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 6 DAVID FELICIANO

7
 8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 9 FOR THE COUNTY OF LOS ANGELES - CENTRAL
 10

11 CHARLES BRAUTIGAM, an individual

12 Plaintiff,

13 v.

14 EAST WHITTIER CITY SCHOOL
 DISTRICT, a governmental entity created and
 15 existing under the laws of the State of
 California; DAVID FELICIANO, an
 16 individual; and MARY BRANCA, an
 individual,

17 Defendants.
 18

Case No: BC541803
 [ASSIGNED TO HON. SUSAN BRYANT-
 DEASON, DEPT. 52, RM 510)
 (Complaint filed on April 4, 2014)

DATE: December 9, 2014
 TIME: 8:30 a.m.
 DEPT.: 52

**DEFENDANTS DEMURRER TO
 PLAINTIFF'S FIRST AMENDED
 COMPLAINT**

Trial Date: Not Assigned

19
 20 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

21 **PLEASE TAKE NOTICE** that on December 9, 2014 at 8:30 a.m., or as soon thereafter as
 22 counsel can be heard in Department 52 of the above-entitled court located at 111 North Hill Street, Los
 23 Angeles, California 90012, Defendants EAST WHITTIER CITY SCHOOL DISTRICT, DAVID
 24 FELICIANO and MARY BRANCA will bring a Demurrer to the First Amended Complaint for
 25 Damages filed by Plaintiff CHARLES BRAUTIGAM. This Demurrer is made on the following
 26 grounds:

27 ///

28 ///

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DEMURRER

1. Demurrer to the second cause of action for violation of the Federal Wiretap Act for failure to state facts sufficient to constitute a cause of action because the defendants' alleged actions can not constitute "interception" under the act.
2. Demurrer to the third cause of action for Invasion of Privacy for failure to state facts sufficient to constitute a cause of action because plaintiff did not have a reasonable expectation of privacy in the District-owned lap-top which is the subject of this litigation.
3. Demurrer to the fourth cause of action for Violation of *Penal Code* § 502 for failure to state facts sufficient to constitute a cause of action because plaintiff does not allege that defendants bypassed any technical barrier in accessing plaintiff's communications.
4. Demurrer to the fifth cause of action because the California wire-tapping statute applies only to telephone and telegraph lines, not email.

This Demurrer is based upon this notice, the memorandum of points and authorities attached hereto, the pleadings, records, and matter on file in this case and upon such oral and documentary evidence as may be presented at the hearing of this matter.

DATED: September 11, 2014

McCUNE & HARBER, LLP

By: 

DANA JOHN MCCUNE, ESQ.

ADAM J. BESHARA, ESQ.

Attorneys for Defendants, EAST WHITTIER CITY SCHOOL DISTRICT, DAVID FELICIANO AND MARY BRANCA

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. FACTUAL ALLEGATIONS**

3 Plaintiff Charles Brautigam is a teacher at Granada Middle School in Whittier, California. The
4 District provided plaintiff with a laptop computer. While the laptop was to be used primarily for
5 plaintiff's teaching responsibilities, Plaintiff alleges that the District allowed him to use the laptop for
6 personal activities also.

7 Plaintiff occasionally used the laptop to access his personal Gmail and Facebook accounts. The
8 web browser on the laptop automatically saved plaintiff's username and password for Gmail and
9 Facebook.

10 On February 5, 2013, the District placed plaintiff on administrative leave and required plaintiff
11 to immediately return the laptop. Plaintiff alleges that, without plaintiff's knowledge or consent,
12 defendants used the laptop to access plaintiff's personal Gmail and Facebook accounts for the next six
13 months.

14 Plaintiff alleges that defendants reviewed and printed out many of plaintiff's personal
15 communications from both Gmail and Facebook. These communications allegedly included
16 confidential communications between plaintiff and his attorney and between plaintiff and his union
17 representative regarding the administrative leave with the District.

18 Significantly, Plaintiff acknowledges that in January of 2009, he signed East Whittier City
19 School District's ("EWCS D") Employee Acceptable Use Policy, which gave EWCS D the right to
20 review, monitor, and restrict information stored on or transmitted from the laptop. However plaintiff
21 alleges that the policy did not provide EWCS D with any right to access or monitor plaintiff's personal
22 communications stored on or made from other computers or devices.

23 Accordingly, plaintiff has sued the District bringing the following causes of action:

- 24 1. Violation of the Federal Stored Communications Act, 18 U.S.C. 2701;
- 25 2. Violation of Electronic Communications Privacy Act (Wiretap Act), 18 U.S.C. 2511;
- 26 3. Invasion of Privacy;
- 27 4. Violation of *Penal Code* § 502 for unauthorized access of computer data.
- 28 5. Violation of *Penal Code* 631 and 637.2

1 **II. STANDARD FOR SUSTAINING A DEMURRER**

2 A party may object to a Complaint by a demurrer on the ground that the Complaint fails to state
3 facts sufficient to constitute a cause of action. *See Cal. Civ. Proc. Code* §430.10(e) and 430.30. The
4 plaintiff must show that the Complaint alleged facts sufficient to establish every element of each cause
5 of action. *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183 Cal. App. 4th 238,
6 243-244. If the plaintiff failed to plead, or if the Defendants negate, any essential element of a
7 particular cause of action, this court should sustain the demurrer. *Id.*

8
9 **III. DEMURRER TO THE SECOND CAUSE OF ACTION BECAUSE PLAINTIFF**
10 **HAS NOT ALLEGED FACTS SUFFICIENT TO SHOW "INTERCEPTION"**

11 Section 2511 of the Electronic Communications Privacy Act ("The Wiretap Act") outlaws the
12 intercepting of phone calls or other electronic communications unless the intercepting party has court
13 approval or the consent of one of the communicating parties. 18 U.S.C Section 2511(1)(a).

14 The Wiretap Act applies only when the acquisition of the communication is "contemporaneous
15 with transmission." *Konop v. Hawaiian Airlines Inc.*, 302 F3rd 868 (9th Cir. 2002). "The ordinary
16 meaning of the word 'intercept' requires an action that halts the transmission of the messages to their
17 intended recipients." *Bunnell v. Motion Picture Association of America* 567 F Sup. 2nd 1148, 1154 (CD
18 Cal. 2006)

19 In *Bunnell*, defendant was alleged to have set up plaintiff's e-mail such that every e-mail
20 plaintiff sent or received would be immediately forwarded to defendant. Despite the fact that this
21 resulted in defendant receiving simultaneous access to plaintiff's e-mails, the court ruled that this did
22 not constitute "interception" because none of the messages were stopped or seized in transit. *Id.* At
23 1154. See also *Executive Security Management Inc. v. Dahl* 830 F. Sup. 2nd 883 (CD Cal. 2011);
24 *Murray v. Finn Visions Inc.*, 2008 WL 4850328 (DARIZ. Nov. 6, 2008); *Garcia v. Haskett*, 2006 WL
25 1821232 (N.D. Cal. June 30, 2006).

26 Here, plaintiff has made no allegation that defendants ever stopped or seized any of plaintiff's
27 communications in transit. Thus there has been no "interception" under the Wiretap Act and plaintiff
28 has failed to allege facts sufficient to establish his second cause of action.

1 **IV. DEMURRER TO THE THIRD CAUSE OF ACTION FOR FAILURE TO STATE**
2 **FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION BECAUSE**
3 **PLAINTIFF DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY**
4 **IN THE DISTRICT OWNED LAPTOP**

5 "A privacy violation based on the common law tort of intrusion has two elements. First, the
6 defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a
7 reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a
8 reasonable person." *Hernandez v. Hillsides*, 47 Cal. 4th 272, 286 (2009).

9 "As to the first element of the common law tort, the defendant must have 'penetrated some zone
10 of physical or sensory privacy. . . or obtained unwanted access to data' by electronic or other covert
11 means, in violation of the law or social norms. In either instance, the expectation of privacy must be
12 "objectively reasonable" *Sanders v. American Broadcasting Companies*, 20 Cal. 4th 907 (1999).

13 "The second common law element essentially involves a policy determination as to whether the
14 alleged intrusion is 'highly offensive' under the particular circumstances. Relevant factors include the
15 degree and setting of the intrusion, and the intruder's motives and objectives. California tort law
16 provides no bright line on offensiveness; each case must be taken on its facts." *Hernandez v. Hillsides*,
17 *supra*, 47 Cal. 4th App. 287.

18 Employees possess some reasonable expectation of privacy in data stored on work computers.
19 *U.S. v. Ziegler*, 474 F 3rd 1184, 1190 (9th Cir. 2007). But "the use of computers in the employment
20 context carries with it social norms that effectively diminish the employees reasonable expectation of
21 privacy with regard to the use of his employers computers." *TBG Insurance Services Cor. v. Superior*
22 *Court*, 96 Cal. App. 4th 443, 452 (2002).

23 In *TBG Insurance*, an employee used his employer's computer to access sexually explicit
24 material, and was consequently fired. The court held that since employers often monitor employees'
25 computer use and the plaintiff knew his use could be monitored, he lacked any reasonable expectation
26 of privacy. *Id.* At 452.

27 Similarly, in the case at hand, plaintiff had no reasonable expectation of privacy in the laptop
28 which was at all times the property of the District. Plaintiff admittedly signed the District's acceptable

1 use policy giving them the right to review and monitor information stored on or transmitted from the
2 laptop.

3 Furthermore, in *Sheehan v. San Francisco 49ers*, (2009) 45 Cal. 4th 1992, the court held that in
4 order to establish a reasonable expectation of privacy, the plaintiff “must have conducted
5 himself. . . in a manner consistent with an actual expectation of privacy, i.e., he. . . must not have
6 manifested by his. . . conduct a voluntary consent to the invasive actions of the defendant. If voluntary
7 consent is present, a defendant’s conduct will rarely be deemed ‘highly offensive to a reasonable
8 person’ so as to justify tort liability.” *Id.* At p. 1000. This “validity of consent” theory depends on the
9 totality of the circumstances. *Id.*

10 Here, by returning his District-owned laptop without logging out of his e-mail or Facebook,
11 plaintiff did not conduct himself in a manner consistent with an actual expectation of privacy. This is
12 further buttressed by the fact that plaintiff knowingly signed the District’s policy stating that all
13 information stored on and transferred from that computer could be monitored by the District.

14 For these reasons, plaintiff had no reasonable expectation of privacy and this cause of action
15 must fail.

16
17 **V. DEMURRER TO THE FOURTH CAUSE OF ACTION BECAUSE PLAINTIFF**
18 **DOES NOT ALLEGE THAT DEFENDANTS BYPASSED ANY TECHNICAL**
19 **BARRIER IN ACCESSING PLAINTIFFS INFORMATION**

20 California Penal Code 502 makes it a crime for any person to “knowingly access and without
21 permission take, copy, or make use of any data from the computer, computer system, or computer
22 network, or take or copy any supporting documentation, whether existing or residing internal or
23 external to a computer, computer system, or computer network.”

24 Plaintiffs misunderstand section 502(c), which is intended to deter criminal hacking. See
25 *Chrisman v. City of Los Angeles*, 155 Cal. App. 4th 29, 34 (2007) (defining access under section 502(c)
26 in terms of hacking.) Ample case law holds that a defendant violates section 502(c) only by
27 circumventing technical barriers, or otherwise engaging in hacking. See *In re Facebook Privacy Litig.*,
28

1 791 F. Supp. 2d 705, 715-16 (N.D. Cal. 2011); *In re iPhone Application Litig.*, no. 11-MD-02250-
2 LHK, 2011 WL 4403963, at *12-13 (N.D. Cal. July 20, 2010).

3 Here, there is no allegation that defendants circumvented any technical barriers. Plaintiff's
4 Gmail and Facebook accounts were simply saved in the laptop's browser such that anyone who visited
5 those websites on the laptop would stumble upon plaintiff's accounts. Accordingly, plaintiff has not
6 pled sufficient facts to make out a cause of action under this statute.

7
8 **VI. DEMURRER TO THE FIFTH CAUSE OF ACTION BECAUSE PENAL CODE**
9 **631 DOES NOT APPLY TO EMAIL**

10 Penal Code section 631, California's wiretapping law, "penalizes various forms of secret
11 monitoring of conversations. The statute makes punishable '[a]ny person who, by means of any
12 machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any
13 unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with
14 any telegraph or telephone wire, line, cable, or instrument, ... or who willfully and without the consent
15 of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to
16 learn the contents or meaning of any message, report, or communication while the same is in transit ...,
17 or is being sent from, or received at any place within this state...." *Ribas v. Clark* 38 Cal.3d 355, at 359
18 (2006).

19 Plaintiff has failed to state a cause of action because this law is limited to telephone and
20 telegraph claims. *Membrila v. Receivables Performance Mgmt., LLC*, 2010 WL 1407274, at 2 (S.D.
21 Cal. Apr. 6, 2010). There is absolutely no precedent for application of this code section to email. The
22 statute was written for the express legislative purpose of punishing those who impermissibly listen to
23 others' phone conversations¹. "A court is not free to advance the public policy that underlies a statute
24 by extending the statute beyond its plain terms and established reach." See *Moallem v. Coldwell Banker*
25 *Commercial Group, Inc.*, 25 Cal. App. 4th 1827, 1833 (1994).

26 Because this cause of action does not apply to email communications, it must fail.
27

28

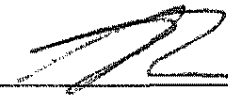
¹ See statement of legislative intent (CA Penal Code 630) which emphasizes the regulation of "Listening devices."

1 **VII. CONCLUSION**

2 Based on the foregoing, the anticipated reply, the court's file and any oral argument made at the
3 hearing, defendants respectfully request that this court sustain the Demurrer without leave to amend.
4

5 DATED: September 11, 2014

McCUNE & HARBER, LLP

6
7 By: 

8 DANA JOHN MCCUNE, ESQ.
9 ADAM J. BESHARA, ESQ.
10 Attorneys for Defendants, EAST WHITTIER
11 CITY SCHOOL DISTRICT; MARY BRANCA
12 AND DAVID FELICIANO
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PROOF OF SERVICE

1
 2 STATE OF CALIFORNIA)
 3)
 4) ss.
 5)
 6 COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action; my business address is 515 South Figueroa Street, Suite 1150, Los Angeles, California 90071.

On September 11, 2014, I served the foregoing document described as **DEFENDANTS DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT**, on the interested parties by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

10 Karl S. Kronenberger
 11 Kronenberger Rosenfeld
 12 150 Post Street, Suite 520
 13 San Francisco CA 94108
 14 Tel (415) 955-1155
 Fax (415) 955-1158
 Attorneys for Plaintiff, CHARLES BRAUTIGAM

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 BY MAIL: I served the documents by enclosing them in an envelope and placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice of collection and processing of correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

 BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the office of the addressee(s).

 X BY FACSIMILE TRANSMISSION: The facsimile machine I used complied with California Rules of Court 2.301 and no error was reported by the machine. Pursuant to rule 2.306(h), I caused the machine to print a record of the transmission, a copy of which is attached to this proof of service.

 X BY OVERNIGHT DELIVERY: I caused the above-referenced document(s) to be delivered via overnight delivery, for delivery to the above address(es).

 X (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

 (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on September 11, 2014, at Los Angeles, California.



 RHIANNA A. GODINEZ