

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

BARRY EPSTEIN, Plaintiff,)	
)	Case No. 1:14-cv-8431
v.)	
)	Judge Thomas M. Durkin
<u>PAULA EPSTEIN, Defendant.</u>)	Magistrate Judge Sheila Finnegan

**DEFENDANTS' ANSWERS AND AFFIRMATIVE DEFENSES
TO PLAINTIFF'S THIRD AMENDED COMPLAINT**

Defendant Paula Epstein, by her attorneys and for her answers and affirmative defenses to plaintiff's third amended complaint, states as follows:

I. ANSWERS

NATURE OF PLAINTIFF'S CLAIMS AND PARTIES

1. This is an action to recover damages caused by Defendant's violation of the Electronic Communications Privacy Act of 1968, 18 U.S.C. § 2510 *et seq.* (the "ECPA"), the United States Stored Communications Act, 18 U.S.C. § 2701 *et seq.* (the "SCA"), and Illinois common law in her attempts to use the accessed e-mails to affect the parties' underlying divorce action, styled *In re the Marriage of: Paula Epstein vs. Barry Epstein*, currently pending before the Circuit Court of Cook County, bearing a docket number of 2011 D 005245 ("underlying divorce").

ANSWER: Plaintiff's description of this action and his claims requires no answer.

Otherwise denied.

2. Plaintiff Barry Epstein is, and at all times relevant hereto has been, a resident of the City of Chicago, County of Cook, State of Illinois, and presently resides therein.

ANSWER: Admitted.

3. Defendant Paula Epstein is, and at all times relevant times hereto has been, a resident of the City of Chicago, County of Cook, State of Illinois.

ANSWER: Paula now lives in Glenview. She lived in Chicago during the time period relevant to this case. Otherwise denied.

4. Defendant no longer resides with Plaintiff, but did so when the actions hereafter complained of occurred.

ANSWER: Admitted.

JURISDICTION AND VENUE

5. This Court has original jurisdiction over Counts I – Electronic Communications Privacy Act (ECPA) and II – Stored Communications Act (SCA) and VI – Temporary and Permanent Injunctive Relief of Plaintiff’s Third Amended Complaint pursuant to 28 U.S.C. § 1331, because these Counts rest upon alleged violations of a federal statute, and thus arise under federal law.

ANSWER: The Court’s subject matter jurisdiction over counts I-II is admitted. Denied that defendant violated any of the statutes on which those claims were based. Otherwise denied.

6. This Court has supplemental jurisdiction over Counts III – Unreasonable Intrusion Upon Seclusion of Another, IV – Intentional Infliction of Emotional Distress (IIED), and V – Trespass to Chattels pursuant to 28 U.S.C. § 1367, because Counts I, II and VI arise under federal law.

ANSWER: Admitted that the allegations under counts III-V qualify for supplemental subject matter jurisdiction. Otherwise denied.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 (b) because Defendant resides in the Northern District of Illinois and a substantial part of the alleged events giving rise to the claims occurred in the Northern District of Illinois.

ANSWER: Admitted that venue is proper in this Court. Otherwise denied.

GENERAL ALLEGATIONS

8. Plaintiff and Defendant were married on June 21, 1970, in Chicago, Illinois, and Defendant filed her Petition for Dissolution of Marriage on May 23, 2011, after forty (40) years of marriage. Plaintiff and Defendant were married over forty-six (46) years until a Judgment for Dissolution of Marriage was entered, effective August 26, 2016, legally divorcing the parties.¹

ANSWER: Admitted.

9. Plaintiff and Defendant at all times maintained separate computers in separate rooms in their marital residence.

¹ The underlying divorce was bifurcated, and the judgement of dissolution was entered while reserving the issues of property division and maintenance, which have yet to be resolved.

ANSWER: Denied.

10. Plaintiff's computers were mostly located in the basement, and in his home office on the home's second floor, from which he conducted his daily business.

ANSWER: Denied.

11. During the parties' entire marriage neither were authorized to use each other's computers or access each other's e-mail accounts without prior express consent from the other spouse.

ANSWER: Denied.

12. Plaintiff utilized his computers in the marital residence not only for private and personal matters, but also to conduct his regular business, and other work-related matters, including but not limited to communicating with his business partners, his attorneys in the underlying divorce, and his Wills, Trust and Estate Planning attorney.

ANSWER: Admitted that plaintiff used the couple's shared home computers to send and receive emails. Otherwise denied.

13. Plaintiff accessed his personal and work e-mail accounts from his computers

ANSWER: Admitted that plaintiff used the couple's shared home computers send and receive emails. Otherwise denied.

14. Defendant intentionally accessed one or more of Plaintiff's computers and gained access to Plaintiff's personal and work e-mail accounts (hereinafter B@) B@yahoo.com, B@rnco.com, and B@att.net without his permission, knowledge, or consent.

ANSWER: Admitted that defendant accessed accounts with corresponding email addresses barryjay_epstein@yahoo.com and bepstein@rnco.com on her home computers that she shared with plaintiff. Otherwise denied.

15. Upon information and belief, Defendant first accessed Plaintiff's e-mail accounts in or before the year 2007.

ANSWER: Admitted that in 2007, on her home computers that she shared with plaintiff, defendant viewed emails which plaintiff received in or sent from accounts which he left open on those shared computers. Otherwise denied.

16. Upon information and belief, Defendant also secretly placed a “rule” into Plaintiff’s e-mail accounts, causing his incoming and/or outgoing e-mails to be automatically forwarded to one or more of Defendant’s e-mail addresses (hereinafter “auto-forwarding rule”).

ANSWER: Denied.

17. Upon information and belief, Defendant’s auto-forwarding rule functioned without Plaintiff’s knowledge, and Plaintiff was unaware that his e-mails were being automatically and simultaneously transmitted to Defendant.

ANSWER: Denied.

18. Defendant caused to be forwarded Plaintiff’s either sent and/or received e-mails from his B@yahoo.com, B@rnco.com, and B@att.net e-mail addresses.

ANSWER: Admitted that when using her home computers that she shared with plaintiff, defendant manually forwarded a limited number of already-transmitted emails from email accounts which plaintiff left open to her email account. Otherwise denied.

19. Defendant caused Plaintiff’s sent and received e-mails to be forwarded to her e-mail accounts (hereinafter P@) P@gmail.com and P@colum.edu.

ANSWER: Admitted that when using her home computers that she shared with plaintiff, defendant manually forwarded a limited number of already-transmitted emails from email accounts which plaintiff left open to her email account. Otherwise denied.

20. Some of the e-mails that Defendant intercepted or otherwise obtained were:

- A. Personal communications between Plaintiff and some of his female colleagues, coworkers, and friends;
- B. Personal communications between Plaintiff and his other family members;
- C. Confidential attorney-client communications between Plaintiff and his divorce attorneys, which contained privileged information and legal strategies regarding the parties’ underlying divorce.
- D. Work and business communications between Plaintiff and his clients, employers, coworkers, colleagues, business partners, and financial advisors.

ANSWER: Denied that defendant intercepted any emails. Admitted that defendant, when using her home computers that she shared with plaintiff, obtained emails between plaintiff and his (a) sexual partners, and a niece of one of those sexual partners, (b) estranged sister, (c) former attorney and her staff, (d) business associates, or (e) financial advisors. Otherwise denied.

21. Defendant intercepted and/or otherwise accessed and obtained these e-mails without the prior consent or knowledge of Plaintiff or any of the other parties to these conversations.

ANSWER: Denied.

22. Defendant intentionally obtained these e-mails in order to use some or all of the information contained therein to gain an unfair financial and tactical advantage in the underlying divorce, and to leverage and extort Plaintiff into agreeing to an inequitable property settlement.

ANSWER: Denied.

23. On or about May 9, 2011, Defendant hired Jay Frank (“Frank”) of Aronberg Goldgehn Davis & Garmisa to represent her in the underlying divorce action with Plaintiff.

ANSWER: Admitted.

24. On May 23, 2011, Defendant filed a Petition for Dissolution of Marriage in the Circuit Court of Cook County, Illinois, Domestic Relations Division, naming Jay Frank of Aronberg, Goldgehn, Davis, & Garmisa as her attorneys of record.

ANSWER: Admitted.

25. Upon information and belief, Defendant disclosed the e-mails that she unlawfully intercepted from Plaintiff’s e-mail accounts, and/or the information from said e-mails, to Frank during or after her initial consultation.

ANSWER: Denied.

26. Upon information and belief Defendant informed Frank as to how she intercepted Plaintiff’s personal e-mails.

ANSWER: Denied.

27. Frank has written, among other articles, at least one article advising potential divorcees about how to use their spouse’s infidelity against their spouse and/or to use the allegations of possible infidelity to embarrass and pressure the other spouse into a favorable divorce settlement for their clients. (See Exhibit A, also *available at*

<http://www.divorcemag.com/articles/jay-frank-answers-my-spouse-has-hadseveral-affairs>)

(“Your husband’s affairs might, however, have some practical effect on the case. He might be more willing to agree to a good financial settlement with you to avoid the embarrassment of a trial exposing his affairs.”)²

ANSWER: Denied.

28. Upon information and belief, Frank advised Defendant that he would use the unlawfully intercepted e-mails between Plaintiff and other female colleagues and/or friends to obtain a better financial settlement in the underlying divorce action.

ANSWER: Denied.

29. Upon information and belief, Frank advised Defendant that he would use the information from Plaintiff’s confidential attorney-client, work, and business e-mails to gain a tactical advantage in the underlying divorce action.

ANSWER: Denied.

30. Upon information and belief, Frank encouraged and instructed Defendant to continue intercepting and otherwise collecting Plaintiff’s e-mails to use against him in the underlying divorce.

ANSWER: Denied.

31. Upon information and belief, Defendant continued intercepting or otherwise accessing Plaintiff’s e-mails through November of 2013, when she moved out of the marital home.

ANSWER: Denied.

32. On or before October 2014, Defendant and/or Frank printed some of the intercepted e-mails on paper and annotated them by hand.

ANSWER: Denied.

33. Upon information and belief, they did this in preparation to use them against Plaintiff in the underlying divorce action and/or in their settlement negotiations.

ANSWER: Denied.

34. Defendant, through her attorney, began using the information from the intercepted e-mails in the underlying divorce as early as 2011, to wit:

² Since 2016, Frank has removed most of these articles and/or said language in his from his online profile pages.

- A. Upon information and belief, conveying the information from Plaintiff's confidential attorney-client, business, financial, and other e-mails to Frank to gain an unfair tactical advantage;
- B. Naming several individuals identified in said intercepted e-mails and accusing Plaintiff of having inappropriate extramarital relations with them in a combined interrogatory and production request. The production request specifically demanded that Plaintiff produce his e-mails with them – the very emails that Defendant unbeknownst to Plaintiff had already intercepted.
- C. Naming several such individuals identified in said intercepted e-mails as witnesses for trial in her witness disclosure statement, so to intimidate, threaten or blackmail Plaintiff;
- D. Subpoenaing to depose one of the females from said intercepted e-mails. The Rider that was attached to the Subpoena insinuated that Plaintiff had an inappropriate relationship with the deponent;
- E. Using allegations of infidelity, as derived from said intercepted e-mails, to support Defendant's claims of maintenance and dissipation.

ANSWER: Defendant's divorce pleadings and disclosures are admitted, and speak for themselves. Otherwise denied.

35. Plaintiff was extremely humiliated by Defendant's allegations of infidelity, including the above subpoena to one of his former coworkers from approximately thirty (30) years prior.

ANSWER: Denied.

36. On October 8, 2014, Plaintiff's attorney in the underlying divorce action, Nejla Lane (hereinafter "Lane") of Lane Legal Services, P.C., propounded upon Frank an updated Request to Produce Documents in the underlying divorce.

ANSWER: Admitted.

37. The said Request to Produce Documents asked for "[a]ny and all communications, documents, e-mails, text messages, photographs, notes, credit card slips, bank statements, or other document whatsoever, which allegedly relate to infidelity as alleged by Paula Epstein or otherwise extramarital relationship".

ANSWER: Admitted.

38. In response to said Request to Produce, Frank and Defendant disclosed printed copies of some of the e-mails she intercepted from Plaintiff, which were annotated and “Bates stamped” by Frank’s law firm.

ANSWER: Admitted that defendant’s attorney produced Bates-stamped documents in response to plaintiff’s requests to produce. Otherwise denied.

39. The produced photocopies did not include all of the original e-mails, such as the e-mails showing when Defendant had caused them to be forwarded from one of Plaintiff’s accounts to her own e-mail account.

ANSWER: Admitted that when using her home computers that she shared with plaintiff, defendant manually forwarded a limited number of already-transmitted emails from email accounts which plaintiff left open to her email account. Admitted that the emails that defendant produced to plaintiff in October 2014 were not all of such emails. Otherwise denied.

40. Plaintiff was enraged after learning his private e-mail conversations were intruded into and disclosed to third persons.

ANSWERS: Denied.

41. Due to the foregoing, highly offensive and objectionable conduct by Defendant and Frank, Plaintiff suffered severe mental anguish and could not stop thinking about this gross violation of his rights.

ANSWER: Denied.

42. Upon learning that his personal, private, and confidential communications with third parties had been taken and disclosed to other individuals, including Frank, Plaintiff could not concentrate on anything other than protecting and enforcing his rights, and specifically was largely unable to conduct his normal career activities, resulting in a material diminution of his income earning ability.

ANSWER: Denied.

43. Plaintiff filed the instant lawsuit on October 27, 2014 – three days after learning of the foregoing actions.

ANSWER: Admitted that this lawsuit was filed on October 27, 2014. Otherwise denied.

COUNT I

(Violation of 18 U.S.C. § 2511 – The Electronic Communications Privacy Act)

44. Plaintiff incorporates Paragraphs 1 through 43 as though fully set forth herein.

ANSWER: Defendant incorporates by reference her answers to paragraphs 1-43.

45. At all relevant times herein, The Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.* was in full force and effect and governed the acquisition and disclosure of electronic communications transmitted by electronic communications services.

ANSWER: The statute and its effective dates are admitted. Otherwise denied.

46. At all relevant times herein, 18 U.S.C. § 2511 prohibited the intentional interception, disclosure, use, or endeavoring to use the contents of any electronic communications between two parties without the consent of one or both of the parties to that communication.

ANSWER: The statute and its effective dates are admitted. Otherwise denied.

47. Defendant intentionally intercepted Plaintiff's electronic communications, i.e., e-mails, without his consent or the consent of any other parties to said communications, thereby violating 18 U.S.C. § 2511 (1)(a).

ANSWER: Denied.

48. Defendant intentionally disclosed or endeavored to disclose Plaintiff's electronic communications, i.e. e-mails, to Frank and, upon information and belief, to others, without Plaintiff's consent, while knowing or having reason to know that the information was obtained through the interception of wire, oral or electronic communication in violation of 18 U.S.C. § 2511 (1)(c).

ANSWER: Denied.

49. Defendant intentionally used, or endeavored to use, the contents of Plaintiff's electronic communications, i.e., e-mail, in helping Frank prepare her case in the underlying divorce action, while knowing or having reason to know that the information was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. § 2511 (1)(d).

ANSWER: Denied.

50. Pursuant to 18 U.S.C. § 2520, Plaintiff is entitled to relief for the Defendant's violations of 18 U.S.C. § 2511 (1)(a), (c), and (d).

ANSWER: Denied.

WHEREFORE, the Court should enter judgment on count I in favor of defendant and against plaintiff, dismiss count I with prejudice, and award defendant costs and any other just and appropriate relief.

COUNT II
(Violation of 18 U.S.C. § 2701 – The Stored Communications Act)

51. Plaintiff incorporates Paragraphs 1 through 43 as though fully set forth herein.

ANSWER: Defendant incorporates by reference her answers to paragraphs 1-43.

52. At all relevant times herein, The Stored Communications Act, 18 U.S.C. § 2701 *et seq.* was in full force and effect and governed the accessing of facilities through which electronic communication service is provided.

ANSWER: The statute and its effective dates are admitted. Otherwise denied.

53. At all relevant times herein, 18 U.S.C. § 2701(a) prohibited the intentional unauthorized accessing of a facility through which an electronic communication service is provided whereby an individual obtains access to an electronic communication which is in electronic storage in such system.

ANSWER: The statute and its effective dates are admitted. Otherwise denied.

54. From June 2007 through at least 2013, Defendant violated 18 U.S.C. § 2701(a) by intentionally and without Plaintiff's authorization repeatedly accessing his electronic communications, i.e., e-mails, while said communications were in electronic storage with the e-mail providers.

ANSWER: Denied.

55. Pursuant to 18 U.S.C. § 2707, Plaintiff is entitled to relief for the Defendant's violations of 18 U.S.C. § 2701(a).

ANSWER: Denied.

WHEREFORE, the Court should enter judgment on count II in favor of defendant and against plaintiff, dismiss count II with prejudice, and award defendant costs and any other just and appropriate relief.

COUNT III
(Unreasonable Intrusion Upon the Seclusion of Another)

56. Plaintiff incorporates Paragraphs 1 through 43 as though fully set forth herein.

ANSWER: Defendant incorporates by reference her answers to paragraphs 1-43.

57. Defendant intentionally and without authorization intruded upon Plaintiff's seclusion by her above-described conduct in unlawfully intercepting and obtaining Plaintiff's private conversations with third parties.

ANSWER: Denied.

58. Plaintiff had an expectation of privacy in his e-mail servers because he reasonably believed they were secure and that only authorized users could access the e-mails.

ANSWER: Denied.

59. Defendant's intentional intrusion upon Plaintiff's seclusion was offensive and highly objectionable to him and would be offensive or objectionable to any reasonable person.

ANSWER: Denied.

60. That the intrusion caused Plaintiff mental and physical health issues, including but not limited to humiliation, anguish, and suffering such that he could not concentrate on anything besides the intrusion.

ANSWER: Denied.

61. The effects of this intrusion are on-going and Plaintiff continues to feel humiliated and uncertain as to the extent to which his private messages are being viewed and transmitted to third parties.

ANSWER: Denied.

62. Plaintiff was particularly anguished such that he was unable to focus on his work because it was none other than his wife who illegally obtained access to these private e-mails, which proximately caused material harm to his professional career, which since has ended.

ANSWER: Denied.

63. Plaintiff is entitled to relief for Defendant's tortious intrusion upon his seclusion.

ANSWER: Denied.

WHEREFORE, the Court should enter judgment on count III in favor of defendant and against plaintiff, dismiss count III with prejudice, and award defendant costs and any other just and appropriate relief.

COUNT IV
(Intentional Infliction of Emotional Distress)

64. Plaintiff incorporates Paragraphs 1 through 43 as though fully set forth herein.

ANSWER: Defendant incorporates by reference her answers to paragraphs 1-43.

65. Defendant's unauthorized access, use, and disclosure of Plaintiff's personal e-mails was extreme and outrageous.

ANSWER: Denied.

66. Defendant intended to cause emotional distress to Plaintiff by using or causing his e-mails to be used against him to embarrass and humiliate him and third parties in the parties' underlying divorce action as described above.

ANSWER: Denied.

67. As mentioned *supra* Plaintiff did in fact suffer severe and extreme emotional distress upon learning of the unauthorized access of his e-mails and Defendant's use and disclosure.

ANSWER: Denied.

68. Defendant's unauthorized access, use, and disclosure of said e-mails actually and proximately caused Plaintiff's emotional distress, and Plaintiff is entitled to relief.

ANSWER: Denied.

WHEREFORE, the Court should enter judgment on count IV in favor of defendant and against plaintiff, dismiss count IV with prejudice, and award defendant costs and any other just and appropriate relief.

COUNT V
(Trespass to Chattels)

69. Plaintiff incorporates Paragraphs 1 through 43 as though fully set forth herein.

ANSWER: Defendant incorporates by reference her answers to paragraphs 1-43.

70. At all relevant times herein, Plaintiff held a possessory interest in his e-mails, the intrinsic value of which was based in part upon the confidential and private nature of the communications.

ANSWER: Denied.

71. Through her actions, Defendant intentionally intermeddled with Plaintiff's possessory interest in his e-mails.

ANSWER: Denied.

72. By intermeddling with Plaintiff's e-mails, Defendant dispossessed Plaintiff of the confidential and private aspects of said communications and used the information contained therein for her personal and professional gain thereby impairing the condition, quality and value of Plaintiff's property.

ANSWER: Denied.

73. By reason of the said trespass, Defendant conducted herself in a manner that was malicious, oppressive, outrageous, willful, wanton, reckless, and abusive so as to entitle Plaintiff to compensatory and punitive damages.

ANSWER: Denied.

WHEREFORE, the Court should enter judgment on count V in favor of defendant and against plaintiff, dismiss count V with prejudice, and award defendant costs and any other just and appropriate relief.

COUNT VI
**(Temporary and Permanent Injunctive Relief Pursuant to
18 U.S.C. § 2520(b), 18 U.S.C. § 2707(b))**

74. Plaintiff incorporates Paragraphs 1 through 43 as though fully set forth herein.

ANSWER: Defendant incorporates by reference her answers to paragraphs 1-43.

75. As direct and proximate result of Defendant's conduct as described herein, Plaintiff has suffered irreparable harm through the loss of his confidential and private electronic communications. Given that the parties are currently litigating the marital property division portion of the underlying divorce, Defendant's misappropriation, possession and continued use and disclosure of the confidential information gained in violation of state and federal law poses a

substantial risk of irreparable harm. The total loss to Plaintiff in economic terms cannot be accurately measured at the time.

ANSWER: Denied.

76. Plaintiff has a substantial likelihood of success on the merits of his claims. In addition, the magnitude of the injury being suffered due to Defendant's unlawful conduct heavily outweighs whatever hardship Defendant could allege or prove from being restrained as requested.

ANSWER: Denied.

77. The granting of the injunctive relief requested herein will not adversely affect any public policy or public interest.

ANSWER: Denied.

78. Injunctive relief, as an equitable remedy, is authorized by 18 U.S.C. § 2520(b), and 18 U.S.C. § 2707(b), and as such Plaintiff need not demonstrate an irreparable injury or inadequacy of other remedies, but merely show a *prima facie* case of illegality and that an injunction would fulfill the legislative purpose of the statute. A temporary restraining order and preliminary injunction will fulfill the purpose of these statutes.

ANSWER: Denied.

79. At this point, Plaintiff has no adequate remedy at law and is suffering immediate, imminent, and irreparable harm. Should Defendant's actions in using and disclosing the communications and information illegally obtained continue unabated, they will continue to harm Plaintiff's ability to proceed in the underlying divorce as well as impact his privacy interests.

ANSWER: Denied.

80. Further, a substantial risk exists that in the absence of an appropriate order directing Defendant to preserve material evidence, Defendant will destroy or conceal evidence supporting the claims contained in this Complaint. Specific items at risk of spoliation include, but are not limited to: digital storage devices; computer hard drives; files stored on-line; stored e-mails; downloaded e-mails and any attachments thereto; correspondence or memoranda summarizing the contents of Plaintiff's e-mails. Given that much of the evidence at issue is likely to be in digital format, the risk of loss through inadvertence, accident, or deliberate action is heightened. In the event that such evidence is lost, mishandled or destroyed, Plaintiff's ability to establish his claims and damages will be threatened with irreparable harm.

ANSWER: Denied.

81. Issuance of a temporary restraining order requiring Defendant to preserve all material evidence in their care, custody or control would aid in fulfilling the remedial purposes articulated in 18 U.S.C. § 2520(c) and 18 U.S.C. § 2707(c).

ANSWER: Denied.

82. As to the requirement of a bond, the Court should set a minimum bond amount of no more than \$100.00 on the grounds that the relief being sought will not cause damage to Defendant in that Defendant have no legal right to possess, disclose or use Plaintiff's electronic communications or materials derived therefrom.

ANSWER: Denied.

83. Accordingly, Plaintiff requests a temporary restraining order and temporary injunction against Defendant, her agents, servants, employees and those persons in active concert or participation with her, from:

- A. Deleting, altering, destroying or removing any e-mails or electronic communications directly or indirectly originating from Plaintiff's e-mail accounts, i.e., B@yahoo.com, B@rnco.com, and B@att.net;
- B. Deleting, altering, destroying, or removing any e-mails or electronic communications directly or indirectly originating from Defendant's e-mail accounts, i.e., P@gmail.com and P@colum.edu;
- C. Deleting, altering, destroying or removing any hard copy of any e-mails or electronic communications or attachments thereto which directly or indirectly originated from Plaintiff's e-mail accounts, i.e., B@yahoo.com, B@rnco.com, and B@att.net;
- D. Deleting, altering, destroying or removing any summary of any e-mails or electronic communications or attachments thereto which directly or indirectly originated from Plaintiff's e-mail accounts, i.e., B@yahoo.com, B@rnco.com, and B@att.net;
- E. Directly or indirectly using or disclosing any information contained within any of Plaintiff's electronic communications or documents attached to any such electronic communications that Defendant may have received;

ANSWER: Denied, including all subparagraphs, which are specifically denied.

84. Plaintiff further requests that the Court enter Temporary Restraining Orders requiring:

- A. Defendant to preserve any and all evidence of any disclosure or dissemination of Plaintiff's electronic communications or any information contained therein;
- B. Defendant to preserve any and all portable or fixed electronic storage devices, including but not limited to, hard drives, floppy disks, on-line storage, thumb or zip

drives, compact disks or flash drives, containing e-mails or electronic communications directly or indirectly originating from Plaintiff's e-mail accounts, i.e., B@yahoo.com, B@rnco.com, and B@att.net, or any e-mail account utilized by Defendant, or any summaries of information derived from Plaintiff's e-mails or electronic communications which may contain evidence of any disclosure or dissemination of Plaintiff's electronic communications or any information contained therein;

- C. That pending further order of this Court, all items and materials covered by this order shall be preserved in such a manner as to maintain the integrity of the data, including all associated meta-data existing as of the date of this order;

ANSWER: Denied, including all subparagraphs, which are specifically denied.

85. The Temporary Restraining Order, as requested above, is warranted in that it would be of assistance in preserving the status quo.

ANSWER: Denied.

WHEREFORE, the Court should enter judgment on count VI in favor of defendant and against plaintiff, dismiss count VI with prejudice, and award defendant costs and any other just and appropriate relief.

II. AFFIRMATIVE DEFENSES

Defendant Paula Epstein, by her attorneys and for her affirmative defenses to plaintiff's third amended complaint, states as follows:

1. Plaintiff and defendant were married in 1970. They lived together between then and November 2013.
2. Defendant sued plaintiff for divorce in May 2011. That divorce case is pending.
3. All of the computers in their home were marital property, and defendant had the right to use and control all of them. 750 ILCS 5/503(b)(1).
4. Plaintiff and defendant shared the use of computers in their home.
5. On those shared home computers, plaintiff used email accounts created by Yahoo, Russel Novak & Company, and AT&T.

6. Plaintiff testified at his deposition that he did not own the Russell Novak account.

7. Using those email accounts, plaintiff carried on adulterous relationships with at least three women. One of those women directly acknowledged to defendant her sexual relationship with plaintiff in and after 2005. Another of the women exchanged romantic and intimate emails with plaintiff in 2011, and plaintiff paid close attention paid to her in 2009 and 2010 while she worked as his dying mother's caretaker. The third woman admitted to sexual intercourse with plaintiff while he was still married to defendant.

8. Adultery is against Illinois public policy. *See* 720 ILCS 5/11-35; *see also Epstein v. Epstein*, 843 F.3d 1147, 1152-53 (7th Cir. 2016) (Posner, J., concurring). Further, alienation of affections and criminal conversation were against Illinois public policy during the relevant time period. *See, e.g., Murphy v. Colson*, 2013 IL App (2d) 130291, ¶ 16.

9. Plaintiff often did not log out of the email accounts after using them on the home computers he shared with defendant.

10. Plaintiff also stored his login information (i.e., username and password) on the login page for each of the email accounts, and/or on the home computers he shared with defendant.

11. Accordingly, defendant was able to view plaintiff's emails on their shared home computers without any appreciable effort to access them.

12. On July 14, 2011, the federal court in *In re Mirabellis Ventures, Inc.*, Case No. 6:09-cv-271-Orl-31DAB (U.S. Dist. Ct. M.D. Fla.) publicly excluded plaintiff's opinion testimony due to his report and testimony failing to meet the standards for expert testimony under Fed. R. Evid. 702. *See* 2011 WL 2784105.

13. This public criticism and exclusion of plaintiff's work by a federal judge was a superseding and/or intervening cause of the "harm" to plaintiff's professional career, which plaintiff alleged in paragraph 60 above.

14. On December 16, 2016, plaintiff sent defendant an extortionate email, in which he threatened criminal accusations against defendant regarding her alleged unauthorized access of emails, unless she agreed to an unfavorable settlement in the divorce case. (Exhibit 1).

15. Similarly, on January 23, 2017, plaintiff again threatened defendant, in a meeting at his home in Chicago, that he would pursue criminal accusations against defendant regarding her alleged unauthorized access of emails, unless she agreed to an unfavorable settlement in the divorce case. Such threats amounted to intimidation and extortion.

16. Extortion is against Illinois public policy. *See* 720 ILCS 5/12-6.

17. Additionally, in his 12/16/16 email, plaintiff said, among other things, that "years ago I explicitly told you about the illegality of breaching electronic communications." (Ex. 1).

18. Further, in an August 12, 2011 email (exhibit 2),³ plaintiff said to a woman with whom he had a relationship that, in part, "[m]y e-mail is definitely being compromised."

19. Plaintiff sent this email after defendant questioned him about the specific woman with whom he was exchanging romantic emails. (*See, e.g.*, 6/17/11 email from defendant to plaintiff, exhibit 3, the first name of the woman is redacted).

20. Defendant also revealed to plaintiff, orally and in writing before October 28, 2012 (the date two years before plaintiff filed this lawsuit on October 27, 2014), detailed information about his extramarital relationships that were contained in his emails with those other women. (*See, e.g.*, 10/21/08 email from defendant to plaintiff, exhibit 4, third-parties' names redacted).

³ The third-party's name and email address have been redacted per the Court's 1/27/17 Order (R. 71).

21. Accordingly, prior to October 28, 2012, plaintiff knew or had reason to know, and/or discovered or had a reasonable opportunity to discover, that defendant “intercepted” and/or accessed emails on their home computers.

22. Further, many of the emails described in plaintiff’s third amended complaint were not at issue in any of his prior complaints, and do not relate back to any of those pleadings under Fed. R. Civ. Proc. 15(c).

23. In his 10/27/14 original complaint, plaintiff referred only to “a sum total of 47 illegally obtained documents.” (R. 1, ¶ 18).

24. In his 1/12/15 first amended complaint, plaintiff indicated that all of the “intercepted communications” were attached as exhibit C. (R. 22, ¶ 30).

25. In his 1/27/17 third amended complaint, plaintiff did not refer to or describe the email categories set forth in paragraphs 16(B), (C), or (D) of the third amended complaint.

26. Accordingly, and at a minimum, the emails described in paragraphs 16(B), (C), and (D) of the third amended complaint did not arise out of the conduct, transaction, or occurrence set out or attempted to be set out in the prior complaints.

27. Plaintiff’s unreasonable delay in bringing suit has prejudiced defendant in several ways, including but not limited to:

- a. Plaintiff may have disposed of the computers which defendant allegedly accessed to intercept or access emails, thus preventing forensic analysis and proof that (i) plaintiff consented to such interception and/or access, and (ii) defendant did not intercept any emails contemporaneously with their initial transmissions;
- b. The other women with whom plaintiff was emailing deleted most if not all of the emails that plaintiff sent to them, thus preventing proof that (i) such emails were not intercepted contemporaneously with their transmission (*see Epstein, supra*, 843 F.3d at 1150-51, determining interception of emails plaintiff sent to other women requires evidence of when those emails were received), and (ii) plaintiff’s emails with them contravened public policy;

- c. The electronic communications providers (i.e. Yahoo, Russell Novak) deleted or discarded the emails that were allegedly intercepted or accessed, thus preventing proof of the times they were intercepted and/or accessed;
- d. The allegedly intercepted and/or accessed emails were otherwise deleted or discarded by the parties or otherwise prior to any reasonable anticipation of litigation regarding them;
- e. The parties' memories regarding the transmission, interception, and/or accessing the emails may have irretrievably faded, thus preventing proof regarding their interception and/or access; and/or
- f. Other prejudice resulting from plaintiff's unreasonable delay in bringing suit after discovering, or a reasonable opportunity to discover, defendant's interception and/or access of plaintiff's emails.

28. On information and belief, based in part on his responses to defendant's discovery requests, plaintiff disposed of (a) the computers with which defendant allegedly intercepted and/or accessed his email accounts, or (b) emails which defendant allegedly intercepted and/or accessed.

29. His computers and the original electronic emails were necessary evidence regarding the propriety of defendant's alleged interception and/or access of those emails, and of defendant's access of those computers.

30. But for plaintiff's destruction or discarding those computers and emails, defendant had a reasonable probability of succeeding in this suit.

31. In addition, on January 12, 2015, plaintiff voluntarily published many of the emails which defendant allegedly intercepted and/or accessed.

32. Plaintiff did not seek to seal those emails at that time, or within a reasonable time thereafter, even though (a) defendant argued in her 3/20/15 motion to dismiss reply that such publication constituted a waiver of any privacy rights, and (b) the Court, in its 4/20/15 opinion, noted its confusion as to why plaintiff published the emails when he also alleged they were private.

FIRST AFFIRMATIVE DEFENSE – STATUTE OF LIMITATIONS

33. Defendant incorporates by reference her allegations in paragraphs 1-32 above.

34. Plaintiff claimed in his third amended complaint that defendant intercepted and/or accessed his emails between 2007 and March 2012.

35. Plaintiff first filed suit regarding such interception or access on October 27, 2014.

36. The statute of limitations for count I is “two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.” 18 U.S.C. § 2520(e).

37. The statute of limitations for count II is “two years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation.” *Id.*, § 2707(d).

38. The statute of limitations for count III is one or five years.

39. The statute of limitations for count IV is two years.

40. The statute of limitations for count V is five years.

41. Accordingly, plaintiff’s claims are barred by the statutes of limitations.

42. In addition, plaintiff’s claims in his third amended complaint regarding emails that he did not attach or refer to in his original complaint, first amended complaint, and/or second amended complaint do not relate back under Fed. R. Civ. Proc. 15(c).

43. Such emails do not arise out of the conduct, transaction, or occurrence set out or attempted to be set out in the prior complaints.

44. Rather, defendant obtained such emails at different times, in different manners, and from different addresses as those at issue in plaintiff’s prior complaints.

45. Accordingly, plaintiffs’ claims regarding such emails are barred by the statutes of limitations, and do not relate back to prior pleadings under Rule 15(b).

SECOND AFFIRMATIVE DEFENSE - LACHES

46. Defendant incorporates by reference her allegations in paragraphs 1-32 above.

47. In and before 2011, plaintiff discovered or had the opportunity to discover his claims regarding defendant's interception and/or access of his emails.

48. Plaintiff unreasonably delayed in bringing suit on such conduct.

49. Plaintiff's unreasonable delay prejudiced defendant.

50. Plaintiff's claims are thus barred by *laches*.

THIRD AFFIRMATIVE DEFENSE – LACK OF STANDING

51. Defendant incorporates by reference her allegations in paragraphs 1-32 above.

52. Plaintiff testified at his deposition that he did not own the Russell Novak & Company account that he used.

53. Thus, plaintiff lacks standing to assert any privacy or other legal rights to the emails he sent from or received in that account.

FOURTH AFFIRMATIVE DEFENSE – CONSENT / LICENSE

54. Defendant incorporates by reference her allegations in paragraphs 1-32 above.

55. Plaintiff failed to log out of his email accounts on his and defendant's shared home computers.

56. Plaintiff stored his email accounts' login information on his email accounts login pages, and/or on his and defendants' shared home computers.

57. Defendant was thus able to access plaintiff's email accounts on her home computer shared with plaintiff without any appreciable effort.

58. Plaintiff knew or had reason to know that defendant could access his email accounts on their shared home computers with no appreciable effort.

59. Accordingly, plaintiff consented to defendant's interception and/or access of his email accounts on their shared home computers.

FIFTH AFFIRMATIVE DEFENSE - WAIVER

60. Defendant incorporates by reference her allegations in paragraphs 1-32 above.

61. Plaintiff indicated to defendant that he knew or had reason to know that defendant intercepted and/or accessed his email accounts.

62. Plaintiff also voluntarily published many of his emails.

63. By his words and conduct, plaintiff intentionally relinquished any rights he had in his emails or email accounts vis-à-vis defendant.

64. Accordingly, plaintiff's claims are barred by waiver.

SIXTH AFFIRMATIVE DEFENSE - ESTOPPEL

65. Defendant incorporates by reference her allegations in paragraphs 1-32 above.

66. Plaintiff indicated to defendant that he knew or had reason to know that defendant intercepted and/or accessed his email accounts.

67. Plaintiff's inaction in bringing suit or asserting his rights on such alleged interception and/or accessed led plaintiff to believe that he would not assert any such rights.

68. Plaintiff's inaction in bringing suit thus prejudiced defendant.

69. Accordingly, plaintiff's claims are barred by estoppel.

SEVENTH AFFIRMATIVE DEFENSE – ILLEGALITY / CONTRARY TO PUBLIC POLICY

70. Defendant incorporates by reference her allegations in paragraphs 1-32 above.

71. Plaintiff's relationships with the other women were against public policy.

72. Plaintiff's attempts to protect his interests in the emails by which he carried on those relationships thus contradict public policy.

73. Plaintiff also intimidated and extorted Paula in connection with his emails by unjustifiably threatening to report her to law enforcement authorities unless she accepted an unfavorable settlement in their divorce case.

74. Accordingly, plaintiff's claims are barred by the illegality of his conduct, and/or that his conduct was against public policy.

EIGHTH AFFIRMATIVE DEFENSE – UNCLEAN HANDS

75. Defendant incorporates by reference her allegations in paragraphs 1-32 above.

76. Plaintiff's relationships with the other women were against public policy.

77. Plaintiff's attempts to protect his interests in the emails by which he carried on those relationships thus contradicts public policy.

78. There is a direct nexus between plaintiff's conduct and his claims in his suit.

79. Accordingly, plaintiff's claims are barred by his unclean hands.

NINTH AFFIRMATIVE DEFENSE – SPOILIATION OF EVIDENCE

80. Defendant incorporates by reference her allegations in paragraphs 1-32 above.

81. Plaintiff knew or had reason to know that defendant accessed his emails.

82. Plaintiff had a duty to preserve evidence regarding defendant's conduct.

83. Plaintiff destroyed or discarded evidence regarding defendant's conduct.

84. But for plaintiff's destruction or discarding such evidence, defendant had a reasonable probability of succeeding in this lawsuit.

85. Accordingly, plaintiff's claims are barred by his spoliation of evidence.

TENTH AFFIRMATIVE DEFENSE - FRAUD

86. Defendant incorporates by reference her allegations in paragraphs 1-32 above.

87. Defendant had legal rights to exclusive marital relations with plaintiff.

88. Plaintiff fraudulently misrepresented and/or concealed his extramarital relations from defendant, and intended that she rely on his misrepresentations and concealment.

89. Defendant justifiably relied on plaintiff's misrepresentations and concealment.

90. Defendant suffered damages as a result of his misrepresentations and concealment.

91. Accordingly, plaintiff's claims are barred by his fraud.

ELEVENTH AFFIRMATIVE DEFENSE – SUPERSEDING / INTERVENING CAUSE

92. Defendant incorporates by reference her allegations in paragraphs 1-32 above.

93. The federal court in *In re Mirabellis Ventures* publicly criticized and excluded plaintiff's opinion testimony. 2011 WL 2784105.

94. Such public criticism and exclusion proximately caused damage to plaintiff's professional career, and was a superseding and/or intervening cause of such damage.

TWELFTH AFFIRMATIVE DEFENSE – FAILURE TO STATE CLAIMS

95. Count I, for violation of the Electronic Communications Privacy Act, 18 U.S.C. § 2501 *et seq.*, failed to state a claim because, among other reasons, (a) the computers which defendant accessed were marital property, to which she had an equal right of access and control, (b) plaintiff failed to sufficiently allege that defendant intercepted plaintiff's emails contemporaneously with their initial transmissions.

96. Count II, for violation of the Stored Communications Act, 18 U.S.C. § 2701 *et seq.*, failed to state a claim because, among other reasons, (a) the computers which defendant accessed were marital property, to which she had an equal right of access and control, and (b) defendant's alleged use of such emails is irrelevant under the Stored Communications Act.

97. Count III, for unreasonable intrusion upon the seclusion of another, failed to state a claim because, among other reasons, (a) the computers which defendant accessed were marital

property, to which she had an equal right of access and control, (b) plaintiff voluntarily published emails with his first amended complaint, thus waiving any privacy interests he had in those emails, and (c) plaintiff did not allege any cognizable damages.

98. Count IV, for intentional infliction of emotional distress, failed to state a claim because, among other reasons, (a) the computers which defendant accessed were marital property, to which she had an equal right of access and control, (b) plaintiff did not allege that defendant intended to cause plaintiff emotional distress, (c) plaintiff did not allege extreme and outrageous conduct, and (d) plaintiff did not allege severe emotional distress.

99. Count V, for trespass to chattels, failed to state a claim because, among other reasons, (a) the computers which defendant accessed were marital property, to which she had an equal right of access and control, and (b) plaintiff's emails are intangible, for which a trespass to chattels claim does not apply.

100. Count VI, for injunctive relief, is not a recognized cause of action.


WHEREFORE, the Court should enter judgment in favor of defendant and against plaintiff on plaintiff's claims, dismiss such claims with prejudice, and award defendant costs and any other just and appropriate relief.

DATE: May 24, 2017

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Respectfully submitted,

PAULA EPSTEIN, defendant.

By: 

Scott A. Schaefers, one of her attorneys

CERTIFICATE OF SERVICE

Scott A. Schaefer, an attorney for defendant Paula Epstein, certifies that on **May 24, 2017**, he caused these **Answers and Affirmative Defenses to Plaintiff's Third Amended Complaint** to be served on counsel of record via the Court's ECF system.

A handwritten signature in black ink, appearing to read "Scott Schaefer", written over a horizontal line.

Scott A. Schaefer