contained a number of outlandish, untrue, and salacious allegations about Courser. Courser hoped that the email would create such a stir that any facts that came out about the affair would be ignored as an exaggeration or seen as a smear campaign. Graham refused to send the email, but Courser found someone else to send it.

On July 6, 2015, Gamrat met with Bowlin about issues concerning Allard and Graham (Cline had previously resigned on April 14, 2015). (*Id.* at PageID.121, 123.) Following that meeting, Bowlin terminated Allard's and Graham's employment. (*Id.* at PageID.123.) After the termination, Allard and Graham told Bowlin about their prior reports to Swartzle, Saari, and Cotter. When the House leadership failed or refused to investigate, Allard and Graham provided their information to the *Detroit News*. On August 7, 2015, the *Detroit News* ran a story about the affair and Courser's "false flag" email, and alleged that Gamrat and Courser misused taxpayer money to cover up their affair.

The same day the *Detroit News* article ran, Cotter requested Bowlin to investigate and prepare a report on alleged misconduct by Gamrat and Courser. On August 31, 2015, the House

Business Office (HBO) issued a report concluding that further investigation by the House was warranted. On August 19, 2015, before Bowlin had completed the HBO report, the House adopted Resolution 129 to form a Select Committee to examine the qualifications of Gamrat and Courser and to determine their fitness to continue holding office. (ECF No. 24-2 at PageID.305.) The Select Committee was composed of six members, four from the Republican Caucus and two from the Democratic Caucus. Defendant McBroom chaired the Select Committee.

On September 8, 2015, the HBO and the Office of the General Counsel issued a "Combined Statement," which set forth the facts uncovered during the investigation. The Combined Statement concluded with the recommendation that Gamrat not be expelled but censured with severe conditions attached. (ECF No. 24-4 at PageID.349.) The following day, McBroom introduced House Resolution 141, which was referred to the Select Committee and reported with recommendation and without amendment. As originally introduced, HR 141 specified that Gamrat be expelled for misconduct in office and for misuse of state resources, but made no mention of a criminal investigation. (ECF No. 24-5.) However, on September 11, 2015, Democratic Representative Andy Schor introduced a resolution to request that the Michigan Attorney General and the Michigan State Police investigate the behavior and conduct of Courser. (ECF No. 24-6.) The same day, Democratic Representative Winnie Brinks moved to amend HR 141 to request that the Michigan Attorney General and the Michigan State Police investigate the behavior and actions of Gamrat and that a copy of the unredacted report and the entire evidentiary record be provided to the Michigan Attorney General and the Michigan State Police. (ECF No. 24-7.) Upon a vote, ninety-one Representatives voted in favor of the amendment. The House then passed HR 141, expelling Gamrat, on a 91 to 12 vote.

Gamrat filed her initial complaint in this case pro se, but failed to serve it. Subsequently, certain Defendants moved to dismiss the case for lack of prosecution. Gamrat responded through counsel, requesting additional time to file an amended complaint. The Court granted Gamrat thirty days to file an amended complaint. Gamrat thereafter filed an amended complaint removing certain Defendants and adding others and adding new claims.

II. MOTION STANDARD

Pursuant to Federal Rule of Civil Procedure 8(a), a complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Detailed factual allegations are not required, but "a plaintiff's obligation to provide the 'grounds' of h[er] 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964–65 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103 (1957)). The court must accept all of the plaintiff's factual allegations as true and construe the complaint in the light most favorable to the plaintiff. *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009). The complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). Although the plausibility standard is not equivalent to a "'probability requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has

not 'show[n]'—that the pleader is entitled to relief." *Id.* at 679, 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

Although a court is generally limited to the pleadings in deciding a motion to dismiss under Rule 12(b)(6), *see* Fed. R. Civ. P. 12(d), a court may consider various documents without converting the motion to a motion for summary judgment. "When a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008) (citation omitted).

III. Discussion

A. House Defendants' Motion

1. Eleventh Amendment Immunity

The individual House Defendants argue that they are entitled to sovereign immunity under the Eleventh Amendment. Because the Court concludes that Gamrat's § 1983 claim is barred by absolute legislative immunity and qualified immunity, the Court need not address this argument as it pertains to the individual House Defendants sued in their individual capacities. As for the House, however, Eleventh Amendment immunity applies to all claims. Under the Eleventh Amendment, a state and its agencies generally are immune from private lawsuits in federal court. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568 (1977). "This immunity is far reaching. It bars all suits, whether for injunctive, declaratory or monetary relief, against the state and its departments." *Thiokol Corp. v. Dep't of Treasury*, 987 F.2d 376, 381 (6th

Cir. 1993) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100–01, 104 S. Ct. 900, 908 (1984)). Accordingly, Gamrat's claims against the House will be dismissed.[2]

2. Due Process Claim

Count I alleges that the House Defendants violated Gamrat's right to procedural due process in connection with the investigation and her expulsion. Although Gamrat alleges that she had a constitutionally-protected interest in state employment, by her own admission, Gamrat was an elected official, not a state employee, and her claim will be analyzed as such. The House Defendants argue that they are entitled to both absolute legislative immunity and qualified immunity on Gamrat's § 1983 due process claim.

Legislative Immunity

Pursuant to the Speech or Debate Clause, defendants who engage in legislative activities are absolutely immune from suit in their individual capacities. The Speech or Debate Clause provides that "for any Speech or Debate in either House, [members of Congress] shall not be questioned in any other place." The Speech or Debate Clause serves "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 181, 86 S. Ct. 749, 755 (1966). The clause provides protection not "simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative

[2] The Court is not persuaded by the individual House Defendants' Eleventh Amendment immunity argument. The case they cite, *Martin v. Wood*, 772 F.3d 192 (4th Cir. 2014), was a Fair Labor Standards Act case. *Martin* did not involve a § 1983 claim, and district courts within the Fourth Circuit have declined to extend *Martin* to the § 1983 context. *See Adams v. NaphCare, Inc.*, 246 F. Supp. 3d 1128, 1138 (E.D. Va. 2017) (stating that "the Fourth Circuit has never extended *Martin* to § 1983 claims, likely because it would 'absolutely immunize state officials from personal liability for acts within their authority and necessary to fulfilling government responsibilities'" (quoting *Patterson v. Lawhorn*, 2016 WL 3922051, at *6 (E.D. Va. 2016)); *Manion v. North Carolina Med. Bd.*, 2016 WL 4523902, at *5 n.3 (E.D.N.C. Aug. 22, 2016) (declining to apply *Martin*'s holding to a suit under § 1983). And, in the § 1983 context, *Martin* is at odds with *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358 (1991), in which the Supreme Court rejected the same argument the individual House Defendants raise here—that "officials may not be held liable in their personal capacity for actions they take in their official capacity." *Id.* at 27, 112 S. Ct. at 363.

process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507, 92 S. Ct. 2531, 2535 (1972). Although the federal Speech or Debate Clause does not protect state legislators, Michigan has such a clause in its Constitution, and the Supreme Court has extended legislative immunity to state and local legislative bodies. *Tenney v. Brandhove*, 341 U.S. 367, 376, 71 S. Ct. 783, 788 (1951).

"Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 119 S. Ct. 966, 972 (1998) (internal quotation marks omitted). To determine whether an act falls within this sphere, a court must examine "the nature of the act, rather than . . . the motive or intent of the official performing it." *Id.* at 54, 118 S. Ct. at 973. The question is whether the activity is

> 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.'

Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504, 95 S. Ct. 1813, 1821–22 (1975) (quoting *Gravel v. United States*, 408 U.S. 606, 625, 92 S. Ct. 2614, 2627 (1972)).

Apart from words spoken in a debate, the Speech or Debate clause extends to "written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880). In addition, "committee hearings are protected, even if held outside the Chambers." *Hutchinson v. Proxmire*, 443 U.S. 111, 124, 88 S. Ct. 2675, 2683 (1979); *see Walker v. Jones*, 733 F.2d 923, 929 (D.C. Cir. 1984) (noting that legislative activity includes "participation in committee investigations, proceedings, and reports"). Legislative immunity extends beyond legislators to legislative aides and counsel. *Eastland*, 421 U.S. at 507, 95 S. Ct. at 1823; *see Ellis v. Coffee Cnty. Bd. of Registrars*, 981 F.2d 1185, 1192 (11th Cir. 1993) (noting that "[t]he Supreme Court has

extended this privilege to the chief counsel of a congressional subcommittee; committee staff, consultants, investigators, and congressional aides, insofar as they are engaged in legislative functions").

In engaging in the investigation of Gamrat's and Courser's activities, recommending a particular outcome, and voting on Gamrat's expulsion, the House Defendants all engaged in legislative activity. For example, in *Whitener v. McWatters*, 112 F.3d 740 (4th Cir. 1997), the Fourth Circuit held that disciplinary action taken by a legislative body against one of its own members is a "core legislative act." *Id.* at 741. In *Whitener*, a county board of supervisors voted to censure one of its members. After surveying the development of English Parliamentary law, the court noted that "Americans at the founding and after understood the power to punish members as a legislative power inherent even in the humblest assembly of men." *Id.* at 744 (internal quotation marks omitted). "Absent truly exceptional circumstances," the court observed, "it would be strange to hold that such self-policing is itself actionable in a court." *Id.* In fact, the Michigan Constitution subscribes to this principle: "Each house shall be the sole judge of the qualifications . . . of its members, and may, with the concurrence of two-thirds of all the members elected thereto and serving therein, expel a member." Mich. Const. art. IV, § 16.

Gamrat's reliance on *Haskell v. Washington Township*, 864 F.2d 1266 (6th Cir. 1988), for the proposition that legislative action that singles out specific individuals and affects them differently from others is administrative, not legislative action, fails to consider the specific facts in that case. *Haskell* involved a local body's enactment of zoning legislation, which could be applied generally to all citizens or specifically to an individual. *Id.* at 1278. In the instant case, we are dealing neither with a local legislative body nor a zoning decision, but a state legislative body's discipline of one of its own members.

Qualified Immunity

"Under the doctrine of qualified immunity, 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Phillips v. Roane Cnty.*, 534 F.3d 531, 538 (6th Cir. 2008) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982)). Once a defendant raises the qualified immunity defense, the burden shifts to the plaintiff to demonstrate that the defendant officer violated a right so clearly established "that every 'reasonable official would have understood that what he [was] doing violate[d] that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987)). The analysis entails a two-step inquiry. *Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013). First, the court must "determine if the facts alleged make out a violation of a constitutional right." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 815–16 (1982). Second, the court asks if the right at issue was "'clearly established' when the event occurred such that a reasonable officer would have known that his conduct violated it." *Id.* (citing *Pearson*, 555 U.S. at 232, 129 S. Ct. at 816). A court may address these steps in any order. *Id.* (citing *Pearson*, 555 U.S. at 236, 129 S. Ct. at 818). Thus, an officer is entitled to qualified immunity if either step of the analysis is not satisfied. *See Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 440 (6th Cir. 2016). Gamrat's claim fails at both steps of the analysis.

"To make out a claim for a violation of procedural due process, the plaintiff has the burden of showing that '(1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest.'" *EJS Props., LLC v. City of*

Toledo, 698 F.3d 845, 855 (6th Cir. 2012) (quoting *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006)). Property interests are not created by the Constitution, but instead "'stem from an independent source such as state law.'" *Thomas v. Cohen*, 304 F.3d 563, 576 (6th Cir. 2002) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972)).

Michigan law has long held that a public office does not constitute a property interest. As the Michigan Supreme Court has explained:

> A public office cannot be called "property," within the meaning of these constitutional provisions. If it could be, it would follow that every public officer, no matter how insignificant the office, would have a vested right to hold his office until the expiration of the term. Public officers [sic] are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public. They are not the subjects of contract, but they are agencies for the state, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred it.

Attorney Gen. v. Jochim, 99 Mich. 358, 367, 58 N.W. 611, 613 (1894). The United States Supreme Court and the Sixth Circuit have likewise held that elected office does not constitute a property interest. As the Court explained in *Taylor v. Beckham*, 178 U.S. 548, 20 S. Ct. 890 (1900): "The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such. . . . In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right." *Id.* at 577, 20 S. Ct. at 900–01; *see also Burks v. Perk*, 470 F.2d 163, 165 (6th Cir. 1972) (noting that "[p]ublic office is not property within the meaning of the Fourteenth Amendment").

In her amended complaint, Gamrat distinguishes *Burks* from her own situation because she was elected to her position, rather than appointed. Yet, nothing in *Burks* suggests such a distinction, and Gamrat fails to cite any persuasive authority to establish that she had a property interest in her elected office.

Gamrat also fails to show that the law was clearly established. In order for a right to be clearly established, it must be established "in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Reichle v. Howards*, 566 U.S. 658, 665, 132 S. Ct. 2088, 2094 (2012) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987)). "[T]he clearly established law must be 'particularized' to the facts of the case," and "in the light of pre-existing law the unlawfulness must be apparent." *White v. Pauly*, -- U.S. --, 137 S. Ct. 548, 552 (2017) (quoting *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3049). In order for a reasonable official to understand that he or she could violate a clearly established right, the courts "do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741, 131 S. Ct. at 2083. Gamrat fails to cite a case from the Supreme Court, the Sixth Circuit, or this Court that clearly establishes that an elected public official expelled from office has a property interest in her office protected by the Due Process Clause. The cases Gamrat cites, *United States v. Brewster*, 408 U.S. 501, 92 S. Ct. 2531 (1972), and *Powell v. McCormack*, 395 U.S. 486, 89 S. Ct. 944 (1969), did not address whether an elected official has a property interest in a public office for purposes of a procedural due process claim.

3. Breach of Contract, Promissory Estoppel, and Fraud

Counts II, III, and VII allege claims of breach of contract, promissory estoppel, and fraud. Each claim is based on assurances Gamrat alleges she received from Defendant Beydoun, and possibly other House Defendants, that she would only be censured in exchange for her presentation of a joint statement and her apology to the House.

Gamrat's breach of contract claim fails because Defendants lacked the authority to commit the full House to such an agreement. Article IV, § 16 of the Michigan Constitution vests the full

Michigan House with the authority to determine whether to expel a member. No House Defendant, including Beydoun, could bind the entire House, or even the Republican Caucus, to vote a certain way because they had no authority to enter into the contract Gamrat alleges. *See Sittler v. Bd. of Control of Mich. Coll. of Min. & Tech.*, 333 Mich. 681, 687, 53 NW.2d 681, 684 (1952) ("Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution." (internal quotation marks omitted)). In addition, legislative immunity protects Defendants from liability stemming from any alleged breach. The decision to censure or expel Gamrat falls within the legislative sphere because Article IV, § 16 of the Michigan Constitution gives the legislature the exclusive authority to judge the qualifications of its members and to expel them. As the Michigan Supreme Court has observed, a court has no jurisdiction to review the legislature's decision on the qualifications of its members. *Attorney Gen. v. Bd. of Canvassers of Seventh Senatorial Dist.*, 155 Mich. 44, 46, 118 N.W. 584, 585 (1908).

Gamrat says that Beydoun, the House Majority Counsel—a non-Representative, non-elected official—had the authority to enter into a contract binding all Representatives in the Republican Caucus to not exercise their rights to vote to expel Gamrat. She fails to cite any authority supporting her argument. She argues, however, that Beydoun was acting on behalf of Cotter, the Speaker, and Cotter had the ability to control the vote through the so-called "Caucus Pledge," which members of the Republican Caucus were required to sign. (ECF No. 32 at PageID.393–94.) However, the so-called "Caucus Pledge"—a political document—is no more enforceable than the "Contract with America." *See Hurt v. Wicker*, No. 1:06-cv-241-M-D, 2006 WL 2727980, at *1 (N.D. Miss. Sept. 22, 2006) (holding that the plaintiff's promissory estoppel claim based on the defendant's breach of the "Contract with America" was non-justiciable).

Moreover, Defendants have shown that the "Caucus Pledge" did not operate as Gamrat claims. Defendants' evidence of Record Roll Call votes from January 14, 2015, through September 11, 2015, shows that 235 of the 296 votes taken were contested, and of the contested votes, 133 of them, or 56%, involved Caucus members voting differently from the majority of the Caucus. (ECF No. 36-1.) To the same point, one Republican Representative voted against Gamrat's expulsion. In short, Gamrat's breach of contract claim lacks merit.

Gamrat's promissory estoppel claim fails as well. A promissory estoppel claim requires reliance, *see Gason v. Dow Corning Corp.*, 674 F. App'x 551, 558–59 (6th Cir. 2017) (quoting *Leila Hosp. & Health Ctr. v. Xonics Med. Sys., Inc.*, 948 F.2d 271, 275 (6th Cir. 1991)), and such reliance must be reasonable. *Zaremba Equip., Inc. v. Harco Nat'l Ins. Co.*, 280 Mich. App. 16, 39, 761 N.W.2d 151, 165 (2008). Gamrat's claim fails because no reasonable person with even a rudimentary understanding of the political system could believe that one or two individuals—the Speaker and/or the Majority Counsel—could guarantee votes, particularly on an issue as sensitive as censuring or ejecting a member. As the Court indicated at oral argument, such a notion is beyond comprehension. Moreover, Gamrat—a sitting Representative—should have been well aware that the Caucus Pledge does not operate in practice as she claims it does in her amended complaint.

Gamrat's fraud claim fails for similar reasons. This claim is based on four statements by Defendant Beydoun: (1) that the evidence did not support expulsion and the House believed censure was more appropriate; (2) that he could control the Republican votes for censure; (3) that Gamrat's conduct violated House Rule 74 in an attempt to obtain an admission from Gamrat that she misused taxpayer resources; and (4) that Gamrat's signature on the censure agreement would allow her to keep her seat and she could clear up the details after she kept her seat. (ECF No. 20

at PageID.143.) Gamrat alleges that these representations and assurances were false because Beydoun never intended to take affirmative steps to protect Gamrat's interest and instead took steps to protect the House and its member Defendants. (*Id.* at PageID.144.) Gamrat claims that she relied on Beydoun's statements by cooperating with the House in its investigation and by entrusting information to Beydoun that should have been protected by the attorney-client privilege. (*Id.*)

As an initial matter, Beydoun's first and third statements cannot form the basis of a fraud claim because they are statements of opinion and/or legal opinion, not statements of fact. *See Galeana Telecomms. Invs., Inc. v. Amerifone Corp.*, 202 F. Supp. 3d 711, 730 (E.D. Mich. 2016) ("In general, an honest statement of opinion cannot support a fraud claim because '[e]xpressions of opinion are not false statements of independently verifiable facts.'") (quoting *Johnson v. Botsford Gen. Hosp.*, 278 Mich. App. 146, 153 n.1, 748 N.W.2d 907, 911 n.1 (2008)); *City Nat'l Bank of Detroit v. Rodgers & Morgenstein*, 155 Mich. App. 318, 323–24, 399 N.W.2d 505, 507–08 (1986) (holding that an erroneous legal opinion is not a basis for fraud). More importantly, as with a claim of promissory estoppel, fraud requires reliance, *Hi-Way Motor Co. v. Int'l Harvester Co.*, 398 Mich. 330, 336, 247 N.W.2d 813, 816 (1976), and a plaintiff's reliance must be reasonable. *See MacDonald v. Thomas M. Cooley Law Sch.*, 724 F.3d 654, 662–63 (6th Cir. 2013). For the reasons set forth above, Gamrat could not have reasonably believed that Beydoun or, for that matter, Cotter, could promise or guarantee any particular outcome to Gamrat.

4. Wiretapping/Eavesdropping, Civil Stalking, and Conspiracy

Count V alleges that all Defendants, except McBroom, violated the federal Wiretap Act, 18 U.S.C. § 2511. "Section 2511 . . . criminalizes the intentional interception of an electronic communication . . . [and 18 U.S.C. § 2520] provides a private cause of action for persons who are

victimized by such criminal conduct." *Luis v. Zang*, 833 F.3d 619, 626 (6th Cir. 2016). Gamrat alleges that Defendants violated the Wiretap Act when they "intentionally intercepted, endeavored to intercept, or procured other people to intercept or endeavor to intercept, [her] wire, oral, and electronic communications," "intentionally used, endeavored to use, or procured other people to use an electronic, mechanical, or other device to intercept [her] oral communications," and "intentionally used, disclosed or endeavored to disclose to other people the contents of the wire, oral, or electronic communications, knowing or having reason to know that the information was obtained . . . in violation of 18 U.S.C. § 2511." (ECF No. 20 at PageID.139.) Count V also alleges that Defendants violated Michigan's eavesdropping statute, M.C.L. § 750.539 *et seq.*, by, among other things, using a device to eavesdrop on Gamrat's private conversations, tapping or accessing without authorization an electronic medium containing Gamrat's communication, and disseminating an illegally-obtained recording of Gamrat's communication to others. (*Id.* at PageID.138–39.)

Count VI alleges that all Defendants, except McBroom, are liable for civil stalking under M.C.L. § 600.2954(1), which provides a civil action to any victim of conduct prohibited under M.C.L. §§ 740.411h and 740.411i. "Stalking" is defined as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized frightened, intimidated, threatened, harassed, or molested." M.C.L. § 750.411h(1)(d). "Harassment" is "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress." M.C.L. § 750.411h(1)(c). It "does not include constitutionally protected activity or conduct that serves a

legitimate purpose." *Id.* To support a civil stalking claim, "there must be two or more acts of unconsented contact that actually cause emotional distress to the victim and would also cause a reasonable person such distress." *Nastal v. Henderson & Assocs. Investigations, Inc.*, 471 Mich. 712, 723, 691 N.W.2d 1, 7 (2005) (footnote omitted).

Count X alleges a claim of civil conspiracy against all Defendants. "In Michigan, a claim for civil conspiracy requires a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Specialized Pharmacy Servs., Inc. v. Magnum Health & Rehab of Adrian, LLC*, No. 12-12784, 2013 WL 1431722, at *4 (E.D. Mich. Apr. 9, 2013) (citation omitted). Conspiracy claims must be pled with some degree of specificity. *Moldowan v. City of Warren*, 578 F.3d 351, 395 (6th Cir. 2009). Thus, vague and conclusory allegations without supporting facts will not do. *Id.*

Nowhere in her amended complaint does Gamrat allege that the House Defendants personally committed any act that violates the federal Wiretap Act or Michigan's eavesdropping statute or gives rise to a claim for civil stalking. Gamrat's claim against the House Defendants under the Wiretap Act, to the extent it is based on procurement, fails from the outset because 18 U.S.C. § 2520 does not impose civil liability for procurement. *See Kirch v. Embarq Mgmt. Co.*, 702 F.3d 1245, 1247 (10th Cir. 2012) (stating that "[a]ny temptation to read the statute as imposing aider-and-abettor liability is overcome by the illuminating statutory history of the civil liability provision," and noting that "almost all courts to address the issue have held that § 2520 does not impose civil liability on aiders or abettors"); *Boseovski v. McCloud Healthcare Clinic, Inc.*, No. 2:16-CV-2491-CMK, 2017 WL 2721997, at *3 (E.D. Cal. June 23, 2017) ("[D]ue to various provisions of the Electronic Privacy Act of 1986, civil liability is not available based on

procurement"). Regardless, Gamrat's wiretapping/eavesdropping and stalking claims against the House Defendants are built solely on conclusory allegations without any factual augmentation. Paragraph 46 is representative of such allegations:

> Upon information and belief, it was around this time that Cotter, Saari, and Swartzle began meeting with Allard, Graham, and Cline in order to direct them to gather information against Gamrat. (See Allegations contained in Complaint and Jury Demand in *Allard and Graham v. Michigan House of Representatives*, case no. 1:15-cv-01259 in the Western District of Michigan, including Paras. 20 and 33, attached as Exhibit 1; Saari MSP Interview at pp. 10, 18, 25; attached as Exhibit 2; April 28, 2015, Text between Allard and Gamrat's son, attached as Exhibit 3.)

(ECF No. 20 at PageID.118–19.)

Gamrat's "upon information and belief" allegation is not *per se* improper under *Twombly*. "The Sixth Circuit has permitted pleading on information and belief in certain circumstances, such as when a plaintiff may lack personal knowledge of a fact, but have 'sufficient data to justify interposing an allegation on the subject' or be required to rely on 'information furnished by others.'" *Apex Tool Grp., LLC v. DMTCO, LLC*, No. 3:13-cv-372, 2014 WL 6748344, at *9 (S.D. Ohio Nov. 26, 2014) (quoting *Starkey v. JPMorgan Chase Bank, NA*, 753 F. App'x 444, 447 (6th Cir. 2014)). However, the exhibits Gamrat cites for her allegation that the House Defendants began meeting with Allard, Graham, and Cline in order to direct them to gather information against Gamrat provide no support for the allegation and, in fact, contradict it. For example, Allard and Graham alleged in their complaint in their previous case against the House that *Allard* initiated the February 2015 meeting with Defendants Saari and Cotter and that "Speaker Cotter appeared genuinely concerned and asked Messrs. Allard, Graham, and Cline to continue to keep Mr. Saari abreast of any additional issues." (*See Allard, et al. v. Michigan House of Representatives*, No. 1:15-CV-259 (W.D. Mich.) (ECF No. 1 at PageID.6–7).) Nothing supports an inference that the House Defendants *directed* Allard, Graham, and Cline to do anything and, more importantly,

Gamrat does not allege that any House Defendant directed, told, or requested Allard, Graham, or Cline to engage in any sort of conduct that conceivably could amount to wiretapping/eavesdropping/stalking. In fact, Allard, Graham, and Cline could have complied with Cotter's request simply by providing him information they obtained from their perfectly legal day-to-day observations of, and interactions with, Gamrat and Courser.

As for the substantive claims, Gamrat relies extensively on what is best characterized as "group pleading"—a practice sometimes permitted in fraud cases but otherwise impermissible. *See State Farm Mut. Auto. Ins. Co. v. Universal Health Grp., Inc.*, No. 14-cv-10266, 2014 WL 5427170, at *3 (E.D. Mich. Oct. 24, 2014) ("Plaintiffs are not permitted, when asserting a fraud claim, to generally assert all claims against all defendants."); *Petrovic v. Princess Cruise Lines, Ltd.*, No. 12-21588-CIV, 2012 WL 3026368, at *3 (S.D. Fla. July 20, 2012) (stating that "a complaint that lumps all the defendants together in each claim and provides no factual basis to distinguish their conduct fails to satisfy Rule 8" (alterations and internal quotation marks omitted)). For example, in paragraph 201, Gamrat alleges that "Defendants further violated 18 U.S.C. § 2511 when they intentionally used, disclosed or endeavored to disclose to other people the contents of the wire, oral, or electronic communications, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communications [sic] in violation of 18 U.S.C. § 2511." Gamrat omits any specifics: what was the information or recording, who obtained it, how was the information used, who disclosed it, and to whom was it disclosed or disseminated? In short, Gamrat's allegations, which do nothing more than parrot the statute, "contribute nothing to the sufficiency of the complaint," and are insufficient to render the wiretapping/eavesdropping and stalking claims plausible. *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 506 (6th Cir. 2013); *see also Alshaibani v. Litton Loan Servicing, LP*,

528 F. App'x 462, 465 (6th Cir. 2013) ("As a practical matter, Plaintiffs' factually unadorned allegation that Litton misapplied their payments does no more to render their claim plausible than would a simple legal conclusion that Litton breached the mortgage."). Gamrat's civil conspiracy claim fails for the same reasons.

Accordingly, the wiretapping/eavesdropping, stalking, and civil conspiracy claims will be dismissed as to the House Defendants.

5. Malicious Prosecution/Abuse of Process

Count IV alleges claims of malicious prosecution and abuse of process against the House Defendants. To succeed on a malicious prosecution claim, a plaintiff must prove that:

> (1) the defendant has initiated a criminal prosecution against him, (2) the criminal proceedings terminated in his favor, (3) the private person who initiated or maintained the prosecution lacked probable cause for his actions, and (4) the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice.

Miller v. Sanilac Cnty., 606 F.3d 240, 248 (6th Cir. 2010) (quoting *Walsh v. Taylor*, 263 Mich. App. 618, 633–34, 689 N.W.2d 506, 516–17 (2004)). In Michigan, "[d]ue to the important state policy of encouraging citizens to report possible criminal violations within their knowledge, a defendant cannot be held liable for malicious prosecution unless he took some active role in instigating the prosecution." *Rivers v. Ex-Cell-O Corp.*, 100 Mich. App. 824, 832–33, 300 N.W.2d 420, 424 (1980). There can be no liability if the defendant "made full and fair disclosure of all of the material facts within his knowledge to the prosecutor, and the prosecuting attorney recommends a warrant." *Id.* at 833, 300 N.W.2d at 424. In such case, the defendant "has not 'instituted' the charge." *Id.* (quoting *Renda v. Int'l Union, UAW*, 366 Mich. 58, 83–87, 114 N.W. 343, 355–56 (1962)). Thus, private individuals and police officers can be liable "only if they knowingly furnish false information that the prosecutor relies and acts upon in initiating criminal

proceedings." *Disney v. City of Dearborn*, No. 2:06-CV-12795, 2006 WL 2193029, at *4 (E.D. Mich. Aug. 2, 2006) (citing *Matthews v. Blue Cross & Blue Shield of Mich.*, 456 Mich. 365, 385–90, 572 N.W.2d 603, 613–15 (1998)).

Gamrat's malicious prosecution claim fails for two reasons. First, public records—enacted legislation and legislative history—refute Gamrat's allegation that Defendants "initiated" the criminal prosecution. As noted above, the matter was referred to the Michigan State Police and the Michigan Attorney General for investigation based on amendments to HR 141 introduced by two Democrat Representatives who are not Defendants in this case, and the amendments were approved by the House. Thus, contrary to Gamrat's allegations, the House Defendants did not initiate the criminal prosecution. Second, Gamrat fails to allege any fact rebutting the presumption that the prosecutor initiated the prosecution. In fact, Gamrat admits in her amended complaint that Defendants Cotter and Bowlin told the Michigan State Police that they did not have direct evidence of anything illegal before conducting the investigation and did not see anything criminal in the investigation. (ECF No. 20 at PageID.137.)

Gamrat's primary argument is that it is "disingenuous" for the House Defendants to argue that their actions did not "initiate" the prosecution because the creation of the HBO Report led directly to the Michigan State Police's investigation and criminal charges. But Gamrat cites no case to support her argument, and Michigan courts have rejected Gamrat's causation theory. *Renda*, 366 Mich. at 91, 114 N.W.2d at 359 (rejecting the notion that "any party who is a proximate cause of a prosecution is himself the prosecutor and may be held liable if the prosecution thereafter ensuing proves to have been commenced without probable cause"). Moreover, Michigan courts have held that there is no liability when, similar to the situation here, a private citizen conducts its own investigation and provides the information to the police, who then conduct their own

investigation. *Wilson v. Sparrow Health Sys.*, 290 Mich. App. 149, 153, 799 N.W.2d 224, 226 (2010). In short, there is no basis for a malicious prosecution claim.

Gamrat's abuse of process claim fails as well. Under Michigan law, an abuse of process claim requires a plaintiff to show: "(1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding." *Friedman v. Dozorc*, 412 Mich. 1, 30, 312 N.W.2d 585, 594 (1981). It is clear under Michigan law that there is no abuse of process claim for causing process to issue. *Id.* n.18 (citing Restatement (Second) of Torts). Rather, an abuse of process claim "lies for the improper use of process after it has been issued, not for maliciously causing it to issue." *Spear v. Pendill*, 164 Mich. 620, 623, 130 N.W. 343, 344 (1911) (internal quotation marks omitted); *see also Garcia v. Thorne*, 520 F. App'x 304, 311 (6th Cir. 2013) ("Garcia's abuse-of-process claim against Thorne fails because Thorne's behavior has to do with the initiation of criminal proceedings, not the misuse of process."). Gamrat concedes that she lacks direct evidence of the House Defendants' malicious use of process, but she states that it is "plausible" that the House Defendants participated more fully in her prosecution by the Attorney General. This speculation does not suffice to save Gamrat's claim from dismissal.

6. Indemnification

Count IX alleges a claim for indemnification against Cotter and the House under M.C.L. § 691.1408(1) and (2). Gamrat seeks indemnification for legal fees she incurred in defending a state-court suit by Allard and Graham and for her defense costs in the criminal proceeding. As mentioned above, the Eleventh Amendment bars this claim against the House.

The statute, which Gamrat quotes in full in her amended complaint, states that when a civil action or a criminal action is commenced against an employee of a government agency, "the governmental agency may pay for, engage, or furnish the services of an attorney to advise the

officer . . . as to the claim and to appear for and represent the officer . . . in the action." Noting that Gamrat concedes in her amended complaint that the statute is discretionary, the House Defendants argue that Gamrat cannot seek relief from this Court. Indeed, the Michigan Supreme Court has held that the "full discretion" granted by the statute precludes judicial second-guessing about whether the governmental agency made a wise decision in deciding whether to pay an officer's attorney's fees. *Warda v. City Council of the City of Flushing*, 472 Mich. 326, 332, 696 N.W.2d 671, 676 (2005) ("Whether the council acted wisely or unwisely, prudently or imprudently, is not for the consideration or determination of this Court.").

Gamrat cites *Warda* for the proposition that a governmental agency's discretionary action must still comport with the United States and Michigan constitutions. She argues that because she has alleged a due process violation she can argue that Defendants acted improperly. However, as Defendants note, the concern with constitutionality arises in the area of equal protection—whether the statute was applied in a discriminatory manner based on membership in a protected class. Gamrat makes no such claim. Moreover, as noted above, Gamrat's due process claim is without merit. Therefore, Gamrat's claim for indemnification will be dismissed.

B. Defendant Saari's Motion

Gamrat's claims against Defendant Saari include the due process, wiretapping/eavesdropping, civil stalking, and civil conspiracy claims. The analysis for each of these claims is the same as set forth for the House Defendants above, as Gamrat essentially lumps Saari into her allegations with the House Defendants. Therefore, for these reasons, Saari is entitled to dismissal of all four claims.

C. Defendants Allard's and Graham's Motion

Gamrat's remaining claims against Allard and Graham include wiretapping/eavesdropping, civil stalking, and civil conspiracy.

1. Wiretapping/Eavesdropping

Allard and Graham argue that Gamrat's wiretapping/eavesdropping claim fails as to them because the amended complaint contains insufficient factual detail to render her claim plausible.[3] *See Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) ("The factual allegations in the complaint need to be sufficient to give notice to the defendant as to what claims are alleged, and the plaintiff must plead 'sufficient factual matter' to render the legal claim plausible, i.e., more than merely possible.") (citing *Iqbal*, 556 U.S. at 578, 129 S. Ct. at 1949–50). Gamrat responds that her allegations in her amended complaint and the documents attached thereto provide a sufficient factual basis to survive a motion to dismiss.

As set forth above, the Court has already determined that Gamrat's allegations regarding the House Defendants "direct[ing]" Allard, Graham, and Cline to gather information against Gamrat by engaging in wiretapping/eavesdropping or stalking activities lack sufficient factual support to survive dismissal. Gamrat's allegations concerning Allard's and Graham's individual conduct similarly lack factual support. For example, in paragraph 57, Gamrat alleges, "At the same time, Allard, Graham, and Cline were also obtaining information through wiretapping and eavesdropping devices, as described in Count V." (ECF No. 20 at PageID.120.) However, Count V does not provide the promised detail, particularly with regard to Allard and Graham. In a similar

[3] The Court rejects Allard's and Graham's initial argument regarding Gamrat's failure to cite a statute that provides a civil action under either state or federal law. Although Gamrat did not specifically cite the statutes that provide private causes of action, 18 U.S.C. § 2520 provides for recovery of civil damages for violations of the Wiretap Act, and M.C.L. § 750.539h provides a civil cause of action for eavesdropping under Michigan law. The Court finds it unnecessary to address Allard and Graham's argument that there is no civil liability for violation of M.C.L. § 750.540.

manner, paragraphs 65 and 66 allege that "Graham and Allard were illegally and secretly recording conversations involving Gamrat . . . [and] [i]n some cases, Graham and Allard were admittedly not part of the recorded conversation." (*Id.* at PageID.121.) Again, Gamrat's allegations are conclusions without factual detail. Gamrat fails to identify who (Allard or Graham) recorded the conversation, the participants, where it occurred, or when it happened. It appears that Gamrat is referring to Graham's recording of his own May 19, 2015, conversation with Courser, during which Gamrat was apparently also on the phone with Courser. If so, Graham violated neither federal nor state law because there is no violation when the individual recording the conversation is also a participant. 18 U.S.C. § 2511(2)(d); *Sullivan v. Gray*, 117 Mich. App. 476, 481, 324 N.W.2d 58, 60 (1982); *Ferrara v. Detroit Free Press*, 52 F. App'x 229, 231–32 (2002) (also permitting third-party disclosure absent a statutory violation). Thus, Gamrat's allegation that Allard "directed" Graham to record his conversations with Gamrat and Courser (as opposed to merely "encouraging" Graham to do so, as Gamrat appears to concede in her response (ECF No. 50 at PageID.701)), is irrelevant because Graham's conduct would have been legal in any event.

Furthermore, Gamrat's other allegations, and the documents she cites in her amended complaint and response, provide no factual basis for her claim. For example, Anne Hill's comment that she "wondered" if Allard and Graham planted surveillance items in Gamrat's office is not evidence of anything illegal, as "wondering" about something is not evidence. Similarly, Allard's alleged statement that Gamrat's office was "bugged" is not factual support for a claim that Allard or Graham engaged in illegal wiretapping or eavesdropping because, even if true, the statement does not show that Allard or Graham had anything to do with planting surveillance items. (ECF No. 20 at PageID.122.) Gamrat's citation to a text exchange between Allard and Joe Gamrat regarding a picture of Gamrat's car—a matter not found in the amended complaint—does not

support Gamrat's claim, as taking a picture of a car does not constitute wiretapping or eavesdropping. Finally, Gamrat's allegation that Allard, Graham, and Cline exchanged texts with Joe Gamrat does not show, or even suggest, that Allard and Graham were intercepting, or attempting to intercept, Gamrat's communications. The lone text message from the Michigan State Police report that Gamrat cites is from Joe Gamrat to Allard concerning Gamrat's whereabouts. Nothing in the text suggests that Allard, or, for that matter, Joe Gamrat, was engaged in conduct that violated wiretapping or eavesdropping laws.[4]

Accordingly, Gamrat fails to state a plausible wiretapping/eavesdropping claim against Allard and Graham.[5] Thus, that claim will be dismissed as to Allard and Graham.

2. Civil Stalking

Allard and Graham contend that Gamrat's stalking claim is subject to dismissal on two grounds. First, citing *Nastal v. Henderson & Associates Investigations*, 471 Mich. 712, 691 N.W.2d 1 (2005), they argue that their conduct does not constitute stalking because it falls within the safe harbor of M.C.L. § 750.411h for conduct that is constitutionally protected or serves a legitimate purpose. Second, they contend that, regardless of whether their conduct falls within the safe harbor, Gamrat's allegations are insufficient to state a plausible civil stalking claim.

The Court need not address Allard and Graham's safe harbor argument because it concludes that Gamrat's allegations fall short of stating a plausible claim. As stated above, to support a civil stalking claim, "there must be two or more acts of unconsented contact that actually

[4] The Michigan State Police Report of Extortion can be found at http://media.mlive.com/lansing-news/other/Police-Report-on-Extortion-Texts-in-Courser-Gamrat-Scandal_Redacted.pdf. The text appears at 295–96 of the report.

[5] In Gamrat's response and at oral argument, Gamrat's counsel intermingled the stalking allegations with the wiretapping/eavesdropping allegations. For example, in discussing the wiretapping/eavesdropping claim, Gamrat's counsel referred to Allard taking a picture of Gamrat's vehicle and to the "extortion texts" Joe Gamrat and Defendant Horr allegedly sent to Gamrat and Courser. However, neither taking a picture, nor sending a text, is conduct that would violate the wiretapping/eavesdropping statutes.

cause emotional distress to the victim and would also cause a reasonable person such distress." *Nastal*, 471 Mich. at 723, 691 N.W.2d at 7 (footnote omitted). The Court has scoured the amended complaint in vain for an allegation that either Allard or Graham had even one unconsented contact with Gamrat that actually caused her emotional distress. Allard's and Graham's communications and contacts with Joe Gamrat, with or without Gamrat's permission, provide no basis for a stalking claim. And, because Allard and Graham were employees in Gamrat's office, any contact they had with her on a regular basis was, obviously, with her implied consent. As for the so-called "extortion texts," they appear to satisfy the elements for a stalking claim. The problem for Gamrat, however, is that she admits in her amended complaint that the Michigan State Police report concluded that Joe Gamrat and/or Defendant Horr, not Allard or Graham, sent those texts. Gamrat's allegation that Allard and Graham were communicating with Joe Gamrat before, during, and after the time the "extortion texts" were sent does not create a plausible inference that they had anything to do with those texts.

Accordingly, the Court will dismiss Gamrat's stalking claim as to Allard and Graham.

3. Civil Conspiracy

Gamrat's conspiracy claim as to Allard and Graham is subject to dismissal for the reasons given above as to the House Defendants. In short, the claim is wholly unsupported by factual content supporting the existence of an agreement to accomplish an unlawful purpose or to accomplish a lawful purpose through unlawful means.

IV. CONCLUSION

For the foregoing reasons, the Court will grant Defendants' motions as to all claims against them.[6]

An Order consistent with this Opinion will be entered.

Dated: March 15, 2018

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

[6] A few days before oral argument, the Court granted Gamrat's motion to file a supplemental brief regarding alleged spoliation of evidence, in which Gamrat claims that the House Defendants or someone on their behalf had tampered with Gamrat's computer and electronic devices after they were seized by the House in connection with the HBO investigation. (ECF No. 64.) The House Defendants had no opportunity to respond prior to oral argument. Nonetheless, Gamrat's supplemental brief cannot save her claims from dismissal. Claims that are factually deficient on their face cannot benefit from speculation about what might have been removed from a computer. *Cf. Brown v. Matauszak*, 415 F. App'x 608, 613 (6th Cir. 2011) ("Although Rule 8 does not constitute a 'hyper-technical, code-pleading regime,' it 'does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.'") (quoting *Iqbal*, 556 U.S. 678–79, 129 S. Ct. at 1950).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CINDY GAMRAT,

Plaintiff,

v. Case No. 1:16-CV-1094

JOSHUA CLINE and DAVID HORR, HON. GORDON J. QUIST

Defendants.
_____/

OPINION

The Court heard oral argument on three interrelated motions on June 25, 2019. Defendant Joshua Cline filed his Motion to Dismiss the Amended Complaint on December 17, 2018. (ECF No. 131.) Cline was a legislative staffer to Cindy Gamrat[1] and Todd Courser, similar to previously dismissed Defendants Keith Allard and Benjamin Graham. Cline argues that he had less involvement in the alleged events than Allard and Graham and that when the Court examined the same claims, issues, and defenses in regard to Allard and Graham's motion to dismiss, it found that Gamrat failed to state a claim against Allard and Graham.

Gamrat responded to Cline's motion to dismiss on January 15, 2019. (ECF No. 143.) In that response, Gamrat asked the Court to consider new factual allegations in a yet-to-be-filed Second Amended Complaint to defeat Cline's motion to dismiss. One day earlier, Gamrat had filed a Motion for Relief from Judgment under Federal Rule of Civil Procedure 60(b), requesting that the Court grant relief from its March 15, 2018, Order, so that Gamrat could revive claims against dismissed Defendants Allard; Graham; Kevin Cotter, the former Speaker of the House;

[1] Cindy Gamrat now uses the name Cindy Bauer. For consistency, the Court will refer to Bauer as Gamrat–the name she used during the events in question.

Norm Saari, the former Chief of Staff to Cotter; and Brock Swartzle, former General Counsel for the Michigan House of Representatives. (ECF No. 138.) On January 22, 2019, Gamrat filed a Motion for Leave to File a Second Amended Complaint, reasserting claims against the aforementioned dismissed Defendants and adding factual allegations based on information gained through discovery in this case and discovery in Courser's state criminal case. (ECF No. 146.)

I. BACKGROUND

Gamrat and Courser were elected to the Michigan House of Representatives in 2014 and began serving in their capacities as representatives in early 2015. Gamrat and Courser had a joint staffing arrangement, whereby Allard, Graham, and Cline worked for both representatives, sharing time between their separate offices.

In February 2015, Joseph Gamrat, Cindy Gamrat's then husband, told Allard, Graham, and Cline that he believed Gamrat and Courser were having a sexual relationship, an affair to which Gamrat and Courser later admitted. Joseph Gamrat had frequent communications with Allard, Graham, and Cline throughout the relevant course of events.

On April 14, 2015, Cline quit his position as a legislative staffer. On May 19, 2015, Graham recorded a conversation that he had with Courser in Courser's office in which Courser asked Graham to send a "false flag" email to cover up the affair.[2] On July 6, 2015, Allard and Graham were fired from their positions with the House. On August 7, 2015, the *Detroit News* ran a story on Gamrat and Courser's affair, which included a portion of the May 19, 2015, recording that Graham had provided to the *Detroit News*.

[2] The email that Courser or someone on his behalf had authored contained a number of outlandish, untrue, and salacious allegations about Courser. Courser hoped the email would create such a stir that any real information that came out about this affair with Gamrat would be ignored as an exaggeration or seen as a smear campaign.

After the news story broke, Cotter directed Tim Bowlin, the Business Director for the House, to investigate allegations of the misuse of taxpayer resources to cover up the affair. On August 19, 2015, the House voted to form a bi-partisan Select Committee in connection with the investigation of Gamrat and Courser. On August 31, 2015, the House Business Office published its report based on Bowlin's investigation (HBO report). Hearings of the Select Committee began on September 8, 2015. The Committee voted to expel Gamrat on September 10, 2015. Very early the next morning, Gamrat was expelled by a vote of the full House.

From May to August 2015, Gamrat and Courser received anonymous extortion texts demanding that they resign from office. A Michigan State Police (MSP) investigation later revealed that Joseph Gamrat and Defendant David Horr were behind the extortion texts.

According to Gamrat, the new information that she has incorporated into the factual allegations of her Second Amended Complaint is as follows:

- Allard, Graham, and Cline were experienced and savvy political insiders—a "trifecta" in the words of Cline. There were certainly not the young and naïve political newbies that counsel for Allard and Graham attempted to portray in their motion to dismiss;
- Cotter and his staff had a contentious relationship with Gamrat;
- Saari had several meetings with Allard, Graham, and Cline, and told them in no uncertain terms that they work for the Speaker first;
- Cline saw it as his duty as a member of Cotter's staff first to give him and his staff information regarding Gamrat;
- Cline was providing information regarding Gamrat to several members of Cotter's staff;
- Cline received a severance package when he resigned;

- Saari and another member of Cotter's staff offered to help Cline find other employment during that time period;
- Cline had unauthorized access to Gamrat's email and personal accounts—some of which was provided by Allard and Graham—after he resigned from his position;
- The infamous recording made by Graham of Courser—and of Gamrat's private conversation with Courser—in Courser's office was edited before it was turned over to the House Business Office and used as part of the House's efforts to expel Gamrat;
- One member of Cotter's staff had told Cline to keep her posted on all fronts; and
- Cline saw the extortion texts and, while he was not the one sending the texts, he knew that information he was providing Joe Gamrat was getting directly to the extortionist.

(Pl.'s Mot. for Relief from J., ECF No. 140 at PageID.1941-42; *see also* Pl.'s Resp. to Cline's Mot. to Dismiss, ECF No. 143 at PageID.3471-72 *and* Pl.'s Mot. to Amend, ECF No. 147 at PageID.3519.)[3]

II. DEFENDANT CLINE'S MOTION TO DISMISS

A. Procedural Issues

Motion to Dismiss vs. Motion for Judgment on the Pleadings

Cline fashioned his motion to dismiss as a motion pursuant to Federal Rule of Civil Procedure 12(b)(6). Gamrat notes in her response that Cline filed an answer to the Amended Complaint on April 20, 2018, rendering a Rule 12(b)(6) motion inappropriate. However, as Gamrat concedes, Cline asserted "Failure to State a Claim" as an affirmative defense in his answer,

[3] The Court need only consider the proposed amendments that were identified by Gamrat in her briefing. *Begala v. PNC Bank, Ohio, Nat. Ass'n*, 214 F.3d 776, 784 (6th Cir. 2000). Gamrat states that, in addition to the new evidence she identified, she incorporates more than 1,500 pages of filings from Courser's related civil cases. However, the Court is not "obligated to wade through" more than a thousand pages of documents to find support for Gamrat's claims and declines to do so. *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989).

and Cline could have brought a motion based on the same defense under Rule 12(c). The Sixth Circuit has explained how a Rule 12(b)(6) defense is considered after an answer has been filed:

> Rule 12(h)(2) provides that the Rule 12(b)(6) defense of failure to state a claim upon which relief may be granted can be raised after an answer has been filed by motion for judgment on the pleadings pursuant to Rule 12(c). Where the Rule 12(b)(6) defense is raised by a Rule 12(c) motion for judgment on the pleadings, we must apply the standard for a Rule 12(b)(6) motion in reviewing the district court's decision.

Morgan v. Church's Fried Chicken, 829 F.2d 10, 11 (6th Cir. 1987).

Although Cline cited Rule 12(b)(6) rather than Rule 12(c) as support for his motion, it appears the Court can simply convert the motion from a motion to dismiss to a motion for judgment on the pleadings. Nothing in Rule 12 prohibits such a conversion. Moreover, Rule 12(d) even specifically permits the Court to convert a motion under Rule 12(b)(6) or Rule 12(c) to a motion for summary judgment so long as the parties are "given a reasonable opportunity to present all the material that is pertinent to the motion." *Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1104 (6th Cir. 2010) (quoting Fed. R. Civ. P. 12(d)). In this case, the parties assuredly have been given a reasonable opportunity to present all the material that is pertinent to the motion because motions under Rules 12(b)(6) and 12(c) are analyzed under the same standard. Thus, the Court will consider Cline's motion to dismiss as a motion for judgment on the pleadings.

Allegations in the Proposed Second Amended Complaint

In her response, Gamrat states that her claims against Cline should not be dismissed because the factual allegations in her proposed Second Amended Complaint suffice to defeat a motion to dismiss. Because the substance of the Second Amended Complaint is before the Court (ECF No. 147-1), the Court may consider the additional factual allegations in deciding whether dismissal with prejudice is appropriate. *See Begala v. PNC Bank, Ohio, Nat. Ass'n*, 214 F.3d 776, 784 (6th Cir. 2000) (stating that the Court would have considered the motion to dismiss in light of

proposed amendments to the complaint had the plaintiff filed a motion to amend and identified the proposed amendments prior to consideration of the motion to dismiss).

B. Legal Standard

As noted above, the standard of review for a judgment on the pleadings under Rule 12(c) is the same as that for a motion to dismiss under Rule 12(b)(6). *Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 389 (6th Cir. 2007). Under that standard, the Court must determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). Although the plausibility standard is not equivalent to a "'probability requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965). A complaint may be dismissed for failure to state a claim if it fails "'to give the defendant fair notice of what . . . the claim is and the grounds upon which it rests.'" *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1959 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103 (1957)).

C. Analysis

Even if the Court considers Cline's motion to dismiss in light of the added factual allegations in the proposed Second Amended Complaint, Gamrat has still failed to state a claim against Cline.

Wiretapping/Eavesdropping

The majority of Gamrat's added factual allegations allude to Cline being more politically savvy than previously known; a strong relationship between Cline and Cotter's staff; and a

contentious relationship between Cotter and Gamrat. Those allegations are irrelevant to whether Cline violated federal or state laws concerning wiretapping and eavesdropping. The only allegations that need to be addressed in the context of the wiretapping and eavesdropping claims are (1) that Cline had unauthorized access to Gamrat's email and personal accounts after he resigned from his position; and (2) that the recording made by Graham of Courser in Courser's office was edited before it was turned over to the House Business Office.

In the proposed Second Amended Complaint, Gamrat alleges that Cline continued to be copied on emails and had unauthorized access to Gamrat's email and other accounts. (ECF No. 147-1 at PageID.3548.) In support of this allegation, Gamrat refers the Court to Exhibits 15 and 16 attached to the Second Amended Complaint. The Court may consider exhibits attached to the complaint when ruling on a motion to dismiss or a motion for judgment on the pleadings. *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008). Exhibit 15 is an email from Graham to Allard and Cline that includes, among other information, a username and password of Courser. (ECF No. 147-16.) Exhibit 16 is a text message from Cline to Allard requesting that Allard forward him an email from Courser. (ECF No. 147-17.) There are multiple problems with Gamrat's allegation. First, Exhibit 15 shows that Cline may have had access to *Courser's* account but does not support the allegation that Cline had access to *Gamrat's* account. Second, even if the Court accepts that Cline had Gamrat's username and password information, that is not enough to sustain a wiretapping or eavesdropping claim when there is no allegation that Cline ever accessed her accounts without permission. Finally, simply asking to have emails forwarded or being copied on emails is not a violation of wiretapping or eavesdropping statutes because there is no allegation that those emails were intercepted illegally. In fact, Gamrat's own allegation is that Cline asked Graham to forward an email that Graham had received from Courser.

Gamrat further alleges that the "infamous recording made by Graham of Courser" was edited before it was turned over to the House Business Office (HBO). (*See* ECF No. 147-1 at PageID.3547.) However, this allegation also fails to show wiretapping or eavesdropping. The Court has already determined that the recording that Graham made of his May 19, 2015, conversation with Courser did not violate any state or federal law "because there is no violation when the individual recording the conversation is also a participant." *Gamrat v. Allard*, 320 F. Supp. 3d 927, 945 (W.D. Mich. 2018). Whether the legally recorded tape was edited makes no difference in terms of wiretapping or eavesdropping laws. Moreover, Gamrat cites several pages of Cline's deposition testimony in support of this allegation. Those portions of deposition testimony state that the recording was edited to remove irrelevant parts of the conversation referring to Courser's wife. (*See* Cline Dep. pp. 147-50, 153-54, 165-66, ECF No. 147-2.) Therefore, the edited version of the recording was simply the relevant portion of the recording.

Civil Stalking

A civil stalking claim requires the plaintiff to prove "two or more acts of unconsented contact that actually cause emotional distress to the victim and would also cause a reasonable person such distress." *Gamrat*, 320 F. Supp. 3d at 946 (quoting *Nastal v. Henderson & Assocs. Investigations, Inc.*, 471 Mich. 712, 723, 691 N.W.2d 1, 7 (2005) (footnote omitted)). As Gamrat notes, the Court previously found that the extortion texts could satisfy the elements for a stalking claim but that Gamrat's allegations were not enough to tie Allard and Graham to the texts. *See id.* Gamrat argues that because Cline testified that he saw the extortion texts and knew that information he was providing Joseph Gamrat was getting to the extortionist, Cline is liable for civil stalking.

However, Gamrat's new factual allegation does not rise to the level of a civil stalking claim. Michigan law is clear that a stalking claim rests on a finding of unconsented contact. *See id.* Cline did not send the texts, nor did he direct anyone to send the texts, so there is no allegation of unconsented contact. Furthermore, the portions of Cline's deposition testimony that Gamrat cites do not support her allegation. Cline testified that no one ever told him about the extortion texts but that he saw the content of the extortion messages when Courser publicly posted the messages on Facebook. (Cline Dep. pp. 143-44, 193, 243-45, ECF No. 147-2 at PageID.3592, 3598, 3602.) Cline then stated that once he saw the content of the extortion messages, it appeared that information he was providing to Joseph Gamrat was reaching the extortionist. (*Id.*). Gamrat's new allegations miss the crucial link of unconsented contact between herself and Cline.

Civil Conspiracy

Under Michigan law, "a claim for civil conspiracy requires a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Gamrat*, 320 F. Supp. 3d at 941. To sustain a civil conspiracy claim, "the plaintiff must establish some underlying tortious conduct." *Urbain v. Beierling*, 301 Mich. App. 114, 132, 835 N.W.2d 455, 464 (2013). The Court has already determined that no Defendant violated the wiretapping or eavesdropping statutes. The only tortious conduct that is potentially alleged in this case is that Horr sent the extortion texts. However, while Gamrat alleges that Cline saw the texts and knew that information he was gathering reached the extortionists, the deposition testimony that Gamrat cites states that no one ever told Cline about the extortion texts and he only found out about the messages when Courser posted the messages on Facebook. That is not enough to show concerted action. Because the

added factual allegations from the proposed Second Amended Complaint do not suffice to state a claim for relief, the Court will grant Cline's motion.

III. PLAINTIFF'S MOTIONS FOR RELIEF FROM JUDGMENT AND TO AMEND

Gamrat filed her Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b), seeking relief from the Court's March 15, 2018, which granted several Defendants' motions to dismiss. (ECF No. 138.) She also filed a Motion for Leave to File a Second Amended Complaint that would, if the Court granted relief from its March 15, 2018, Order, allow her to reassert claims against the previously dismissed Defendants and add factual allegations against Cline and others. However, because Gamrat's motions are procedurally improper, the Court will deny both motions.

Rule 60(b) provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding" in six enumerated situations. "[B]y its terms, Rule 60(b) applies only to final judgments." *Mallory v. Eyrich*, 922 F.2d 1273, 1277 (6th Cir. 1991). The dismissal of claims against some but not all defendants—as was the case with the March 15, 2018, Order—is not a final judgment. *Gavitt v. Born*, 835 F.3d 623, 638 (6th Cir. 2016).[4] Thus, Gamrat's motion for relief from judgment pursuant to Rule 60(b) is procedurally improper.

Although Gamrat cannot obtain relief from the Court's March 15, 2018, Order pursuant to Rule 60(b), the Court recognizes that it does have authority under Rule 54(b) to revise its Order. The Court is justified in revising its interlocutory orders when there is: (1) an intervening change in controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice. *Luna v. Bell*, 887 F.3d 290, 297 (6th Cir. 2018). Here, there has been no

[4] Gamrat conceded that the March 15, 2018, Order was not a final order when she voluntarily dismissed her appeal of the order in the Sixth Circuit, recognizing that the Sixth Circuit did not have jurisdiction over a non-final order. (*See* ECF No. 152-1.)

intervening change in controlling law, and Gamrat has not pointed to any clear error from the prior ruling, so the Court will focus on Gamrat's argument with respect to claimed new evidence. As stated above in the analysis of Gamrat's claims against Cline, the new allegations do not support claims for wiretapping/eavesdropping, civil stalking, or conspiracy against anyone other than potentially Defendant Horr. While Gamrat vaguely references evidence of "many audio clips and recordings," she has not offered anything more than conclusory allegations that the recordings were intercepted illegally. (ECF No. 147 at PageID.3520.) Thus, the new evidence is immaterial and does not justify a revision of this Court's previous order.

Because the March 15, 2018, Order dismissed Gamrat's claims against Defendants Allard, Graham, Cotter, Saari, and Swartzle with prejudice and Gamrat has not obtained relief from that Order, she cannot simply amend her complaint to revive claims against the previously dismissed Defendants through a motion to amend.

IV. CONCLUSION

For the foregoing reasons, the Court will **grant** Cline's Motion for Judgment on the Pleadings (ECF No. 131), **deny** Gamrat's Motion for Relief from Judgment (ECF No. 138), and **deny** Gamrat's Motion for Leave to File a Second Amended Complaint (ECF No. 146). An appropriate order will enter.

Dated: July 11, 2019

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
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SOUTHERN DIVISION

CINDY GAMRAT,

Plaintiff,

v. Case No. 1:16-CV-1094

JOSHUA CLINE and DAVID HORR, HON. GORDON J. QUIST

Defendants.
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I. BACKGROUND

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II. DEFENDANT CLINE'S MOTION TO DISMISS

A. Procedural Issues

Motion to Dismiss vs. Motion for Judgment on the Pleadings

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and Cline could have brought a motion based on the same defense under Rule 12(c). The Sixth Circuit has explained how a Rule 12(b)(6) defense is considered after an answer has been filed:

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Although Cline cited Rule 12(b)(6) rather than Rule 12(c) as support for his motion, it appears the Court can simply convert the motion from a motion to dismiss to a motion for judgment on the pleadings. Nothing in Rule 12 prohibits such a conversion. Moreover, Rule 12(d) even specifically permits the Court to convert a motion under Rule 12(b)(6) or Rule 12(c) to a motion for summary judgment so long as the parties are "given a reasonable opportunity to present all the material that is pertinent to the motion." *Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1104 (6th Cir. 2010) (quoting Fed. R. Civ. P. 12(d)). In this case, the parties assuredly have been given a reasonable opportunity to present all the material that is pertinent to the motion because motions under Rules 12(b)(6) and 12(c) are analyzed under the same standard. Thus, the Court will consider Cline's motion to dismiss as a motion for judgment on the pleadings.

Allegations in the Proposed Second Amended Complaint

In her response, Gamrat states that her claims against Cline should not be dismissed because the factual allegations in her proposed Second Amended Complaint suffice to defeat a motion to dismiss. Because the substance of the Second Amended Complaint is before the Court (ECF No. 147-1), the Court may consider the additional factual allegations in deciding whether dismissal with prejudice is appropriate. *See Begala v. PNC Bank, Ohio, Nat. Ass'n*, 214 F.3d 776, 784 (6th Cir. 2000) (stating that the Court would have considered the motion to dismiss in light of

proposed amendments to the complaint had the plaintiff filed a motion to amend and identified the proposed amendments prior to consideration of the motion to dismiss).

B. Legal Standard

As noted above, the standard of review for a judgment on the pleadings under Rule 12(c) is the same as that for a motion to dismiss under Rule 12(b)(6). *Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 389 (6th Cir. 2007). Under that standard, the Court must determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). Although the plausibility standard is not equivalent to a "'probability requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965). A complaint may be dismissed for failure to state a claim if it fails "'to give the defendant fair notice of what . . . the claim is and the grounds upon which it rests.'" *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1959 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103 (1957)).

C. Analysis

Even if the Court considers Cline's motion to dismiss in light of the added factual allegations in the proposed Second Amended Complaint, Gamrat has still failed to state a claim against Cline.

Wiretapping/Eavesdropping

The majority of Gamrat's added factual allegations allude to Cline being more politically savvy than previously known; a strong relationship between Cline and Cotter's staff; and a

contentious relationship between Cotter and Gamrat. Those allegations are irrelevant to whether Cline violated federal or state laws concerning wiretapping and eavesdropping. The only allegations that need to be addressed in the context of the wiretapping and eavesdropping claims are (1) that Cline had unauthorized access to Gamrat's email and personal accounts after he resigned from his position; and (2) that the recording made by Graham of Courser in Courser's office was edited before it was turned over to the House Business Office.

In the proposed Second Amended Complaint, Gamrat alleges that Cline continued to be copied on emails and had unauthorized access to Gamrat's email and other accounts. (ECF No. 147-1 at PageID.3548.) In support of this allegation, Gamrat refers the Court to Exhibits 15 and 16 attached to the Second Amended Complaint. The Court may consider exhibits attached to the complaint when ruling on a motion to dismiss or a motion for judgment on the pleadings. *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008). Exhibit 15 is an email from Graham to Allard and Cline that includes, among other information, a username and password of Courser. (ECF No. 147-16.) Exhibit 16 is a text message from Cline to Allard requesting that Allard forward him an email from Courser. (ECF No. 147-17.) There are multiple problems with Gamrat's allegation. First, Exhibit 15 shows that Cline may have had access to *Courser's* account but does not support the allegation that Cline had access to *Gamrat's* account. Second, even if the Court accepts that Cline had Gamrat's username and password information, that is not enough to sustain a wiretapping or eavesdropping claim when there is no allegation that Cline ever accessed her accounts without permission. Finally, simply asking to have emails forwarded or being copied on emails is not a violation of wiretapping or eavesdropping statutes because there is no allegation that those emails were intercepted illegally. In fact, Gamrat's own allegation is that Cline asked Graham to forward an email that Graham had received from Courser.

Gamrat further alleges that the "infamous recording made by Graham of Courser" was edited before it was turned over to the House Business Office (HBO). (*See* ECF No. 147-1 at PageID.3547.) However, this allegation also fails to show wiretapping or eavesdropping. The Court has already determined that the recording that Graham made of his May 19, 2015, conversation with Courser did not violate any state or federal law "because there is no violation when the individual recording the conversation is also a participant." *Gamrat v. Allard*, 320 F. Supp. 3d 927, 945 (W.D. Mich. 2018). Whether the legally recorded tape was edited makes no difference in terms of wiretapping or eavesdropping laws. Moreover, Gamrat cites several pages of Cline's deposition testimony in support of this allegation. Those portions of deposition testimony state that the recording was edited to remove irrelevant parts of the conversation referring to Courser's wife. (*See* Cline Dep. pp. 147-50, 153-54, 165-66, ECF No. 147-2.) Therefore, the edited version of the recording was simply the relevant portion of the recording.

Civil Stalking

A civil stalking claim requires the plaintiff to prove "two or more acts of unconsented contact that actually cause emotional distress to the victim and would also cause a reasonable person such distress." *Gamrat*, 320 F. Supp. 3d at 946 (quoting *Nastal v. Henderson & Assocs. Investigations, Inc.*, 471 Mich. 712, 723, 691 N.W.2d 1, 7 (2005) (footnote omitted)). As Gamrat notes, the Court previously found that the extortion texts could satisfy the elements for a stalking claim but that Gamrat's allegations were not enough to tie Allard and Graham to the texts. *See id.* Gamrat argues that because Cline testified that he saw the extortion texts and knew that information he was providing Joseph Gamrat was getting to the extortionist, Cline is liable for civil stalking.

However, Gamrat's new factual allegation does not rise to the level of a civil stalking claim. Michigan law is clear that a stalking claim rests on a finding of unconsented contact. *See id.* Cline did not send the texts, nor did he direct anyone to send the texts, so there is no allegation of unconsented contact. Furthermore, the portions of Cline's deposition testimony that Gamrat cites do not support her allegation. Cline testified that no one ever told him about the extortion texts but that he saw the content of the extortion messages when Courser publicly posted the messages on Facebook. (Cline Dep. pp. 143-44, 193, 243-45, ECF No. 147-2 at PageID.3592, 3598, 3602.) Cline then stated that once he saw the content of the extortion messages, it appeared that information he was providing to Joseph Gamrat was reaching the extortionist. (*Id.*). Gamrat's new allegations miss the crucial link of unconsented contact between herself and Cline.

Civil Conspiracy

Under Michigan law, "a claim for civil conspiracy requires a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Gamrat*, 320 F. Supp. 3d at 941. To sustain a civil conspiracy claim, "the plaintiff must establish some underlying tortious conduct." *Urbain v. Beierling*, 301 Mich. App. 114, 132, 835 N.W.2d 455, 464 (2013). The Court has already determined that no Defendant violated the wiretapping or eavesdropping statutes. The only tortious conduct that is potentially alleged in this case is that Horr sent the extortion texts. However, while Gamrat alleges that Cline saw the texts and knew that information he was gathering reached the extortionists, the deposition testimony that Gamrat cites states that no one ever told Cline about the extortion texts and he only found out about the messages when Courser posted the messages on Facebook. That is not enough to show concerted action. Because the

added factual allegations from the proposed Second Amended Complaint do not suffice to state a claim for relief, the Court will grant Cline's motion.

III. PLAINTIFF'S MOTIONS FOR RELIEF FROM JUDGMENT AND TO AMEND

Gamrat filed her Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b), seeking relief from the Court's March 15, 2018, which granted several Defendants' motions to dismiss. (ECF No. 138.) She also filed a Motion for Leave to File a Second Amended Complaint that would, if the Court granted relief from its March 15, 2018, Order, allow her to reassert claims against the previously dismissed Defendants and add factual allegations against Cline and others. However, because Gamrat's motions are procedurally improper, the Court will deny both motions.

Rule 60(b) provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding" in six enumerated situations. "[B]y its terms, Rule 60(b) applies only to final judgments." *Mallory v. Eyrich*, 922 F.2d 1273, 1277 (6th Cir. 1991). The dismissal of claims against some but not all defendants—as was the case with the March 15, 2018, Order—is not a final judgment. *Gavitt v. Born*, 835 F.3d 623, 638 (6th Cir. 2016).[4] Thus, Gamrat's motion for relief from judgment pursuant to Rule 60(b) is procedurally improper.

Although Gamrat cannot obtain relief from the Court's March 15, 2018, Order pursuant to Rule 60(b), the Court recognizes that it does have authority under Rule 54(b) to revise its Order. The Court is justified in revising its interlocutory orders when there is: (1) an intervening change in controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice. *Luna v. Bell*, 887 F.3d 290, 297 (6th Cir. 2018). Here, there has been no

[4] Gamrat conceded that the March 15, 2018, Order was not a final order when she voluntarily dismissed her appeal of the order in the Sixth Circuit, recognizing that the Sixth Circuit did not have jurisdiction over a non-final order. (*See* ECF No. 152-1.)

intervening change in controlling law, and Gamrat has not pointed to any clear error from the prior ruling, so the Court will focus on Gamrat's argument with respect to claimed new evidence. As stated above in the analysis of Gamrat's claims against Cline, the new allegations do not support claims for wiretapping/eavesdropping, civil stalking, or conspiracy against anyone other than potentially Defendant Horr. While Gamrat vaguely references evidence of "many audio clips and recordings," she has not offered anything more than conclusory allegations that the recordings were intercepted illegally. (ECF No. 147 at PageID.3520.) Thus, the new evidence is immaterial and does not justify a revision of this Court's previous order.

Because the March 15, 2018, Order dismissed Gamrat's claims against Defendants Allard, Graham, Cotter, Saari, and Swartzle with prejudice and Gamrat has not obtained relief from that Order, she cannot simply amend her complaint to revive claims against the previously dismissed Defendants through a motion to amend.

IV. CONCLUSION

For the foregoing reasons, the Court will **grant** Cline's Motion for Judgment on the Pleadings (ECF No. 131), **deny** Gamrat's Motion for Relief from Judgment (ECF No. 138), and **deny** Gamrat's Motion for Leave to File a Second Amended Complaint (ECF No. 146). An appropriate order will enter.

Dated: July 11, 2019

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX D

Appendix D
18 U.S.C § 2511

Interception and disclosure of wire, oral, or electronic communications prohibited
(1) Except as otherwise specifically provided in this chapter any person who—
(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—
(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or
(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or
(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or
(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or
(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or
(e)(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b)–(c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).
(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public

shall not utilize service observing or random monitoring except for mechanical or service quality control checks.
(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—
(A) a court order directing such assistance or a court order pursuant to section 704 of the Foreign Intelligence Surveillance Act of 1978 signed by the authorizing judge, or
(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order, statutory authorization, or certification under this chapter.
(iii) If a certification under subparagraph (ii)(B) for assistance to obtain foreign intelligence information is based on statutory authority, the certification shall identify the specific statutory provision and shall certify that the statutory requirements have been met.
(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.
(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.
(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.
(f) Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.
(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person—
(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;
(ii) to intercept any radio communication which is transmitted—
(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;
(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;
(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or
(IV) by any marine or aeronautical communications system;

(iii) to engage in any conduct which—
(I) is prohibited by section 633 of the Communications Act of 1934; or
(II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act;

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or
(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(h) It shall not be unlawful under this chapter—
(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title); or
(ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider

furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(i) It shall not be unlawful under this chapter for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser transmitted to, through, or from the protected computer, if—
(I) the owner or operator of the protected computer authorizes the interception of the computer trespasser's communications on the protected computer;
(II) the person acting under color of law is lawfully engaged in an investigation;
(III) the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser's communications will be relevant to the investigation; and
(IV) such interception does not acquire communications other than those transmitted to or from the computer trespasser.

(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.
(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication—
(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;
(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;
(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or
(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.
(b) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted —
(i) to a broadcasting station for purposes of retransmission to the general public; or
(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.
(5)(a)(i) If the communication is—
(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.
(ii) In an action under this subsection—
(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and
(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.
(Added Pub. L. 90–351, title III, §802, June 19, 1968, 82 Stat. 213; amended Pub. L. 91–358, title II, §211(a), July 29, 1970, 84 Stat. 654; Pub. L. 95–511, title II, §201(a)–(c), Oct. 25, 1978, 92 Stat. 1796, 1797; Pub. L. 98–549, §6(b)(2), Oct. 30, 1984, 98 Stat. 2804; Pub. L. 99–508, title I, §§101(b), (c)(1), (5), (6), (d), (f)[(1)], 102, Oct. 21, 1986, 100 Stat. 1849, 1851–1853; Pub. L. 103–322, title XXXII, §320901, title XXXIII, §330016(1)(G), Sept. 13, 1994, 108 Stat. 2123, 2147; Pub. L. 103–414, title II, §§202(b), 204, 205, Oct. 25, 1994, 108 Stat. 4290, 4291; Pub. L. 104–294, title VI, §604(b)(42), Oct. 11, 1996, 110 Stat. 3509; Pub. L. 107–56, title II, §§204, 217(2), Oct. 26, 2001, 115 Stat. 281, 291; Pub. L. 107–296, title II, §225(h)(2), (j)(1), Nov. 25, 2002, 116 Stat. 2158; Pub. L. 110–261, title I, §§101(c)(1), 102(c)(1), title IV, §403(b)(2)(C), July 10, 2008, 122 Stat. 2459, 2474.)

APPENDIX E

APPENDIX E

18 U.S.C § 2520

(a) In General.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.
(b) Relief.—In an action under this section, appropriate relief includes—
(1) such preliminary and other equitable or declaratory relief as may be appropriate;
(2) damages under subsection (c) and punitive damages in appropriate cases; and
(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of Damages.—(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:
(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than and not more than 0.
(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than 0 and not more than 00.

(2) In any other action under this section, the court may assess as damages whichever is the greater of—
(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
(B) statutory damages of whichever is the greater of 0 a day for each day of violation or ,000.

(d) Defense.—A good faith reliance on—
(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;
(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation.—A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

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(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of Damages.—(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:
(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than and not more than 0.
(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than 0 and not more than 00.

(2) In any other action under this section, the court may assess as damages whichever is the greater of—
(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
(B) statutory damages of whichever is the greater of 0 a day for each day of violation or ,000.

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(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;
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