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January 31, 2017

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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

Dear Judge Broderick:

We represent Defendants Katherine M. Bolger and Matthew L. Schafer ("Defendants") in the above-referenced action. Per Rule 4.A. of your Honor's Individual Rules and Practices, Defendants request a pre-motion conference and leave to move to dismiss the Complaint of Plaintiff Roy Den Hollander ("Plaintiff" or "Hollander") pursuant to Fed. R. Civ. Pro. 12(b)(6).

A. Background. Plaintiff Roy Den Hollander is a serial litigant who previously has been reminded of his Rule 11 obligations by the Second Circuit. *See Hollander v. Members of Bd. of Regents of Univ. of N.Y.*, 524 F. App'x 727, 730 (2d Cir. 2013) ("Before again invoking his feminism-as-religion thesis in support of an Establishment Clause claim, we expect [Plaintiff] to consider carefully whether his conduct passes muster under Rule 11."). Hollander has filed the instant case against the lawyers (Ms. Bolger and Mr. Schafer) who represented his former opponents in a New York state court proceeding that he recently lost.

In the prior state court action, *Hollander v. Shepherd, et al.* Index No. 152656/2014 (Sup. Ct. N.Y. Cnty.) (the "*Shepherd* Action"), Hollander sued certain Australian newspapers, represented by Ms. Bolger and Mr. Schafer, alleging that the newspapers injured him by publishing articles describing his attempts to establish a "men's rights" course at an Australian university. Defendants are lawyers who specialize in media and First Amendment law. In the course of representing the defendants in the *Shepherd* Action, Mr. Schafer conducted a Google search and discovered a publicly available website maintained by Hollander that included a

document about the *Shepherd* case entitled "Responses to Media" (the "Document"). A copy of that Document was included as an exhibit in opposition to Hollander's motion for "an immediate trial" that was filed on January 12, 2015. *Id*, Dkt. Nos. 69-71.

The next day, Hollander filed an order to show cause alleging that Defendants' viewing of the Document amounted to various violations of criminal and civil statutes—including illegal "hacking" under the Computer Fraud and Abuse Act ("CFFA"). *Id*, Dkt. No. 73. Judge Peter Moulton refused to sign the order to show cause. *Id*, Dkt. No. 99. Plaintiff next filed a motion "requiring defendants to withdraw illegally obtained document" (the "Motion to Withdraw"), claiming that Defendants hacked his computer and then tried to cover-up the alleged hacking by describing the "Responses to Media" document as a "Media Response".

Defendants responded by submitting evidence that the website was public, including screenshots of the publicly available website as well as affidavits from Ms. Bolger and Mr. Schafer explaining how they accessed the Document (the "Affidavits"). On January 11, 2016, Justice Schecter, after full briefing and oral argument, dismissed Hollander's lawsuit and further denied Hollander's Motion to Withdraw finding "[t]here is no basis for granting the relief sought." *Id.*, Dkt. Nos. 119-20. Hollander appealed the order dismissing his case, but *did not appeal the denial of his Motion to Withdraw*. On August 25, 2016 , his entire appeal was dismissed by the First Department for violating a court order, which the New York Court of Appeals affirmed. *Hollander v. Shepherd, et al.*, Mo. No. 2016-942 (N.Y. Nov. 2, 2016).

A. The Complaint. Hollander filed this lawsuit seeking to relitigate in federal court his already-rejected "hacking" and fraud allegations. Hollander asserts meritless claims against Defendants for alleged violations of the CFAA, Racketeer Influenced and Corrupt Organizations Act ("RICO"), trespass to chattel, injurious falsehood, and violation of attorney work product.

B. Basis for Defendants' Motion. First, this lawsuit is barred by collateral estoppel because Hollander has already litigated—and lost—the very same issue in the *Shepherd* Action. "The doctrine of collateral estoppel . . . prevents relitigation of an issue which is identical to one necessarily decided in a prior action," whether in state court or federal court, "and which the parties were afforded a full and fair opportunity to contest." *Polur v. Raffe*, 912 F.2d 52, 55 (2d Cir. 1990). Here, Justice Schecter—after full briefing and oral argument—has already decided that the same arguments Hollander has re-packaged here have "no basis." Hollander is, therefore, collaterally estopped from bring this action.

In addition, Hollander's claims must be dismissed because he has not and cannot plausibly allege that Defendants engaged in the central act of wrongdoing that informs his complaint—the "hack" of Hollander's "iCloud" or computer. It is well established that "[i]f the allegations of a complaint are contradicted by documents made a part thereof, the document controls and the court need not accept as true the allegations of the complaint." *Weston Funding, LLC v. Consorcio G Grupo Dina, S.A. de C.V.*, 451 F. Supp. 2d 585, 587 (S.D.N.Y. 2006. Here, Plaintiff pleads that Ms. Bolger and Mr. Schafer "admitted 'accessing' Plaintiff's iCloud" and he bases that claim on the Affidavits. But the very paragraphs Plaintiff cites directly contradict the allegations as the Affidavits state that the websites were publicly available and no password was required to visit them. Indeed, Hollander purposely omitted the two exhibits that were originally attached to Mr. Schafer's affidavit and that *prove* the Document was publically available – the screenshot of Plaintiff's publicly accessible website as visited by Mr. Schafer on December 30, 2014 (Ex. 1) and the screenshot of the Google-cache version of how the website appeared on

January 3, 2015. Moreover, Hollander offers no other "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," as required by *Iqbal v. Twombly*, 556 U.S. 662, 678 (2009). He offers only speculation that the defendants "most likely stole the attorney work product from the iCloud, but that does not rule out that they stole if from Plaintiff's personal computer without authorization." Compl. ¶ 7.

Finally, each of Hollander's claims fail on their merits as a matter of law. Briefly, as to his CFAA claim, Hollander fails to plead a cognizable loss. *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 523 (S.D.N.Y. 2001). Moreover, accessing a publicly available website cannot form the basis of a CFAA claim. *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 692 F. Supp. 2d 373, 385 (S.D.N.Y. 2010). As to his RICO claims, the two predicate acts are not well pleaded. The first, wire fraud for filing a document "falsely" characterizing another document in court filings fails because litigation activities cannot form the basis of wire fraud as a RICO predicate act. *See FindTheBest.com, Inc. v Lumen View Tech. LLC*, 20 F. Supp. 3d 451, 460 (S.D.N.Y. 2014). As to the second, robbery, Hollander has failed to show how hacking—which involves neither physical force let alone force in the presence of the victim—constitutes robbery under New York law. *See, e.g.*, *People v. Flynn*, 123 Misc. 2d 1021, 1024 (Sup. Ct. N.Y. Cnty. 1984). Next, Hollander cannot plead a trespass claim for hacking because he has not, and cannot, plead actual injury to his claimed property interest in the "iCloud." *Twin Sec., Inc. v Advocate & Lichtenstein, LLP*, 113 A.D.3.d 565, 565-66 (1st Dep't 2014). The injurious falsehood claim fails as the *sine qua non* of such a claim is falsity, but Hollander points to no material falsehood. *Newport Serv. & Leasing, Inc. v Meadowbrook Distrib. Corp.*, 18 A.D.3d 454, 455 (2nd Dep't 2005). Under New York law, the litigation privilege bars defamation-type claims against parties and their attorneys for the statements made during the course of a litigation. *See Singh v HSBC Bank USA*, 200 F. Supp. 2d 338, 340 (S.D.N.Y. 2002). The claim for violation for attorney work product fails because the Court of Appeals has rejected the claim as not cognizable in New York. *Madden v. Creative Servs.* 84 NY2d 738, 741 (1995). For all these reasons, this case should be dismissed.

C. Request for Stay. Defendants also request a stay of discovery pending the pre-motion conference. Stays are appropriate where proposed motion to dismiss "appear to have substantial grounds," discovery would be burdensome, and the opposing party would not be unfairly prejudiced. *Am. Fedn of Musicians & Employers' Pension Fund v. Atl. Recording Corp.*, No. 1:15-CV-6267-GHW, 2016 WL 2641122, at *1 (S.D.N.Y. Jan. 8, 2016). Here, Defendants have extremely strong arguments to dispose of this harassing litigation at the pleading stage. Defendants should not be forced to undergo onerous discovery at the hands of a vexatious plaintiff while the motion is pending, and Hollander will not be prejudiced by a stay.

We thank the Court for its time and attention to this matter.

Respectfully submitted,

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cc: *via ECF and email*

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