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October 27, 2022

**Via ECourts**

**Hon. Louis S. Sceusi J.S.C.  
Superior Court of New Jersey  
Morris County Courthouse  
Washington and Court Streets  
Morristown, NJ 07960**

**Re: Kanarek v. Barisone et.al  
Docket No.: MRS-L-2250-19**

Dear Judge Sceusi:

We represent Plaintiff in the above matter. Please accept this letter in opposition to Defendant Michael Barisone's motion to for leave to file an amended answer. The motion is currently returnable before Your Honor on November 4, 2022. This Court should deny Defendant's motion.

**FACTUAL SUMMARY**

Defendant Michael Barisone (hereinafter "Barisone" or "Defendant"), a medalist in the 2008 Summer Olympic Games in Beijing, agreed to train Plaintiff and her horses at his Long

Valley equestrian center. However, the relationship quickly soured, and following a long campaign of harassment and intimidation against Plaintiff, at approximately 2:15 pm on August 7, 2019, Defendant confronted Plaintiff at the farmhouse at 411 W. Mill Road, Long Valley, New Jersey. During that conversation, Barisone took out a handgun and shot Plaintiff in the chest multiple times at point-blank range.

Barisone was arrested and charged with multiple counts of attempted murder and weapons offenses. At Barisone's criminal trial, the jury determined that Barisone was not criminally responsible for his attempted murder due to insanity. However, it is undisputed that Barisone committed an assault and battery against Plaintiff, causing Plaintiff to suffer grievous injuries.

Defendant now brings this motion to amend his Answer and Counterclaim. Defendant's proposed Amended Complaint and Counterclaim seeks to revise his Answer and add a Count to the Counterclaim for "Civil Action for Damages Arising From Unlawful Recording of Private Conversations".

However, the motion must be denied. Defendant provides no explanation as to why the proposed changes were not made in his original pleadings or what necessitated the amendments. Further, Defendants proposed additional counterclaim is futile as it is facially deficient as a matter of law.

## Legal Argument

### I. The Motion To Amend the Answer Should be Denied

#### A. Legal Standard to Amend Pleadings

Amendments are governed by R. 4:9-1, and while motions to amend are liberally granted, the decision lies within the discretion of the Court. Kernan v. One Washington Park Urban Renewal Associates, 154 N.J. 437, 456-457 (1998). "That exercise of discretion requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006). If an amended pleading would fail as a matter of law, it is within the Court's discretion to deny leave to amend. Interchange State Bank v. Rinaldi, 303 N.J. Super. 239 (App. Div. 1997) ("Significantly, 'courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law.'" quoting Mustilli v. Mustilli, 287 N.J. Super. 605 (Ch. Div. 1995)).

#### B. The Proposed Amended Counterclaim Is Futile As It Is Barred By The Statute Of Limitations

##### 1. The Applicable Statute Of Limitations Is Two Years

The proposed Amendment to the Counterclaim seeks to add a Count for civil damages pursuant to the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 et seq. (the "Act"). While civil actions are permitted under the Statute

by N.J.S.A. 2A:156A-24, the claim should be barred, as it was not timely filed. Although 2A:156A-24 does not specify as to the applicable statute of limitations, 2A:156A-32<sup>1</sup> provides that claims may not be commenced later than two years after the claim arose.

Even if the limitation found in Section 32 does not apply to claims under Section 24, two years is still the appropriate limitation. "When the Legislature creates a statutory cause of action without including a limitations provision, a court will apply the general limitations provision which governs that category of claim." Troise v. Extel Commc'ns, Inc., 345 N.J. Super. 231, 236 (App. Div. 2001), aff'd, 174 N.J. 375 (2002). In determining the appropriate statute of limitations, "the focus is on the nature of the injury, not the underlying legal theory" Smith v. Datla, 451 N.J. Super. 82, 94 (App. Div. 2017). Courts look to analogous causes of action to aid in the determination. Ibid.

Here, the Proposed Amendment makes clear that the nature of the injury is personal in nature and is thus subject to a two-year statute of limitations. See N.J.S.A. 2A:14-2(a) ("Except as otherwise provided by law, every action at law for an injury to the person . . . shall be commenced within two years next after

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<sup>1</sup>N.J.S.A. 2A:156A-32 provides a similar civil action for "any service provider, subscriber or customer" aggrieved by certain sections of the Act.

the cause of any such action shall have accrued"). The proposed amendment to the Counterclaim provides:

As a direct, proximate and foreseeable result of Kanarek's unlawful acts, actions, and omissions connected with her surreptitious use of Recording Devices, Barisone was caused injury and resulting damage including but not limited to serious and severe personal injuries, pain and suffering emotional distress, and has sustained past and future lost income, and other injuries but personal and business in nature.

(Proposed Amended Answer and Counterclaim, ¶39).

By Defendant's own claim, the alleged injuries are personal in nature and thus are governed by a two-year statute of limitations. The proposed amendment explicitly identifies personal injuries.

This is consistent with similar causes of action arising from an alleged breach of privacy. See e.g. Smith v. Datla, 451 N.J. Super. 82 (App. Div. 2017) (holding that invasion of privacy claim and violation of the AIDS Assistance Act was governed by two-year statute of limitations). Likewise, the federal iteration of the Act<sup>2</sup> applies a two-year statute of limitations. 18 U.S.C. § 2520(e) ("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.").

Thus, no matter the source of the applicable statute of limitations, it must be two years. Any argument for a longer

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<sup>2</sup>The New Jersey Act was modeled after Title III of the Omnibus Crime and Safe Streets Act, 18 U.S.C.A. §§ 2510-2520. State v. Feliciano, 224 N.J. 351, 368 (2016).

statute of limitations finds no support in the statute or caselaw. Pursuant to N.J.S.A. 2A:14-2(a) every action for personal injury must be brought within two years "unless otherwise provided by law". There is no law providing otherwise, therefore, the claim must be brought within two years.

2. Defendant Failed To Timely Bring A Claim Under The Act

Defendant's moving papers fail to set forth why the proposed amendments were not made at the time of the original pleadings, or at any time within two years of the alleged conduct. Defendant seemingly implies that he only recently discovered the recordings during Plaintiff's testimony at Defendant's criminal trial. (See Certification of Counsel, ¶6; Defendant's Brief, pg. 2) However, the recordings were certainly disclosed to the Defendant by the Morris County Prosecutor's Office before the trial began.

Moreover, the Defendant's original Answer and Counterclaim confirms that he was aware of the alleged recording devices. Defendant filed his pleadings on March 2, 2020. Specifically, the Counterclaim provides: "[f]or example, Kanarek harassed Barisone by utilizing technology to "bug" (i.e., unlawfully eaves drop) upon private conversation Barisone was having". (Defendant Barisone's Counterclaim, ¶12). There can be no dispute that when Defendant filed his pleadings in March of 2020, he was aware of the allegations. Over two years have passed and now Defendant seeks leave to amend.

C. The Proposed Amended Counterclaim Does Not Relate Back to the Original Pleading

Pursuant to R. 4:9-3, only when an amended claim "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading" can the amended pleading relate back to the date of the original pleading. Here, the amended claim, while involving the same parties, sets forth an entirely new statutory cause of action.

CONCLUSION

Based upon the foregoing, Defendant Barisone's motion to amend should be denied.

Respectfully,

*Bruce H. Nagel*

BRUCE H. NAGEL

