UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Roy Den Hollander, Docket No. 16-cv-9800 (VSB) (ECF)

Plaintiff,

-against-

Katherine M. Bolger,
Matthew L. Schafer, and
Jane Doe(s),

Defendants.

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Plaintiff's Opposition to Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(6)

(The plaintiff requests oral argument on the motion.)

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Preliminary Statement

Defendants' attorney, Joseph L. Francoeur ("Francoeur"), just can't shake his neo-McCarthyite-fascho addiction to *ad hominem* attacks, lies, prevarications and invented accusatory dissemblings. Right at the beginning of his 29 page memorandum-diatribe against a proud Trump supporter (after all we won), Francoeur launches into his litigation tactic of personal destruction by demonizing me, the opposing lawyer and plaintiff. He clearly believes the Politically Correct ("PC") adage that one must vilify and incite hatred against those with whom PCers disagree for surely non-PCers are sub-humans without rights.

Picking up where Francoeur left off in his pre-motion letters, he paints me as malicious, alleging I brought this action to "harass" (Def. Mem. at 3), and that it is "frivolous" as are all the cases I have brought trying to defend the rights of white, heterosexual men (Def. Mem. at 1). I know, that very phrase is considered by half of the country as a blasphemy—but not the other half. To them, and the Founding Fathers, I have a First Amendment right to go to court against those who violate my rights and the rights of the group to which I belong. Francoeur disagrees, even while emphasizing that his clients are accomplished lawyers who specialize in media and First Amendment law. (Def. Mem. at 4). Francoeur would do well to consult his own clients before advocating that a native-born American does not have rights under U.S. law. Besides, what would the likes of Francoeur have me do—hire Russian goons to resolve this dispute? Having managed Kroll Associates in Moscow, I am well aware that such is a bad idea.

Francoeur in true lefty, supremacist fashion disparages the pendent civil remedies he alleges as "tag-along" causes of action. (Def. Mem. at 1, 3). The premier treatise on Internet law recommends that when computer information is stolen, a party should consider not only traditional federal remedies, such as copyright and civil RICO, but also state actions, including

trespass. Ian C. Ballon, *E-Commerce and Internet Law* at § 44.11, (2d ed. 2016). The treatise also recommends law enforcement involvement, *id.,* which I did by filing a complaint with the S.D.N.Y. U.S. Attorney's Civilian Crime Reports Unit.

As a firm believer in not turning the other cheek, let's look at Francoeur a little. I'm sure he will whine pompously in his reply. Francoeur "spearheaded" his firm's involvement with the tax exempt organization "Safe Passage Project" that thwarts the deportation of "unaccompanied minors" who illegally enter the U.S. In effect, Safe Passage facilitates schemes to keep illegal alien youths in the U.S., such as M-13 gang members. "[T]he image of unaccompanied alien children as little children is misleading. Out of nearly 200,000 UAC apprehended from 2012 to 2016, 68 percent were ages 15, 16 or 17." Stephen Dinan, *Obama knew gang members part of illegal immigrant surge*, Washington Times, May 24, 2017. Just recently, U.S. Immigration and Customs Enforcement arrested eight gang members who illegally crossed the border as unaccompanied minors. These so-called innocent children engage in murder, racketeering, rape and sex trafficking. Stephen Dinan, *Feds nab three Dreamers, 10 UAC in nationwide gang operation*, Washington Times, May 11, 2017.

Now this is not the type of litigation I learned by graduating with high honors from George Washington University's law school or as an associate at Cravath, Swaine & Moore, but since Francoeur, a graduate of Hofstra University Law, wants to fight in the mud—here we go.

Facts—not Francoeur's fake facts

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) assumes that a plaintiff's allegations and reasonable inferences are true, providing that the

> [f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact), *see, e.g., Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not

> countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhode*s, 416 U.S. 232, 236 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-556 (2007).

Two key allegations by me are that my iCloud was protected by access codes and my home computer protected by a firewall. (FAC ¶¶ 4, 100). Defendants allege that my iCloud was not protected, but public; therefore, neither they nor anyone associated with them or their Rupert Murdoch client News Corp hacked my iCloud. (Def. Mem. at 13). They remain strangely mute about my home computer.

So whose allegations are speculative? I have practiced as an attorney in New York for 30 years and at one time was an associate at Cravath, Swaine & Moore. Defendant attorneys combined have practiced in New York for 20 years, one as a partner and the other as an associate at Levine Sullivan Koch & Schulz ("LSKS"). I swore by signing the First Amended Complaint that my iCloud was protected by access codes and not available to the public and that my home computer was protected by a firewall and not available to the public. (FAC ¶¶ 4, 100). The Defendant lawyers swore in their affidavits (FAC Ex. B & C) that the iCloud was public. They made no mention about my home computer. Looks like the allegations over whether my iCloud was public are a tie—so whose are considered true on a motion to dismiss? Under American law—mine, but under PC law, the Defendants' because I'm a Trump supporter and have to prove my allegations in my pleadings.

Francoeur advocates that under PC law affidavits submitted to show party opponent admissions against Defendants' interests can actually be used to prove facts that favor their interests. Francoeur tries to confuse two fact issues: (1) did Defendants copy the attorney work product and other materials from my iCloud or my home computer, and (2) was my iCloud open

to the public. Defendants' affidavits indicate they obtained the attorney work product and other materials from my iCloud, but as the FAC ¶ 7 alleges, they may have taken the materials from my home computer. Francoeur claims as a defense that because Defendants' affidavits were included as exhibits in the FAC, that everything in them is assumed true and anything contrary in the FAC is assumed false. Under New York law, affidavits as a primary source of proof of a defense must be ignored since they do not qualify as documentary evidence on a motion to dismiss. Siegel, *N.Y. Prac.* § 259 (5th ed.). Francoeur relies on *Weston Funding, LLC v. Consorcio G Grupo Dina, S.A. de C. V*, 451 F. Supp. 2d 585, 587 (S.D.N.Y. 2006). Weston involved an "Indenture" as documentary evidence not affidavits of defendants submitted in an action. The same is true for the other inapposite cases Francoeur cites. (Def. Mem. at 12).

Further, in true "Alice in Wonderland" style, Francoeur claims my "*sole* factual support for" Defendants hacking my iCloud are their affidavits admitting they accessed the iCloud. (Def. Mem. at 2, 13, emphasis by Francoeur). The FAC makes clear that after extensive research the only places Defendants could have obtained the attorney work product and other materials were from my iCloud or home computer. (FAC ¶¶ 4, 28-32). What Francoeur is really trying to pull here is that the FAC must prove rather than allege. A plaintiff must not be put to the test to prove his allegations at the pleading stage. *See Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947).

Francoeur also accuses me of "conveniently" omitting two exhibits from the FAC: "a screenshot of Plaintiff's publicly accessible website as visited by Mr. Schafer on December 30, 2014 . . . and a screenshot of the publicly accessible Google-cache version of how the website appeared on January 3, 2015." (Def. Mem. at 7 n.5, 14). Here's the deceit in this trick by Francoeur. The FAC at ¶ 8 alleges that once the defendants broke into the iCloud "they stripped the access codes thereby making it viewable to them and the public at any time." Without the

access codes, the website became public, so of course the defendants were then able to obtain a screenshot and a Google-cache version. In that sense, Francoeur actually got a fact right, since it admits his clients' hacking—they hacked in and then stripped the codes to make the iCloud public. All the Court has to do is compare Defendants Bolger and Schafer's party opponent admissions as to when they admit but not necessarily first accessed my iCloud to the dates on the screenshots. Oh, wait a minute. The first screenshot submitted by Francoeur (Def. Mem. Ex. T, Schaffer Aff. Ex. 1) does not have a date, but does state "Tue 9:48 AM." The second screenshot submitted by Francoeur (Def. Mem. Ex. T, Schaffer Aff. Ex. 2) does have a date in the bottom right hand corner of every page—January 13, 2015. January 13th was a Tuesday, which infers that the first screenshot was also taken on that day—meaning Schafer lied in his affidavit about taking the screenshot on December 30, 2014. (Def. Mem. Ex T ¶ 2). That's why there is no date on the first screenshot as there is on the second screenshot—tricky. Francoeur has no unequivocal proof of when the first screenshot was taken, so discovery is needed.

January 13, 2015, is after Defendants stole the attorney work product because it was submitted to the N.Y.S. Court on January 12, 2014. Perhaps they stole the attorney work product from my home computer instead—we will never know without discovery. Anyway, at the very top of the first page on the second screenshot it states, "It is a snapshot of the page as it appeared on Jan 3, 2015 17:30:43 GMT." So on January 3, 2015, my iCloud was public, but as Francoeur admits, Defendants accessed my iCloud on December 30, 2014 (Def. Mem. at 14). Therefore, by Francoeur's own words and submitted exhibits, Defendants accessed my iCloud before any screenshots were recorded. That clearly enabled them to strip the access codes and subsequently view my iCloud at any time convenient to them—just as the FAC ¶ 8 alleges. Therefore, rather than contradicting the FAC allegation, the screenshots directly support my allegation.

Exactly when the Defendants first hacked into and therefore stripped the codes from my iCloud or breached my home computer firewall may have been revealed if the documents I requested in early discovery had been produced. Whether Defendants printed or downloaded the materials, the date and time when they did such would have been printed or embedded in those documents. If downloaded, one would select the file, right click on it, select "properties" in the context menu, then in the pop-up window halfway down it would note when the file was created. If printed, Defendants' printer would list when. Either would indicate when Defendants first hacked into my iCloud or home computer or first stole materials from them.

Francoeur also alleges that evidence of my iCloud being public was that the Columbia University Alumni Club website listed its URL. (Def. Mem. at 14). The FAC at ¶ 19 states that when the link was clicked "page not found" came up. Discovery concerning the Alumni website can easily prove this.

Another Francoeur fake fact is his characterization of the N.Y.S. Court case *Hollander v. Shepherd, et al.*, 152656/2014 (N.Y. Sup. Ct. 2014), as merely a defamation case. (Def. Mem. at 1). The causes of action were injurious falsehood and interference with a prospective economic advantage leveled against all four defendants and libel against only <u>one</u> of the defendants, a reporter. The attorney work product stolen from my protected iCloud or home computer was filed in connection with, as Defendant Bolger swore, my "oral motion for an immediate trial pursuant to Rule 3211(c) of the New York Civil Practice Law and Rules" on the issue of personal jurisdiction. (FAC Ex. D, ¶ 1). It did not deal with the substance of defendant Bolger's motion to dismiss as Francoeur falsely infers. (Def. Mem. at 1).

Francoeur also prevaricates over my filing of an order to show cause in the N.Y.S. Court to require Defendants to withdraw the stolen attorney work product. Francoeur says Justice

Peter H. Moulton "refused to sign the order to show cause" (Def. Mem. at 2), which is correct, but the Justice also ruled that I could bring a motion by notice—which I did. (Pl. Mem. Ex. A, Moulton's Order at 3). Francoeur did not note that because his strategy of deception requires him to hide important facts. He even tries to represent the Order to Show Cause as fully litigating and determining all the issues in this federal proceeding. (Def. Mem. at 2). If that were so, Justice Moulton would never have allowed my motion to withdraw by notice.

Francoeur also falsely claims the notice motion to withdraw had "full briefing" before N.Y. Justice Jennifer G. Schecter. As far as oral argument, there was no transcript, and Defendants and I disagreed on what was orally argued. Both sides submitted "In Lieu of Transcript Statements" on appeal and those statements conflict, which shows a lack of clarity on the issues litigated and determined, *see Restatement 2d, Judgments*, § 27, Comment f. (Pl. Mem. Ex. B, *in lieu* of transcripts). Even Defendant Bolger said in her statement that "no issues of fact were resolved" and that I "was never allowed to introduce evidence" at the hearing on the motion to withdraw the attorney work product. (Pl. Mem. Ex. B, Bolger Stmt. at 3). Further, if there really was "full briefing," then why did the N.Y.S. Court issue such a brief decision: "Denied. There is no basis for granting the relief sought." (Pl. Mem. Ex. C).

As for Defendants lying that the stolen attorney work product was a "Media Release," Francoeur argues it "depends on what the definition of 'is' is." Oh, sorry—that's Bill Clinton. For Francoeur "it depends on what the definition of 'Media Release' is." But before we get to Francoeur's PC parsing, he outright lies that Defendants "first" referred to the attorney work product as what it was titled "Responses to Media." Defendant Bolger's affirmation in opposition to my motion for trial on personal jurisdiction (FAC Ex. D at ¶ 2), specifically swears that "A true and correct copy of the 'Media Release' available at Plaintiff's MR Legal Fund

website . . . is attached hereto as Exhibit 1." Bolger did mention the accurate title once in her memorandum of law, but then proceeded to label it a media release eight times. (FAC Ex. E at pp. 9, 17, 18, 19). If nothing, Bolger knows how to deceive a busy judge.

> So what is a media release, or, before the Internet, a press release?
>
> A press release, news release, media release, press statement or video release is a written or recorded communication directed at members of the news media for the purpose of announcing something ostensibly newsworthy. . . . [P]ress releases can be anywhere from 300 to 800 words. *Wikipedia.*

The attorney work product is over 6,000 words. Bolger and Schafer as lawyers "primarily represent[ing] journalists and news organizations in defending lawsuits brought based on their news reporting" (Def. Mem. at 4) had to know that the document was not as they called it a "Media Release" but rather an attorney work product. After all, it was 17 pages long of contingent questions and possible answers. Simply put, they lied and did so intentionally.

While the 17 page attorney work product was not registered with the Copyright Office, other materials on my iCloud and my home computer were registered, and, on information and belief, were also reproduced, disturbed or displayed by Defendants. (FAC at ¶¶ 21-23). But without discovery, there is no way to determine which registered works Defendants infringed. Defendants are using their refusal to disclose in order to argue for dismissal of the Copyright action under 17 U.S.C. § 411(a) (infringement action requires registration). Basically, they are saying the Court has to dismiss because we will not say what works we took without permission.

Another chicanery by Francoeur is he bases his objection to the copyright cause of action on a Second Circuit "Summary Order." (Def. Mem. at 3, 6 n.4, 17). Francoeur fails to mention that Summary Orders in the Second circuit do not have precedential value. Local Rule 32.1.1, *Disposition by Summary Order*. They are limited to that case and that case alone. Further, the facts here are different. For example, that Summary Order only dealt with the submission of

copyrighted material in court. Here Defendants distributed registered copyrighted documents (FAC ¶¶ 99, 143) to their Australian clients without my permission, which is infringement under 17 U.S.C. § 501. Those materials were not used in the N.Y.S. Court nor were the megabytes of other stolen documents that were not registered under copyright law.

Francoeur's hiding of those other documents is the basis for him saying the replevin action is duplicative of the copyright action and therefore preempted by it. How can the replevin action be preempted by a copyright infringement action when under 17 U.S.C. § 411(a), infringement can only be brought for registered works. Megabytes of other documents Defendants copied were not registered, so there's no infringement action for them, but there is a replevin action.

In my April 5, 2017, letter to the Court over Francoeur's objection to the FAC copyright issue, I accused him of trying to intimidate me. Francoeur picked up on "intimidate" and now accuses me—a 70 year old attorney living mainly on the pittance of social security—of intimidating attorneys who work for "one of the best First Amendment law firms in the country." (Def. Mem. at 3-4). Oh please! But imitation is the sincerest form of flattery—thank you Joe.

Francoeur makes laudatory remarks about LSKS, which is not a defendant in this action, and recites some of Defendant Bolger's resume. (Def. Mem. at 4). Impressive, but not as impressive as that of Richard Nixon who was disbarred in New York or Bill Clinton who was suspended from the Bar in Arkansas.

As for me, well, Francoeur simply did as I warned this Court when he wanted extra pages. (Pl. Letter April 13, 2017, Dkt. 25). True to his and his clients' *modus operandi*, they raised irrelevant matters in order to engage in their neo-McCarthyite-PC smear tactics. They consume space and valuable Court time with their self-righteous, hypocritical and bigoted

ideological attacks against me for resorting to the courts to defend my rights under the law. They, like most lefties these days (such as Antifa), are marked by a severe strain of intolerance toward anyone who does not believe as they do. Especially, if that person worked as a volunteer in Donald Trump's campaign for the presidency—as I did. From the tyrant next door to powerful lawyers, those who aim to exploit, control and silence others predictably turn to personal attacks, lies and deception as Francoeur does throughout his extended memorandum.

Francoeur continues his habitual fake facts in describing the N.Y.S. Court case. It was against a Rupert Murdoch newspaper published mainly on the Internet by Murdoch's corporation and a different newspaper also published mainly on the Internet by another multi-billion corporation. The University of South Australia offered for registration eight courses as part of a Males Studies Program—the first ever in higher education anywhere in the world. The courses were created by various professors in America and Australia. I was slated to teach a three-week section titled "Men and the Law" for one of the courses. Six of the eight courses were canceled, however, due to the fake news reporting of the two Internet newspapers. Therefore, I sued for injurious falsehood and interference with an economic advantage against the Internet newspapers and two reporters. One of the two reporters was also sued for libel.

The case started before Justice Milton Tingling with a November 14, 2014, hearing. In sum and substance, Defendant Bolger argued that the Murdoch corporation and the other company did not have sufficient contacts with New York State for the court to have personal jurisdiction over them. Justice Tingling responded that is a "fact question." To which I made a standing motion for a trial on personal jurisdiction to determine the facts because the usual discovery procedures would not prevent Bolger's clients from continuing to perjure themselves on the facts concerning personal jurisdiction with suborning assistance from her. Justice

Tingling granted my request to make the motion and scheduled the submission of papers on whether a trial on the issue of personal jurisdiction should be held.

Facing a Justice who considered that Defendant Bolger's arguments on personal jurisdiction raised issues of fact clearly threatened Bolger's hope for a quick dismissal. So the Defendants needed something from which to spin fake facts to turn the Justice against me, as Francoeur tries here. Defendants therefore hacked into my iCloud or home computer and took the attorney work product and lots of other materials. The spin of falsity that Defendant Bolger applied to the attorney work product was that it was a "Media Release"—meaning I had volitionally made it public to the press. Bolger swore under penalty of perjury that it was a "Media Release" in her affirmation in opposition to my standing motion for trial on personal jurisdiction (FAC Ex. D at ¶ 2) and eight (8) times in her memorandum of law in opposition (FAC Ex. E at pp. 9, 17, 18, 19). Even Francoeur admits that Defendant Bolger repeatedly called the attorney work product a "Media Release." (Def. Mem. at 6).

Then the case was transferred to Justice Peter Moulton who ended up with my request for an Order to Show Cause. Obviously, I wanted the confidential attorney work product withdrawn as soon as possible to mitigate the harm Defendant Bolger was out to cause my practice. Justice Moulton denied my request but ordered that I could make a motion by notice, which I did. (Pl. Mem. Ex. A at 3). I submitted an affidavit and reply, Defendants submitted two affidavits and a memorandum of law in opposition. The motion by notice accused Defendants of violating my right to privacy; unauthorized use of a computer, N.Y. Penal Code § 156.05; computer trespass, N.Y. Penal Code § 156.10; unlawful duplication of computer related material, N.Y. Penal Code § 156.30; computer tampering, N.Y. Penal Code § 156.20; violating 18 U.S.C. § 1030(a)(2)(C);

and for Bolger committing perjury in swearing that the attorney work product was actually a "Media Release."

Then something strange happened—the case was transferred again, this time to a new acting Justice, Jennifer Schecter. There was one hearing before Justice Schecter on May 27, 2015, which involved Defendant Bolger's motion to dismiss, my motion for a trial on personal jurisdiction, and my motion for withdrawal from the record the attorney work product. Defendant Bolger, relying on the hacked attorney work product, essentially argued that because I was not an anointed Feminist, the Court should rule that it did not have personal jurisdiction over her clients. To which Justice Schecter remarked—it depends on how you define Feminism.

On my request that the hacked attorney work product be withdrawn, Justice Schecter asked whether I had any evidence of hacking to which I responded there had been no discovery, and added, "You've read the document, ask yourself what man in this day and age would make such public?" The logic in this question was that a white, heterosexual male lawyer in this day and age would never make public that attorney work product. It would not only violate the Professional Codes of Conduct, but given the vehement hatred that PCers hold for anyone who dares disagree with their cult-like ideology, he would open himself to "Nancy Pelosi" type outrage and demonization in an effort to destroy him. That was the totality of the hearing on my motion to withdraw the hacked attorney work product.

As for my papers, besides swearing that my iCloud was protected by access codes, I argued that Defendant Bolger's first motion to dismiss the N.Y.S. Court case on August 29, 2014 made clear that her team was trolling the Internet for information on my business because her papers had included various exhibits from the Internet. Defendants Bolger and Schafer say they found the attorney work product between December 30, 2014, and January 12, 2015. (FAC Ex.

B & C). If my iCloud was open to the public, why didn't Defendants find the attorney work product sooner? If my iCloud was open to the public, coupled with my knowing Defendants were scouring the Internet for any politically incorrect statements by me, why didn't I protect it with access codes? In response, Bolger simply disparaged me and whined they didn't do it.

Francoeur's duplicitous strategy in litigation is made clear in Def. Mem. at 6 n.4. First, he idiotically assumes that a particular right can be violated by lawyers such as him only once. I'm sure Francoeur has had dozens of cases in which he lies, dissembles and prevaricates about the opposing party in order to scare them into giving up or bias the court against them. In his disingenuous footnote, he says that in another case involving me, an opposing "lawyer noted that [certain] articles 'appeared on the internet.'" (Emphasis added). In truth, the opposing lawyer actually said, "it is my understanding 'these' articles appeared on the internet." *Hollander v. Copacabana Nightclub, et al.*, No. 07-cv-5873, Dkt. 24 at 4 (emphasis added). That's a big difference than stating flat out they appeared on the internet. That's not the only Francoeur trick here. He does not cite the page number for the opposing lawyer's quote. Why—because the document on the court's website is not searchable; therefore, a busy clerk is unlikely to look it up and will accept Francoeur's intentionally false characterization.

Francoeur faults my filing this action "less than a month" after the Court of Appeals decided not to allow an appeal of the N.Y.S. Court case. It should not have come as a surprise, since I had informed a lawyer at LSKS that I would handle the theft of my documents when the N.Y.S Court case was over.

The FAC was filed on March 24, 2017, as a matter of course under Fed. R. Civ. P. 15 (a)(1)(B), since Defendants had not yet filed their motion to dismiss. The FAC added a copyright infringement action over the registered documents stolen by Defendants, a N.Y.S.

replevin action, and requested this Court refer Defendants Bolger and Schafer to the Disciplinary Committee for the Appellate Division First Department for violating N.Y. Professional Misconduct Rule 4.1. The FAC seeks economic damages for the harm to my business in the amount of $500,000. Under civil RICO, a trebling of those damages to $1.5 million and punitive damages under the trespass to chattel and injurious falsehood actions in the amount of $2 million. After all, we are talking about the intentionally near complete destruction of my law and consulting business.

The FAC also requests that all the copies and downloads of materials from my iCloud or home computer and in the possession and control of Defendants be turned over to me, that Defendants be prohibited from making public any materials, Defendants provide the names of anyone involved in the theft and anyone possessing or in control of copies of such materials.

As far as the facts go, Francoeur is clearly trying to create an alternate reality to support his disingenuous arguments. He never refers to all the materials that the defendants stole from my iCloud or my home computer—actually, they probably downloaded everything, but they refuse to say. He only refers to one, calling it "a document" in the N.Y.S. Court case. The lie here is that the document was an attorney work product—big difference.

Arguments

I. The undiscovered country

There is a looming unknown in this case. The extent of the materials Defendants stole by copying or downloading from my iCloud or home computer. This Court has denied my request to explore that unknown—an unknown that Francoeur and Defendants know very well.

Francoeur and Defendants want very badly to keep me and the Court in the dark concerning what they misappropriated from my computers concerning my law practice and personal life. Under N.Y. Penal Code § 156.35, the following is a class E felony:

> A person is guilty of criminal possession of computer related material when having no right to do so, he knowingly possesses, in any form, any copy, reproduction or duplicate of any computer data or computer program which was copied, reproduced or duplicated in violation of section 156.30 [duplicates computer material without right to do so] . . . with intent to benefit himself or a person other than an owner thereof.

Under N.Y. Penal Code § 165.50, the following is a class D felony:

> A person is guilty of criminal possession of stolen property in the third degree when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof, and when the value of the property exceeds three thousand dollars.

Defendants' fear that what they took without authorization would be exposed is illustrated by the threatening letter Francoeur sent me. (Pl. Mem. Ex. D). His letter of May 9, 2017, was sent in response to my request that the Court resolve the early discovery dispute and allow me to find out exactly what the Defendants copied or downloaded. Francoeur's letter was not sent to the Court—just to me, since it was I he was trying to intimidate. Never before had I seen such a blatant attempt by a lawyer to intimidate another. Francoeur tried to coerce me into withdrawing my request by starting off with, "We are writing to demand that you immediately withdraw your Letter Motion to the Court dated May 8, 2017 (Dkt. 27)." Near the letter's end, he bullied, "We therefore demand that you immediately withdraw you Letter Motion. If you fail to do so, we reserve the right to seek all appropriate relief from the Court." Francoeur and his clients are clearly scared of something.

Francoeur's threatening letter by using "we" infers that Defendants and he have access to what was stolen from my iCloud or home computer. His words clearly verbalize the threat that

he and they are willing to use that information in this Court to make their prevaricating and dissembling smears public and hopefully win this case. That makes Francoeur's words menacing, intimidating and bullying. The message is simple—unless I do what he says in this case, he will use the confidential information from my iCloud or home computer to depict me as a demon out of the TV show "Supernatural." Francoeur and Defendants have essentially engaged in coercion in the second degree, N.Y. Penal Law § 135.60(5), by threatening to expose secrets or publicize asserted facts, whether true or false, tending to subject my business to hatred, contempt or ridicule—a class A misdemeanor. Francoeur, of course, plays the innocent Pollyanna by feigning ignorance in his May 11, 2017, letter (Dkt. 30) to the Court. Based on that letter, the Court decided to deny me access to my property that was taken without my consent.

As alleged in the FAC ¶¶ 21-23, 26, the Defendants copied, downloaded or reproduced much of or all of my iCloud or the materials on my home computer. That is millions of bytes of information. The sheer magnitude of their intentional efforts to amass so much information infers a malicious intent to destroy my business. My iCloud and home computer contained privileged and confidential matters related to my law practice and personal life, which places Defendants, and now Francoeur, in a unique position of power over the survival of my practice. All they need do in typical neo-McCarthyite-PC fashion is release selective information out of context with false or dissembling interpretations, and I'm back to driving a taxi. (FAC ¶ 24). Yet, I am not allowed to step into this undiscovered country to defend myself, and with this Court's possible dismissal of my case (Francoeur has had his way so far), I will never know what they stole until they start leaking it to their friends in the *Pravda Correct* press.

Unfair is an understatement. They blatantly violated the law but because they are PC, they may get away with it. It's as though I'm a millennial accused of sexual harassment on a

college campus without any right to present evidence in my defense. Here, I have no right to present evidence in the form of exhibits that Defendants infringed my copyrighted, registered, unpublished works by reproducing, distributing or displaying them without my permission. As I told Francoeur in my May 3, 2017, letter (Pl. Mem. Ex. E), "Clearly your clients' original reproduction of those documents without authorization is evidence reasonably calculated to support my allegations of copyright infringement." Defendants, however, will ask for hundreds of thousands of dollars in attorney fees and costs because the attorney work product that everyone knows they reproduced, distributed and displayed was not registered with the U.S. Copyright Office. They, however, adamantly refuse to say whether in accessing my iCloud or home computer, they also took registered copyrighted materials, other attorney work products or attorney client communications. Because, if they did, no court would grant them attorney fees and costs or put up with such Russian-type conduct. So the full extent of defendants' nefarious activities, and therefore the harm they have caused and are in an imminent position to cause as a result of invading my law practice and personal life are not fully known.

Francoeur and Defendants are clearly gloating over their discovery victory. It keeps hidden all that they misappropriated from my iCloud or home computer. They now have a betting chance to get away with their crimes, such as violations of N.Y. Penal Codes §§ 135.60(5), 156.05, 156.10, 156.30, 156.35, and 165.50. They have violated and flaunted the law and received nothing but protection so far. This Court, which denied my request for discovery, is unlikely to ever allow such for it would have to deny Defendants' motion to dismiss, and the Second Circuit is notoriously left leaning, so the only possible shot is the U.S. Supreme Court—depending on what happens this summer.

Such a "Hail Mary" may work. Under Fed. P. Civ. R. 12(b)(6), the plausibility standard requires "a complaint with enough factual matter (taken as true) to suggest that" the elements of the cause of action are satisfied. *Arista Records LLC v. Doe*, 604 F.3d 110, 120 (2d Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). This standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 545). But, the plausibility standard "does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant . . . ." *Arista Records LLC*, 604 F.3d at 120 (citing *see, e.g., Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir.2008)). As Francoeur and Defendants made clear in avoiding discovery, the full extent of what was stolen from my iCloud or home computer is "peculiarly within the possession and control of the defendant[s]."

Besides the FAC at ¶¶ 21-23, 26, alleging that Defendants took most if not all of the materials on my iCloud or home computer, neither Francoeur nor the Defendants have ever denied taking documents in addition to the attorney work product. Actually, in their responses to my early discovery request for those documents—and only for those documents, they basically admitted they had them. Francoeur's coercion letter of May 9, 2017, (Pl. Mem. Ex. D) states:

> If after you withdraw your Letter Motion, you continue to seek discovery from my clients pursuant to your May 3, 2017 letter [Pl. Mem. Ex. E, only requested copies of documents other than the attorney work product], then we invite you to conduct a meet-and-confer with [Francoeur] . . . . If we are unable to come to a resolution of those matters following such a meet-and-confer, then we will work with you in good faith at the time to submit a joint letter to the Court pursuant to Judge Broderick's Rule.

Francoeur did not make this offer just to chat. If his clients did not have the documents, he would not have bother suggesting a meet-and-confer.

Further, in Francoeur's May 8, 2017, letter (Pl. Mem. Ex. F) in response to my May 3, 2017, discovery request, he objected because I had not specified "a reasonable time, place, and manner for the inspection" of those documents according to Fed. R. Civ. P. 34(b)(1)(B). To which he added, that I should telephone him to have "a good faith discussion regarding these matters . . . ." By his own words, Francoeur was willing to have a discussion about when and where I would be able to inspect all the documents, other than the attorney work product, that Defendants had taken, providing it gave Defendants 30 days to respond, as he argued in his May 11, 2017, letter to the Court (Pl. Mem. Ex. G, Dkt. 30). If Defendants were willing to spend the time, energy and effort in discussing discovery of other documents, not the work product, they possessed or controlled but wanted time to put the copies together—it clearly shows that when they accessed by iCloud or home computer, they copied more than the attorney work product.

Francoeur clearly wants to avoid any discovery by having this case dismissed that he actually tries to convince the Court that I am alleging Russians hacked into my iCloud or home computer. (Def. Mem. at 15). If any lie by Francoeur destroys his credibility it is that. The FAC ¶ 141 describes Francoeur's clients as "Russian-like criminals," not that some unknown Russians hacked my iCloud or home computer.

II. The plausibility standard for a Fed. R. Civ. P. 12(b)(6) motion to dismiss

According to the U.S. Supreme Court, the analysis begins with "taking note of the elements a plaintiff must plead to state a claim . . . ," *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1947 (2009), then proceeds in two steps:

1. Identifying the specific allegations in a complaint that are not entitled to the presumption of truth. *Iqbal*, 129 S.Ct. at 1951; *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010). Those are statements that cut and copy the elements of a cause of action; that is, they are

conclusory. *Twombly*, 550 U.S. at 555. The allegations should be more than an unadorned: the-defendant-unlawfully-harmed-me accusations. *Iqbal*, 129 S.Ct. at 1949. Some legal conclusions, however, are permissible when the defendants are given notice of the date, time and place of the alleged illegal conduct. *Iqbal v. Hasty*, 490 F.3d 143, 156 (2d Cir. 2007), *rev'd sub nom. on other grounds, Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

2. Next, the analysis considers the remaining factual allegations in a complaint as true and determines if they plausibly—not probably but more than possibly— infer that the defendant is liable for the misconduct alleged. *Twombly*, 550 U.S. at 556; *Hayden v. Paterson*, 594 F.3d at 161. In doing so, the courts "draw[] all inferences in favor of the plaintiff," *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 692 (2d Cir. 2009), and a complaint cannot be dismissed based on a judge's disbelief of the factual allegations even if it strikes a judge that actual proof is improbable. *Twombly*, 550 U.S. at 556.

Francoeur has failed miserably in satisfying this two-step process for each of the following causes of actions.

A. Defendants violated the Computer Fraud and Abuse Act of 1986.

The elements for a civil action under the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030(a)(2)(C), are accessing without authorization a computer, used in interstate or foreign commerce, obtaining information there from, and causing loss. The only elements that Francoeur asserts were not plausibly alleged are that Defendants did not have authorization to access my iCloud or home computer and I suffered no loss.

Defendants swear they had authorization because the iCloud was public—they tellingly make no mention about my home computer. (FAC Ex. B & C). I, however, swear that both my iCloud and home computer were not publicly available. (FAC ¶¶ 4, 100). So it's a tossup over

the iCloud and Francoeur loses because it is not Defendants' allegations that are assumed true but mine. Yet Francoeur reverts to the lame argument that because Defendants Bolger and Schafer admit accessing the iCloud that the remainder of their affidavits must be true. (*Supra* pp. 3-4). That's as dumb as saying that because the Washington Post might have printed one sentence in an article that was true, the rest of the article was also true.

As for my home computer, Francoeur does not even challenge that allegation, other than to make the conclusory allegation that it is speculative. (Def. Mem. at 15). The only places the attorney work product and other materials existed from which they could have been acquired via the Internet were my iCloud and home computer. Both were protected; therefore, Defendants hacked one or the other or both. The FAC at ¶¶ 4, 21, 22, 30, 31, 57, 58, 65, 100-104, specifically alleges Defendants broke into my iCloud or home computer.

The only way to resolve this factual dispute is through discovery. One avenue is that Defendants Bolger and Schafer's Internet Service Provider ("ISP") will have tracked their Internet Protocol ("IP"), or computer address, when they used the Internet. Their ISP logs will show when Bolger and Schafer contacted my iCloud or home computer and how many times. If they lied as to when they contacted my iCloud or home computer, then they probably lied as to their hacking.

The FAC does <u>not</u> allege violation of 18 U.S.C. § 1030(a)(5)(B), which is what Francoeur quotes as requiring that unauthorized access "recklessly causes *damage*." (Def. Mem. at 19, Francoeur's emphasis). The sleight of hand here is Francoeur falsely claiming that I alleged "damage" rather than loss. The statute has specific and different meanings for both, which Francoeur conveniently fails to mention. Under 18 U.S.C. § 1030(e)(8), "the term 'damage' means any impairment to the integrity or availability of data, a program, a system, or

information." Copying data does not equal damage, *E-Commerce & Internet Law* § 44.08(1), which is why Francoeur alleges that I am claiming "damage" rather than loss. Under 18 U.S.C. § 1030(e)(11), "the term 'loss' means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." Loss includes time and expenses in analyzing, investigating, assessing security of a computer, modifying computers to prevent further unauthorized access, and otherwise responding to the intrusion, *e.g.*, *A.V. v. iParadigms, LLC*, 562 F.3d 630, 646 (4th Cir. 2009); *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1066 (9th Cir. 2016) (plaintiff spent hours analyzing, investigating, and responding to defendant's actions). That's what the FAC alleges at ¶¶ 28-33, 141-143.

So the real allegations—not Francoeur's fake allegations—are that Defendants' theft of data from my iCloud or home computer caused me losses over a one year period of $5,000 or more as required by 18 U.S.C. 1030(g).

B. Defendants violated civil RICO.

Francoeur advocates immunity for Defendants Bolger and Schafer from RICO because they are lawyers involved in litigation. Courts, however, disagree. In *Feld Entertainment Inc. v. American Society for the Prevention of Cruelty to Animals*, 873 F.Supp.2d 288, 318-319 (D.D.C. 2012), the court refused to dismiss the RICO case based on attorney misconduct. In *Handeem v. Lemaire*, 112 F.3d 1339, 1349 (8th Cir. 1997), the court stated that "An attorney's license is not an invitation to engage in racketeering, and a lawyer no less than anyone else is bound by generally applicable legislative enactments. Neither *Reves v. Ernst & Young*, 507 U.S. 170 (1993), nor RICO itself exempts professionals . . . from the law's proscriptions, and the fact that

a defendant has the good fortune to possess the title 'attorney at law' is, standing alone, completely irrelevant to the analysis dictated by the Supreme Court [in *Reves*]." In *Hall Am. Ctr. Assocs. Ltd. P'ship v. Dick*, 726 F.Supp. 1083, 1093–97 (E.D.Mich.1989), the court found that lawsuits can be a component of a predicate act.

Defendants committed the RICO predicate act of wire fraud.

The courts interpret the mail and wire fraud statutes broadly. In *U.S. v. Paccione*, 751 F. Supp. 368, 372 (S.D.N.Y. 1990), *aff'd*, 949 F.2d 1183 (2d Cir. 1991), defendants were liable for mail fraud stemming from fraudulent statements given to the N.Y.S. Department of Environmental Conservation in order to obtain a permit to transport medical waste. Here, as part of an extensive scheme to destroy my business and advocacy for men's rights, Defendants provided not just the N.Y.S. Court but the public at large fraudulent statements that the privileged attorney work product was a press release issued by me. The elements of mail and wire fraud are construed *in pari materia*, except for the interstate requirement. *U.S. v. Tarnopol*, 561 F.2d 466, 475 (3d Cir.1977), *abrog. other grounds, Griffin v. U.S.*, 502 U.S. 461 (1991).

Francoeur relies on malicious prosecution and abuse of process cases to assert that litigation activities can never form the basis for the RICO predicate act of wire fraud. True to his litigation trickery, he fails to cite to cases that have found that alleged mail and wire fraud violations in such cases can be RICO predicate acts when there is more than just allegations of malicious prosecution or abuse of process. *U.S. v. Eisen*, 974 F.2d 246, 254 (2d Cir.1992), involved mail fraud violations arising out of a scheme by a law firm to deprive civil defendants and their liability insurers of money through perjury. The Second Circuit noted:

> [T]here is some tension between the congressional decision to include federal mail [wire] fraud as a predicate offense and to exclude perjury, whether in violation of federal or state law. . . . [However, where] a fraudulent scheme falls within the scope of the federal mail [wire] fraud statute and the other elements of

> RICO are established, use of the mail [wire] fraud offense as a RICO predicate act cannot be suspended simply because perjury is part of the means for perpetrating the fraud. We do not doubt that where a series of related state court perjuries occurs, it will often be possible to allege and prove both a scheme to defraud within the meaning of the mail [wire] fraud statute as well as the elements of a RICO violation.

In *Lemelson v. Wang Laboratories Inc.*, 874 F.Supp. 430, 434 (D.Mass.1994), mail and wire fraud violations involving extortion and fraudulently obtaining patents through a pattern of litigation were RICO predicate acts. In *Hall American Center Assoc. L.P. v. Dick*, 726 F.Supp. 1083, 1097 (E.D.Mich. 1989), allegations that defendants engaged in filing fraudulent litigation as part of a larger scheme were sufficient to be considered RICO predicate acts.

The RICO scheme in this action is extensive. FAC ¶¶ 46-54. Defendant Bolger used perjury—nine times—to depict my attorney work product as a "Media Release"; thereby, disparaging my legal and consulting services as inept because they not only made confidential and privilege information public but actually released such to the press. Defendants Bolger and Schafer communicated the fraud over the wire three times to the *N.Y. Supreme WebCivil* site. They also communicated the attorney work product and their misrepresentations about it over the wires to their clients in furtherance of their scheme. Wire fraud need only be in furtherance of a scheme, since "it is sufficient . . . to be 'incident to an essential part of the scheme . . . or a step in the plot'." *Schmuck v. U.S.*, 489 U.S. 705, 710-711 (1989) (citations omitted).

Defendant Bolger's scheme was to negatively impact my business and deter clients by falsely depicting my practice as unable to protect privileged and confidential data. Additionally, Defendants made the false representation as a step in their plot to deceive the N.Y. S. Court into ruling in their favor and to intimidate me into giving up my action. In making the attorney work product public, defendants were also telling me that they will continue to publicize materials from my iCloud, or home computer, through their Murdoch client's Internet news sites and

continue to deceive the public concerning those materials so as to destroy my livelihood and my role as a men's rights advocate.

If such criminal conduct as that of Defendants Bolger and Schafer cannot be reached by wire fraud, then in this Internet age, any attorney can make up any outrageous lie, communicate it to his clients over the wires for their approval, and not only win an action, hammer an opponent into submission but also destroy an opponent's business by broadcasting such a lie over a publicly available court website. FAC ¶ 56.

Defendants committed the RICO predicate act of robbery.

The predicate act of robbery under RICO, 18 U.S.C. § 1961(A), is "included by generic description," David Smith, *Civil RICO*, ¶ 2.02(1), p. 2-4 to 6, which means a court can rely on other state offenses that are not specifically labeled robbery, *id*. The appeals court in *U.S. v. Forsythe*, 560 F.2d 1127, 1137 (3rd Cir. 1977), which incorporated the Supreme Court's holding in *U.S. v. Nardello*, 393 U.S. 286, 295 (1969), determined that RICO's legislative history, H.R. Rep. No. 1549, 91st Cong., 2d sess. 56 (1970), showed that the predicate act "inquiry is not the manner in which States classify their criminal prohibitions but whether the particular state involved prohibits the . . . activity." (Quoting *Nardello* at 295). N.Y. Penal Code § 156.30 prohibits theft of computer related material. It is a Class E felony—punishable by more than one year; therefore, it satisfies 18 U.S.C.A. § 1961(A). *See* FAC ¶¶ 61-62. Even Francoeur admits his clients engaged in robbery when he refers to it as "loot[ing]." (Def. Mem. at 24).

Defendants' predicate acts are open-ended.

Contrary to Francoeur's pathological deceptions (Def. Mem. at 24), the FAC alleges that Defendants will continue, as the record in the N.Y.S. Court makes clear, trying to loot any "new information stored" on my iCloud or home computer. FAC ¶ 75 (emphasis added). Further, the

FAC at ¶¶ 24 & 143 alleges that Defendants will use the information already looted in any way possible to destroy my business and my men's rights advocacy. Additionally, the FAC does not allege RICO conspiracy, nor does it cite LSKS as a defendant or co-conspirator. LSKS is the enterprise, but it is Defendants who violated 18 U.S.C. § 1962(c). FAC ¶¶ 36-40, 77-88.

C. Defendants infringed my registered copyrighted works.

While the attorney work product stolen by Defendants was not registered with the U.S. Copyright Office, other materials on my iCloud and my home computer were registered. But without discovery, there is no way to determine which works they infringed. Francoeur is using Defendants' refusal to disclose in order to argue for dismissal of the copyright action under 17 U.S.C. § 411(a) (infringement action requires registration). Basically, he is saying the Court has to dismiss because his clients will not tell the Court which registered copyrighted works they infringed by reproducing, distributing or displaying them without my permission.

Okay, since the PC elitist Francoeur is allowed to keep us in the dark, I have filed a copyright application for Schafer's screenshots (Def. Mem. Ex. T, Schafer Ex. 1 & 2) with the U.S. Copyright Office. (Pl. Mem. Ex. H). A copyright infringement action may be maintained even when registration is made after the filing of the complaint. *Frankel v. Stein & Day, Inc.*, 470 F. Supp. 209, 212 n.2 (S.D.N.Y. 1979), *aff'd,* 646 F.2d 560 (2d Cir. 1980). In *Demetriades v. Kaufmann*, 680 F.Supp. 658, 661 (S.D.N.Y. 1988), the Court decided that the cure to an action in which copyright certificates had not yet issued was to amend the complaint when the certificates were received. Therefore, I request that this case be set aside until the certificate of registration is issued and then be permitted to amend the FAC with that certificate.

The Copyright Act of 1976, 17 U.S.C. § 101 *et seq*., gives copyright owners protection from unauthorized reproduction, distribution and displaying of their works. U.S. Copyright

Office, Circular 1, p.1. Protection under the Act begins from the time the work is created in fixed form. *Id*. at 2. Information stored on the Internet for longer than a transitory period is in fixed form. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 129-130 (2d Cir. 2008) ("the definition of 'fixed' imposes both an embodiment requirement and a duration requirement").

By reproducing my registered works from my iCloud or home computer without my permission, Defendants violated 17 U.S.C. § 501(a). By distributing those reproductions to their Australian clients without my permission, Defendants again violated 17 U.S.C. § 501(a). Both violations entitle me to statutory damages under § 504(c). These infringed registered materials were not used in the N.Y.S. Court, so there is not even a glimmer of a fair use argument.

Francoeur's fair-use objection concerns only the attorney work product and relies on a Second Circuit "Summary Order." [1] Francoeur's deception here is his intentional failure to mention it was a Summary Order. Summary Orders do not have precedential value. *Second Circuit Local Rule* 32.1.1. Such orders are limited to that case and that case alone.

So desperate is Francoeur to eliminate the copyright action, that he even tried to intimidate me into dropping it with the threat of paying his exorbitant attorney fees and costs under 17 U.S.C. § 505. (Pl. Mem. Ex. D, Francoeur threatening letter). Francoeur's huffing, puffing, bullying and desperation infers that his clients not only absconded with the attorney work product but other documents of mine—both registered and unregistered.

D. Defendants committed the tort of trespass to chattel.

The New York tort of trespass to chattel consists of intentionally using or intermeddling with a chattel in another's possession. *Hecht v. Components Intl., Inc*., 22 Misc.3d 360, 369

[1] He makes no such objection to the infringed registered works—as he cannot.

(Nassau Cnty. Sup. Ct. 2008) (citing *Restatement 2d Torts* § 217). Computer data is property for the purposes of litigation, *People v. Versaggi*, 83 N.Y.2d 123, 128 (1994). Francoeur admits that the chattel which was intermeddled with included not only the attorney work product but "other unspecified digital information" in my iCloud or home computer. (Def. Mem. at 28). Of course, it is "unspecified" because only he and Defendants know but are refusing to say exactly what they intermeddled with.

Trespass intent means Defendants knew their actions would interfere with my possessory rights in my computer data. Defendant Bolger clearly knew I had a home computer connected to the Internet because we communicated by email. She and Defendant Schafer also knew of the existence of my iCloud. (FAC Ex. F at 5) (illustrating how they found the iCloud address). As alleged, they also knew the home computer and iCloud were protected from public scrutiny, FAC at ¶¶ 98, 100, 101. On information and belief, they concluded that both contained privileged and confidential digital information that could be used to demonize me in the N.Y.S. Court case as well as injure my business and disparage the services and products it offered. FAC ¶ 98.

Interference with information stored on a computer gives rise to trespass to chattel if the condition, quality or value of the data is diminished as a result of defendants' duplication. *Twin Sec., Inc. v. Advocate & Lichtenstein, LLP*, 113 A.D.3d 565, 565–66 (1st Dept. 2014); *see Restatement 2d Torts* § 218, Comment e. Here, Defendants' interference is actionable because the interference hindered my use of the attorney work product for its own purposes. Having opposing lawyers copying it and making it public destroyed its value of confidentiality. CPLR 3101(c) recognizes the sanctity of the lawyer's mental impressions and strategic analyses, 3A Weinstein, *N.Y. Civil Prac.* ¶ 3101.42, which is why attorney work products are not legally

discoverable. Defendants' theft and publication of the attorney work product destroyed its sanctity, confidentiality and, therefore, its value.

In *eBay, Inc. v Bidder's Edge, Inc.*, 100 F.Supp. 2d 1058, 1071 (N.D. Cal. 2000), the court explained that even if the alleged interference is negligible, the interference deprives the property owner to use its property for its own purposes—"[t]he law recognizes no such right to use another's personal property." *Id.* And no Francoeur, I'm not saying your clients' interference was negligible.

In *AGT Crunch Acquisition LLC v Bally Total Fitness Corp.*, 2008 WL 293055 (N.Y. Sup. Ct. 2008), the court found interference when defendants copied names and addresses from a customer database, which data they then used to solicit business. Here, Defendants copied the attorney work product and used it to gain an unfair advantage in the N.Y.S. Court. Defendant Bolger relied almost exclusively on the attorney work product in oral argument before Justice Schecter on May 27, 2015. FAC ¶ 109. She also used it to send me the message that if I persisted in fighting for the rights of men in the courts, she would punish my efforts by destroying my business. She would publish out of context and falsely depict more of the stolen information. In effect, Defendants were telling my—"resistance is futile, you will be assimilated" to our misandry beliefs or your business will be destroyed. FAC ¶ 110.

Whether the harm from trespass is direct or consequential is immaterial, so long as it is caused by the defendant's act. Prosser & Keeton, *Law of Torts* § 14 (5th Ed). As to the requisite degree of harm in the context of computer databases, "evidence of mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels." *Register.com, Inc. v Verio, Inc.*, 126 F. Supp. 2d 238, 250 (S.D.N.Y. 2000), *aff'd in part and reversed in part on other grounds*, 356 F.3d 393 (2d Cir.2004). Defendants interfered

with my exclusive right of possession of the attorney work product and all the other materials by copying or downloading them from my iCloud or home computer without my authorization.

E. Replevin requires Defendants to relinquish their copies of my property.

Replevin is available when the defendants are in possession of certain property to which the plaintiff has a superior right of possession. *Batsidis v. Batsidis*, 9 A.D.3d 342, 343 (2d Dept. 2004). The New York Legislature has specifically protected computer data as property. *People v. Versaggi*, 83 N.Y.2d 123, 128-129 (1994). As between Defendants and me, it is axiomatic that I have the superior right of possession to the copies or downloads of the property from my iCloud or home computer that Defendants continue to possess, control and conceal.

Francoeur wrongly argues that the replevin action is duplicative of the copyright infringement action and therefore preempted by it. The replevin action cannot be preempted by the copyright infringement action, 17 U.S.C. 411(a), because infringement can only be brought for registered works. What about all those other documents Defendants stole that were not registered? As Francoeur wrote, "absent a registration, the courts do not have jurisdiction over copyright claims." (Def. Mem. at 16). Francoeur, therefore, concedes, as he must, that replevin requires Defendants to turn over all the copies or downloads of the unregistered documents they possess or control. There's no infringement action for them, but there is a replevin action.

F. Defendants Bolger and Schafer blatantly and repeatedly violated the N.Y. Rule of Professional Misconduct 4.1.

With flaunting hubris and falsehoods, Defendants Bolger and Schafer cast aside the sanctity of the protections afforded a lawyer's mental impressions, views and strategic analyses concerning litigation in the attorney work product. 3A Weinstein, *N.Y. Civil Prac.* ¶ 3101.42. Not even the most *Pravda Correct* theories can justify unwarranted inquiries into the files and the mental impressions of an attorney. *See Hickman v. Taylor*, 329 U.S. 495, 510. They

misappropriated, then published the attorney work product and tried to cover-up their despicable acts by lying that it was a mere "Media Release." In committing perjury before the N.Y.S. Court that the attorney work product was a "Media Release," they violated Rule 4.1.

Defendants Bolger and Schafer also violated Rule 4.1 and N.Y. Judiciary Law § 90(4)(e) by violating N.Y. Penal Code 156.30:

> A person is guilty of unlawful duplication of computer related material in the first degree when having no right to do so, he or she copies, reproduces or duplicates in any manner any computer data . . . and thereby intentionally and wrongfully deprives or appropriates from an owner thereof an economic value or benefit in excess of two thousand five hundred dollars . . . .

By stealing the attorney work product and publishing it, the two destroyed its value and harmed my business in an amount well over $2,500 and committed a class E felony.

In addition, they also violated and continue to violate N.Y. Penal Code § 156.35 in which their possession of all the misappropriated compute data is a class E felony:

> A person is guilty of criminal possession of computer related material when having no right to do so, he knowingly possesses, in any form, any copy, reproduction or duplicate of any computer data or computer program which was copied, reproduced or duplicated in violation of section 156.30 of this article, with intent to benefit himself or a person other than an owner thereof.

Such amounts to a violation of Rule 4.1 and Judiciary Law § 90(4)(e).

By retaining materials other than the attorney work product from my iCloud or home computer, Defendants are engaging in coercion in the second degree under N.Y. Penal Law § 135.60(5) because their possession of my personal and business data amounts to a continuing threat to expose secrets or publicize asserted facts, whether true or false, tending to subject me and my business to hatred, contempt or ridicule. The manifest malevolence of alt-left persons, such as Defendant Bolger, toward Trump supporters, such as me, will result in a WikiLeaks type publication of much of the material Defendants stole so as to allow their clients, the Murdoch

Internet newspaper and its reporter, to spin the data into further harming my law and consulting business by disparaging its products and services. FAC ¶¶ 24, 54, 111. Such is also a violation of Professional Misconduct Rule 4.1.

III. Were all of the above issues litigated and determined in the N.Y.S. Court motion?

Just look at all those issues in all those causes of actions. Could the one sentence decision in the N.Y.S. Court actually cover them all? Only under PC law—not New York State law, which is what controls here for collateral estoppel.

The key determination for estoppel is whether the identical issues—all the issues raised above under Section II—were litigated and necessarily decided in the prior action. *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455 (1985). Every issue involved in this federal case—whether fact or legal—must have been litigated and disposed of by Justice Schecter's decision on my motion to withdraw the attorney work product. *See Zabriskie v. Zoloto*, 22 A.D.2d 620, 623 (1st Dep't 1965). Collateral estoppel applies to issues rather than to whole claims or defenses, Siegel, *N.Y. Prac.* § 457 (5th ed.), unless the "causes of action are different, not in form only . . . but in the rights and interests affected. The estoppel is limited in such circumstances to the point[s] actually determined . . . ." *Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 N.Y. 304, 307 (1929) (Cardozo, J).

Estoppel does not apply when the first decision is a general verdict because such does not clarify precisely what the court found on an issue that was actually raised, assuming it was. *See Manard v. Hardware Mutual Casualty Co.*, 12 A.D.2d 29, 30 (4th Dept. 1960). The N.Y.S. Court issued a bare general verdict on my motion to withdraw the attorney work product: "Denied. There is no basis for granting the relief sought." (Pl. Mem. Ex. C). It is, therefore, impossible to say what issues were determined—and delusional to conclude that all the issues in

all the actions raised here were actually determined. Further, the causes of action alleged here include numerous rights and interests not even touched upon in the N.Y.S. Court motion. An issue is not actually litigated if, for example, the matter has not been placed in issue by proper pleading or proper motion of which the motion to withdraw was neither. *See Restatement 2d, Judgments* § 27 comments d.

"The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination . . . ." *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d at 456. That means Francoeur had to show that all the issues in Section II *supra* were litigated in the N.Y.S. Court motion and disposed of by its general verdict at which he utterly failed. Francoeur tries to shift his burden to me to show his own failure, okay here it is.

The following elements for RICO were not litigated or decided: Defendants' law firm as an Enterprise; wire fraud—the fraud in the N.Y.S. Court motion was falsely representing the attorney work product as a "Media Release," not communicating such over the wires in furtherance of Defendants' RICO scheme; robbery as a predicate act, theft of computer data under Penal Code § 156.30 was raised but not litigated, and it is unclear whether it was decided—probably not since it is a criminal statute that does not provide for a civil action as does RICO; two or more predicate acts made in furtherance of a scheme, such a scheme was unnecessary for the N.Y.S. motion's decision; predicate acts related in time and open to repetition so as to constitute a pattern of racketeering activity was unnecessary for the N.Y.S. motion's decision and unclear whether it was considered; Defendants participation in the conduct of the Enterprise's affairs through a pattern of racketeering activity was not an issue in the N.Y.S. motion, so never litigated, never determined and unnecessary for the decision.

As for copyright infringement, the N.Y.S. Court does not have subject matter jurisdiction over a copyright action, 28 U.S.C. § 1338(a), so it could not have been litigated or determined.

Trespass requires the interference of my exclusive right of possession in the attorney work product and other materials on my iCloud or home computer. The N.Y.S. Court never determined whether Defendants' possessory interference was sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels; Defendants' intent in trespassing to obtain information for their strategy of litigating by personal destruction to help win their case and harm my business was never determined by the N.Y.S. Court's motion decision; and punitive damages for trespass was never litigated.

As for replevin, Defendants continue to retain possession or control of all those other materials stolen from my iCloud or home computer—an issue never resolved by the N.Y.S. Court's motion decision.

In relation to theft of the attorney work product, Defendants breach of the policy behind CPLR 3101(c) by improperly using the attorney work product without permission was not addressed in the N.Y.S. Court's motion decision.

Defendants' violations of the N.Y. Professional Misconduct Rule 4.1 via perjury was never determined, Defendants' violation of Jud. Law § 90(4)(e) was never determined, Defendants coercion in the second degree, N.Y. Penal Law § 135.60(5), by retaining other materials from my iCloud or home computer for future use against me was never determined in N.Y.S. Court's motion decision.

Finally, the CFAA, 18 U.S.C. § 1030(a)(2)(C), was mentioned once in the papers but never argued during the short back and forth in front of Justice Schecter who never even mentioned the CFAA in her decision on the motion to withdraw.

Francoeur was required to go through each and every issue raised in this federal action to show that it was also litigated and determined, and necessarily so, in the motion to withdraw in the N.Y.S. Court—he did not, even though he had ample space to do so with his 35 page allowance.

IV. Injury

As the FAC alleges, my legal and consulting clients have significantly diminished. I am now relegated to the lowest level of legal work—document review. Allegations and proof of a general loss of sales is sufficient, leaving it to the trier of the facts to determine whether the loss is properly to be attributed to the Defendants' nefarious acts or not. *See Lake v. Dye*, 232 N.Y. 209, 213-214 (1921). One long term client who paid an annual retainer of $1,000 a year has canceled his legal and business relationship with me as a result of Defendants Bolger and Schafer's appalling conduct. I have incurred expenses in bringing this action, beginning with the $400 filing fee, in order to counteract Defendants Bolger and Schafer's publication and as a reasonable effort to minimize damages by showing that Bolger and Schafer falsely depicted the attorney work product as a publicly available press release so as to disparage my business product and services.

Conclusion

To mimic Francoeur's supremacist lefty egotism, Defendants' motion to dismiss "must be dismissed." I am glad, however, that he requested memoranda with an extended page length. I never would have been able to keep all this to 25 pages—thanks again Joe.

Dated: June 14, 2017
New York, N.Y.

Respectfully,
s/ Roy Den Hollander
Roy Den Hollander, Esq.
Plaintiff and Attorney
545 East 14th Street, 10D

New York, N.Y. 10009
(917) 687-0652
rdenhollander97@gsb.columbia.edu

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

Roy Den Hollander, Civil No. 1:16-cv-9800 (VSB)

Plaintiff,

-against-

Katherine M. Bolger,
Matthew L. Schafer, and
Jane Doe(s),

Defendants.

----------x

Affirmation of Roy Den Hollander in opposition to defendants' motion to dismiss

ROY DEN HOLLANDER, an attorney duly admitted to practice law in the courts of the State of New York and the U.S. District Court of the Southern District of New York, affirms the following under penalties of perjury:

1. I am the plaintiff in this action and representing myself.

2. I am fully familiar with the facts and circumstances of this action.

3. This Affirmation and the accompanying Memorandum of Law is being submitted (1) in opposition to defendants' motion to dismiss the First Amended Complaint under Fed. R. Civ. P. 12(b)(6), (2) to request awarding plaintiff costs and attorney's fees (including those available pursuant to 17 U.S.C. § 505), and (3) for granting such other and further relief as this Court deems just and proper.

4. Annexed hereto as Exhibit "A" is a true-and-accurate copy of New York State Justice Peter H. Moulton's Order on plaintiff's request for an order to show cause in *Hollander v. Shepherd, et al.*, 152656/2014 (N.Y. Sup. Ct. 2014).

5. Annexed hereto as Exhibit “B” are true-and-accurate copies of the plaintiff’s and defendants’ Statements In Lieu of Transcript from *Hollander v. Shepherd, et al.*, 152656/2014 (N.Y. Sup. Ct. 2014).

6. Annexed hereto as Exhibit “C” is a true-and-accurate copy of New York State Justice Jennifer G. Schecter’s Order on plaintiff’s motion by notice to withdraw the attorney work product stolen and filed by Defendants in *Hollander v. Shepherd, et al.*, 152656/2014 (N.Y. Sup. Ct. 2014).

7. Annexed hereto as Exhibit “D” is a true-and-accurate copy of defense attorney Joseph L. Francoeur’s threatening letter in the above captioned action, dated May 9, 2017.

8. Annexed hereto as Exhibit “E” is a true-and-accurate copy of plaintiff’s request for a stipulation on early discovery in the above captioned action, dated May 3, 2017.

9. Annexed hereto as Exhibit “F” is a true-and-accurate copy of defense attorney Joseph L. Francoeur’s denial for early discovery in the above captioned action, dated May 8, 2017.

10. Annexed hereto as Exhibit “G” is a true-and-accurate copy of defense attorney Joseph L. Francoeur’s opposition to early discovery in the above captioned action, dated and filed May 11, 2017.

11. Annexed hereto as Exhibit “H” is a true-and-accurate copy of plaintiff’s May 22, 2017, application to the U.S. Copyright Office for registration of materials that Defendants reproduced in two screenshots of one page of plaintiff’s iCloud or his home computer in *Hollander v. Shepherd, et al.*, 152656/2014 (N.Y. Sup. Ct. 2014), and filed here as defendants’ Exhibit T, Schafer Exhibits 1 & 2 (Dkt. 34 # 20).

WHEREFORE, for the reasons set forth in plaintiff’s accompanying Memorandum of Law, plaintiff respectfully requests that this Court issue an Order: (1) denying defendants’ motion to dismiss the First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), (2) awarding plaintiff

costs and attorney's fees (including those available pursuant to 17 U.S.C. § 505), and (3) granting such other and further relief as this Court deems just and proper.

Dated: June 14, 2017
New York, N.Y.

Respectfully,
s/ Roy Den Hollander

Roy Den Hollander, Esq.
Plaintiff and Attorney
545 East 14th Street, 10D
New York, N.Y. 10009
(917) 687-0652
rdenhollander97@gsb.columbia.edu

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Peter H. Moulton PART 57
Justice

Roy Du Hollander

INDEX NO. 152656/14

MOTION DATE

v.

Tory Stapp et al

MOTION SEQ. NO. 003

MOTION CAL. NO.

Cross-Motion: ☐ Yes ☐ No

Court declines to sign order to show cause (see 2nd page of OSC)

Dated: 1/22/15

New York, New York

J.S.C.
PETER H. MOULTON

1. Check one: ..... ☐ Case Disposed ☑ Non-Final Disposition
2. Check as Appropriate: ..... Motion is: ☐ Granted ☑ Denied ☐ Granted in Part ☑ Other
3. Check if Appropriate: .....: ☐ Settle Order ☐ Submit Order

☐ Do Not Post ☐ Fiduciary Appointment ☐ Reference

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

At I.A.S. Part ____ of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, N.Y., on the ____ day of _____, 2015

M.S. #3 OTHER

PRESENT: HON. _____
Justice of the Supreme Court

----------X

Roy Den Hollander,

Plaintiff,

-against-

Tory Shepherd, Political Editor of The Advertiser-Sunday Mail Messenger;
Advertiser Newspapers Pty Ltd., d/b/a The Advertiser-Sunday Mail Messenger;
Amy McNeilage, Education Reporter for The Sydney Morning Herald;
Fairfax Media Publications Pty Ltd., d/b/a The Sydney Morning Herald;

Defendants.

----------X

Index No. 152656/2014
Justice Tingling

ORDER TO SHOW CAUSE IN CIVIL ACTION

Upon reading the affidavit in support by Plaintiff Roy Den Hollander, Esq., sworn to the 13th day of January 2015, and the exhibits attached thereto, namely the Affirmation of Attorney Katherine M. Bolger and Exhibit 1 to that Affirmation, let the party or attorney in opposition show cause at I.A.S. Part _____, Room _____, of this Court, to be held at the Courthouse, 60 Centre Street, New York, N.Y., on the ____ day of _____, 2015, at _____ o'clock in the _____ noon or as soon as the parties to this proceeding may be heard why an order should not be issued requiring that attorney Bolger withdraw Exhibit 1 that was obtained by her without authorization from Plaintiff, that attorney Bolger turn over to Plaintiff all paper and digital copies of Exhibit 1 that are in her possession or control and all that are in the possession

or control of Defendants, that Bolger identify all the parties involved in obtaining Exhibit 1 so that they may be referred to the proper authorities, and such other and further relief as may to the court seem just and proper, for the reasons stated in the attached affidavit of Roy Den Hollander.

Sufficient cause appearing therefore, let personal service of a copy of this order, the affidavit in support, and all other papers upon which this order is granted upon the attorneys for all parties who have appeared in this action on or before the _____ day of __________________, 2015, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

ENTER

____

J.S.C.

Decline to sign without prejudice to bringing this application by motion if appropriate.

PM

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

----------X

Roy Den Hollander,

Index No. 152656/2014

Plaintiff-Appellant

-against-

Tory Shepherd, Political Editor of The Advertiser-Sunday Mail Messenger;
Advertiser Newspapers Pty Ltd., d/b/a The Advertiser-Sunday Mail Messenger;
Amy McNeilage, Education Reporter for The Sydney Morning Herald; and
Fairfax Media Publications Pty Ltd., d/b/a The Sydney Morning Herald;

Defendants-Respondents.

----------X

Statement in lieu of stenographic transcript before Justice Tingling, CPLR 5525(d)

1. On November 14, 2014, oral argument occurred before Justice Tingling on motion 002, defendants- respondents' motion to dismiss.

2. Defendants-respondents' counsel, Katherine M. Bolger, argued that defendants-respondents did not have sufficient contacts with New York State for the Court to have personal jurisdiction over them.

3. Justice Tingling responded that is a "fact question."

4. Plaintiff-appellant, Roy Den Hollander, requested that he be permitted to make a standing motion for a trial on personal jurisdiction to determine the facts

because, as he said, the usual discovery procedures would not prevent defendants-respondents from continuing to perjure themselves on the facts concerning personal jurisdiction with the suborning assistance of their attorney, Bolger. A trial was needed in which the Justice could observe the demeanor of the defendants in the witness box rather than having their attorney manipulate their responses in affidavits or at a deposition so as to avoid the truth.

5. Justice Tingling granted Den Hollander's request to make the motion and scheduled the submission of papers on whether a trial on the issue of personal jurisdiction should be held. Both sides submitted papers.

Statement in lieu of stenographic transcript before Justice Schecter, CPLR 5525(d)

1. The case was subsequently transferred to Justice Moulton and then again to Justice Schecter.

2. On May 27, 2015, oral argument was held on defendants-respondents' motion to dismiss and plaintiff-appellant's standing motion for trial on the issue of personal jurisdiction and plaintiff-appellant's motion to strike from the record an attorney work product document stolen from plaintiff-appellant's iCloud by attorney Bolger's Rupert Murdock client, Advertiser Newspapers Pty Ltd., or by attorney Bolger herself, or by a third party hired by them who hacked into plaintiff-appellant's protected iCloud.

3. Attorney Bolger, relying on the hacked attorney work product, essentially argued that because plaintiff-appellant was not an anointed PC-Feminist, the Court should rule that it did not have personal jurisdiction over defendants-respondents.

4. Plaintiff-appellant replied that whether he was PC-Feminist depended on how the term was defined, and that he defined it the same way Women Against Feminism did.

5. Plaintiff-appellant also argued that defendants-respondents had numerous contacts with New York State, that defendants-respondents lied about their contacts as suborned by attorney Bolger, and plaintiff-appellant referred the court to his papers, an affidavit with over 20 exhibits, supporting his standing motion for a trial on personal jurisdiction and showing that the defendants-respondents repeatedly lied about their contacts with New York.

6. Justice Schecter replied that she had no such papers before her and proceeded to try to pressure plaintiff-appellant into withdrawing his standing motion for a trial on personal jurisdiction. Those papers fully presented plaintiff-appellant's facts and arguments showing that defendants-respondents had clearly and repeatedly committed perjury, suborned by Bolger, on the issue of personal jurisdiction, and that the reality of their contacts gave the Court personal jurisdiction over them, or, at least, raised substantial questions as to the extent of their contacts with New York.

7. Plaintiff-appellant refused to withdraw his standing motion arguing that Justice Tingling had given him permission to make the motion, so it was going to stay in the record.

8. Justice Schecter finally relented and ordered both sides to resubmit their papers on the standing motion for a trial on personal jurisdiction.

Dated: New York, N.Y.
February 2, 2016

/S/ Roy Den Hollander
Roy Den Hollander
Attorney-Plaintiff-Appellant
545 East 14 St., 10D
New York, NY 10009
(917) 687-0652
rdenhollander97@gsb.columbia.edu

To: Katherine M. Bolger
Levine Sullivan Koch & Schulz LLP
Attorney for Defendants-Respondents
321 West 44th Street, Suite 1000
New York, NY 10036
Tel: (212) 850-6100
Fax: (212) 850-6299
Email: kbolger@lskslaw.com

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ROY DEN HOLLANDER, Plaintiff, -against- TORY SHEPHERD, ADVERTISER NEWSPAPERS PTY LTD., AMY McNEILAGE, FAIRFAX MEDIA PUBLICATIONS PTY LIMITED, Defendants.	:	Index No. 152656/2014

OBJECTIONS TO PLAINTIFF'S STATEMENTS IN LIEU OF STENOGRAPHIC TRANSCRIPT

Defendants Tory Shepherd, Advertiser Newspapers Pty Ltd. ("Advertiser Newspapers" or "*The Advertiser*"), Amy McNeilage, and Fairfax Media Publications Pty Limited ("Fairfax Media" or "*The Herald*"), by and through their undersigned attorneys, submit these objections in response to Plaintiff Roy Den Hollander's ("Plaintiff" or "Den Hollander") Statements in Lieu of Stenographic Transcript pursuant to Rule 5525(d) of the New York Civil Practice Law and Rules ("CPLR") (the "Statements").

This Court should strike the Statements because they are not necessary to perfect the appeal and do not fairly and accurately memorialize the proceedings before the Court. In the alternative, this Court should sustain Defendants' objections to the Statements.

BACKGROUND

This Court dismissed the underlying action on January 11, 2016, finding that Shepherd, *The Advertiser*, McNeilage, and *The Herald* were not subject to this Court's jurisdiction under CPLR § 302(a)(1), and that "[i]n the end, there is no authority for subjecting defendants to

jurisdiction in New York based on articles published outside New York for a non-New York audience." Doc. No. 119 ("Order") at 9. Moreover, the Court rejected, as a matter of law, Plaintiff's arguments that Defendants were subject to jurisdiction under CPLR 302(a)(2) or (3), which expressly exclude claims sounding in defamation. *Id.* at 9-10. In a separate order, the Court also denied Plaintiff's motion to strike from the record a document Den Hollander alleged had been illegally obtained on the grounds that, "[t]here is no basis for granting the relief sought." Doc. No. 120.

Subsequently, on January 12, Defendants filed notices of entry as to each of the Court's orders. *See* Doc. Nos. 121 & 122. On February 2, Plaintiff then appealed this Court's order dismissing his suit and denying further discovery. Doc. No. 126. Plaintiff then served Defendants' counsel with Statements in Lieu of Stenographic Transcript pursuant to Rule 5525(d) of the CPLR. *See* Plaintiff's Statement in Lieu of Stenographic Transcript (February 2, 2016) ("Statements"). Defendants now respectfully request that the Court strike Plaintiff's Statements from the record or, alternatively, sustain their objections.

ARGUMENT

POINT I

THIS COURT SHOULD REJECT PLAINTIFF'S STATEMENTS

Because the Statements submitted by Plaintiff are not necessary and, at any rate, procedurally defective, they should be stricken. Appellants proposing statements in lieu of transcripts must "prepare and serve upon the respondent a statement of the proceedings from the best available sources, including his recollection, for use instead of a transcript." CPLR Rule 5525(d). Thereafter, a respondent may object or propose amendments. *Id.* At that point, it is the duty of the "judge . . . before whom the proceedings were had" to settle the differences between

the statements. *Id.* Ultimately, "it is her recollection that must ultimately control." *Brandenburg v. Brandenburg*, 188 A.D.2d 368, 369 (1st Dep't 1992).

Statements in lieu of transcripts serve a limited purpose. They are not necessary when an appeal concerns a question of law, CPLR, Rule 5525(b) (transcript may be omitted where plaintiff "relies only upon exceptions to rulings on questions of law"), and they are not necessary, even where issues of fact may have been addressed, if the papers submitted by the parties "provide a sufficient basis to review the court's determination," *Pers. Sys. Int'l, Inc. v. Clifford R. Gray, Inc.*, 146 A.D.2d 831, 832 (3d Dep't 1989). Moreover, appellants cannot use such statements merely to supplement the record with argument "properly the subject of an appeal brief," *Dyno v. Vill. of Johnson City*, 255 A.D.2d 737, 737 (3d Dep't 1998), or with a "desultory" version of events, *Perez v. Value King Dep't & Furniture Store*, 39 Misc. 3d 143(A), 2013 WL 2349333 (1st Dep't May 16, 2013) (informal statements are "not the type of summary of the proceedings contemplated by CPLR 5525(d)"). Here, Plaintiff's Statements are unnecessary and improper.

First, the Statements are unnecessary because no issues of fact were resolved at either hearing. CPLR Rule 5525(b) (noting that transcript may be omitted where no issues of fact presented); *Pers. Sys. Int'l, Inc.*, 146 A.D.2d at 832 (requiring transcript or statement in lieu thereof only for hearings "at which issues of fact were addressed"). Plaintiff makes no contention to the contrary—nor can he. Indeed, he concedes that he was never allowed to introduce evidence at the hearings. *See, e.g.*, Statements at 2. Plaintiff simply misunderstands the purpose of CPLR Rule 5525. Moreover, Plaintiff's Statements are also unnecessary because, as Plaintiff admits, his positions were fully developed in the affidavits and exhibits submitted to

this Court. *See* Statements at 3. *Pers. Sys. Int'l, Inc.*, 146 A.D.2d at 832. There is, therefore, no need for statements in lieu of transcripts.

Next, the Statements should be stricken as improper because they are clearly tainted by Plaintiff's bias. Statements in lieu of transcripts are not to be used, as a matter of law, to merely repeat the arguments Plaintiff has made throughout this litigation. *Perez*, 2013 WL 2349333 (informal statements are "not the type of summary of the proceedings contemplated by CPLR 5525(d)"); *Dyno*, 255 A.D.2d at 737. In fact, the Statements are full of Plaintiff's characteristic *ad hominem* attacks and false allegations. *See, e.g.*, Statements at 3 (falsely claiming that Defendants "lied about their contacts," that Defendants argued he was not an "anointed PC-Feminist," and that this Court "pressur[ed]" Plaintiff into withdrawing a motion). CPLR Rule 5525(d) does not give Plaintiff *carte blanche* to repeat arguments he has already made. The Statements are, therefore, improper.

For all these reasons, this Court should strike Plaintiff's Statements from the record as a matter of law.

POINT II

EVEN IF PLAINTIFF'S STATEMENTS WERE PROPER, DEFENDANTS NEVERTHELESS OBJECT

If the Court concludes the Statements are proper, Defendants object as set forth below:

Statement in lieu of stenographic transcript before Justice Tingling, CPLR 5525(d)

1. Defendants do not object.

2. Defendants object to Plaintiff's characterization of their arguments. Defendants argued that jurisdiction was not proper under CPLR 302(a)(2) or (a)(3) because defamation is expressly excluded from those sections of the statute. Defendants further argued that there was

no jurisdiction under CPLR 302(a)(1) as Defendants did not transact business in the state relating to Plaintiff's cause of action.

3. Defendants object. Counsel does not recollect Justice Tingling making such a statement.

4. Defendants do not object to statement that Plaintiff requested to make a motion for an immediate trial on personal jurisdiction, but object to the remainder, including Plaintiff's unsupported assertions that Defendants perjured themselves or that counsel for Defendants suborned perjury.

5. Defendants do not object.

Statement in lieu of stenographic transcript before Justice Schecter, CPLR 5525(d)

1. Defendants do not object.

2. Defendants do not object to the existence of the hearing, but object to the remainder, including Plaintiff's characterization of the issues before the Court and Plaintiff's unsupported assertions that Defendants or any of their agents were involved with the alleged "theft" of Plaintiff's work product.

3. Defendants object to Plaintiff's characterization, which is false. Defendants' counsel presented arguments in accordance with the issues briefed in Defendants moving papers.

4. Defendants object. Counsel does not recollect Plaintiff making such a statement.

5. Defendants do not object to the assertion that Plaintiff presented argument opposing Defendants' motion, but do object to the remainder, including Plaintiff's characterization of that argument and further object to Plaintiff's unsupported assertions that Defendants lied or that Defendants' counsel suborned perjury.

6. Defendants object to Plaintiff's characterization of the Court's conduct, which is false. Defendants further object to Plaintiff's characterization of his papers, Plaintiff's unsupported assertions that Defendants lied or that Defendants' counsel suborned perjury, and Plaintiff's unsupported legal conclusion.

7. Based on Defendants' response in Paragraph 6, Defendants object.

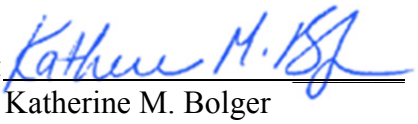
8. Based on Defendants' response in Paragraphs 6 and 7, Defendants object.

CONCLUSION

For each of the foregoing, independent reasons, Defendants respectfully request that the Court strike Plaintiff's Statements in lieu of transcripts and/or sustain Defendants' objections thereto.

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: 
Katherine M. Bolger

321 West 44th Street, Suite 1000
New York, NY 10036
(T): (212) 850-6100
(F): (212) 850-6299
Counsel for Defendants

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER J.S.C. Justice PART 57

Index Number : 152656/2014
DEN HOLLANDER, ESQ, ROY
vs
SHEPHERD, TORY
Sequence Number : 004
OTHER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for Strike from record

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1
Answering Affidavits — Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DENIED. There is no basis for granting the relief sought.

This constitutes the Decision and Order of the Court.

Dated: 1/8/16

HON. JENNIFER G. SCHECTER, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: [ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: ..... [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

WILSON ELSER

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

May 9, 2017

Joseph L. Francoeur
212.915.5638 (Direct)
Joseph.Francoeur@wilsonelser.com

Via email

Roy Den Hollander, Esq.
545 East 14th Street, 10D
New York, New York 10009
roy17den@gmail.com

RE: *Roy Den Hollander v. Katherine M. Bolger, Matthew L. Schafer, Jane Doe(s)*
C.A. No. : 1:16-cv-09800
Our File No.: 16664.00002

Dear Mr. Den Hollander,

We are writing to demand that you immediately withdraw your Letter Motion to the Court dated May 8, 2017 (Dkt. 27) ("Letter Motion"). Your Letter Motion is palpably improper and violates Judge Broderick's rules.

Putting aside the issue of the stay and the fact that your May 3, 2017 letter (Dkt. 27-1) did not constitute a proper discovery demand, your Letter Motion deliberately misrepresents to the Court our obligations under the both the Federal Rules and Judge Broderick's Rules. Fed. R. Civ. P. 34(b)(2)(A) grants a party 30 days to respond to a discovery demand for documents, and thus we were under no obligation to respond "within 72 hours" of receipt of your May 3, 2017 letter. Your letter improperly attempts to short-circuit the Federal Rules by unilaterally declaring the existence of a discovery dispute, particularly when no Rule 26(f) conference has yet occurred.

Further, to the extent that our May 8, 2017 response (Dkt. 27-2) was not to your liking, Fed. R. Civ. P. 37(a)(1) requires that you then conduct a good faith meet-and-confer prior to the filing any discovery motion. Indeed, Judge Broderick's Rules mandate "[s]trict adherence" to Fed. R. Civ. P. 37(a)(1). In that regard, our May 8, 2017 letter (Dkt. 27-2) explicitly invited you "to have a good faith discussion" with the undersigned regarding the matters that are the subject of your Letter Motion. In spite of that explicit invitation, you failed to call or otherwise contact our office.

According to Judge Broderick's Rules, upon receipt of our letter you were obligated to meet and confer, and then to draft for our consideration a proposed joint discovery dispute letter. *See* Judge Broderick's Individual Rule 3. We were entitled to review and comment on the letter, and the letter must be jointly submitted. In the event that we did not respond to your proposed joint letter motion to the Court within 72 hours, then only at that point you would be free to proceed by individual letter. However, because you failed to engage in a meet-and-confer, and failed to provide a proposed draft letter, your Letter Motion violates Judge Broderick's Individual Rule 3 and Fed. R. Civ. P. 37(a)(1).

We therefore demand that you immediately withdraw your Letter Motion. If you fail to do so, we reserve the right to seek all appropriate relief from the Court. If, after you have withdrawn your Letter Motion, you continue to seek discovery from my clients pursuant to your May 3, 2017 letter (Dkt. 27-1), then we invite you to conduct a meet-and-confer with the undersigned pursuant to Fed. R. Civ. P. 37(a)(1). If we are unable to come to a resolution of those matters following such a meet-and-confer, then we will work with you in good faith at that time to submit a joint letter to the Court pursuant to Judge Broderick's Rules.

Should you have any questions or concerns, please do not hesitate to contact the undersigned.

Sincerely,

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

Joseph L. Francoeur

ROY DEN HOLLANDER
Attorney at Law

545 East 14th Street, 10D
New York, N.Y. 10009

Tel: (917) 687-0652
rdenhollander97@gsb.columbia.edu

May 3, 2017

Joseph L. Francoeur, Esq.
Wilson Elser Moskowitz Edelman & Dicker LLP
150 East 42nd Street #23
New York, N.Y. 10017

***Hollander v. Bolger et al.*, 1:16-cv-09800, Discovery Request**

Dear Mr. Francoeur:

In your January 31, 2017, letter to Judge Vernon S. Broderick, you requested a "stay of discovery pending the pre-motion conference." (Francoeur letter at C. p. 3, Dkt. No. 14). The pre-motion conference was canceled, so any argument that the stay was granted or applies is fatuous.

Since there is no stay on discovery and since the First Amended Complaint at ¶¶ 21 & 23 alleges that your clients copied, downloaded or otherwise reproduced without my permission documents on my iCloud other than the attorney work product (First Amend. Compl. Ex. 4, Dkt. No. 18, Attachment 4)—this letter is a discovery request pursuant to Fed. R. Civ. P. 26(d)(1) for copies of all those documents. Clearly your clients' original reproduction of those documents without authorization is evidence reasonably calculated to support my allegations of copyright infringement.

Of course, if your clients only reproduced or had someone reproduce or are aware of only a reproduction of the attorney client work product from my iCloud, then this discovery demand is unnecessary. Affidavits from both of them should be sufficient to make this request superfluous. However, absent such affidavits, this discovery request stands.

If you decline to agree to such a request, then we have a discovery dispute. Under Judge Broderick's rules for civil practice at paragraph three (3), we need to submit a joint letter to the judge setting out the dispute and our respective positions within 72 hours of your receipt of this discovery request.

Thank you for your time.

Sincerely,
/s/ Roy Den Hollander

Roy Den Hollander

WILSON ELSER

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

May 8, 2017

Joseph L. Francoeur
212.915.5638 (Direct)
Joseph.Francoeur@wilsonelser.com

Via email

Roy Den Hollander, Esq.
545 East 14th Street, 10D
New York, New York 10009
roy17den@gmail.com

RE: *Roy Den Hollander v. Katherine M. Bolger, Matthew L. Schafer, Jane Doe(s)*
C.A. No. : 1:16-cv-09800
Our File No.: 16664.00002

Dear Mr. Den Hollander,

We are writing in response to your May 3, 2017 letter, received by our office the afternoon of May 5, 2017.[1] We disagree with the contentions set forth in your letter.

As an initial matter, your letter does not constitute a proper discovery demand. As you know, Fed. R. Civ. P. 26(d)(1) states that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f) . . . ." Here, no 26(f) conference has occurred. Therefore, Fed. R. Civ. P. 26(d)(1) specifically prohibits you from seeking any discovery from Defendants at this time. Further, your purported discovery demand is not in compliance with Fed. R. Civ. P. 34(b)(1)(B), which requires the request to set forth "a reasonable time, place, and manner for the inspection."

More to the point, even if your request was proper (and, clearly, it is not), we would be under no obligation to respond because discovery in this matter is stayed by virtue of Judge

[1] Contrary to your representations, we are under no obligation to respond to your letter within "72 hours." Under Fed. R. Civ. P. 34(b)(2)(A), "[t]he party to whom the request is directed must respond in writing within 30 days after being served." The individual practice to which you refer is not to the contrary, nor is your citation to Fed. R. Civ. P. 26(d)(1).

Broderick's orders granting our first and second letter motions. As you are aware, our first letter motion requested a stay of discovery pending the resolution of our motion to dismiss. As you are also aware, our supplemental letter motion, filed in response to your amended complaint, fully incorporated our first letter motion, including, of course, the request for a stay. In neither of your letter responses did you oppose the stay of discovery. Instead, you specifically represented to the Court that you did not oppose our letter motions. As a result, the Court granted them. Therefore, discovery is stayed pending resolution of our forthcoming motion to dismiss.

Finally, we note that Judge Broderick's rules require "[s]trict adherence" to Fed. R. Civ. P. 37(a)(1), which demands that any party, before seeking to compel discovery responses, act in "good faith" in attempting to resolve discovery disputes. Here, you failed to do so. You merely demand that we provide you with the requested discovery or submit to you our portion of the joint discovery dispute letter within 72 hours which, since you delivered the letter on a Friday, allowed this office less than one business day to respond. Your letter is simply not in conformity with the Federal Rules nor Judge Broderick's rules.

Should you wish to have a good faith discussion regarding these matters, please call me at my direct dial ((212) 915-5638) during normal business hours.

Sincerely,

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

Joseph L. Francoeur

WILSON ELSER
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

May 11, 2017

Joseph L. Francoeur
212.915.5638 (Direct)
Joseph.Francoeur@wilsonelser.com

Via ECF

Hon. Vernon S. Broderick
United States District Judge
United States District Court
Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square, Room 415
New York, NY 10007

RE: *Roy Den Hollander v. Katherine M. Bolger, Matthew L. Schafer, Jane Doe(s)*
C.A. No. : 1:16-cv-09800
Our File No.: 16664.00002

Dear Judge Broderick,

As the Court is aware, we represent Defendants Katherine M. Bolger and Matthew L. Schafer ("Defendants") in the above-referenced action. We write this letter to the Court in opposition to Plaintiff's May 8, 2017 Letter Motion (Dkt. 27) and Plaintiff's May 10, 2017 letter to the Court (Dkt. 29).[1]

It is unclear precisely what relief Plaintiff is seeking. It is and has been Defendants' understanding that discovery has been stayed in this matter by virtue of the Court's Order dated April 6, 2017, which granted Defendants' letter motions. *See* Dkt. 22. Plaintiff never objected to our request for a stay, and eventually "agree[d]" that the Defendants should be allowed to move to dismiss, thereby resolving the dispute. *See* Dkt. 16, 21. Indeed, Plaintiff never even broached the topic of discovery until his May 3, 2017 letter. *See* Dkt. 27-1. Accordingly, we respectfully request that the Court stay discovery until Defendants' motion to dismiss is resolved.

Should the Court hold that discovery was not stayed by virtue of the Court's Order dated

[1] Defendants are cognizant of Your Honor's Rule that "separate and successive letters [pertaining to discovery disputes] will not be read." *See* J. Broderick Individual Rule 3. However, Defendants' attempts to resolve this matter with Plaintiff without Court intervention have proved unsuccessful, thus necessitating the instant letter. *See, e.g.*, Dkt. 27-2, 29-1.

April 6, 2017,[2] Plaintiff's purported discovery demand is wholly improper because it is violative of both the Federal Rules and Your Honor's Individual Rules. *See* Dkt. 27-2. Briefly, Fed. R. Civ. P. 26(d) states that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f) . . . or when authorized by these rules, by stipulation, or by court order." It is undisputed that none of the events that would have permitted Plaintiff to properly seek discovery have occurred. Further, Plaintiff's purported discovery demand is not in compliance with Fed. R. Civ. P. 34(b)(1)(B) because it failed to set forth "a reasonable time, place, and manner for the inspection."

Plaintiff's purported discovery request was also improper because it did not grant Defendants 30 days to respond, as required by Fed. R. Civ. P. 34(b)(2)(A). In addition, Plaintiff has failed to conduct a meet-and-confer with Defendants pursuant to Fed. R. Civ. P. 37(a)(1). As the Court is of course aware, Your Honor's Individual Rules demand "[s]trict adherence to Fed. R. Civ. P. 37(a)(1)" prior to raising any discovery dispute with the Court. In that regard, the undersigned twice invited Plaintiff to meet-and-confer in an attempt to resolve his concerns in good faith. *See* Dkt. 27-2, 29-1. To date, Plaintiff has not responded to either invitation.

Finally, Defendants object to Plaintiff's claim that our May 8, 2017 constitutes "threatening" or otherwise improper conduct, and respectfully request that the Court deny Plaintiff whatever relief his May 10, 2017 letter may be construed as seeking. *See* Dkt. 29.

Should Your Honor have any questions or concerns, please do not hesitate to contact the undersigned. We thank Your Honor for your attention to this matter.

Respectfully submitted,

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

Joseph L. Francoeur

cc: *via ECF only*

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545 East 14th Street, 10D
New York, New York 10009
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[2] In that event, Defendants will move by separate letter motion for a stay.

Gmail

Roy Den Hollander <roy17den@gmail.com>

Confirmation of Receipt

Copyright Office <noreply@loc.gov> Mon, May 22, 2017 at 5:00 PM
To: roy17den@gmail.com

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United States Copyright Office

Gmail

Roy Den Hollander <roy17den@gmail.com>

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