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 REPLY TO PLAINTIFF ROY DEN HOLLANDER'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Defendants Katherine M. Bolger and Matthew L. Schafer, by and through their undersigned attorneys, submit this reply memorandum of law in support of their motion to dismiss the First Amended Complaint of Plaintiff Roy Den Hollander pursuant to Fed. R. Civ. P. 12(b)(6).[1]

PRELIMINARY STATEMENT

Defendants moved to dismiss Den Hollander's Amended Complaint on the grounds that it was barred by collateral estoppel, as the state court in the *Shepherd* Action has already found that the factual basis for this lawsuit had "no basis," and, at any rate, each and every claim failed on its merits. In response, Den Hollander attacks Defendants, Defendants' counsel, and various courts, but offers no substantive reason that any of his claims should be sustained. To the contrary, the Amended Complaint must be dismissed for any number of reasons.

ARGUMENT

Den Hollander devotes much of his Memorandum to *ad hominem* attacks on Defendants' counsel and Ms. Bolger and Mr. Schafer. This emphasis reveals the true intent of this litigation—Den Hollander is not seeking to vindicate a legally cognizable wrong; he is seeking to harass and intimidate lawyers who oppose him. But nothing in Den Hollander's invective filled 35-page memorandum alters the fact that his Amended Complaint must be dismissed.

First, this entire action is barred by the doctrine of collateral estoppel because the court in the *Shepherd* Action already held that Den Hollander's accusations of hacking, perjury and other wrongdoing against Defendants have "no basis." Defs.' Mem. at 8-11. In an attempt to avoid the application of the doctrine, Den Hollander claims that collateral estoppel only applies when "every issue . . . whether fact *or legal*" was previously decided, and then suggests that because

[1] Ms. Bolger and Mr. Schafer use the same defined terms here as those used in Defendants' Memorandum of Law in Support of their Motion to Dismiss (the "Defs.' Mem."). They further refer to Den Hollander's Opposition to their Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) as "Pl.'s Mem."

he has, in part, enumerated additional causes of action from those he litigated in the *Shepherd* Action, his claims can survive here. Pl.'s Mem. at 32 (emphasis added). Den Hollander is simply wrong. The very case he cites, *Zabriskie v. Zoloto*, makes clear that "[w]here *a question of fact essential* to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action *on a different cause of action*." 22 A.D.2d 620, 623 (1st Dep't 1965) (emphasis added) (citing Restatement of Judgments, § 68 (1942)); *see also* Defs.' Mem. at 9 (citing *M.J. Woods, Inc. v. Conopco, Inc.*, 271 F. Supp. 2d 576, 580 (S.D.N.Y. 2003)). Here, the court's decision in the *Shepherd* Action has already rejected Den Hollander's allegations that Ms. Bolger and Mr. Schafer hacked Den Hollander's computer (or his iCloud), unlawfully duplicated the "Responses to Media" Document and committed perjury by describing it as a "Media Release." Defs.' Mem. at 8-10. This decision precludes Den Hollander from relitigating any claims based on those allegations—regardless of how he chooses to enumerate his causes of action.[2]

Plaintiff next argues that he is not estopped because the order in the *Shepherd* Action is short. Pl.'s Mem. at 32. There is, however, no word count requirement in the doctrine of collateral estoppel. The state court was unequivocal that there was "no basis" to credit Den Hollander's accusations of hacking or other wrongdoing. No other words were required. *See, e.g.*, *Irish Lesbian and Gay Organization v. Giuliani*, 143 F.3d 638, 645 (2d Cir. 1998) (collateral estoppel applies to issue "implicitly decided" in prior ruling); *Wilder v. Thomas*, 854 F.2d 605, 620 (2d Cir. 1988) ("An issue may be actually decided even if it is not explicitly

[2] In fact, he concedes that the motion to withdraw in the *Shepherd* Action accused Defendants of unauthorized access to his computer, unlawful duplication of computer related material, and perjury. Pl.'s Mem. at 11-12.

decided if it is a necessary component of the decision reached'" (citation omitted)); *accord United States v. TDC Management Corp., Inc.*, 24 F.3d 292, 296 (D.C. Cir. 1994).[3]

Finally, Plaintiff's argues that collateral estoppel does not apply because the *Shepherd* court's order was a "general verdict." Pl.'s Mem. at 32 (citing *Manard v. Hardware Mutual Casualty Co.*, 12 A.D.2d 29, 30 (4th Dept. 1960)). But the order was not a "general verdict" subject to ambiguous interpretation, *see* CPLR Rule 4111; it was an order that unequivocally determined that there was "no basis" to conclude that any hacking or other wrongful conduct occurred. For these reasons, Den Hollander is estopped from asserting the claims in his Amended Complaint and it must be dismissed in its entirety.

Second, Den Hollander also fails to demonstrate that he has plausibly alleged "hacking" in accordance with pleading requirements of *Iqbal*, *Twombly* and *Rapoport* and for this reason, Counts I, II, IV, VI, VII should be dismissed. Defs.' Mem. at 11-15 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Rapoport v. Asia Electronics Holding Co., Inc.*, 88 F. Supp. 2d 179 (S.D.N.Y. 2000)).

In the Opening Memo, Ms. Bolger and Mr. Schafer argued that Plaintiff failed to plead that they had unlawfully accessed his computer (or iCloud) because the only factual predicates asserted by Plaintiff for those claims were the two affidavits submitted by Ms. Bolger and Mr. Schafer in the *Shepherd* Action. *Id.* Those affidavits, far from showing that Ms. Bolger and Mr. Schafer hacked Den Hollander's website, in fact, showed that they had downloaded the Document from a public website. *Id.*; *see also* FAC, Ex. B (Bolger Aff.), Ex. C (Schafer Aff.). Because the law is clear that the complaint is deemed to include any documents annexed thereto,

[3] Den Hollander also claims that collateral estoppel does not apply because Defendants previously stated that "no issues of fact were resolved" and he "was never allowed to introduce evidence." Pl.'s Mem. at 7. As he recognizes in the same breath, however, those statements were made in regard to what occurred *at the hearing* on his motion, not as to the briefing and subsequent *judgment* on his motion. *Id.* There can be no doubt that the relevant issues were vigorously litigated and ultimately decided by the court in the *Shepherd* Action. Def.'s Mem. at 10-11.

see, e.g., *Weston Funding, LLC v. Consorcio G Grupo Dina, S.A. de C.V.*, 451 F. Supp. 2d 585, 587 (S.D.N.Y. 2006), Ms. Bolger and Mr. Schafer argued that the contradiction between the documents and the fact of the complaint precluded any finding that the complaint was plausibly pleaded. *See* Defs.' Mem. at 11-15 (*citing Feick v. Fleener*, 653 F.2d 69, 75 (2d Cir. 1981); *Beauvoir v. Israel*, 794 F.3d 244, 248 (2d Cir. 2015); *Rapoport v. Asia Electronics Holding Co., Inc.*, 88 F. Supp. 2d 179 (S.D.N.Y. 2000)).

In response, Plaintiff claims that the affidavits are insufficient because they make no mention of whether Ms. Bolger and Mr. Schafer somehow accessed his home computer and so, Den Hollander hypothesizes, they could have stolen the Document in that way. Pl.'s Mem. at 20-21. This argument is a red herring. The Bolger and Schafer Affidavits make clear that they accessed the Document from a public facing website. This sworn testimony contradicts any allegation that Ms. Bolger and Mr. Schafer hacked his computer, iCloud or any other devices, and thus Counts I, II, IV, VI, VII of the Amended Complaint should be dismissed.

Third, each of Plaintiff's claims must be dismissed for the independent reason that each falls on its merits:

- As to the copyright claim, Den Hollander concedes that he failed to register the Document upon which he basis his claim. FAC ¶¶ 89-97. For this reason alone, this claim must be dismissed outright. Defs.' Mem. at 16-17. Indeed, Den Hollander all but concedes as much, Pl.'s Mem. at 26-27, 30, but then argues that his copyright claim should be allowed to go forward because he has now filed copyright applications for *other* documents, *id.* at 26. But this argument fails for at least three reason. First, this is not the copyright claim Den Hollander pleaded. FAC ¶¶ 89-97. Second, he has failed to identify a specific document infringed (other than the unregistered Document), as required. *See, e.g.*, *John Wiley & Sons, Inc. v. Book Dog*

Books, LLC, 2015 WL 5724915, at *14 (S.D.N.Y. 2015) (copyright infringement claim cannot succeed unless a specific work is identified). And, third, courts in this Circuit have routinely held that pending copyright application is not a sufficient prerequisite to a copyright infringement action. *See, e.g.*, *Gattoni v. Tibi, LLC*, 2017 WL 2313882, at *3-4 (S.D.N.Y. 2017); *see also* Defs.' Mem. at 16.

Den Hollander also fails to defeat Defendants' fair use argument, choosing instead to argue that *Den Hollander v. Steinberg*, 419 F App'x 44, 44-45 (2d Cir. 2011)—a case nearly identical to this one and decided against Den Hollander—should be ignored simply because it is as summary order. Pl.'s Mem. at 27. But the Second Circuit has made clear that summary orders have persuasive value, and denying them "precedential effect does not mean that the court considers itself free to rule differently in similar cases." *United States v. Irving*, 554 F.3d 64, 78 (2nd Cir. 2009). *Steinberg* forecloses Plaintiff's claim on the merits, and this claim should be dismissed for that reason too.

- Den Hollander's replevin claim also fails for similar reasons. In Defendants' Memorandum, Ms. Bolger and Mr. Schafer argued that this claim was preempted by the Copyright Act. In response, Den Hollander asserts somewhat quixotically that preemption does not apply because his copyright claim fails. Pl.'s Mem. at 30. Setting aside this admission that the copyright claim is baseless, Plaintiff's argument is, in any event, wrong. Whether or not a work is registered has no effect on the preemption analysis: "[a]s unregistered works fall within the scope of the Copyright Act's protection, *preemption extends to causes of action concerning unregistered works*, as well as registered works." *Alexander Interactive, Inc. v. Leisure Pro Ltd.*, 2014 WL 4651942, at *6 (S.D.N.Y. 2014) (emphasis added) (citing *Membler.com LLC v. Barber*, 2013 WL 5348546, at *13 (E.D.N.Y. 2013) (dismissing as preempted by federal

copyright law claims arising out of unauthorized copying of unregistered works)). Here, Den Hollander asserts protectable interests in a tangible work that allegedly belongs to him by virtue of his authorship. Such a claim falls squarely within the ambit of federal copyright law and thus must be dismissed as preempted. *See, e.g.*, *CA, Inc. v. Rocket Software, Inc.*, 579 F. Supp. 2d 355, 366-67 (E.D.N.Y. 2008).

- Den Hollander's Opposition also demonstrates that he has failed to plead a CFAA claim. In the Opening Memo, Ms. Bolger and Mr. Schafer argued, *inter alia*, that the CFAA claim was dismissible because Den Hollander failed to allege compensable losses. Defs.' Mem. at 18-20. In response, Den Hollander erroneously stresses the distinction between "loss" and "damage" under the CFAA, arguing purported investigation of the alleged "hack" and the "more costly security precautions" he claims to have later instituted are sufficient "losses" to plead a CFAA claim. Pl.'s Mem. at 20-22; FAC ¶¶ 26-33. But this argument is unpersuasive. "Loss" under the CFAA is construed narrowly, *See, e.g.*, *Reis, Inc. v. Spring11 LLC*, 2016 WL 5390896, at *8–10 (S.D.N.Y. 2016) (dismissing CFAA claim where investigation did not concern damage to the computer system), *B.U.S.A. Corp. v. Ecogloves, Inc.*, 2009 WL 3076042, at *6-10 (S.D.N.Y. 2009), and includes only "remedial costs of investigating the computer *for damage*, remedying *the damage*," *see Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F. Supp. 2d 468, 474 (S.D.N.Y. 2004) (emphasis added). Contrary to Den Hollander's assertions, costs associated with collecting information about the alleged "hack" are *not* compensable losses under the CFAA, nor are prophylactic measures designed to prevent future intrusions. *See Tyco Int'l (US) Inc. v. Does*, 2003 WL 21638205, at *1–2 (S.D.N.Y. 2003); *Int'l Chauffeured Serv. v. Fast Operating Corp.*, 2012 WL 1279825, at *3–4 (S.D.N.Y. 2012). For these reasons, as well as those in Defendants' Memorandum, Den Hollander's CFAA claim must be dismissed.

- Next, Den Hollander provides no reason in the Opposition to save his RICO claim. In the Opening, Ms. Bolger and Mr. Schafer argued that Den Hollander's claim was barred by several reasons, including that Ms. Bolger and Mr. Schafer alleged tortious activities were litigation activities and, as such, could not provide the basis of a RICO claim. In response, he contends that "courts disagree" as to whether normal litigation activities cannot be the basis of a RICO claim. Pl.'s Mem. at 22-23. But the very cases he cites state the opposite. *See Handeen v. Lemaire*, 112 F.3d 1339, 1349 (8th Cir. 1997) ("we are sure, that we find it extremely difficult to fathom any scenario in which an attorney might expose himself to RICO liability by offering conventional advice to a client or performing ordinary legal tasks (that is, by acting like an attorney)").[4] That is because the case law is clear: "litigation activities . . . cannot properly form the basis for RICO predicate acts." *Singh v. NYCTL 2009-A Trust*, 2016 WL 3962009, at *8 (S.D.N.Y. 2016); *see also Estate of Izzo v. Vanguard Funding, LLC*, 2017 WL 1194464, at *11 (E.D.N.Y. 2017); *see also* Defs.' Mem. at 22. Thus, the Amended Complaint does not sufficiently allege wire fraud.[5]

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[4] Others cases he cites are just irrelevant. *United States v. Paccione*, 751 F. Supp. 368, 372 (S.D.N.Y. 1990) (criminal RICO support by false statements to state agency resulting in establishment of illegal landfill); *Lemelson v. Wang Labs., Inc.*, 874 F. Supp. 430, 432 n.4 (D. Mass 1994) (finding mail fraud where party used vexatious lawsuits to "exploit *fraudulently obtained patents*" (emphasis added)); *Hall American Ctr. Associates v. Dick*, 726 F. Supp. 1083, 1093 (E.D. Mich. 1989) (dismissing wire and mail fraud allegations as insufficiently pleaded pursuant to Fed. R. Civ. P. 9(b), but finding other racketeering predicate acts sufficiently pleaded based upon alleged conduct and violations of law not alleged here).

[5] Den Hollander's reliance on *United States v. Eisen* lends no support to his position. 974 F.2d 246 (2d Cir. 1992). *Eisen* involved the criminal prosecution of a personal injury law firm that engaged in broad scheme litigation fraud by pressuring witnesses to testify falsely, paying other witnesses not to testify, and fabricating evidence. *Id.* at 250-52. Plainly, there is no comparison between this conduct and Den Hollander's claim that the Defendants "falsely . . . depicted" the Document as a "Media Release" in motion papers. FAC ¶¶ 43-56. As one court said of *Eisen*, "*Eisen* did not reach the issue here regarding whether litigation activities alone can suffice as RICO predicate acts of mail and wire fraud." *Curtis Associates v. Law Offices of David M. Bushman*, 758 F. Supp. 2d 153, 43 (E.D.N.Y. 2010). The same logic is applicable here, and as such, Den Hollander's wire fraud claim must be dismissed.

Den Hollander also fails to address the other essential element of his claim—that there was no material fraud. Defs.' Mem. at 22-23. The entire basis of Den Hollander's "fraud" claim is that Ms. Bolger and Mr. Schafer referred to the Document as a "Media Release." FAC ¶ 46. But as Defendants explained, "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." Defs.' Mem. at 22-23. There was no fraud.

Next, in the Opening Memo, Ms. Bolger and Mr. Schafer argued that Den Hollander failed to adequately plead the RICO predicate act of robbery because it does not plead the use of physical force against his person. In the Opposition, Den Hollander does not dispute this. Instead, he claims that the separate and distinct crime of Unlawful Duplication of Computer Related Material, N.Y. Penal Code § 156.30, may constitute the RICO predicate act of robbery. Pl.'s Mem. at 25. Once again, Den Hollander is simply wrong on the law. "[T]he only state law crimes which constitute predicate acts of racketeering activity under are those acts . . . which involve 'murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical.'" *Brewer v. Vill. of Old Field*, 311 F. Supp. 2d 390, 402 (E.D.N.Y. 2004) (citations omitted). If and only if the state law crime is substantively equivalent to a predicate act in RICO, in this case robbery, can it serve as a predicate act—regardless of its name. *See, e.g.*, *United States v. Forsyth*, 560 F.2d 1127, 1137 (3rd Cir. 1977). Here, Unlawful Duplication of Computer Related Material is not equivalent to "robbery," because New York law generically defines robbery as "forcible stealing." *See* N.Y. Penal Code § 160.00, *et seq.*; *Naples v. Stefanelli*, 2015 WL 541489, at *9 (E.D.N.Y. 2015); *see also* Defs.' Mem. at 24. Plainly, unlawful duplication of computer related material contains no element of force. N.Y. Penal Code § 156.30 therefore does not "involve" robbery, and thus

cannot serve as a RICO predicate. *See, e.g.*, *Wood v. Inc. Vill. of Patchogue*, 311 F. Supp. 2d 344, 358 (E.D.NY. 2004) (noting that grand larceny does not constitute a charge of robbery). Den Hollander's claim must be dismissed.

- Further, Den Hollander's Memorandum does nothing to save his trespass to chattel claim. In Opposition, Den Hollander appears to challenge Ms. Bolger and Mr. Schafer's claims that trespass to chattels must involve damage to the chattel to be actionable. But the very cases Den Hollander cites confirm that dismissal is required here. Pl.'s Mem. at 28. In *Twin Securities, Inc. v. Advocate & Lichtenstein, LLP*, 113 A.D.3d 565 (1st Dep't 2014), for example, the First Department dismissed a trespass to chattels claim virtually identical to the one here. In that case, the plaintiff alleged a trespass to chattel claim because the defendants allegedly copied data from the plaintiff's computer and hard drive which contained trade secrets. *See id.* at 565-66. The First Department, reversing the lower court's denial of the defendants' motion to dismiss, reasoned that "trespass to chattel is . . . not viable since there is no indication that the condition, quality or value of the computer, its hard drive, *or any of the information on the computer was diminished* as a result of defendants' duplication of the hard drive." *See id.* (emphasis added). Similarly, here, Den Hollander concedes there was no injury to his computer or iCloud. For these reasons, Den Hollander's trespass to chattels claim must be dismissed.[6]

- Finally, Den Hollander makes no attempt to save his injurious falsehood claim or his attorney work product claim. Indeed, he mentions those claims only in passing, but advances

[6] Den Hollander also cites *AGT Crunch Acquisition LLC v. Bally Total Fitness Corp.*, 2008 NY Slip Op 30247[U], *2 (Sup. Ct., NY Cty. 2008) for the proposition that merely accessing his computer or "iCloud" is sufficient to make out trespass to chattels claim. Pl.'s Mem. at 29. But *AGT Crunch Acquisition LLC* predates *Twin Securities, Inc.*, and thus its holding is inapplicable in light of that case. *Twin Sec., Inc.*, 113 A.D.3d at 565-66. Den Hollander's reliance on *Reg.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 249-50 (S.D.N.Y. 2000) is similarly misplaced. In *Reg.com, Inc.*, the harm was the defendants' use of plaintiff's computer resources, which had the effect of depriving the plaintiffs of the use of those same resources, creating a deprivation. *Id.* Den Hollander alleges no such harm here, and, in fact, admits that no harm occurred. FAC ¶ 107.

no argument whatsoever as to why they should not be dismissed. *Hanig v. Yorktown Cent. Sch. Dist.*, 384 F. Supp. 2d 710, 723 (S.D.N.Y. 2005) ("[B]ecause plaintiff did not address defendant's motion to dismiss with regard to this claim, it is deemed abandoned and is hereby dismissed.").

CONCLUSION

For each and all the foregoing reasons, Defendants respectfully request that this Court dismiss the Amended Complaint with prejudice and respectfully renew their request for an award of costs and fees (including those pursuant to 17 U.S.C. § 505) and grant such other relief as this Court deems appropriate.

Dated: June 28, 2017
New York, New York

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