UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROY DEN HOLLANDER,

Plaintiff,

-against-

KATHERINE M. BOLGER,
MATTHEW L. SCHAFER,
JANE DOE(s),

Defendants.

Civil No.: 1:16-cv-09800 (VSB)

NOTICE OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

PLEASE TAKE NOTICE that, upon the Affirmation of Joseph L. Francoeur, dated May 15, 2017, and the exhibits annexed thereto, and upon the accompanying Memorandum of Law, and the authorities cited therein, and upon all other prior papers and proceedings in this action, Defendants, Katherine M. Bolger and Matthew L. Schafer, move this Court, before Hon. Vernon S. Broderick, at the United States District Court, Thurgood Marshall United States Courthouse, 40 Foley Square, Courtroom 518, New York, New York 10007, for an Order: (1) dismissing the Plaintiff's First Amended Complaint, on the merits and with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6), (2) awarding the Defendants costs and attorney's fees, including such attorneys fees and cost available pursuant to 17 U.S.C. § 505, and (3) granting such other and further relief as this Court deems just and proper. Pursuant to the Parties' agreed-upon briefing schedule which has been So Ordered by this Honorable Court, Plaintiff shall serve and file his opposition by June 14, 2017, and Defendants shall serve and file their reply papers to any opposition by June 28, 2017.

Dated: New York, NY
May 15, 2017

Respectfully Submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROY DEN HOLLANDER, Plaintiff, -against- KATHERINE M. BOLGER, MATTHEW L. SCHAFER, JANE DOE(s), Defendants.	Civil No.: 1:16-cv-09800 (VSB)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS KATHERINE M. BOLGER AND MATTHEW L. SCHAFER'S MOTION TO DISMISS

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Defendants Katherine M. Bolger and Matthew L. Schafer ("Defendants") respectfully submit this memorandum of law in support of their motion to dismiss the Amended Complaint of Plaintiff Roy Den Hollander pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

Plaintiff Roy Den Hollander ("Plaintiff" or "Den Hollander") repeatedly targets with frivolous litigation speech he does not like, individuals and their lawyers with whom he does not agree, and judges who do not rule in his favor.[1] This is one such case, and, as with all the rest, it too should promptly be disposed of.

Den Hollander brings this action against Ms. Bolger and Mr. Schafer after his state court defamation suit against their clients, two Australian newspapers and reporters, was dismissed. In representing their clients against Den Hollander's baseless defamation claims, Ms. Bolger and Mr. Schafer viewed on the internet Den Hollander's publicly available website, which included a document titled "Responses to Media" (the "Document"). They then attached this public document as an exhibit to Ms. Bolger's affidavit filed in connection with the motion to dismiss. This run-of-the-mill stuff of litigation is the sole basis for this multi-million dollar lawsuit for violations of the Computer Fraud and Abuse Act ("CFAA"), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and the Copyright Act, in addition to several tag-along state law claims. Den Hollander's Amended Complaint should be dismissed for any number of reasons.

As an initial matter, this litigation is barred by the doctrine of collateral estoppel because Den Hollander has already raised, litigated, and lost in state court the issues that form the basis of this action. In state court, Den Hollander filed an order to show cause seeking to have the

[1] *See, e.g., Hollander v. Members of Bd. of Regents* ("*Members*"), 524 F. App'x 727, 730 (2d Cir. 2013).

Document stricken from the record on the basis that it was improperly obtained, but the judge refused to sign the order to show cause. Den Hollander then filed a motion seeking the same relief and, after full briefing, the court found unequivocally that "there is no basis for granting the relief" he sought. Den Hollander is therefore estopped from relitigating these issues for a third time, before a third judge.

In addition, all of Den Hollander's claims fail on their merits. First, the lion's share of claims fail for the simple reason that the principle allegation—*i.e.*, that Ms. Bolger and/or Mr. Schafer "hacked" Den Hollander's iCloud—is not sufficiently pleaded. Den Hollander's *sole* factual support for this allegation is Ms. Bolger's and Mr. Schafer's previously filed state court affidavits, which, on their face, state unequivocally that they *did not* hack into Plaintiff's website. Dkt. 18 ("Amended Complaint" or "FAC"), Exs. B & C. Den Hollander's hacking allegation is not only implausible and insufficient under *Iqbal* and *Twombly*, it is explicitly contradicted by the exhibits Den Hollander attached to the Amended Complaint. As the entire Amended Complaint is based upon affidavits that specifically deny that any hacking took place, the Amended Complaint fails to adequately plead that any "hacking" occurred which requires the dismissal of Counts I, II, IV, VI, and VII.

The other claims fare no better. His RICO and injurious falsehood claims must be dismissed because the Amended Complaint and judicially noticeable documents show that Ms. Bolger and Mr. Schafer did not "intentionally lie[]" by describing the Document as a "Media Release." *Id.* at 12. Rather, they actually referred to the Document by Den Hollander's preferred title—"Responses to Media" —when they first discussed it in the state court filing and attached a copy of that Document that all parties here agree is authentic. *Id.*, Ex. E at 10. Further, although it was later *described* as a "Media Release" this is no more than a description

of the Document and does not constitute a false statement or material falsity, and Den Hollander cannot bring an action simply because he describes the Document differently. Therefore, Counts II and V should be dismissed because there was no fraud or falsehood.

The two remaining claims are equally frivolous. Den Hollander's copyright infringement claim is premised solely on the submission of the Document as an exhibit in Den Hollander's state court lawsuit. This claim must be dismissed outright because Plaintiff failed to plead that his purported copyright in the Document was registered with the Copyright Office. Such an allegation is an absolute prerequisite for filing any copyright infringement action.

The copyright claim also fails as the alleged violation is protected by the doctrine of fair use. Den Hollander is well aware of this, as he was the plaintiff (asserting an identical claim against a former opposing counsel) in a proceeding before the Second Circuit finding that submission of copyrighted materials in a legal proceeding constitutes fair use under the Copyright Act. *Hollander v. Steinberg*, 419 Fed. App'x 44, 47-48 (2nd Cir. 2011). Den Hollander's tag-along replevin claim fails too because it is preempted by and duplicative of this inadequately pleaded copyright claim. Finally, Den Hollander's concocted "violation of attorney work product" claim is not a recognized cause of action in New York. *Madden v. Creative Servs., Inc.*, 84 N.Y.2d 738 (N.Y. 1995). Thus, Counts III, VI & VII fail.

Den Hollander's Amended Complaint is a textbook example of a frivolous lawsuit brought solely to harass and intimidate. It should be swiftly disposed of, with prejudice, and Defendants should be awarded costs and fees.

BACKGROUND

A. Katherine Bolger and Matthew Schafer

At all times relevant to this action, Ms. Bolger and Mr. Schafer were attorneys with the

law firm Levine Sullivan Koch & Schulz, LLP ("LSKS"). FAC ¶ 3. LSKS is widely recognized as one of the best First Amendment law firms in the country, and primarily represents journalists and news organizations in defending lawsuits brought based on their news reporting.[2] Ms. Bolger is an accomplished litigator and a partner at LSKS, in addition to an adjunct faculty member at Fordham Law. She has been recognized by Chambers & Partners as a leading media lawyer nationwide and by Best Lawyers as one of the preeminent media lawyers in New York. Mr. Schafer, at the relevant time, was associated with LSKS.

B. Roy Den Hollander

Roy Den Hollander is a self-described "anti-feminist" lawyer and a prolific litigant for his cause. Den Hollander is also well-known to the Second Circuit, which has previously warned him against filing duplicative lawsuits. *Members*, 524 F. App'x at 729. In *Members*, Plaintiff asserted that various state and federal officials violated the Establishment Clause by providing funding to Columbia University because Columbia had a women's studies program promoting feminism, which Den Hollander alleged was a "religion." *Id.* Noting that "[s]everal years ago" the court "affirmed the dismissal of a nearly identical suit" brought by Den Hollander, the court found that Den Hollander was "barred from relitigating" the issue a second time. *Id.* In doing so, it cautioned that, "[b]efore again invoking his feminism-as-religion thesis in support of an Establishment Clause claim, we expect [Den Hollander] to consider carefully whether his conduct passes muster under Rule 11." *Id.* at 730.

In addition, Den Hollander frequently files lawsuits against his opponents' lawyers and even against judges when they disagree with him. *Steinberg*, 419 F. App'x 44 (suit alleging that

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[2] *See, e.g.*, Levine Sullivan Koch & Schulz, LLP, *U.S. News Best Law Firms*, http://bestlawfirms.usnews.com/profile/levine-sullivan-koch-schulz-llp/overview/31928 (recognizing Levine Sullivan as the law firm of the year for first amendment litigation); Levine Sullivan Koch & Schulz, LLP, *Chambers & Parters*, http://www.chambersandpartners.com/usa/firm/75780/levine-sullivan-koch-schulz. A court "may take judicial notice of a law firm's 'reputation for high quality work.'" *Wise v. Kelly*, 620 F. Supp. 2d 435, 442 (S.D.N.Y. 2008).

Plaintiff's opposing counsel violated the Copyright Act by using Plaintiff's writings in the course of judicial proceedings); *Hollander v. Flash Dancers Topless Club*, 173 F. App'x 15, 19 (2d Cir. 2006) (complaint alleging RICO violations against Plaintiff's ex-wife and mother, their lawyers, and various exotic dance clubs); *Hollander v. Block*, No. 10-CV-1713 NGG CLP, 2010 WL 1779995, at *1 (E.D.N.Y. 2010) (suit against Judge Block of the Eastern District, alleging that Judge Block discriminated against Plaintiff in favor of "Feminist establishment"); *cf. Hollander v. Copacabana Nightclub, et al.*, No. 07-cv-5873-MGC, Dkt. 32 (S.D.N.Y. 2007) (Plaintiff motion to recuse Judge Cedarbaum for bias against men).

C. The Prior Lawsuit

In March 2014, Den Hollander filed a lawsuit in New York Supreme Court alleging that two Australian newspapers and two Australian journalists defamed him through the publication of several news articles describing his attempts to establish a "men's rights" course at the University of South Australia. *See Hollander v. Shepherd*, Index No. 152656/2014 (Sup. Ct. N.Y. Cnty.) (the "*Shepherd* Action"); Francoeur Aff., **Ex. "I"**; *see also* FAC ¶ 2 (citing same).[3] Ms. Bolger and Mr. Schafer were the attorneys for defendants in that lawsuit.

The Australian defendants moved to dismiss the complaint for lack of personal jurisdiction and on the grounds that the articles, which, among other things, called Den Hollander an "anti-feminist," were true. Den Hollander then moved for an immediate trial. *See* Francoeur Aff., **Ex. "J"**; **Ex. "K"**. In the course of opposing the motion for an immediate trial, Mr. Schafer conducted a Google search and discovered a publicly available website maintained by Plaintiff that included a document about the *Shepherd* Action entitled "Responses to Media."

[3] A court may take "judicial notice of these state court filings." *Taveras v. Morales*, 22 F. Supp. 3d 219, 228 (S.D.N.Y. 2014); *see also Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir.1991) (courts may "take judicial notice of documents filed in other courts . . . to establish the fact of such litigation and related filings.").

A copy of that Document was included as an exhibit to Ms. Bolger's January 12, 2015 affirmation in opposition to a motion for immediate trial. *See* Francoeur Aff., **Ex. "K"**; FAC, Ex. D (attaching the Document and noting it was "available at Plaintiff's MR Legal Fund website, http://www.mensrightslaw.net/main/Down_Under/Press_Responses.pdf."). In the opposition, Defendants described the Document as "a document titled 'Responses to Media,' also published on Den Hollander's website" and then used the defined term "Media Release" in subsequent citations to the documents. *See* Francoeur Aff., **Ex. "J";** FAC, Ex. E at 10.

D. The Motion To Withdraw

The next day, Den Hollander sought an order to show cause asserting that Ms. Bolger and Mr. Schafer had hacked his "website" and further that such conduct violated a litany of criminal laws including unauthorized use of a computer, computer trespass, computer tampering, and the CFAA. *See* Francoeur Aff., **Ex. "L"**; **Ex. "M"**. Ms. Bolger and Mr. Schafer then filed a letter noting that the order to show cause "is frivolous on its face and should be denied." *Id.*, **Ex. "N"**. Justice Peter Moulton declined to sign the order, noting that "if appropriate" Plaintiff could bring the order by motion. *Id.*, **Ex. "O"**.

Undeterred, the next day, Den Hollander brought a "motion requiring defendants to withdraw illegally obtained document," alleging that Ms. Bolger and Mr. Schafer "hack[ed] into Plaintiff's personal computer or his digital cloud" to obtain the document and fraudulently described that document as a "Media Release."[4] *Id.*, **Ex. "P"**; **Ex. "Q"**; **Ex. "U"**. Ms. Bolger

[4] Plaintiff has made similar allegations against another opponent's lawyer. In *Steinberg*, he brought a copyright complaint after that lawyer attached to a filing Plaintiff's various writings. *See* 419 F. App'x 44. There too, Plaintiff alleged the attorney's "acquisition of [his] essays raises serious questions of cyber crime—unauthorized access of computers, 18 U.S.C. § 1030(a)(2)." *Copacabana Nightclub, et al.*, No. 07-cv-5873-MGC, Dkt. 59 at 4. Plaintiff demanded that she be ordered to "disclose how and when she acquired the copyrighted essays" and "to provide a list of all the persons to whom . . . she provided the essays." *Id.*, Dkt. 57 at 2. In response, that lawyer noted that the articles "appeared on the internet." *Id.*, Dkt. 24. The judge denied the motion, finding it outside the scope of the litigation.

and Mr. Schafer opposed that motion and submitted affidavits in which they swore they did not hack Den Hollander's website, the document was "freely available on Plaintiff's website," they lacked the skills to hack Plaintiff's computer, and they did not direct anyone else to hack into the website. *Id.*, **Ex. "R"** at 1, 5-7; *see also id.*, **Ex. "S"** ("Bolger Aff.")); **Ex. "T"** ("Schafer Aff.")).

Mr. Schafer also attached to his affidavit a screenshot of Plaintiff's website showing that Defendants visited a publicly available website "www.mensrightslaw.net/main/index.html" and that Google had cached a publicly available version of that website. *See* Schafer Aff., Exs. 1-2; *see also* FAC, Ex. C at 3-4.[5] Those exhibits also showed that Den Hollander was soliciting donations from the public through a "Donate" button, and that he was publicizing his various litigations, notably publicizing the *Shepherd* case as "Bimbo Book Burners from Down Under," under which he included links to court filings, "Press Releases," "Media Answers," and "Media Coverage." Schafer Aff., Ex. 2. In reply, Den Hollander insisted that Ms. Bolger and Mr. Schafer must have hacked his computer because they did not file the document with their original motion to dismiss. Francoeur Aff., **Ex. "U"**.

E. Justice Schecter Holds That There Was No Basis To Grant Den Hollander's Requested Relief.

On January 11, 2016, Justice Jennifer Schecter denied Den Hollander's motion because "[t]here is no basis for granting the relief sought." *Id.*, **Ex. "V"**. The court also dismissed the suit for lack of personal jurisdiction. *Id.*, **Ex. "W"**. Although Den Hollander appealed the dismissal, he did not appeal the order denying his motion to withdraw the illegally obtained document. Ultimately, the First Department dismissed Den Hollander's appeal, and the New York Court of Appeals denied him leave to appeal. *Id.*, **Ex. "X"**; **Ex. "Y"**.

[5] Notably, although Plaintiff filed as an exhibit to the Amended Complaint the Schafer Affidavit, he conveniently failed to include those exhibits as originally attached to the Schafer Affidavit. In any event, it is well-established that the Court can take judicial notice of these documents. *Kramer*, 937 F.2d at 774.

Less than a month after the final dismissal of his appeal in the *Shepherd* Action, Den Hollander filed the instant suit against Ms. Bolger and Mr. Schafer. *Id.* **Ex. "A".**

F. The Complaint and Amended Complaint in This Action.

On December 20, 2016, Den Hollander filed his complaint in this action, alleging as he had in state court that Defendants hacked his computer or iCloud to retrieve the Document and fraudulently described the Document filed with the state court as a "Media Release" rather than "Responses to Media." *See generally* Dkt. 1.

After Defendants filed a letter motion for a pre-motion conference seeking dismissal of the complaint, Den Hollander filed his Amended Complaint purportedly attempting to remedy several of the deficiencies pointed out in Defendants' letter motion, but, in reality, adding additional frivolous claims. *See generally* FAC; *see also* Francoeur Aff., **Ex "B"**; **Ex. "F"**.

Den Hollander's Amended Complaint, based again on Defendants' alleged hacking and their descriptions of documents in the state court proceeding, *id.* ¶¶ 26-88, 98-122, 128-47, seeks millions of dollars in damages for alleged violations of the CFAA, RICO, trespass to chattel, injurious falsehood, and violation of attorney work product. *Id.* In the Amended Complaint, Den Hollander also added claims for alleged violations of the Copyright Act, *id.* ¶¶ 89-97, and replevin, *id.* ¶¶ 123-27.

ARGUMENT

Den Hollander's frivolous claims all fail as a matter of law and should be dismissed.

I. PLAINTIFF'S CLAIMS ARE BARRED BY COLLATERAL ESTOPPEL

All of Den Hollander's claims in this action must be dismissed because Den Hollander has already litigated and lost the underlying issue that forms the foundation of this entire lawsuit

in the *Shepherd* Action. The doctrine of collateral estoppel "bars the relitigation of an issue that was raised, litigated, and actually decided by a judgment in a prior proceeding, regardless of whether the two suits are based on the same cause of action," *M.J. Woods, Inc. v. Conopco, Inc.*, 271 F. Supp. 2d 576, 580 (S.D.N.Y. 2003), or whether the issue was litigated in state or federal court, *see Polur v. Raffe*, 912 F.2d 52, 55 (2d Cir. 1990) (New York collateral estoppel law applies to prior state court decision).

Under New York law, collateral estoppel precludes a later proceeding if (i) the issue to be decided in the second action is identical to an issue necessarily decided in a prior proceeding; and (ii) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Constantine v. Teachers Coll.*, 448 F. App'x 92, 93 (2d Cir. 2011). The burden initially is on the party asserting the doctrine to prove identity of the issues; however, the burden of proving the absence of a full and fair opportunity to litigate is on the party contesting the doctrine's application. *Id.*; *see also Temple of Lost Sheep, Inc. v. Abrams*, 930 F.2d 178, 179-81 (2d Cir. 1991) (where plaintiffs choose to put their allegations "directly in issue" in state court, resolution of those issues will estop subsequent proceedings in federal court). Collateral estoppel is "a flexible doctrine" where the "fundamental inquiry is whether relitigation should be permitted . . . in light of . . . fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results." *M.J. Woods, Inc. v. Conopco, Inc.*, 271 F. Supp. 2d at 581 (quoting *Buechel v. Bain*, 97 N.Y.2d 295, 304 (N.Y. 2001)).

The Second Circuit has specifically held that repackaging already litigated issues in New York State court into a federal complaint does not circumvent the doctrine of collateral estoppel. *Polur*, 912 F.2d at 56-57. For example, in *Polur*, the plaintiff—an attorney—was subject to a

criminal contempt order and sanctions judgment in state court for violating an injunction against him. Plaintiff first challenged the order in state court, but was unsuccessful. *Id.* at 54. Thereafter, he filed a federal complaint alleging, *inter alia*, RICO violations against the New York State judge and opposing counsel for "wrongfully obtaining and enforcing a state criminal contempt order and sanctions judgment against him." *Id.* at 54-55. The court dismissed many of the plaintiff's claims on collateral estoppel grounds (and the other claims on other grounds), and the Second Circuit affirmed concluding that the claims were barred because "[s]everal state courts have addressed these identical issues and rejected them as meritless. A different judgment here 'would destroy or impair rights or interests established by'" the prior decisions. *Id.* at 55.

Here, as in *Polur*, Den Hollander is collaterally estopped from relitigating the issues of Defendants' alleged hacking and misrepresentation. All elements of collateral estoppel are easily satisfied. Initially, there is complete identity of the issues already raised and decided by Plaintiff's motion to withdraw in the *Shepherd* Action and those at issue here. In his state court motion, Den Hollander accused Defendants (or some unknown party acting at their behest) of exactly the same conduct he accuses them of here: (i) hacking into Plaintiff's digital cloud or personal computer (Francoeur Aff., **Ex. "Q"** at ¶ 3; FAC ¶¶ 5-9, 20-24), (ii) eliminating the authorization codes (Francoeur Aff., **Ex. "Q"** at ¶ 3; FAC ¶¶ 8, 21), (iii) stealing a document (Francoeur Aff., **Ex. "Q"** at ¶ 1; FAC ¶¶ 57-65), (iv) attaching that document as an exhibit to a separate motion paper (Francoeur Aff., **Ex. "Q"** at ¶ 5-8; FAC ¶¶ 10, 11, 89-97), and (v) attempting to conceal their actions by committing perjury and falsely characterizing the allegedly stolen document as a "Media Release" (as opposed to "Responses to Media") (Francoeur Aff., **Ex. "Q"** at ¶ 5-8; FAC ¶¶ 13, 46, 49).[6] Were there any doubt as to the identity of the issues, one

[6] Although Plaintiff limited his motion, in the first instance, to Ms. Bolger's alleged conduct or the conduct of some unidentified third parties, after Mr. Schafer submitted an affidavit denying Plaintiff's allegations, Plaintiff, in his

need look no further than Plaintiff's causes of action. In state court, he claimed that Defendants' actions violated the CFAA, as well as computer trespass and fraud, just as he does here. *Compare* Francoeur Aff., **Ex. "Q"** at ¶¶ 3(a)-(e), 6-8 *with* FAC ¶ 25-97. Even as to those causes of action that were not raised by Plaintiff in the *Shepherd* Action, the underlying *factual issues* are nevertheless identical—*i.e.*, whether Defendants wrongly acquired and wrongly used the "Responses to Media" Document (and other data) at-issue here. Accordingly, the issues in this action are identical to those raised and decided against Plaintiff in the *Shepherd* Action.

The burden thus shifts to Den Hollander to demonstrate that he did not have a full and fair opportunity to litigate the issue before Judge Schecter—a burden he cannot possibly carry. *See D'Arata v. N.Y. Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 665-66 (N.Y. 1990). Den Hollander vigorously litigated the issues underlying this very suit—first seeking an order to show cause, which was denied outright, and second by motion, which was denied after complete and extensive briefing by the parties. Francoeur Aff., **Ex. "P"**; **"Q"**; **"R"**; **"S"**; **"U"**. Accordingly, not only did Plaintiff *have* the opportunity to litigate these issues then, *he actually did so* and he cannot now do so for a third time, before a third judge. *Polur*, 912 F.2d at 55; *see also D'Arata*, 76 N.Y.2d at 665-66. For these reasons, collateral estoppel bars this action in its entirety, and therefore Plaintiff's Amended Complaint must be dismissed.

II.
PLAINTIFF HAS NOT PLAUSIBLY OR SUFFICIENTLY ALLEGED ANY OF THE CLAIMS IN THE AMENDED COMPLAINT

All of Den Hollander's claims must also be dismissed for the independent reason that he has failed plausibly or sufficiently to plead each one. A complaint can survive a motion to dismiss only if it "state[s] a claim to relief that is plausible on its face." *Bell Atl. Corp. v.*

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reply, made the hacking assertions against both Ms. Bolger and Mr. Schafer. Francoeur Aff., **Ex. "U"** at ¶ 1-2, 5-8, 30-34.

Twombly, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action," "supported by mere conclusory statements, do not suffice" to state a viable claim. *Iqbal*, 556 U.S. at 678. Instead, a claim has "facial plausibility when the plaintiff *pleads factual content* that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (emphasis added); *see also Twombly*, 550 U.S. at 545.

Although a court should generally assume the truth of allegations in a complaint for purposes of a motion to dismiss, it "need not feel constrained to accept as truth conflicting pleadings that make no sense," "would render a claim incoherent," or "are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely, or by facts of which the court may take judicial notice." *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405 (S.D.N.Y. 2001). In fact, "[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); *see also Beauvoir v. Israel*, 794 F.3d 244, 248 (2d Cir. 2015) ("threadbare recitals" in a complaint did not refute contradictory letter attached as an exhibit to the complaint); *Feick v. Fleener*, 653 F.2d 69, 75 (2d Cir. 1981) (dismissal proper when power of attorney annexed to complaint contradicted plaintiffs' claims). This is so even where documents are referenced by but not attached to the complaint. *Rapoport v. Asia Electronics Holding Co., Inc.*, 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000) (affirming dismissal in part because newspaper article and prospectus referenced in complaint "call[ed] into question and, apparently, contradict[ed]" allegations in complaint).

A. Plaintiff Has Not Plausibly Alleged Any Act of "Hacking."

At the most fundamental level, Den Hollander has not and cannot plausibly allege that Ms. Bolger or Mr. Schafer engaged in the central act of wrongdoing that provides the basis for his Amended Complaint—the purported "hacking" of Plaintiff's "iCloud" or computer.

First, Den Hollander relies exclusively on Defendants' affidavits for the factual support for his Amended Complaint and those affidavits directly contradict his allegations. Specifically, Plaintiff alleges that Ms. Bolger and Mr. Schafer "admitted 'accessing' Plaintiff's iCloud." FAC ¶¶ 5, 6. Remarkably, Plaintiff bases these allegations on Defendants' affidavits from the *Shepherd* action swearing that they *did not* hack Plaintiff's computer or website. *Id.* ¶¶ 5 (citing Ex. B, Bolger Aff. ¶¶ 2-4), 6 (citing Ex. C, Schafer Aff. ¶¶ 2-4). Rather, Defendants "clicked on [in Mr. Schafer's case, a link to Plaintiff's website on Google, and in Ms. Bolger's, a URL to that website that Mr. Schafer sent her] and immediately accessed the website, which [they were] able to navigate freely." *Id.*, Ex. B (Bolger Aff. ¶¶ 2-3); *Id.*, Ex. C (Schafer Aff. ¶¶ 2-3). Both affirm further that "[o]n no occasion was I ever asked to enter a username or password to access the Plaintiff's website. I simply visited the link like I visit other websites." FAC, Ex. B (Bolger Aff. ¶¶ 2-3); FAC, Ex. C (Schafer Aff. ¶ 2). And both affidavits swear that "I did not 'hack' the website, nor did anyone else to my knowledge. Indeed, I have no training or skills on how to 'hack' or gain unauthorized access to Plaintiff's website, and I do not know how to do so. Moreover, I did not direct anyone to 'hack' Plaintiff's website." FAC, Ex. B (Bolger Aff. ¶ 7); FAC, Ex. C (Schafer Aff. ¶ 5). The affidavits, therefore, directly contradict the hacking claims contained within the Amended Complaint. As a consequence, here as in *Feick*, *Beauvoir*, and *Rapoport*, the Amended Complaint must be dismissed.

Indeed, Den Hollander must have been aware of the contradiction because he conveniently chose not to attach certain exhibits originally attached to Mr. Schafer's affidavit that conclusively demonstrate the obvious: that neither Mr. Schafer nor Ms. Bolger engaged in any wrongdoing. Francoeur Aff., **Ex. "T"** (attaching a true-and-accurate copy of the original Schafer Affidavit, together with annexed Exhibits 1-2). As noted above, Den Hollander excluded the exhibits that showed a screenshot of Plaintiff's publicly accessible website as visited by Mr. Schafer on December 30, 2014 (Schafer Aff., Ex. 1) and the screenshot of the publicly accessible Google-cache version of how the website appeared to the public on January 3, 2015 (Schafer Aff., Ex. 2).[7] *See also* FAC ¶¶ 18-19 (attempting to explain away Columbia University Alumni Club website link to Plaintiff's allegedly private computer or iCloud). These screenshots unequivocally establish that the website *was not locked* in an iCloud or password protected but, quite to the contrary, was publicly available at the time it was visited by the Defendants.

In this respect, this case is very like the court's decision in *Rapoport*.[8] 88 F. Supp. 2d at 184. There, the plaintiffs made certain allegations in complaint that referenced a newspaper article and a prospectus but did not attach either document to the complaint. *Id.* The court, after first commenting that "Plaintiffs' decision not to attach either of these documents to the amended complaint puzzles and concerns this Court," concluded "[i]f these documents contradict the allegations of the amended complaint, the documents control and this Court need not accept as true the allegations in the amended complaint." *Id.* When the court compared the two and found

[7] *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1156 & n.3 (9th Cir. 2007) (noting that a "Google cache" permits users to view websites as they appeared even after a website publisher, for example, "render[s an] image unavailable").

[8] *Rapoport*'s finding were made under the more lenient pre-*Iqbal/Twombly* standard and thus should apply with extra force under the more demanding *Iqbal/Twombly* standard. *See, e.g., Employees' Ret. Sys. v. Morgan Stanley & Co.*, 814 F. Supp. 2d 344, 353 (S.D.N.Y. 2011) (applying the *Rapoport* rule post-*Iqbal/Twombly*); *see also Dunn v. Sederakis*, 143 F. Supp. 3d 102, 107 n.4 (S.D.N.Y. 2015) (same).

the documents did not support the allegations, it dismissed the complaint. *Id.* As in *Rapoport*, the documents attached to or referenced in the Amended Complaint directly contradict its central allegations. The Amended Complaint must be dismissed for this reason alone.

Second, other than misstating the affidavits, Den Hollander pleads no "factual content that allows the court to draw the reasonable inference that the defendant[s are] liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Indeed, his whole Amended Complaint is unsupported speculation—and wholly speculative allegations need not be taken as true. *Gallop v. Cheney*, 642 F.3d 364, 368 (2d Cir. 2011) (affirming dismissal of conspiracy complaint based on "a series of unsubstantiated and inconsistent allegations" and concluding that "the courts have no obligation to entertain pure speculation"); *see also Denton v. Hernandez*, 504 U.S. 25, 33 (1992) (court need not credit facts that "are 'clearly baseless,'" "fanciful," "fantastic," and "delusional"); *Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App'x 582, 585 (2d Cir. 2011) (rejecting "conclusory and speculative [RICO] allegations" against prior opposing counsel).

Den Hollander himself seems unsure of the alleged wrongdoing, pleading, for example, that the "Russia-like" defendants, FAC ¶ 141, "*most likely* stole the attorney work product from the iCloud, but that *does not rule* out that they stole it from Plaintiff's personal computer without authorization," *id.* ¶ 7, and speculating that "[o]n information and belief, Defendants will eventually do a Wikileaks type release of all the material they hacked so as to allow the Murdoch newspaper to spin the data" contained therein, *id.* ¶ 24; *see also id.* ¶¶ 9 (noting that Defendants "either engaged in the hacking . . . or had the assistance from an unknown person"), 22 (naked assertion that "Defendants may have also illegally accessed Plaintiff's home computer"). These speculative, fanciful, and at times contradicting allegations do not come close to satisfying

Iqbal/Twombly. *See Gallop*, 642 F.3d at 368.

B. Plaintiff's Copyright Claim Must Be Dismissed.

Next, Den Hollander's frivolous copyright claim—which is identical to a claim that he made against a former opposing counsel and that was rejected both by the Eastern District and the Second Circuit—should also be dismissed. *See* FAC ¶¶ 89-97.

In the Amended Complaint, Plaintiff alleges that Ms. Bolger and Mr. Schafer committed copyright infringement by reproducing and filing the Document as an exhibit to a motion in the *Shepherd* Action. As a threshold matter, this claim must be dismissed because Plaintiff has not pleaded that his purported copyright in the Document (also alleged to be his attorney work product) was registered with the Copyright Office, a prerequisite for filing a copyright infringement action. *See* 17 U.S.C. § 411(a); *see also* FAC ¶¶ 89-97. Indeed, absent a registration, the courts do not have jurisdiction over copyright claims. *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 37 n.6 (S.D.N.Y. 1992); *see also BWP Media USA, Inc. v. Gossip Cop Media, LLC*, 87 F. Supp. 3d 499, 504 (S.D.N.Y. 2015) (holding that valid copyright registration required prior to filing a civil claim and listing cases).

Registration aside, the claim fails on the merits because Ms. Bolger and Mr. Schafer's use of the Document in the *Shepherd* litigation is a fair use. *See* 17 U.S.C. § 107. Courts have repeatedly found that the use of copyrighted material for the purposes of litigation are, generally, fair use. *Scott v. WorldStarHiphop, Inc.*, No. 10 CIV 9538 PKC RLE, 2011 WL 5082410, at *7–8 (S.D.N.Y. 2011) (dismissing nearly identical claims on a Rule 12(b)(6) motion); *accord Devil's Advocate, LLC v. Zurich Am. Ins. Co.*, 666 F. App'x 256, n.12 (4th Cir. 2016) (collecting cases standing for the proposition that that use of copyrighted material in court proceedings constitutes fair use).

More specifically, Den Hollander is well aware of this precedent because he has already litigated and lost a virtually identical copyright claim against a different former opposing counsel in this very Circuit. In *Hollander v. Swindells-Donovan*, No. 08-CV-4045 (FB) (LB), 2010 WL 844588, at *1–2, *3–5 (E.D.N.Y. 2010), Den Hollander claimed that two attorneys committed copyright infringement because they submitted his copyrighted essays as exhibits in separate judicial proceedings. The court held that the attorney's submission of the essays was fair use and "clearly could not support [a] copyright infringement" claim. *Id.* at *5. On appeal, the Second Circuit agreed, holding that the attorneys' use of the document was not for a commercial purpose, but rather for "litigation strategy," and that there would be no effect on the market because few readers "would even be aware of the essays' presence in a court file, let alone choose to acquire copies by the cumbersome methods of visiting a courthouse to make copies or using PACER." *See Steinberg*, 419 Fed. App'x at 47. So too here.

Accordingly, given the frivolity of Den Hollander's copyright claim and his acute awareness of this fact, not only should the copyright claim be dismissed, but Defendants should be awarded attorney's fees and costs pursuant to 17 U.S.C. § 505 for being forced to bring the instant motion. *See Mahan v. Roc Nation, LLC*, 634 F. App'x 329, 330-31 (2d Cir. 2016).

C. Plaintiff's Replevin Claim Must Be Dismissed.

Similarly, Den Hollander's claim for replevin must be dismissed because it is preempted by the Copyright Act. The only factual basis set forth for the replevin claim is Defendants' alleged retention and use of the Document and other purported intellectual property that he claims to own. FAC ¶¶ 123-27. Putting aside the veracity of such allegations, Den Hollander's common law claim seeks to enforce the exact same rights that are within the exclusive province of the Copyright Act. 17 U.S.C. § 301(a); *Miller v. Holtzbrinck Publishers, L.L.C.*, 377 F. App'x

72, 73 (2d Cir. 2010) (dismissing claims of tortious interference and conversion as preempted by the Copyright Act); *Christen v. iParadigms, LLC*, No. 1:10CV620, 2010 WL 3063137, at *2–3 (E.D. Va. 2010) ("[l]ike Plaintiff's conversion claim, the replevin claim complains of Defendant's use and retention of a copy of [plaintiff's] manuscripts and thus seeks to vindicate a right that is the exclusive province of the Copyright Act. Thus, Plaintiff's replevin claim . . . is . . . preempted"). Alternatively, it is simply duplicative of the copyright infringement claim in that it alleges no distinct facts. *See, e.g.*, *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225, 232-33 (S.D.N.Y. 2000).[9] Accordingly, it must be dismissed.

D. Plaintiff's Computer Fraud and Abuse Act of Claim Must Be Dismissed.

Just as he did in the *Shepherd* Action, Den Hollander's Amended Complaint alleges that Defendants violated the CFAA, 18 U.S.C. § 1030(a)(2)(C). *See* FAC ¶¶ 26-33. The CFAA imposes criminal and civil penalties on any person who "intentionally accesses a computer without authorization or exceeds authorized access." Private parties may also bring civil suits to redress violations of the CFAA, but only in very limited circumstances. *Univ. Sports Pub. Co. v. Playmakers Media Co.*, 725 F. Supp. 2d 378, 382 (S.D.N.Y. 2010). This is not such a case.

As an initial matter, exhibits attached to the Amended Complaint and other judicially noticeable documents establish that Den Hollander's website was publicly available. *See supra* Sec. II. Accessing a publicly available website cannot form the basis of a CFAA claim. *See, e.g.*, *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 692 F. Supp. 2d 373, 385 (S.D.N.Y. 2010)

[9] At any rate, even if this claim were not preempted, the issue of possession has been rendered moot by the instant litigation. During this litigation, Plaintiff attached copies of the very Document to that now he demands be returned to him. As a result, the Document, being filed to ECF and part of the record in civil action, is now *public record* and is freely available to anyone who wishes to obtain a copy. By making the Document part of the public record, Plaintiff has relinquished whatever possessory interest he had in the Document. *See, e.g.*, *Joseph P. Carroll Ltd. v. Ping-Shen*, 140 A.D.3d 544, 544 (1st Dep't 2016) (present possessory interest in chattel required to maintain claim for replevin).

(rejecting argument that CFAA prohibits use of "information to which the employee freely was given access and which the employee lawfully obtained"); *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 932-34 (E.D. Va. 2010) (rejecting CFAA claim based on accessing publicly available website); *accord CollegeSource, Inc. v. AcademyOne, Inc.*, 597 F. App'x 116 (3d Cir. 2015) (affirming because PDF document was "available without precondition to any member of the general public who clicked the link"). Thus, the CFAA should be dismissed on that basis alone.

Den Hollander brings his claim under Section 1030(a)(2)(C) of the CFAA, which prohibits "intentionally access[ing] a computer without authorization or exceed[ing] authorized access, and thereby obtain[ing] . . . information from any protected computer." But the CFAA provides a that a civil right of action may only "be brought only if the conduct involves 1 of the factors set forth in subclauses (I) , (II), (III), (IV), or (V) of subsection (c)(4)(A)(i)." 18 U.S.C. § 1030(g). Here, the only subsection possibly applicable is Section (c)(4)(A)(i)(I), which is limited to unauthorized access that "recklessly causes *damage*" resulting in a "loss . . . aggregating at least $5,000 in value." (emphasis added); *see also* 18 U.S.C. § 1030(a)(5)(B). Plaintiff's Amended Complaint must be dismissed because he has not pleaded compensable losses of any sort, much less those of $5,000 or more.

Specifically, Den Hollander fails to allege that he spent any time remedying any alleged damage to his "iCloud" or his data as is required to plead a sustainable CFAA claim. *Reis, Inc. v Lennar Corp.*, No. 15 CIV. 7905 (GBD), 2016 WL 3702736, at *6–7 (S.D.N.Y. 2016) (citing *Fink v. Time Warner Cable*, 810 F. Supp. 2d 633, 641 (S.D.N.Y. 2011) (holding that "losses relating to time and effort in assessing 'damage' to each computer whose transmissions were interrupted" are outside of those contemplated by the scope of the CFAA because the plaintiffs

did not allege "that they needed to restore[] . . . data, [a] program, [a] system, or information to its condition prior to Defendant's conduct")). Instead, Plaintiff alleges that he instituted unidentified "costly security precautions" to "modify" his computers to prevent against future hacks. FAC ¶¶ 32-33. But losses incurred from instituting prophylactic security measures against "some potential future offense" are not recoverable. *Reis, Inc. v. Lennar Corp.*, No. 15 CIV. 7905 (GBD), 2016 WL 3702736, at *6 (S.D.N.Y. July 5, 2016); *see also Univ. Sports Publ'ns Co. v Playmakers Media Co.*, 725 F. Supp. 2d 378, 388 (S.D.N.Y. 2010) (audit that sought to identify ways to improve the database's security system following a breach not recoverable under the CFAA).

Den Hollander also alleges that he conducted "extensive searching" on the internet in order to determine how Defendants "hacked" his computer and obtained the Document. FAC ¶ 28-29, 31. But these allegations—amounting to little more than "Googling"—do not constitute an assessment of damage to his computer or its data, and thus are not compensable losses under the CFAA. *See Tyco Int'l (US) Inc. v. Does*, No. 01 CIV.3856(RCC)(DF), 2003 WL 23374767, at *3–4 (S.D.N.Y. 2003) (investigating nature of alleged hack and identity of hacker not compensable losses under the CFAA). Thus, Plaintiff's CFAA claim should be dismissed for failure to plead the requisite damages.

E. Plaintiff's RICO Claim Must Be Dismissed.

Next, this Court should dismiss Den Hollander's RICO claim, see FAC ¶¶ 34-88, because the two alleged "racketeering predicate acts"—wire fraud and robbery—are insufficiently pleaded, and even if they were not, he nevertheless fails to plead a "pattern of racketeering activity."

As an initial matter, the RICO statute was not intended to elevate one attorney's

grievances against another into a cause of action. To the contrary, in a similar case to this one, the Eastern District emphasized how problematic such an outcome would be. In *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, the plaintiff—a lawyer—asserted RICO claims against a law firm and its clients because, the plaintiff claimed, the law firm prosecuted "knowingly false legal malpractice claims" and mailing various litigation documents, including a "completely false affidavit." 758 F. Supp. 2d 153, 157-58, 162, 164-65 (E.D.N.Y. 2010), *aff'd*, 443 F. App'x 582. In granting defendants' motion to dismiss, the *Curtis* court reasoned that the service and filing of litigation documents are routine litigation activities that cannot properly constitute RICO predicate acts. *Id.* at 171-72. To hold otherwise would mean that "almost every state or federal action could lead to corollary federal RICO actions"—a result that the *Curtis* court found to be "absurd." *Id.* It would likewise be absurd here.

Not surprisingly then, Den Hollander's RICO claim under 18 U.S.C. § 1962(c) fails for multiple other reasons. To prevail, a plaintiff must show "he was injured by defendants' (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Kalimantano GmbH v. Motion in Time, Inc.*, 939 F. Supp. 2d 392, 404 (S.D.N.Y. 2013). To plead a "pattern of racketeering activity," a plaintiff must allege that defendants committed two or more "racketeering predicate acts" within a ten-year period. *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 183 (2d Cir. 2008)). A plaintiff must further plead "either an open-ended pattern of racketeering activity (*i.e.*, past criminal conduct coupled with an adequately pled threat of future criminal conduct) or a closed-ended pattern of racketeering activity (*i.e.*, past criminal conduct extending over a substantial period of time)."[10] *First Capital Asset Mgmt. v Satinwood, Inc.*, 385 F.3d 159, 180 (2d Cir. 2004).

[10] Den Hollander neither pleads nor relies on closed-ended continuity. *Spool*, 520 F.3d at 185.

Here, Den Hollander has failed to plead these basic elements. *First*, he has failed properly to plead any racketeering predicate acts. As to his wire fraud allegation, this claim is premised upon the allegation that Defendants "falsely" characterized the "Responses to Media" document as a "Media Release" in litigation documents that they e-filed in connection with the *Shepherd* Action. FAC ¶¶ 46-56. Courts in this Circuit, however, have routinely held that routine litigation activities (such as the serving and filing of motions) cannot form the basis of RICO predicate acts—and in particular cannot constitute wire fraud. *FindTheBest.com, Inc. v Lumen View Tech. LLC*, 20 F. Supp. 3d 451, 460 (S.D.N.Y. 2014); *Von Bulow v. Von Bulow*, 657 F. Supp. 1134, 1145 (S.D.N.Y. 1987); *accord Daddona v. Gaudio*, 156 F. Supp. 2d 153, 162 (D. Conn. 2000). Indeed, "courts have refused to recognize as wire or mail fraud even litigation activities that rise to the level of malicious prosecution simply because the mail or wires were used." *FindTheBest.com, Inc.*, 20 F. Supp. 3d at 460; *accord United States v. Pendergraft*, 297 F.3d 1198, 1208 (11th Cir. 2002) (mailing "false affidavits" could not support a RICO claim); *St. Germain v. Howard*, 556 F.3d 261, 262-63 (5th Cir. 2009) (rejecting RICO mail and wire fraud claims arising out of litigation activity). The same rule applies here and Plaintiff's litigation-based wire-fraud RICO claim must be dismissed.

Moreover, Den Hollander must further allege "the existence of a scheme to defraud" and "defendant's knowing or intentional participation in the scheme." *S.Q.K.F.C., Inc. v. Bell Atl. TriCon Leasing Corp.*, 84 F.3d 629, 633 (2d Cir. 1996). In addition to the requirement that a scheme to defraud must be alleged "with particularity," *id.* at 634 (citing F.R.C.P. 9(b)), the alleged "fraud" must be material, *see A. Terzi Prods. v Theat. Protective Union, Local No. One*, 2 F. Supp. 2d 485, 499 (S.D.N.Y 1998) (requiring a "material misrepresentation or concealment"), and materiality is a question of law properly decided on a motion to dismiss, *see*

Econ. Opportunity Comm'n of Nassau Cty. v. Cty. of Nassau, Inc., 47 F. Supp. 2d 353, 364 (E.D.N.Y. 1999) (finding that allegedly fraudulent letters "do not constitute fraudulent misrepresentations as a matter of law" and dismissing claim).

Den Hollander pleads none of this. Here, the only "falsehood" Plaintiff attributes to Defendants is their use of the term "Media Release" to characterize the "Responses to Media" document in the *Shepherd* Action.[11] FAC ¶ 46. But the documents attached to the Amended Complaint demonstrate that Defendants actually introduced the document as a "Responses to Media" and attached a true and accurate copy of the document to Ms. Bolger's Affidavit. *See id.*, Ex. E at 5; *id.*, Ex. D at 1. Surely, this is not a material misrepresentation nor concealment—let alone an intent to defraud. *S.Q.K.F.C., Inc.*, 84 F.3d at 634 ("A review of the documents relating to the initial negotiations, which are attached to S.Q.K.F.C.'s complaint, severely undercuts any inference of fraudulent intent"); *Econ. Opportunity Comm'n*, 47 F. Supp. 2d at 364. Plaintiff has therefore failed to plead *any* facts to support the allegations that Defendants committed fraud.

Den Hollander also fails to allege, as he must, how he or any third-party justifiably relied on Defendants' alleged mischaracterization. *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 133 (2d Cir. 2010). Pleading such reliance would be impossible under these circumstances because anyone who viewed the filings below would understand precisely "what was what" based on Defendants' statements, and, in any event, would see that Plaintiff immediately contested Defendants' use of the phrase "Media Release," and in fact accused Defendants of stealing the document, *see, e.g.*, FAC, Ex. F. *See Beck v. Mfrs. Hanover Trust Co.*, 645 F. Supp. 675, 681 (S.D.N.Y. 1986) (no misapprehension regarding a document is possible when said

[11] Plaintiff himself apparently gave the Document yet another name (in the PDF's file name), "Press Responses," *see* FAC, Ex. D at 1, a characterization that, if made by the Defendants, Plaintiff would surely have labeled fraud.

document is freely available for review). Plaintiff has thus utterly failed to plead wire-fraud.

Den Hollander also has not pleaded the second racketeering predicate act he alleges—robbery. In New York, every degree of robbery requires (1) the use of physical force or the threat of physical force (2) against a person. N.Y. Penal Law §§ 160.05, 160.10, 160.15; *see also People v. Ramirez*, 89 N.Y.2d 444, 451-53 (N.Y. 1996). The Amended Complaint fails to adequately plead either element. The only physical force alleged is that "[o]n information and belief" Defendants tried to guess his "iCloud's" password until they guessed right. FAC ¶¶ 57, 62. This "digital" physical force, of course, is neither the use of *actual* physical force nor the threat of physical force as required. *See, e.g.*, *People v. Flynn*, 123 Misc.2d 1021, 1024 (Sup. Ct. N.Y. Cnty. 1984) (finding that the use of trickery to have locked door opened does not satisfy force or threat of force requirement). At any rate, Den Hollander has not pleaded any physical force used against *him*, as opposed to his "iCloud" or computer. *See In re Joseph H.*, 55 A.D.3d 608, 609 (2d Dep't 2008). Therefore, because Plaintiff has not pleaded robbery or any other cognizable predicate act required for a civil RICO claim, the claim must be dismissed.

Second, even if Den Hollander had adequately pleaded the required predicate acts, he cannot plead an "open-ended pattern of racketeering activity," and his RICO claims fails for this reason too. A plaintiff must allege "that there was a threat of continuing criminal activity beyond the period during which the predicate acts were performed." *Spool*, 520 F.3d at 185; *see also First Capital Asset Mgmt.*, 385 F.3d at 180. Plaintiff fails to do so here. In fact, he affirmatively pleads otherwise, alleging that Ms. Bolger and Mr. Schafer already "downloaded everything from the iCloud." FAC ¶ 21. In the face of similar allegations, the Second Circuit has found open-ended continuity lacking because "there is nothing left to loot." *GICC Capital Corp. v. Tech. Fin. Grp., Inc.*, 67 F.3d 463, 466 (2d Cir. 1995); *First Capital Asset Mgmt., Inc.*,

385 F.3d at 181 ("Once [a party] had fraudulently conveyed his assets, which he allegedly accomplished by . . . fil[ing] for bankruptcy, the scheme essentially came to its conclusion"); *Westchester Cty. Indep. Party v. Astorino*, 137 F. Supp. 3d 586, 611 (S.D.N.Y. 2015) (dismissing RICO claim where "scheme, as alleged by Plaintiffs, 'has an intended and foreseeable endpoint'").

Finally, Den Hollander's contradictory and implausible allegations utterly fail to satisfy the requirements of *Iqbal* and *Twombly*. As *Twombly* emphasized, it is not enough for a plaintiff to allege a *conceivable* claim (Den Hollander fails to do even that here); in order to survive dismissal, a plaintiff must allege sufficient facts to "nudge their claims across the line from conceivable to *plausible*." *Twombly,* 550 U.S. at 570. And the specific factual allegations "must be enough to raise a right to relieve above the speculative level," *id.* at 577, while "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" will not do, *Iqbal,* 129 S.Ct. at 1949.

Den Hollander's RICO thesis—that the highly regarded LSKS law firm and Ms. Bolger and Mr. Schafer engaged in an unlawful conspiracy to hack into his computer and steal his documents is unsupported by any facts and directly contradicted by others in the Amended Complaint. It would require this Court to elevate Den Hollander's irresponsible and paranoid allegations to the level of "plausibility" based on little more than his say-so. *Gallop*, 642 F.3d at 368 (2d Cir. 2011) ("the courts have no obligation to entertain pure speculation"). This runs afoul of *Iqbal* and *Twombly.*[12]

For all the foregoing reasons, Den Hollander's attempt to make the rote practice of law a

[12] The truly fanciful nature of Den Hollander's allegations is captured in Paragraph 75 of the Amended Complaint, which alleges that "[o]n information and belief, [Defendants'] team continues trolling the Internet for information on Plaintiff's business and continues to try and hack into Plaintiff's iCloud or his home computer to obtain any new information stored there, so as to further harm Plaintiff's business and its services and products." After *Iqbal* and *Twombly*, courts are required to dismiss claims based on unsupported allegations such as these.

federal crime should be rejected and his RICO claims dismissed.

F. Plaintiff's Injurious Falsehood Claim Must Be Dismissed.

Den Hollander's claim for injurious falsehood must also be dismissed. *See* FAC ¶¶ 112-22. As an initial and dispositive matter, it is barred by the one-year statute of limitations applicable to injurious falsehood claims. CPLR § 215(3); *Lesesne v. Brimecome*, 918 F. Supp. 2d 221, 223 (S.D.N.Y. 2013). Here, the events alleged by Den Hollander as giving rise to this claim occurred—by his own admission—no later than January 12, 2015. *See* FAC ¶ 10. Thus the statue of limitations expired on January 12, 2016, and this action was not commenced until December 20, 2016. *See* Francoeur Aff., **Ex "A"**.

Next, the claim is barred by New York's litigation privilege, which holds that statements made in litigation are absolutely privileged. *Singh v HSBC Bank USA*, 200 F. Supp. 2d 338, 340 (S.D.N.Y. 2002); *Icahn v Raynor*, 32 Misc. 3d 1224[A], *5-6 (Sup. Ct. N.Y. Cnty. 2011) (applying privilege to injurious falsehood claim); *see also Kelly v. Albarino*, 485 F.3d 664, 665 (2d Cir. 2007). The only alleged false statement made by Ms. Bolger and Mr. Schafer was choosing to refer the Document entitled "Responses to Media" as a "Media Release" in subsequent citations in a brief. FAC, Ex. E at 5. As such, there is no doubt that the alleged falsity is privileged and for this reason, too, the claim must be dismissed.

Finally, the *sine qua non* of an injurious falsehood claim is falsity. It is, therefore, axiomatic that truth is a complete defense. *See Pitcock v. Kasowitz, Benson, Torres, & Friedman, LLP*, 74 A.D.3d 613, 615 (1st Dep't 2010). Moreover, because the plaintiff bears the constitutionally mandated burden of proof regarding falsity, "'[i]t's not necessary of course that a statement be literally true.'" *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 301 (2d Cir. 1986) (citation omitted); *see also, e.g.*, *Stepanov v. Dow Jones & Co.*, 120 A.D.3d 28, 35 (1st

Dep't 2014). "Material falsity" is not the same thing as a minor error. As the Supreme Court has explained, a statement does not amount to material falsity so long as "'the substance, the gist, the sting, of the libelous charge be justified.'" *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991) (citation omitted); *accord Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 379-83 (1977). "Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Masson*, 501 U.S. at 517 (citation omitted).[13]

Here, Den Hollander cannot show that Defendants' statement is false, let alone *materially* false. No reasonable person could believe that using the defined term "Media Release" conveys a different impression than the term "Response to Media," particularly in light of the fact that the Defendants introduced the Document by Plaintiff's preferred titled, FAC, Ex. E at 10, and the Document was itself submitted as an attachment to Ms. Bolger's affidavit, permitting anyone to inspect it, *id.*, Ex. D at 1. Thus, there is no falsehood on which to base an injurious falsehood claim.

G. Plaintiff's Trespass To Chattels Claim Must Be Dismissed.

Next, Den Hollander's trespass to chattels claim must be dismissed. *See* FAC ¶¶ 98-111. The elements of such claim are "'(1) intent, (2) physical interference with (3) possession (4) resulting in harm.'" *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 258 (S.D.N.Y. 2012). A trespasser is liable when the trespass diminishes the physical condition, quality or value of personal property, or deprives the owner of use of the chattel for a substantial period of time. *J. Doe No. 1 v. CBS Broad. Inc.*, 24 A.D.3d 215, 215 (1st Dep't 2005). Where the trespass is to an

[13] Injurious falsehood claims are subject to the same constitutional protections as are defamation claims. *See, e.g., Newport Serv. & Leasing, Inc. v. Meadowbrook Distrib. Corp.*, 18 A.D.3d 454, 455 (2d Dep't 2005) (dismissing injurious falsehood claim on summary judgment based on substantial truth defense) (*citing Carter v. Visconti*, 233 A.D.2d 473, 474 (2d Dep't 1996) (defamation case)); *see also Biro v Condé Nast*, 883 F. Supp. 2d 441, 483 (S.D.N.Y. 2012) (rejecting attempts to circumvent defamation standards by pleading injurious falsehood).

intangible property right, actual injury to the claimed property interest must be shown. *In re Jetblue Airways Corp. Privacy Litigation*, 379 F. Supp. 2d 299, 328 (E.D.N.Y. 2005). As one judge in this Circuit explained, even if privacy interests in personal information were infringed, "such a harm does not amount to a diminishment of the quality or value of a materially valuable interest in their personal information." *Id.*

Here, Den Hollander identifies the Document and other unspecified "digital information" in his iCloud or computer as the chattel owned by Plaintiff's business that was allegedly trespassed. FAC ¶¶ 104, 107, 109. But Den Hollander admits that "the physical condition of the chattel was not impaired." *Id.* ¶ 107. This is fatal to his claim.

H. Plaintiff's Attorney Work-Product Claim Must Be Dismissed.

Finally, Den Hollander's so-called "violation of attorney work product privilege" claim must should be dismissed for the simple reason that it does not exist in New York. *See* FAC ¶¶ 128-39. The Second Circuit has previously certified to the New York Court of Appeals the question of whether a plaintiff may bring a tort claim for violating attorney-related privileges in a case where a defendant allegedly broke into an attorney's office and copied privileged files. *Madden v. Creative Servs., Inc.*, 24 F.3d 394, 396 (2d Cir. 1994). The Court of Appeals answered that question in the negative, rejecting the invitation to recognize what it called a "new avenue—or, more realistically, thoroughfare—of liability." *Madden v. Creative Servs., Inc.*, 84 N.Y.2d 738 (N.Y. 1995). The Second Circuit "dismiss[ed] the claim for breach of the attorney-client privilege, in light of the authoritative ruling of the New York Court of Appeals." *Madden v. Creative Servs., Inc.*, 51 F.3d 11, 13 (2d Cir. 1995). That authoritative ruling precludes Den Hollander's claim here.

CONCLUSION

This is an entirely frivolous Amended Complaint filed by a vexatious litigant. For each and all the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiff's Amended Complaint with prejudice and award Defendants costs and attorneys' fees (including those pursuant to 17 U.S.C. § 505) and grant such other relief as this Court deems appropriate.

DATED: May 15, 2017
New York, New York

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROY DEN HOLLANDER,

Plaintiff,

-against-

KATHERINE M. BOLGER,
MATTHEW L. SCHAFER,
JANE DOE(s),

Defendants.

Civil No.: 1:16-cv-09800 (VSB)

AFFIRMATION OF JOSEPH L. FRANCOEUR IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

JOSEPH L. FRANCOEUR, an attorney duly admitted to practice law in the courts of the State of New York, affirms the following under penalties of perjury:

1. I am a member of the law firm of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, attorneys of record for the Defendants, KATHERINE M. BOLGER and MATTHEW L. SCHAFER (collectively "Defendants").

2. I am fully familiar with the facts and circumstances of the within action by virtue of my review of the file maintained by this office.

3. This Affirmation and the accompanying Memorandum of Law is being submitted in Support of Defendants' Motion, which seeks an Order: (1) dismissing the Plaintiff's First Amended Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6), (2) awarding the Defendants 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.

4. Annexed hereto as **Exhibit "A"** is a true-and-accurate copy of Plaintiff's Complaint in the above-captioned action, dated and filed on December 20, 2016, together with Plaintiff's annexed Exhibits A through F. *See also* Dkt. 1.

5. Annexed hereto as **Exhibit "B"** is a true-and-accurate copy of Defendants' First Letter Motion for a Pre-Motion Conference, dated January 31, 2017, and made pursuant to Rule 4.A. of Your Honor's Individual Rules & Practices in Civil Cases. *See also* Dkt. 14.

6. Annexed hereto as **Exhibit "C"** is a true-and-accurate copy of Plaintiff's Letter Response to Defendants' First Letter Motion for a Pre-Motion Conference, dated February 3, 2017. *See also* Dkt. 16.

7. Annexed hereto as **Exhibit "D"** is a true-and-accurate copy of Your Honor's Memo Endorsement, Ordering the parties in the above-captioned action to appear for a Pre-Motion Conference on April 7, 2017. *See also* Dkt. 17.

8. Annexed hereto as **Exhibit "E"** is a true-and-accurate copy of Plaintiff's First Amended Complaint ("FAC") in the above-captioned action, dated and filed March 24, 2017, together with Plaintiff's annexed Exhibits A through F. *See also* Dkt. 18.

9. Annexed hereto as **Exhibit "F"** is a true-and-accurate copy of Defendants' Second Letter Motion for a Pre-Motion Conference, dated April 5, 2017, and made pursuant to Rule 4.A. of Your Honor's Individual Rules & Practices in Civil Cases. *See also* Dkt. 20.

10. Annexed hereto as **Exhibit "G"** is a true-and-accurate copy of Plaintiff's Letter Response to Defendants' Second Letter Motion for a Pre-Motion Conference, dated April 5, 2017. *See also* Dkt. 21.

11. Annexed hereto as **Exhibit "H"** is a true-and-accurate copy of Your Honor's Memo Endorsement, cancelling the previously scheduled Pre-Motion Conference and Granting the Defendants leave to move to dismiss the Plaintiff's FAC. *See also* Dkt. 22.

12. Annexed hereto as **Exhibit "I"** is a true-and-accurate copy of Plaintiff's Summons and Verified Complaint in the action styled *Roy Den Hollander v. Tory Shepherd, et*

al. New York Supreme Index No.: 152656/2014 (the "*Shepherd* Action"), dated and filed on March 24, 2014, together with Plaintiff's annexed Exhibits A through B. *See also* NYSCEF Dkt. 1-4.

13. Annexed hereto as **Exhibit "J"** is a true-and-accurate copy of the *Shepherd* Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Immediate Trial in the *Shepherd* Action, filed on January 12 2015. *See also* NYSCEF Dkt. 69.

14. Annexed hereto as **Exhibit "K"** is a true-and-accurate copy of the Affirmation of Katherine M. Bolger in Opposition to Plaintiff's Motion for Immediate Trial in the *Shepherd* Action, dated and filed on January 12, 2015, together with annexed Exhibits 1-10. *See also* NYSCEF Dkt. 70-71.

15. Annexed hereto as **Exhibit "L"** is a true-and-accurate copy of Plaintiff's Proposed Order to Show Cause in the *Shepherd* Action. *See also* NYSCEF Dkt. 72.

16. Annexed hereto as **Exhibit "M"** is a true-and-accurate copy of Plaintiff's Affidavit in Support of Order to Show Cause in the *Shepherd* Action, dated January 13, 2015, together with annexed Exhibit 1. *See also* NYSCEF Dkt. 73.

17. Annexed hereto as **Exhibit "N"** is a true-and-accurate copy of a Letter by Katherine M. Bolger to Judge Peter H. Moulton, dated January 15, 2015. *See also* NYSCEF Dkt. 74.

18. Annexed hereto as **Exhibit "O"** is a true-and-accurate copy of an Order by Judge Peter H. Moulton declining to sign Plaintiff's Order to Show Cause in the *Shepherd* Action, dated January 22, 2015. *See also* NYSCEF Dkt. 103.

19. Annexed hereto as **Exhibit "P"** is a true-and-accurate copy of Plaintiff's Notice of Motion Requiring Defendants to Withdraw Illegally Obtained Document from the Record in

the *Shepherd* Action ("Motion to Withdraw"), dated January 23, 2015. *See also* NYSCEF Dkt. 100.

20. Annexed hereto as **Exhibit "Q"** is a true-and-accurate copy of Plaintiff's Affidavit in Support of Motion to Withdraw in the *Shepherd* Action, dated January 23, 2015, together with annexed Exhibit A. *See also* NYSCEF Dkt. 101-102.

21. Annexed hereto as **Exhibit "R"** is a true-and-accurate copy of the *Shepherd* Defendants' Memorandum of Law in Opposition to Plaintiff's Motion to Withdraw in the *Shepherd* Action, filed on February 3, 2015. *See also* NYSCEF Dkt. 104.

22. Annexed hereto as **Exhibit "S"** is a true-and-accurate copy of the Affidavit of Katherine M. Bolger in Opposition to Plaintiff's Motion to Withdraw in the *Shepherd* Action, dated and filed on February 3, 2015, together with annexed Exhibits 1-3. *See also* NYSCEF Dkt. 105-106.

23. Annexed hereto as **Exhibit "T"** is a true-and-accurate copy of the Affidavit of Matthew L. Schafer in Opposition to Plaintiff's Motion to Withdraw Trial in the *Shepherd* Action, dated and filed on February 3, 2015, together with annexed Exhibits 1-2. *See also* NYSCEF Dkt. 107-108.

24. Annexed hereto as **Exhibit "U"** is a true-and-accurate copy of Plaintiff's Affidavit in Reply to *Shepherd* Defendants' Opposition to Plaintiff's of Motion to Withdraw in the *Shepherd* Action, dated February 7, 2015, together with annexed Exhibit A. *See also* NYSCEF Dkt. 109-110.

25. Annexed hereto as **Exhibit "V"** is a true-and-accurate copy of an Order by Judge Jennifer G. Schecter denying Plaintiff's Motion to Withdraw in the *Shepherd* Action, dated January 8, 2016. *See also* NYSCEF Dkt. 120.

26. Annexed hereto as **Exhibit "W"** is a true-and-accurate copy of an Order by Judge Jennifer G. Schecter dismissing the *Shepherd* Action in its entirety, dated January 8, 2016. *See also* NYSCEF Dkt. 119.

27. Annexed hereto as **Exhibit "X"** is a true-and-accurate copy of a Decision and Order of the Appellate Division, First Department, dismissing Plaintiff's appeal of Judge Jennifer G. Schecter's Order dismissing *Shepherd* Action, entered August 25, 2016.

28. Annexed hereto as **Exhibit "Y"** is a true-and-accurate copy of an Order of the State of New York Court of Appeals, denying Plaintiff's motion for leave to appeal to the Court of Appeals, decided and entered on November 22, 2016.

WHEREFORE, for the reasons set forth in Defendants' accompanying Memorandum of Law, of which all factual and legal contentions are fully incorporated herein, Defendants respectfully request that this Court issue an Order: (1) dismissing the Plaintiff's First Amended Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6), (2) awarding the Defendants 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: May 15, 2017
New York, New York

JOSEPH L. FRANCOEUR