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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 ROY DEN HOLLANDER,

4 Plaintiff,

5 v.

16 CV 9800 (VSB)

6 KATHERINE M. BOLGER, et al.,

7 Defendants.

8 -----x
9 New York, N.Y.
February 16, 2018
3:30 p.m.

10 Before:

11 HON. VERNON S. BRODERICK,

12 District Judge

13 APPEARANCES

14 ROY DEN HOLLANDER, PRO SE

15 WILSON ELSEER MOSKOWITZ EDELMAN & DICKER, LLP
16 Attorneys for Defendants

17 BY: JOSEPH L. FRANCOEUR
MICHELLE VIZZI

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1 (Case called; in open court)

2 THE DEPUTY CLERK: State your appearances for the
3 record.

4 MR. HOLLANDER: Good afternoon, your Honor.

5 THE COURT: Mr. Hollander, you could just need to
6 speak into the microphone. So if you could just identify
7 yourself for THE record.

8 MR. HOLLANDER: My name is Roy Den Hollander, and I am
9 the plaintiff. I am also an attorney admitted in this case
10 representing myself.

11 THE COURT: Good afternoon, Mr. Hollander.

12 For the defense.

13 MR. FRANCOEUR: Good afternoon, your Honor. Joseph
14 Francoeur from Wilson Elser Moskowitz for the defendants. I
15 also have my colleague, Michelle Vizzi, who has not placed an
16 appearance in the case, but she was just admitted to this court
17 on --

18 MS. VIZZI: Tuesday.

19 THE COURT: Welcome. You were part of the crew before
20 Judge Oetken I may have seen downstairs?

21 MS. VIZZI: Yes.

22 THE COURT: Thank you. You may be seated.

23 Now, you should feel free to remain seated or if you
24 want to stand and address me, that is fine. The only thing I
25 ask again is that you speak into the microphone so that we can

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1 make sure that the reporter gets everything down.

2 I put this on for oral argument in part because I
3 think there was a request Mr. Hollander.

4 MR. HOLLANDER: Yes.

5 THE COURT: You had made a request for that. I issued
6 an order with certain questions. We can go through those
7 questions. Or, Mr. Hollander, some of them are directed --
8 most of them are directed to you as plaintiff but some are
9 directed to the defendant. Or if you already have something
10 prepared that addresses each of the questions, that is fine
11 also. If you want we can go one by one to see if there is
12 anything additional -- anything additional that isn't contained
13 in your complaint I would say.

14 MR. HOLLANDER: I just have two preliminary points
15 that I would like to make and then we might as well go through
16 them question by question.

17 THE COURT: Go ahead.

18 MR. HOLLANDER: The first point is before the papers
19 for motion to dismiss and before your Honor's questions, I made
20 an earlier discovery request and that early discovery request
21 was for all the materials that the defendants took from either
22 my iCloud or my home computer. Now, your Honor denied the
23 request; but I think now that the issues are more defined in
24 that some of answers to your Honor's questions actually
25 implicate some of the mass -- what I allege as the mass of

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1 documents which they took or reproduced or copied or downloaded
2 from my iCloud or home computer, the fact that some of the
3 questions are implicated by that and the fact that some of the
4 issues, I cannot -- I cannot defend on some of the issues
5 because I don't have that information. So I would like to make
6 a request to resubmit that motion for early discovery, which
7 calls for everything that they copied or downloaded from my
8 iCloud or my home computer.

9 So far they have they have not said -- so far they
10 have said they only got three documents, but they haven't
11 denied the fact that they took masses of other documents. One
12 of the reasons for that is that I have a copyright infringement
13 allegation. Now, copyright infringement allegation can only be
14 brought if somebody reproduces a registered copyrighted
15 document. Now, on my iCloud and in my home computer, there is
16 a number of copyrighted registered documents; but I cannot
17 really make that allegation stick under the plausibility
18 standard unless I know what they took or what they didn't take.

19 THE COURT: Look, typically a plaintiff is not
20 entitled to pre-charging or pre-complaint discovery. Here, in
21 particular, I think you reference the copyright charge or cause
22 of action. So let's focus on that. The basis of that is in
23 fact the use or the alleged use by the plaintiff in some way of
24 a copyrighted material. I am not aware of any cases that allow
25 absent some -- that allow basically sort of you to in essence

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1 to get discovery to see whether or not they have material.
2 While they may have possession and they haven't used it in this
3 way, there is still no basis to assume that they necessarily
4 do. I think your initial comment also assumes certain things
5 that are part of the subject of some of the questions that I
6 have.

7 I should say that the questions I have, and some of
8 them may not have been artfully drafted as they could have
9 been, really go to in essence -- I am no way suggesting to the
10 allegations of the complaint and whether or not there is
11 support for certain of the claims that are made. In other
12 words, claims that are made in the complaint. In other words,
13 that where you haven't referenced a document, for example, or
14 something like that that supports a particular claim that you
15 are making.

16 Again, as things stand right now I am not going
17 revisit my decision about the discovery issues. If during the
18 course of this afternoon I think that your responses to the
19 questions or the back and forth that we have changes that view,
20 then I will revisit it. I don't see any reason to change that
21 view or to alter the view that typically plaintiffs are not
22 entitled to the sort of discovery in order to bolster their
23 complaint.

24 MR. HOLLANDER: Yes, your Honor. May I just interject
25 that it is not so much that they use it, it is just that if

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1 they copied it. That means reproduce. If they reproduced any
2 of my registered copyrighted materials on my iCloud or my home
3 computer without my permission -- just that they are reproduced
4 it -- that is copyright infringement action. As far cases go,
5 there is a case called Digital Sin v Does. It is 279 F.R.D.
6 239, Southern District of New York. It was a copyright
7 infringement action for downloading from the Internet a
8 copyrighted film without the authorization of the people who
9 produced the film and owned the copyright in the film. The
10 Court there granted expedited discovery. In that case they
11 granted expedited discovery to determine who actually download
12 the material. Whereas here, what I am asking for is expedited
13 discovery or early discover to find out what they actually
14 downloaded or copied.

15 THE COURT: There are a couple questions I have. The
16 argument that you are making assumes, I guess, that the
17 allegations in your complaint are sufficient to demonstrate
18 that the defendants downloaded the document in question. The
19 affidavits that you point to or declaration actually disclaim
20 any hacking or anything like that and they indicate that -- in
21 fact, they assert that they obtained it from the publically
22 available website.

23 My question for you, number one, is with regard to the
24 underlying basis for the claim of hacking, did you have any
25 forensic analysis done of your computer or did you contact

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1 Apple with regard to your iCloud to determine or request for
2 them to determine who, if anyone, might have accessed your
3 iCloud?

4 MR. HOLLANDER: Yes, your Honor. Let me just make
5 Clear I used the phrase iCloud. iCloud is basically --

6 THE COURT: Are you just saying the Internet?

7 MR. HOLLANDER: Yes. It is an Internet service.

8 THE COURT: So whoever your Internet service provider
9 is if it is not Apple or whoever it might be.

10 MR. HOLLANDER: Yes. I contacted the host, which was
11 E-name Station. I contacted them twice. Basically what they
12 told me, and what I've learned through various research, is
13 that if somebody uses what I said in the complaint was brute
14 force hacking. So they have a computer program and it just
15 runs different passwords over and over against your protected
16 Internet website and at one point it gets through. There is no
17 way that my host had to keep a log of what computers were doing
18 that.

19 In other words, you have URL computer. So it runs
20 this program through multiple possible passwords to access the
21 case. Now, my host did not have that. At that time -- and I
22 believe still -- there is no law in the United States that
23 requires what they call access logs. In Europe they have a law
24 which requires access logs. So if any host had been in Europe,
25 I would have had a whole list of every computer that tried,

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1 whether successfully or not, to access my iCloud. But you
2 don't have that here and that is what I allege.

3 THE COURT: The issue is what is the basis for the
4 claim that in fact that is what happens. You haven't
5 established through documentation that in fact this website
6 that you say through whoever the website provider was a secured
7 website. Because just Googling your name quite frankly you do
8 find references to articles that have been written where other
9 individuals who had written the articles have had access to
10 some website that you had. I don't know what website it is or
11 anything like it. So at some point there were certainly
12 publically available information with regard to you. Whether
13 it was with regard to the allegations of this other lawsuit, I
14 have no idea. I guess what I am saying is you haven't
15 established that you actually had an account that was in fact
16 secure.

17 MR. HOLLANDER: That basically brings me to my second
18 preliminary argument and this is a 12(b)(6) motion to dismiss.
19 So your Honor seems to be asking me and in some of the
20 questions asking me for evidence and proof of the allegations.
21 Now, my understanding is I am not to be put on the place where
22 I need to prove my allegations. The question is plausibility.
23 As far as the plausibility goes, you have my sworn statement,
24 which I am a lawyer so when I signed my first amended
25 complaint, I swore in what was there is true. You have my

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1 sworn statement that iCloud was protected by access codes. You
2 have their two affidavits from two attorneys saying when they
3 accessed the iCloud, it was public. Now, I just would like to
4 touch upon the fact that in their affidavits --

5 THE COURT: Your allegation could be viewed as
6 conclusory. In other words, they hacked it for example.
7 Specifically with regard to your computer, I am fairly
8 competent -- well, did you have a forensic analysis done on
9 your computer?

10 MR. HOLLANDER: Well, the forensic analysis that he
11 have done -- my understanding of a forensic analysis is going
12 through all of my documents to see if they had been damaged or
13 interfered with in some matter or form. So I did that myself.

14 There are two allegations. One is this brute force
15 hacking, which concerns the iCloud. The other one is what is
16 called phishing, which I receive a number of e-mails from the
17 defendant's lawyers, they were lawyers, with attachments. I
18 opened those attachments. In one of those attachments might
19 have been called what is called a malware, and that would have
20 provided information whenever I accessed my iCloud what my
21 access codes were. So I am currently in discussion with a
22 forensic expert on that case and as soon as he is finished with
23 the case he is doing, I am going have him check all those
24 attachments to see if there is phishing.

25 I understand on the fact that the allegations appear

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1 conclusory or bare, I just want to bring up the point one of
2 your questions was, when was the Google cache captured. Now,
3 the Google cache was submitted as an exhibit by Matthew
4 Schafer, who is one of the defendants. He said that he --
5 first he says he accessed my iCloud for the first time on
6 December 30th, 2014. Then he found a Google cache
7 January 13th. Of course the document had already been
8 submitted to the Court. He found a Google cache on January 13.
9 The Google cache says that it was a Google cache made on
10 January 3rd. So what that tells us is that on January 3rd,
11 2015, my iCloud was public.

12 My allegation is that they accessed my iCloud on
13 December 30th by hacking. When they hacked into my iCloud,
14 they stripped the access codes. It is just my allegation. If
15 they strip the access codes on December 30th, 2014, namely,
16 there would be a Google cache available five days later because
17 The website would have been public. If the website had been
18 public before December 30th, 2014, they would have gotten a
19 Google cache from December 20th, December 25th and that would
20 have shown that the website was public before they first
21 accessed that. They didn't get it.

22 THE COURT: Going back to the point I was making about
23 the allegations being conclusory, you're website, whoever is
24 the provider for your -- I will refer to it as iCloud.

25 MR. HOLLANDER: That is how we have been doing it all

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1 along.

2 THE COURT: So the iCloud that you have indicated they
3 would be able to indicate that it was in fact password
4 protected on X date and that on another date -- because you are
5 saying something was striped and it seems to me that they would
6 be able to verify that in fact something was protected in some
7 way.

8 Are you saying that you never had at the time period
9 of this lawsuit publically accessible website?

10 MR. HOLLANDER: No.

11 THE COURT: You are not saying that?

12 MR. HOLLANDER: No. I am saying that I have during
13 the time of this lawsuit and the time of the prior lawsuit,
14 which this evolved out of, the Supreme Court New York lawsuit,
15 I never had a public website.

16 Now, there was a time prior to that, which goes back
17 to the Steinberg v. Hollander case, when at that time I was
18 trying to put together a website for a my law practice -- at
19 that time my law practice, as it is now, I bring men's rights
20 cases. That is basically the concentration of my law practice.
21 For a short period, if you read through all the papers -- in
22 the Steinberg v. Hollander case -- a website was public and it
23 was mine, but it didn't have any of this material on it. In
24 other words, it didn't have the media responses, which the
25 defendants have called the media release and then the

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1 defendants also downloaded what was called a screen shot. That
2 wasn't there. That wasn't on that old website.

3 So during the time of the New York Supreme Court case
4 and this case, I have not had any public websites. As far as
5 what articles you have read, most of those articles I just do
6 interviews with people.

7 THE COURT: Let's go through some of the questions.

8 The first question that deals with the protected
9 computer, what are the allegations in the complaint that
10 support claim that your computer was protected? Or is it just
11 simply the basis that your computer somehow was involved or
12 affected interstate or foreign commerce?

13 MR. HOLLANDER: It is what you said, the last part.

14 THE COURT: If it was protected, how did it do that?

15 MR. HOLLANDER: Well, the First Amendment complaint,
16 just what you said. I allege that the -- I don't allege. I
17 say that my iCloud and home computer are used for interstate
18 commerce. Now, under the act, which is the Computer Fraud
19 Abuse Act, it defines protected computer as meaning a computer
20 which is used in or affecting interstate or foreign commerce or
21 communication. It doesn't say anything about access codes.

22 THE COURT: Other than parroting the language of the
23 statute, what are the allegations that in fact you're computer
24 or your iCloud was utilized in that fashion?

25 MR. HOLLANDER: Basically I use my home computer to

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1 contact clients. The clients may be in the United States or
2 they may be in overseas or they may be in Russia. I have a
3 paralegal in Slovakia, who I use my home computer to contact
4 with. I receive materials --

5 THE COURT: Are those allegations in the complaint?

6 MR. HOLLANDER: No. I had an objection to that
7 question because once again we're at the point where I believe
8 I am being asked to prove my allegations. I will put that in
9 if I can amend it.

10 THE COURT: Well, there is a distinction. The
11 distinction that I would draw is the following: Merely
12 parroting the language of a statute in a complaint that that
13 would be insufficient in order to actually carry the day for
14 plausibility. In other words, because the computer was
15 involved in interstate commerce without more doesn't really in
16 my mind raise an issue that there is a plausible claim.

17 MR. HOLLANDER: Then I am going ask if I can amend
18 that. My view -- yes, I make mistakes. I have made a lot of
19 mistakes. My view is that if the definition of a protected
20 computer is something that is used in the interstate and that
21 is how I use my computer and I iCloud, then that fits.

22 There is also a case Becker v. Toka, an Eastern
23 District of Louisiana case, and that court held that -- it said
24 that the plaintiff alleged that he used the computers in
25 connection with his law firm business, which is what I am

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1 alleging. The plaintiff also claimed the computers were
2 connected to the Internet. I believe that is in there.

3 THE COURT: I thought you earlier said that earlier on
4 you had had a website that was utilized in order to try to
5 promote your law business, but this website was it --

6 MR. HOLLANDER: Private. Not that.

7 THE COURT: So I don't understand what you were just
8 saying. In other words, if it is private and you are not using
9 it to solicit clients and the like. In this case I assume in
10 the allegation is that you created the document in question as
11 something you would utilize in the litigation?

12 MR. HOLLANDER: Yes.

13 THE COURT: Again, I don't see it in the same way. I
14 don't see if as if it were a website for your law firm or law
15 practice.

16 MR. HOLLANDER: It was a website not to publicize my
17 law firm or law practice. It was a website for repository of
18 documents on it and also personal other information.

19 Why does that iCloud consist of interstate
20 communications? Because the computer is located in Arizona.
21 When I put my access codes to get into my iCloud, that computer
22 I am talking to is in Scottsdale, Arizona. I am sending
23 electronic messages to Scottsdale, Arizona.

24 THE COURT: You are saying the mere fact that the
25 server is in another location is sufficient under the act to

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1 affect interstate or foreign commerce?

2 MR. HOLLANDER: I believe so.

3 THE COURT: Let's get back to at core the issue of how
4 you are alleging defendants got access. Am I correct the basis
5 of your allegation is that this document was on your computer
6 or iCloud and that it was private?

7 MR. HOLLANDER: Yes.

8 THE COURT: You cite, though, to their declarations
9 where they indicate that -- in other words, for support of that
10 because again I could view that as a conclusory allegation
11 without any support. There were no forensics that were done on
12 your home computer. There was no indication from your service
13 provider that at the time of the complaint you actually had a
14 website that was password protected or anything of that nature.

15 Would you be able to actually get from your website
16 provider a document that said at this time you had a website
17 that was protected?

18 MR. HOLLANDER: No. Because that is what -- I am
19 going to be honest with you, when I called them up, that is
20 basically part of what I told them. I said, Look, I have a
21 website and it's protected. And they told me, It doesn't
22 matter whether you have access codes or not. If somebody is
23 going to use a type of hacking, which is brute force hacking
24 which is running through a whole bunch of passwords, we have no
25 indication to tell if it happened where it came from. The

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1 reason for that simply is that there was a law that was going
2 to be passed, but it was never passed.

3 THE COURT: Perhaps I am not being clear.

4 MR. HOLLANDER: Okay.

5 THE COURT: Whatever your bill is that comes from your
6 Internet provider, for example people have a G-Mail account or
7 let's say for example Facebook, Facebook would be able to tell
8 you I think -- although, I am not on Facebook -- what your
9 privacy settings are. So why wouldn't your Internet service
10 provider be able to provide the same putting aside brute force
11 hacking and alike? They would be able to basically tell you
12 and provide you with a document I think that supports that.
13 Without that my view is that the allegations are conclusory.

14 Similarly, with regard to your computer, the basis for
15 your claim that they actually did some accessing are their
16 declarations or affidavits themselves but those declarations or
17 affidavits actually state the opposite. In other words, they
18 say that they didn't hack and that they got these from a
19 publically available website. That is why I asked you whether
20 you had forensics done on your computer itself.

21 MR. HOLLANDER: I can go back to my iCloud host and
22 see if they are able to do that. As far as my home computer
23 goes, I can copy -- I have the Avira firewall. I can copy that
24 off the computer. It's on my computer. That is the firewall
25 that protects somebody from hacking in.

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1 THE COURT: No. The issue is, and you mentioned it
2 yourself, in order to get access to the internal file within
3 your commuter, one of the ways to do that I would assume is to
4 use malware or something like that. But if your computer had
5 malware -- again, if malware was on there such that it would
6 allow someone to get access, I would assume a forensic analysis
7 would show that.

8 MR. HOLLANDER: That is what I am -- right now, and I
9 know it is late, I have talked to this forensic expert, Matthew
10 Peterson. I have tried to get him to do something by today but
11 he was busy on other jobs and he I am going to specifically ask
12 to check if there is a malware on there. Specifically check
13 those -- I have about 10 e-mails that came from defendants with
14 attachments and that is how the malware would have gotten in
15 there if it is there.

16 As I sit here today, all I have is my sworn statement
17 through the first amended complaint versus their sworn
18 statements and some logic such that I talked to you about on
19 the iCloud. I am basically countering their accusations. They
20 say that further evidence that the iCloud was public was that
21 it existed on the Columbia Business School alumni website. So
22 they say that because the URL for the iCloud was on the
23 Columbia Business School website that meant that it was public.
24 Well, no, it doesn't mean it was public because if you clicked
25 on the URL, it would come up "page not found."

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1 Now, once again it is my word versus their word. But
2 going back to my request for everything that they took from my
3 iCloud or home computer, if out of all those documents there is
4 nothing from the Columbia Business School website, that means
5 when they found it -- it infers that when they found it and
6 they clicked on it, nothing came up. Because if something had
7 come up from my iCloud, they would have copied it down. They
8 would have downloaded it because that is what they were looking
9 for. Throughout the entire New York Supreme Court case over
10 seven months they were looking for anything they could find on
11 the Internet to use against me via ad hominem attacks in the
12 New York Supreme Court case.

13 THE COURT: I don't necessarily want to get into the
14 substance of it.

15 The document in question that you refer to is a
16 document that on its face appears to be something that was
17 outward facing. In other words, it seemed as if it were
18 something to respond to inquiries by the media --

19 MR. HOLLANDER: Correct.

20 THE COURT: -- and not for necessarily use in
21 connection with the litigation. In other words, you claim it
22 is work product.

23 MR. HOLLANDER: Yes.

24 THE COURT: And I haven't thought this through, but
25 just because you're a lawyer and you have a lawsuit doesn't

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1 necessarily mean that everything you do is work product.

2 MR. HOLLANDER: Correct.

3 THE COURT: I also don't know how the fact that you
4 are pro se in that case and this case how that implicates that
5 issue.

6 Let me just ask this, because I will tell you that on
7 the basis of the allegations in the complaint that I was
8 prepared to dismiss your complaint today. If what you are
9 telling me that you believe you can add facts and the facts
10 specifically relating to -- again, I don't know who your
11 service provider is but to the extent that you have a service
12 provider and you can get the information that basically shows
13 that during this time period you had a website and that that
14 website -- I don't know what it would -- that you had a website
15 or a cloud or some sort of storage on the Internet that was
16 protected. In other words, that no other individuals could
17 access. That would be something that you would rely on in
18 connection with your complaint. In other words, it would be an
19 attachment to your complaint.

20 Similarly if what you are saying a forensic analysis
21 of your computer would show there was malware on there and that
22 that malware was put on the computer at or around the time
23 that -- let me put it this way: My view is that would be the
24 only way that I think you would be able to substantiate again
25 those basic allegations in your complaint. That is putting

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1 aside the issue of some of the legal claims that you have.

2 We're talking about the Computer Fraud and Abuse Act now.

3 MR. HOLLANDER: Right.

4 THE COURT: There are other legal problems that I see
5 with some of your other claims in the complaint, for example,
6 the RICO claim. My understanding is the predicate acts that
7 you refer to are one is wire fraud. I understand that. The
8 other is robbery. The New York statute that you refer to is
9 not robbery. When you look at the generic definition of
10 robbery, it doesn't encompass the -- I apologize. I think it
11 is Section 150.

12 MR. HOLLANDER: Theft of computer. It doesn't include
13 force.

14 THE COURT: That's correct. At core robbery involves
15 some physical use of force or threatened use of force. That is
16 not present in that statute. In fact, there are separate
17 statutes for robbery and the theft from a computer. While I
18 understand the legal argument you are trying to make the
19 connection, absent a New York court interpreting that statute
20 to be akin to robbery, the elements are different between
21 robbery and the generic robbery which either generic robbery as
22 under federal law or robbery as defined under New York State
23 law. So I don't think there is a predicate act sufficient.
24 Putting aside the wire fraud count, I don't think there is a
25 sustainable RICO charge here. That is without going to the

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1 issue of whether there is an enterprise --

2 MR. HOLLANDER: Sure.

3 THE COURT: -- and the like.

4 MR. HOLLANDER: On the robbery, RICO talks about
5 the -- RICO lists a number of predicate acts. One of them is
6 robbery. Now, according to the Second Circuit court in a case
7 *United States v. Paone*, 782 F.2d 386 (2d Cir. 1986), when you
8 try to determine the definition of robbery or those other
9 predicate acts they are generic definitions. They are not
10 dependent upon what a state law may say. Because if they are
11 dependent upon what a state law may say, in one state you may
12 have a RICO predicate act but because the state law is
13 different in the second state, you won't have a predicate act.
14 That is why the Courts have said -- not only the Second Circuit
15 but also the Third Circuit -- that in order to determine
16 whether the predicate act as defined in the RICO statute fits
17 with something in the state, it is a generic definition.

18 So robbery while in New York State requires force,
19 under the federal law a lesser included offense of robbery is
20 theft. Simple theft under federal law 18, U.S.C., Section 2111
21 is a lesser offense of the federal offense of robbery. There
22 is an Eighth Circuit Case, *United States v. Walking Crow*, 560
23 F.2d 386 (8th Cir. 1977). My argument is since theft, which is
24 specifically mentioned in that New York Penal Law, says theft
25 of computer material is a lesser included offense under federal

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1 law of robbery that that would fit with the federal generic
2 definition of robbery in the RICO listing of predicate acts.

3 THE COURT: I understand the argument; but if it is
4 lesser included, it means that it is missing an element and it
5 is missing an element of robbery. So under Model Penal Code a
6 person is guilty of robbery in the course of committing a theft
7 if he, A, inflicts serious bodily injury upon another, or B,
8 threatens another with or purposely puts him in fear of
9 immediate serious bodily injury. So you have both either the
10 threat of bodily injury. So it is not just the theft, it's
11 that additional element that is totally missing. Just by its
12 very definition, a lesser included offense is not the offense;
13 right? It a lesser included offense for a reason and that is
14 because it is missing a critical element here. So it wouldn't
15 be robbery. It would be something else.

16 MR. HOLLANDER: My position is that -- my
17 understanding of it is whatever the state says an extortion is
18 or murder is, that doesn't matter. What matters is what the
19 RICO statute says extortion or murder are. I cite in my papers
20 *United States v. Forsythe*, 567 F2d 1127, Third Circuit. There
21 it said That Congress's intent when it passed a RICO statute
22 was to show that the predicate act inquiry is not the manner in
23 which states classify their criminal prohibitions, which here
24 was robbery, but whether the particular state involved
25 prohibits the activity involved. The activity involved that I

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1 am alleging is theft of computer material. So while, yes, what
2 happened here doesn't -- I couldn't go to the D.A. here and
3 say, They robbed my material here in New York, but my view is
4 that a generic federal definition of that predicate act of
5 robbery is included here as theft of computer material.

6 THE COURT: I think that that is deficient. Again, I
7 would dismiss the RICO cause of action on that basis. Having
8 said that, I would give you a limited amount of time because
9 all of these claims hinge upon your claim that somehow there
10 was hacking or something like that.

11 MR. HOLLANDER: Okay.

12 THE COURT: As I mentioned coming in today, in my view
13 the allegations in your complaint were conclusory with regard
14 to that and that the information that you relied upon to
15 buttress your complaint, in other words the declarations or
16 affidavits of the defendants in the prior case, didn't support
17 the claim of hacking and actually were inconsistent with that.
18 So as I mention I was prepared to dismiss the complaint on that
19 basis.

20 I will tell you this, though, if the information comes
21 back from your service provider that in fact you had a public
22 website, that is going to be a problem for you.

23 MR. HOLLANDER: No. If it comes back that way, I will
24 tell you the case is done. And if I talked to them once, I
25 talked to them twice. My Internet service provider says, Look,

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1 we went through all our computers and they say your website was
2 public at that time, then this case is gone and I am not going
3 to bother appealing it.

4 THE COURT: What I am saying to you is this: I am not
5 making a ruling right now, but that piece of information is
6 something that you would be acutely aware of at the time. So
7 by putting in the complaint -- and I know you said it is sworn
8 to and while you are an attorney --

9 MR. HOLLANDER: Right.

10 THE COURT: -- the complaint itself is not your sworn
11 statement.

12 MR. HOLLANDER: I will swear right now that that to
13 the best of my knowledge -- I mean, that iCloud was protected
14 by access codes until it was broken into and the access codes
15 were stripped. I already said that on January 3rd when that
16 Google cache came out that at that point in time that iCloud
17 was public. The only way it would have been public was that
18 the access codes at some time before that had been stripped.
19 That is my firm understanding and belief.

20 Now, I am not a computer expert and I don't know what
21 kind of strange things happen with computers, but that is my
22 view. Otherwise I wouldn't have brought this case. It would
23 have made no sense. Why should I waste everybody's time,
24 energy and effort including mine?

25 THE COURT: Well, that's not a question for today.

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1 What I am saying to you, and I want to be clear, is that if the
2 information, either one or both on forensics, comes back and
3 shows there is no malware on your computer -- and the other
4 thing is I am assuming that you have had the same computer.
5 In other words, you have had the same computer from the date
6 that you filed -- in other words, this is the same computer you
7 had when you had the state court action.

8 MR. HOLLANDER: Okay. The computer back then that was
9 connected to the Internet is different than the computer I have
10 now. In order -- my understanding to determine whether there
11 is malware is I still have the e-mails with the attachments
12 that came from the defendants. So that is what the forensic
13 expert is going to look at. There may or may not be malware in
14 there. I always said in my complaint iCloud or home computer.
15 The only reason I said that is because those are the only two
16 places where the document, media responses and the screen shot
17 existed. So I said iCloud or that.

18 Now, there may or may not be malware there. I don't
19 know. I will have him check. And then I will also go back to
20 my website host. I know I asked them this about two years ago
21 can you tell what was going on and what the status was and back
22 then they said, No, they couldn't.

23 THE COURT: Do you still have that old computer?

24 MR. HOLLANDER: Yes.

25 THE COURT: Here is the issue: You are bringing a

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1 lawsuit based upon what may or may not have been done with your
2 computer and your iCloud.

3 MR. HOLLANDER: Right.

4 THE COURT: I don't know both as a legal matter or as
5 a matter of forensics the fact that you now have a different
6 computer whether that necessarily makes a difference. The
7 bottom line is the evidence that an argument would be made to
8 preserve the computer itself. So I don't know if you still
9 have that computer and it still has the information on it and
10 you just don't use it anymore, or whether you stripped
11 everything off of that and it has been wiped clean.

12 MR. HOLLANDER: No. What was on there in the past is
13 probably still there. I will ask the guy to look at both. I
14 will ask him to look at the e-mails in my computers.

15 THE COURT: Again, I have not gone through because
16 there are issues with regard to some of the other claims that
17 you brought. I have spoken about the RICO claim.

18 MR. HOLLANDER: Right. Could I touch upon the
19 copyright again?

20 THE COURT: Yes.

21 MR. HOLLANDER: Let's assume --

22 THE COURT: Do you have a copyright on this document?

23 MR. HOLLANDER: No. On the media -- this goes back to
24 the discovery stuff. So the media response is there is no
25 copyright on it.

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1 THE COURT: Just to be clear --

2 MR. HOLLANDER: No registered copyright.

3 THE COURT: No registered copyright on the media.

4 MR. HOLLANDER: On the media responses.

5 Now, there was an Exhibit 1 from Schafer, which was a
6 screen shot. Now, that screen shot -- most of that screen shot
7 is registered, and I have that here. The screen shot was a
8 small bit of information, but that bit of information had been
9 registered back with the -- this had been registered as when I
10 was -- remember, I mentioned the fact that I was trying to --

11 THE COURT: Do you have a copy for your adversary?

12 MR. HOLLANDER: No, I don't. I am sorry.

13 The data that was on the screen shot was registered
14 with that particular website. I can show what was included in
15 that registration.

16 THE COURT: Again, am I correct that the basis of the
17 claim, putting aside the --

18 MR. HOLLANDER: The one screen shot?

19 THE COURT: No. Putting aside the responses to media
20 document, the basis for this claim would be your suspicion that
21 other things may have been copied?

22 MR. HOLLANDER: No. I will show this to him. This is
23 Exhibit 1 of the screen shot of Schafer. That one Defendant
24 Schafer in his affidavit said he copied that on December 30th,
25 2014, when he first copied the December 30th, 2014 -- when he

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1 first accessed the iCloud.

2 Now, what you are holding in your hand is the
3 registration statement that includes this material. You can
4 see -- if I can come up there and bring it to your Honor. This
5 is the screen shot and this is some of the material that was
6 registered under that copyright registration. It's not much.

7 THE COURT: The question is the website here that is
8 listed is RoyDenHollander.com.

9 MR. HOLLANDER: Right.

10 THE COURT: The website that the defendants are
11 alleged to have accessed is something different.

12 MR. HOLLANDER: Yes. The screen shot that they took
13 from my iCloud -- the manner, the wording, the phrasing is
14 identical to some of the phrasing that was previously
15 registered under RoyDenHollander.com.

16 THE COURT: This website, MensRightslaw.net, is that a
17 website that you maintain?

18 MR. HOLLANDER: That is part of the iCloud. It has
19 a -- see, it started with my basically trying to set up a
20 lawyer website, RoyDenHollander.com. That was years ago. That
21 was only public for a short period of time. Then it evolved
22 into -- when I started doing a lot of men's rights cases, it
23 involved into men's rights cases. So I included that stuff in
24 the iCloud, but it wasn't public. Then it evolved into using
25 this thing as a iCloud. So I had this website that went

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1 through a transition period and it ended up just holding a
2 whole bunch of disparate, different materials. Now, among one
3 of the materials it held was this men's rights stuff, which I
4 was thinking to putting together at some point in time.

5 THE COURT: Do you concede that this screen shot is a
6 screen shot of website that you had at the time, whether it was
7 public or private?

8 MR. HOLLANDER: The screen shot was taken when
9 everything was private. And some of the phraseology in that
10 screen shot, some of the sentences are identical to what was
11 registered under the RoyDenHollander.com website. I say that
12 RoyDenHollander.com website was -- some of it when it was being
13 created was public at that particular point in time because I
14 was creating it. Now, that kind of segues me into the other
15 materials.

16 THE COURT: With regard to the document at issue
17 again, the responses to media, there is no copyright for that;
18 right?

19 MR. HOLLANDER: No. It was not registered with the
20 Copyright Office because it is attorney work product. In my
21 view it was attorney work product of the I am not going
22 register attorney work product with Copyright Office.

23 THE COURT: When you say it is "attorney work
24 product," again what is the basis for that statement, that
25 you're an attorney and you created it?

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1 MR. HOLLANDER: No. It was created in the course of
2 litigation for that litigation. I brought -- up to that point
3 in time I had a number of these men's rights cases and a lot of
4 times I am contacted by the media. So what I would do is put
5 together a document with -- just, you know, anything that came
6 into my head. No matter how far out to the left or to right, I
7 just put it into that document and in case I got contacted by
8 the media. Sometimes I use it. Sometimes I wouldn't.

9 In this case I was never contacted by media, but that
10 is why I created that document because I was in litigation. My
11 view was that communications to the media when you are
12 litigating a case has some -- can have some impact on a case.
13 There can be some involvement there. So I considered it as an
14 attorney work product for that reason.

15 THE COURT: That type of material, the type of
16 material that the document contained, isn't it more akin to
17 something a public relations firm might do? It didn't inform,
18 am I correct, and it wasn't your legal impressions or legal
19 analysis of the case itself? And, in fact, you were intending
20 to share with others and one of the things that work product is
21 that it's not something that you would share with others.

22 MR. HOLLANDER: It never was shared with others. And
23 also in that document there is some of the legalese in simpler
24 language as to what this case is about. Whenever I was
25 contacted by the media for any of my other cases, they want to

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1 know, okay, what is this about. So I tried to put it in simple
2 language, the legalese. Yes, if I had been contacted by the
3 media, I may have used that. I may not. So it was just
4 something there to put my thoughts down in that situation.

5 THE COURT: With regard to the copyright and the
6 specific documents that we -- the responses to media, since
7 there isn't a valid copyright for it, how can you sustain a
8 copyright claim with regard to it?

9 MR. HOLLANDER: You can't sustain a copyright
10 infringement claim for that.

11 THE COURT: Okay.

12 MR. HOLLANDER: Now, I have that screen shot and my
13 belief is under the law I can sustain a copyright infringement
14 claim for that small screen shot you have.

15 THE COURT: Those allegations, the allegations that
16 you just recounted -- and again I am not in any way saying that
17 they would pass muster -- those allegations are not in your
18 complaint.

19 MR. HOLLANDER: Okay. Can I then go to why I consider
20 this -- the mass material that they took from my iCloud and
21 home computer so important?

22 THE COURT: Well, okay.

23 MR. HOLLANDER: Let's assume my iCloud was public. My
24 iCloud is public. They went in there and they copied these
25 other matters, which are registered with the Copyright Office.

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1 That is an infringement. Even if my iCloud was public, that is
2 the infringement. There is plenty of case law for the fact
3 that just because somebody puts something up on the Internet,
4 it does not mean it has been published. See, publication under
5 copyright law has a specific meaning.

6 THE COURT: If you have a public website and you are
7 allowing people to copy the materials on your website, I fail
8 to see how you would be able to sustain a copyright action in
9 particular when there are no allegations, A, that any other
10 documents -- that the defendants were in possession of any
11 other documents.

12 MR. HOLLANDER: On information and belief, your Honor.
13 There is plenty of that in my complaint.

14 THE COURT: Information and belief does not mean you
15 can just guess. As I understand it -- you can correct me if I
16 am wrong -- the logic behind it is all based upon the pillar
17 that they improperly accessed and got access to the responses
18 to media documents and therefore you then say on information
19 and belief they got access to other documents and downloaded
20 them.

21 MR. HOLLANDER: Yeah. You are allowed to under the
22 plausibility standard -- there are a couple of cases where it
23 allows you to bring information and belief allegations when
24 they have the information. They still refuse to say whether
25 they copied anything else other than what you have there as the

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1 screen shot and media responses. They refuse to say, No, we
2 didn't copy anything else. So that information they know. I
3 don't know.

4 THE COURT: Let's say they put in an affidavit saying
5 the only document that they ever had was this responses to
6 media document.

7 MR. HOLLANDER: If they put in an affidavit, I will
8 believe it. But they haven't said -- this case has been going
9 on for a while and the other case under that motion before the
10 New York Supreme Court was some years ago. They have not said
11 one way or another. They haven't put in an affidavit. They
12 could have put in an affidavit. They could have walked in here
13 with an affidavit and the argument would have been gone.

14 THE COURT: I will hand this back to you.

15 Let me just state that the document that has copyright
16 on it doesn't indicate with any sort of specificity what the
17 purported copyrighted material is. I guess what I would say to
18 you, Mr. Hollander, as stated I would dismiss the copyright
19 claim based upon the current allegations in the complaint.

20 MR. HOLLANDER: Could I add one thing?

21 THE COURT: Yes.

22 MR. HOLLANDER: Let's assume the iCloud is public. I
23 assume that. Assume that. If they copied a registered
24 copyrighted docket from a public iCloud, that is infringement
25 under the Copyright Act because publication -- putting

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1 something public on the Internet does not give them -- no, I
2 have to go back.

3 Just because something is public on the Internet
4 doesn't mean there is a publication. If I have a document, a
5 book and it is published, publication and I give it to your
6 Honor and sell it to your Honor --

7 THE COURT: But if they don't use it for anything.

8 MR. HOLLANDER: All they have to do is reproduce. It
9 is reproduce, distribute, display. All they have to do is
10 copy.

11 THE COURT: First of all, there is no evidence that
12 they have gotten any other documents.

13 MR. HOLLANDER: Correct.

14 THE COURT: There is no evidence that they have
15 reproduced anything in any way, shape or form.

16 MR. HOLLANDER: That is why I asked for early
17 discovery.

18 THE COURT: No. In copyright claims typically there
19 is an assertion that the photo appeared in a magazine or the
20 excerpt of a book appeared -- somebody copied it and it
21 appeared somewhere else. You are not entitled to get
22 discovery. The case that you mentioned there was already it
23 sounded -- again, I haven't looked at it -- as if there had
24 been a determination that the movie had been downloaded and the
25 issue there was who did the downloading and what use was it put

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1 to. Here there aren't any allegations. Again, with regard to
2 this other tranche of documents that you are now claiming --
3 again, I am not changing my prior ruling with regard to
4 discovery because I don't believe that type of discovery would
5 be warranted in this case. In other words, the discovery to
6 attempt to not even bolster. It is an attempt to actually --
7 well, someone might describe it as the classic fishing
8 expedition. In other words, you don't have a claim and so you
9 need to produce discovery to substantiate it.

10 Now, I don't know what the specific allegations -- I
11 don't have the allegations that you would include that you
12 claim would support this copyright claim with regard to this
13 other material, but it is fair to say with regard to the
14 document that is at issue here there is no copyright claim.

15 MR. HOLLANDER: On media response there was on that
16 small document you looked at.

17 Your Honor, you have a situation -- I mean, this
18 situation in the New York court, I mean, you really had the
19 classic political divide here. Me the Trump supporter. They
20 are the political correct. So there was a lot of animosity.
21 Somehow they get into my iCloud. Logic tells me, but maybe
22 logic doesn't matter, they are going to take everything. But
23 if they have more than what this is or -- once again, they
24 haven't said one way or another whether they have taken more or
25 not; but if they took everything, they got me by the throat.

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1 If they took everything, they got me by the throat. They can
2 destroy my business easily with all that. You take it out of
3 context and you spin it around and that is.

4 THE COURT: Isn't that some future lawsuit? They
5 haven't used it. Assuming everything you said is correct, that
6 they downloaded it and that they are lying in wait, they
7 haven't done anything with it. In fact, they may never --
8 let's assume -- do anything with it. It is just sitting
9 somewhere. Again, I am accepting it for purposes of the
10 argument here. In my mind you haven't stated a claim. In
11 other words, it is not ripe. Again assuming all those facts,
12 it wouldn't be ripe.

13 MR. HOLLANDER: I gotcha. When it happens, I hope you
14 are the judge on the case.

15 THE COURT: Well, let me just ask this: Before I send
16 you off to amend the complaint with regard to the copyright, as
17 I mention assuming you could show that this material is
18 copyrighted and arguably they may have had access to it on this
19 website -- I think it would have to be on the .net website, not
20 the .com website because my understanding of that is that
21 predated the .net website. And, in fact, the .com website may
22 have been the website you were utilizing in connection with
23 your law practice.

24 Assuming you are able to substantiate that. Since
25 there is no use at least in my view, there isn't a ripe claim

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1 here. Again, that is without establishing that there is some
2 proof that they in fact downloaded the material. It just shows
3 that you had certain copyrighted materials at or around the
4 time of the prior state case.

5 MR. HOLLANDER: Okay. We just disagree on the law
6 there. My understanding is if somebody copies it, then it
7 infringes. That is a disagreement on the law.

8 THE COURT: Again, what I am going to do is --

9 MR. FRANCOEUR: Your Honor, if I could be heard before
10 you make a ruling.

11 THE COURT: Yes.

12 MR. FRANCOEUR: Just a few minutes.

13 Your Honor, I appreciate you have not made a ruling on
14 whether or not to give plaintiff a right to amend. I would
15 suggest to, your Honor, there are two reasons why you should
16 not. The first one is that even if the plaintiff went back and
17 got what is glaringly and obviously missing from the complaint
18 and that there was some evidence that the website was private,
19 collateral estoppel bars these claims. All the claims that we
20 have in this action is that there has been hacking of a private
21 website and that then there was improper use of the document,
22 the media release, was all previously litigated.

23 THE COURT: I know that these issues were raised in
24 the prior litigation. However, wasn't that case dismissed on
25 jurisdictional grounds?

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1 MR. FRANCOEUR: No, your Honor. There was a
2 one-sentence decision that said, There is no basis for the
3 relief sought, and I suspect that the Court had the same
4 reaction to the logic arguments that you are having. While I
5 like logic and I like logic games, in the pleading logic is a
6 problem. Because in a pleading logic means on unsupported
7 conclusory allegation. There is case law that is legion that
8 says that is not enough.

9 There is a second reason, your Honor. The plaintiff
10 needs to show for a computer fraud claim damages.

11 THE COURT: Yes.

12 MR. FRANCOEUR: There is no showing whatsoever about
13 damages. There are five cases that I cite that give five
14 specific reasons why the complaint as pledged shows no damages.
15 Plaintiff has said there is no third-party vendors that have
16 come in and done an analysis. He spent many some time looking
17 it. He spent some time researching. He spent some time taking
18 prophylactic measures to prevent future attacks.

19 In 30 seconds I can read you these five quote, and
20 then I will be quite. "Losses relating to time and effort in
21 assessing damage are not within the scope of damage for
22 computer fraud claims." That is the *Think v. Time Warner Cable*
23 case at 810 F. Supp. 2d 633 (S.D.N.Y 2011).

24 My second quote: "Loss is incurred from instituting
25 prophylactic security measures against some potential future

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1 offense are not recoverable." *Rice Inc. v. Lennar Corp.*, 15 CV
2 7905 2016 WL 372736 (S.D.N.Y. 2010).

3 My third of five: "Plaintiff concedes that copying
4 data does not constitute damage for the purposes of a computer
5 fraud act." Oh, I am sorry. That is in the plaintiff's own
6 opposition at page 21.

7 Fourth point: "Accessing a publically available
8 website cannot form the basis of a CFAA claim." That is *Orbit*
9 *One v. Numerex*, 692 F. Supp 2d 373 (S.D.N.Y. 2010).

10 Finally, you have the old American rule, which I think
11 comes in here, if the plaintiff has taken some time to analyze
12 the damages and see what has happened here, those are
13 litigation costs. In *McGuire v. Russell*, Second Circuit, 1
14 F.3d 1306 in 1993 said, "In federal practice the general rule,
15 sometimes called the American rule, is that each party bears
16 its own fees unless fee shifting is permitted by contract of
17 statute," which it is not.

18 THE COURT: In other words, the investigation that had
19 gone into preparing the complaint, which is I think in essence
20 what you are saying that done by here the plaintiff himself. I
21 understand the issue with regard to the damages. However --
22 and this is a big if -- if through the forensic analysis there
23 is some costs associated with that that demonstrates that --
24 again, everything has to line up. By that I mean the
25 computers, the timing and the malware at the time. I think

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1 there is more of an argument he has expended -- that there has
2 been damage to the computer itself. And I agree with you that
3 as the complaint stands now, it doesn't sufficiently allege
4 damages.

5 MR. FRANCOEUR: My point is even if he comes back with
6 the computer service provider saying it was locked, the
7 amendment is not going to cure the lack of damages.

8 THE COURT: I am not prejudging the issue with regard
9 to the iCloud issue, but I think with regard to the computer
10 itself to the extent there was malware and malware found on it
11 and the forensic analysis bears that out, I think that at least
12 at this stage, the pleading stage, that would be sufficient.

13 Having said that, let me go back to a point I made
14 earlier, Mr. Hollander. When you go and you have this analysis
15 done, I am going to hear from defendants with regard to --
16 because as they have indicated in their papers, they believe
17 this lawsuit is pure harassment plain and simple. I am not
18 opining on that one way or another, but I will say that if one
19 were to look at the history of things, I understand the
20 argument that they are making. So I am not precluding them
21 from if we go down this path and you amend your complaint and
22 the information comes out that doesn't support the allegation
23 that the defendants hacked into your computer or that they
24 improperly accessed your iCloud, I will hear from them with
25 regard to what if any remedies they would like to take with

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1 regard to that.

2 Again, I am not ruling any Rule 11 motion is something
3 that I would grant or not, but I am saying that is within the
4 ambit of what my consideration would be. So as you go through
5 these steps, I want to be clear that that is something that I
6 am not precluding and I wouldn't preclude them from making such
7 a motion to seek costs in connection with responding to this
8 litigation.

9 MR. HOLLANDER: Fine. I assume what will happen is
10 they will seek costs under the Copyright Act and I will just
11 use that screen shot.

12 I want to go back to two of the other questions.

13 THE COURT: Let's separate that out. There are costs,
14 yes, that the copyright statute can provide with attorney fees.
15 I am talking about something separate and apart from that,
16 which is Rule 11 of the the Rules of Civil Procedure, which
17 they can pursue also.

18 MR. HOLLANDER: Okay.

19 THE COURT: So I am not limiting it to a particular
20 statute, in other words, to the copyright statute that they
21 prevail and therefore they should be entitled to get attorney
22 fees.

23 MR. HOLLANDER: So it would be another case or
24 whatever. Fine.

25 I just and want to go back to two points. You started

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1 to raise the point that -- well, the New York Supreme Court was
2 dismissed for lack of personal jurisdiction. The motion to
3 withdraw the document was simply denied. Basically two
4 sentences, denied and no basis for it. So the motion to
5 withdraw the document, which was the media responses, the
6 Supreme Court case said denied. The entire case -- the merits
7 of the case was dismissed on personal jurisdiction. You read
8 through the order from Justice Schechter. It is all about
9 personal jurisdiction.

10 Now back to damages. Defense counsel confusions
11 damages with losses. Damages under the Computer Fraud and
12 Abuse Act 1030(e)(8). That is damages. That is when the
13 computer or data somebody corrupts.

14 THE COURT: Yes. The document is corrupted or --

15 MR. HOLLANDER: That is damages. Losses is what I
16 allege. The term losses under 18, U.S.C., 1030(e)(11) -- the
17 term losses means any reasonable cost to any victim including
18 the cost responding to an offense; conducting the damage
19 assessment, which is what an investigation; losses in time and
20 expenses and analyzing; investigating security of the computer;
21 modifying computers to prevent further unauthorized access and
22 otherwise responding to the intrusion. That is losses. I have
23 nine cases. He has five cases.

24 THE COURT: The question I have, and I haven't looked
25 at this, but don't you only get to losses to the extent you are

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1 able to sufficiently allege damages? In other words, that you
2 have been statutorily damaged under a particular statute.

3 MR. HOLLANDER: *Navistar, Inc. v. New Baltimore Garage*
4 *Inc.*, 2012 WL 4338816 (N.D. Ill. Sept. 20, 2012). Even if the
5 alleged offense ultimately is found to have caused no damage to
6 the computer, no damage to the data, no damage to the databases
7 or interruption of service, losses still apply.

8 *First Rate Mortgage Corp. v. Vision Mortgage Services*
9 *Corporate*, 211 WL 666--

10 THE COURT: Well, I am going to cut it off. I
11 understand the argument with regard that plaintiff should be
12 estopped. My reading from the decision of the state court is
13 that the basis was jurisdictional. Even if I could read into
14 that the judge somehow touched on the merits of the underlying
15 claims, it seemed to me that that was more in the realm of
16 dicta.

17 Having said that, I am making a rule on the RICO
18 claim. The RICO claim is out.

19 MR. HOLLANDER: Okay.

20 THE COURT: I am making a rule on the copyright claim.
21 The copyright as it currently stands is out.

22 Mr. Hollander, if you think there is some allegations
23 that you think that can pass muster, although, again without
24 having any allegations that relate to use or distribution of
25 these things, that again you'll have to make the connection

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1 that somehow that they copied the materials, I will allow you
2 to try and do that. As it stands right now, the copyright
3 infringement claim is out as it relates to the document in
4 question.

5 MR. HOLLANDER: Fine.

6 MR. FRANCOEUR: Judge, can I clarify something I said
7 about the collateral estoppel?

8 THE COURT: Yes. What I will say with regard to the
9 collateral estoppel, I am giving you my preliminary analysis.
10 I am not ultimately ruling on that now.

11 Go ahead.

12 MR. FRANCOEUR: It is all clearly laid out in the
13 papers. The action may have been disposed of on jurisdictional
14 grounds, but the issue of the hack was decided in a sanctions
15 motion which was denied and in a separate motion which was
16 specific to the hack. The action was resolved on a different
17 basis.

18 THE COURT: Replevin, did you ever ask for the
19 document back?

20 MR. HOLLANDER: Yes. It was my notice of -- it was in
21 the New York Supreme Court. It was my notice of motion for
22 withdrawal of what we have been calling media responses and
23 that was made January 23rd, 2015. I said that defendants
24 turned over to me all paper and digital copies of any of
25 Exhibit 2, which was the media responses, and any other

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1 material obtained in the same manner that they are in
2 possession or control of.

3 THE COURT: How is it that you have superior right to
4 the defendants with regard to this? It is not copyrighted;
5 right?

6 MR. HOLLANDER: It is not copyright. The replevin --
7 well, basically it is my property.

8 THE COURT: You have to --

9 MR. HOLLANDER: I mean, as between someone who takes
10 your -- makes a copy of your property without your
11 authorization and you -- I would say I or you have the superior
12 possessory right.

13 THE COURT: Again, it is based upon this idea that it
14 wasn't a public website because they didn't have access to it.
15 It certainly can't be based on copyright because the document
16 was not copyrighted.

17 MR. HOLLANDER: Right.

18 THE COURT: I am pointing out to you issues I believe
19 that to the extent you can, you would need to address that in
20 any subsequent pleading. In addition, you made that request
21 but was there an actual refusal to return it?

22 MR. HOLLANDER: Sorry?

23 THE COURT: Refusal to return the document?

24 MR. HOLLANDER: I made the request and there was no
25 refusal that I can recall.

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1 THE COURT: Now, with regard to the trespass to
2 chattels, is there any allegation in the complaint that the
3 defendants intended to interfere with your possession of the
4 particular document and that there was a harm that resulted
5 from that?

6 MR. HOLLANDER: For instance, yeah, the media
7 responses, but this goes back. So my allegation is media
8 responses was an attorney work product.

9 THE COURT: You still had it?

10 MR. HOLLANDER: I still have -- see, that goes back.
11 We're getting back to the computer fraud piece. I still had
12 that document, but because they made what I allege as an
13 attorney work product public, it destroyed its value. I mean,
14 if you have an attorney work product and your opponent gets
15 ahold of it and they use it, which they did in the New York
16 Supreme Court case, whatever value that document may have had
17 is gone.

18 THE COURT: How is the use, A, diminished by using it
19 in a litigation? As I understand it, the documents provide
20 information. I don't know what value necessarily it would
21 have. What I will say is this: In connection with whatever
22 amendment you are going to do, as I understand in order for the
23 defendants to be liable, the defendants would have to have
24 harmed the material value or material interests in the physical
25 condition of the document, the quality or the value of the

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1 chattel, which I hear is the document. Again, I don't believe
2 that you sufficiently allege that in the current complaint.

3 They haven't deprived you of the value of the document
4 because you still have the document. It is not clear to me
5 exactly what value the document necessarily has and if there is
6 such a value how the defendants have somehow diminish that
7 value of that particular document.

8 MR. FRANCOEUR: Judge, if I may.

9 THE COURT: Yes.

10 MR. FRANCOEUR: I am going to refer the Court to the
11 papers but we have cases on here that say these trespass to
12 chattel claims, replevin, they are covered under the Copyright
13 Act and they are not appropriate. The Second Circuit has
14 spoken in *Miller v. Hallbrook*, 377 Fed. Appx. 72 (2d Cir.
15 2010). It was preempted by the Copyright Act.

16 MR. HOLLANDER: I would like to respond twice.

17 Well, I had an attorney work product. The key to the
18 attorney work product is kept quiet. It is considered the
19 sanctity of an attorney's thought. So in the argument before
20 the New York Supreme Court, Defendant Bolger focused on this
21 document, and once again it brings up the ad hominem attacks
22 and the split in this country between, shall we say,
23 Trump-ites -- although, I wasn't a Trump-ite then -- and people
24 who then would have been Obama and Clinton. She focused on the
25 document to exploit that political split. I believe it

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1 succeeded. The point was it was an attorney work product and
2 she made it public and she used it in the case.

3 Now, as far as preemption goes, defense counsel
4 doesn't really have the preempt change requirement correct.
5 Preemption does not apply when the state action comes within
6 the subject matter of copyright and -- this is the key part --
7 the state action -- the state action claims -- the state
8 actions claims --

9 THE COURT: What is the additional element?

10 MR. HOLLANDER: That is what I am going to.

11 THE COURT: What is the additional element?

12 MR. HOLLANDER: It is that the state action claims may
13 proceed when those claims contain extra elements that may -- or
14 what is the extra element here?

15 THE COURT: Exactly.

16 MR. HOLLANDER: The extra element here is copyright
17 protects rights to produce, perform, distribute and display not
18 to possess. The trespass is an action concerning possession --
19 the right of possession.

20 THE COURT: Well, I think it is clear that the core of
21 your claim here is the unauthorized publication of the document
22 in question and that the right therefore that you are seeking
23 to enforce appears to be coextensive, at least in my view, with
24 the Copyright Act for purposes of the trespass to chattel and
25 replevin claims.

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1 Putting aside again the other legal issues with
2 deficiencies that I have pointed out there. So with regard to
3 the --

4 MR. HOLLANDER: Could I just add one point?

5 THE COURT: Yes.

6 MR. HOLLANDER: In his papers he raises preemption as
7 to replevin. He doesn't raise it in his papers as the
8 trespass. My argument against preemption with respect to
9 replevin is that New York CPLR 701 specifically provides for a
10 recovery of chattel through a replevin action. You can even
11 use the sheriff to recover that chattel. That doesn't exist in
12 the Copyright Act. And when we're talking about replevin, it
13 is copies that they have of my material being returned to me.
14 I am unaware that anywhere in a Copyright Act it has that. I
15 guess you can bring a copyright claim and you can ask for a
16 preliminary injunction or injunction.

17 THE COURT: They never refused to return it; right?

18 MR. HOLLANDER: That's interesting. That's right. We
19 got to that point. Can I ask them now?

20 THE COURT: If they will return the document?

21 MR. HOLLANDER: Yeah. I will ask them now.

22 MR. FRANCOEUR: It is preempted, your Honor.

23 THE COURT: It's what?

24 MR. HOLLANDER: It's preempted he said.

25 THE COURT: Look, as things stand now as I mentioned,

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1 the New York State claims for replevin and trespass to chattels
2 are out for the reasons I have specified. I will provide a
3 more detailed explanation if need be at a future date.

4 With regard to the injurious falsehood --

5 MR. HOLLANDER: Oh, I am withdrawing that. Statute of
6 limitations problems. Forget it. It is gone.

7 THE COURT: Isn't your professional Conduct 4.1
8 claim -- assuming you can bring such a claim -- isn't that
9 based upon this idea of somehow it is an injurious falsehood?
10 Just factually the document is referred to. It's identified in
11 the papers of the state as responses to media. It is then
12 defined as release. There are only two places that I was able
13 to find where it was called media release.

14 Why is that somehow a falsehood? I assume that it is
15 somehow something more than just a mere description of a party
16 in a litigation. How does that not only make a false statement
17 a fact to a third person?

18 MR. HOLLANDER: Can you tell me which of your
19 questions that is under?

20 THE COURT: Well, I am going through the rules of
21 conduct.

22 MR. HOLLANDER: You did. You asked why does the
23 characterization -- I am looking for the question -- why would
24 the characterization of the documents --

25 THE COURT: Hold on. I can find that for you.

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1 MR. HOLLANDER: It is under RICO. Plaintiff's
2 memorandum --

3 THE COURT: The question is: To the extent that you
4 could necessarily even have a claim under the professional
5 responsibility against these attorneys, what are the
6 allegations that support that either lawyer made a false
7 statement of fact or law to a third person in the state case?

8 MR. HOLLANDER: I am asking the Court to refer them to
9 professional responsibility committee for essentially making --
10 -- intentionally making a false statement of fact. It is based
11 upon the fact that the media responses was introduced in
12 Defendant Bolger's affirmation. In that affirmation, she
13 stated on page 1, Exhibit 1, and under that affirmation she
14 swore a true and correct copy of the media release. That is
15 important. Media release available at plaintiff's iCloud is
16 attached hereto as Exhibit 1. So she and introduced the
17 document as a media release when it is not a media release.

18 THE COURT: The document itself was not doctored;
19 right?

20 MR. HOLLANDER: No. The document wasn't doctored.

21 THE COURT: The title itself was plain for the judge
22 to see; right?

23 MR. HOLLANDER: The judge could see the title.

24 THE COURT: The papers that were filed in other places
25 actually identified the document by name; right?

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1 MR. HOLLANDER: No. No. Let me finish it.
2 Affirmation calls it a media release. In her memorandum of law
3 at page 5 -- it is in my first amended complaint Exhibit E --
4 she noted that the product -- that the title of the document
5 was responses to media. She noted that the -- that is the one
6 and only time -- let me finish. She cited to it. She made a
7 shorthand citation. We put the parens and we put the quotes
8 in.

9 THE COURT: Release.

10 MR. HOLLANDER: She called it media release.

11 THE COURT: No. I think it was defined as release.

12 MR. HOLLANDER: Okay. Release.

13 THE COURT: It actually doesn't matter.

14 MR. HOLLANDER: Nine times.

15 THE COURT: Well, it doesn't matter. A party in a
16 litigation, whether it is a memo of law or otherwise, having
17 appropriately identified the document by its actual title and
18 then defines it as release, I don't view that then subsequently
19 the mentioning of it as release as a falsehood. That's number
20 one.

21 Number two, the premise that without altering the
22 document, the mere fact that at two places the defendants,
23 whether it is in their affirmations or in the memo of law, may
24 have referred to media release, I find that is not sufficient
25 to meet the falsehood that would be necessary for an attorney

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1 to violate the New York Law of Professional Conduct 4.1.

2 MR. HOLLANDER: I disagree.

3 THE COURT: By extension if I were to rule otherwise,
4 A, any litigant who defines a document in a way that their
5 adversary doesn't believe -- in other words, defines it. In
6 other words, identifies it correctly and then defines it in a
7 way that somehow the adversary would view as not the best way
8 of defining it would be sufficient. Here it has to be
9 something that is false. Putting aside the fact that this was
10 before the state court judge, in other words, the idea that if
11 it was something that was so blatant and such a falsehood
12 and -- again, this is not necessarily critical to my ruling --
13 the state court judge would have called it the lawyers out on
14 it. In other words, when you are talking about a violation of
15 4.1, that is akin to basically a lawyer lying to a judge.

16 MR. HOLLANDER: That is what I saw it as.

17 THE COURT: Here again -- I will provide additional
18 details -- it simply does not meet the criteria for any kind of
19 referral. To the extent that you were alleging that it could
20 also be somehow a substantive claim, I would dismiss it on that
21 basis only because I believe you were just asking me to
22 refer --

23 MR. HOLLANDER: Just that. I didn't bring it as a
24 substantive --

25 THE COURT: Based on the allegations as I understand

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1 them and what I have already indicated, I would decline to do
2 that. I simply find that there is no basis to conclude that
3 the attorneys were knowingly making false statements of law to
4 the state court judge or fact to the state court judge as to
5 the description of that document.

6 MR. HOLLANDER: I saw that as a fact that she was
7 experienced in the media as her attorney mentions and the fact
8 that your typical press release is only 600, 800 words. Okay.

9 MR. FRANCOEUR: Your Honor, can I make a brief point?

10 THE COURT: Yes.

11 MR. FRANCOEUR: I know you have reserved judgment on
12 the --

13 THE COURT: Collateral estoppel.

14 MR. FRANCOEUR: -- collateral estoppel, but I would
15 like to make a brief point. I told myself I didn't want to
16 belabor the point about vexatious litigation, but I would like
17 to make a very brief point. My clients are here in the
18 courtroom. This is a painful --

19 THE COURT: I saw some shaking heads back there and I
20 figured they were people who might have an interest.

21 Go ahead.

22 MR. FRANCOEUR: It is hard to listen to. There is a
23 lot of serious allegations. There is no merit. There is no
24 basis. The closest we came was logic. I just ask the Court to
25 keep in mind these are people, these are lives with

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1 reputations. It is very hard for them. There are claims being
2 withdrawn it seems almost flippantly. It doesn't matter to the
3 plaintiff, but it matters tremendously to the people on it
4 defense and I ask that the Court to keep that in mind.

5 THE COURT: I understand that.

6 MR. FRANCOEUR: I appreciate you letting me say that.

7 THE COURT: In all litigations, in particularly when
8 you are involving attorneys and alleging that the attorneys'
9 conduct in a prior litigation was somehow arguably -- I guess
10 the allegation with regard to 4.1 was sanctionable in essence.
11 I understand the issues with regard to the defendants and their
12 profession.

13 MR. HOLLANDER: Your Honor, may I say something?

14 THE COURT: Yes.

15 MR. HOLLANDER: I am 70 years old. I am going to be
16 71 in September. How do I get by? I get by doing the lowest
17 of lowest of legal work called document review. One reason I
18 am doing that document review is because of their defendants
19 back there and their litigation of personal destruction,
20 including Mr. Francoeur and his litigation of personal
21 destruction.

22 The first -- the second letter he sends to your Honor,
23 he brings in all this irrelevant stuff in support, which I can
24 see now didn't work to bias the Court. That is what I went
25 through in the New York Supreme Court. Nothing but

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1 allegations, ad hominem attacks. You know why I lost the case
2 in New York Supreme Court? Because I didn't have enough money
3 to put together an appendix that was stuffed with irrelevant,
4 repetitive documents that were filed in the New York Supreme
5 Court by the defendant Bolger and Defendant Schafer.

6 I am also a victim here. I really hate using that
7 phrase, but I am not here as some evil Trump-ite trying to get
8 revenge. I just want justice. My rights have been stepped on
9 and I have been called all kinds of names by them.

10 THE COURT: You are entitled to file a complaint. It
11 is my job to review that complaint to determine whether or not
12 there is legal merit.

13 MR. HOLLANDER: Understood.

14 THE COURT: I have ruled on the portions of complaint
15 that I have today. Based upon my ruling, what remains is in
16 essence the possibility of the -- again, I don't believe in my
17 view that you can substantiate a copyright claim. I direct you
18 to go back and look at copyright law based upon whatever
19 additional allegations you think you can put in there because I
20 don't believe there is sufficient basis, other than conclusory
21 allegations, that you could substantiate that the defendants
22 copied anything other than the --

23 MR. HOLLANDER: The screen shot.

24 THE COURT: Again, the screen shot doesn't mean they
25 that downloaded any of those documents.

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1 Putting aside the second issue, which is the use or
2 distribution or the like of any of those materials, that claim,
3 the CFAA claim, I will allow to you attempt to amend your
4 complaint.

5 Let me get back to this point because if the
6 information comes back from that at the time your website was
7 public, I would find it hard to -- not only that it was public
8 in a sense that that is the way it was created and it was a
9 public accessible .net website -- I guess a couple thing. The
10 website that I understand the --

11 MR. HOLLANDER: iCloud.

12 THE COURT: -- defendants to have access was the .net
13 website.

14 MR. HOLLANDER: I just want to clarify that. It is an
15 iCloud and so it has a particular URL but at that point in time
16 it was just a mixture of a lot of different things.

17 THE COURT: Documents you mean?

18 MR. HOLLANDER: Which is what you use an iCloud for.

19 THE COURT: Whatever. It was a place where you stored
20 various documents as I understand what you have been saying.

21 The issue is whether or not others could access that.
22 In other words, whether members of the public could access it.

23 MR. HOLLANDER: I want to clarify. On January 3rd --
24 I am saying on January 3rd, 2015, it was public. There is a
25 Google cache there. Once again my claims are that it was

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1 public at that point because the defendants accessed it and
2 striped the access codes. Now, on January -- when I first
3 learned on January 12th, 2015 that that website was public, I
4 learned about it because I saw Defendant Bolger's affirmation
5 saying she got this media release off of this website. I went
6 back -- I went back to my website and I saw that it was public
7 and I put the access codes right back on. And I think she says
8 in her affidavit that when she tried to access the website --
9 it might have been January 13th, 2015 -- she couldn't because
10 there were access codes. So it was public for a period of
11 time. The moment I learned about it, which was January 12th,
12 2015, I put those access codes right back on it.

13 MR. FRANCOEUR: Your Honor, with the plaintiff
14 admitting that it was public, I don't think there is a
15 good-faith basis for him to even amend now all my other
16 arguments aside. He admitted it was public and the time and he
17 put the codes on after.

18 MR. HOLLANDER: That's not --

19 MR. FRANCOEUR: So we know now he is not going to come
20 back with what your Honor is asking for. He just said it was
21 public.

22 MR. HOLLANDER: I am not admitting that. Give me a
23 break.

24 THE COURT: If you go back to whatever provider it is,
25 whoever created it, and they basically say, It has always been

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1 public and there were never any security measures on there and
2 there were never any privacy measures on there --

3 MR. HOLLANDER: I am sorry. I will tell you what they
4 told me back then -- I will go back to them. They are going to
5 say, We have no way of telling. That's what they told me back
6 then. I will go again.

7 THE COURT: Account opening documents, documents that
8 show when you opened the .net website.

9 MR. HOLLANDER: I will see if there are any documents.

10 THE COURT: I don't understand why it wouldn't be like
11 a Facebook where you would have some privacy measures that you
12 would put on there so the people couldn't gain access to it and
13 why they wouldn't be able to tell you that.

14 MR. HOLLANDER: Well, the access codes were put on
15 there. I am going to go back. I am just trying to be frank
16 with your Honor. I talked to two different people there and
17 they said they had no way -- they had no way of telling. If
18 they had been able to tell me, I would have been here with
19 those documents. The documents would have been in the
20 complaint. All I have is what I know I did.

21 THE COURT: If your documents don't bear out what you
22 believe you are stating was your belief as to what
23 transpired -- because again you concede at a certain point it
24 was public. There were declarations put in the other matter
25 that it was public earlier than the date that has been

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1 indicated. In other words, they downloaded the document from a
2 public website. I am looking for something that will
3 substantiate that. Either documentation from the company that
4 shows that you basically had this storage and that it was
5 something that was not accessible to the public. It may be
6 that if you're correct that they are unable to tell you that,
7 well, then see if you can get some documentation that reflects
8 that.

9 MR. HOLLANDER: Okay. I will do what I can.

10 THE COURT: Again, I just want to be clear about this,
11 I dismissed the lion's share of the other claims and if need be
12 I will create additional detail. By that I will read into the
13 record my specific rulings with case citations with regard to
14 each of the other claims that I dismissed here today; but if
15 you persist and these documents and what they show is
16 something -- in other words, if the next thing that gets filed
17 is a dismissal of the action, I am going retain jurisdiction to
18 hear from the defendants with regard to whether or not they
19 have an application with regard to whether or not they view
20 this as a frivolous lawsuit. I just want to be clear because I
21 don't want you to be surprised by that.

22 MR. FRANCOEUR: Thank you, your Honor.

23 THE COURT: Anything else that we need to deal with?

24 How much time do you need, Mr. Hollander?

25 MR. HOLLANDER: What I will do is I will see if I can

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1 contact this company over the weekend.

2 THE COURT: Why don't you do this: I will give you
3 two weeks to contact the forensic entity as well as your
4 Internet service provider that you were using at the time that
5 supported .net website that defendants have indicated they
6 obtained the document from.

7 Obviously, keep in touch with defendants and provide
8 me with a letter -- Ms. Williams two weeks -- asking them how
9 much time they need to get you the materials or to do the work
10 they need to do.

11 THE DEPUTY CLERK: March 2nd.

12 THE COURT: March 2nd.

13 MR. HOLLANDER: I just want to make clear as far as
14 the forensics on the computer whether there is malware there or
15 not, I don't know. He may not find any. He may find some. If
16 he doesn't find anything, then that is why I put in my first
17 amendment complaint the iCloud or the home computer.

18 THE COURT: I understand.

19 MR. FRANCOEUR: Your Honor, malware is not a claim.
20 There is no malware claim.

21 MR. HOLLANDER: I think phishing is in there.

22 THE COURT: No.

23 MR. FRANCOEUR: There is no claim.

24 MR. HOLLANDER: Then it depends basically on the
25 iCloud.

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1 THE COURT: Brute force hacking.

2 MR. HOLLANDER: They call it cracking. Brute force.
3 It is just on the -- I will contact my host -- the host.

4 THE COURT: Anything else that we need to deal with
5 today, Mr. Hollander?

6 MR. HOLLANDER: No.

7 THE COURT: Once you get the information, speak with
8 your adversary and let them know what the timing is going to be
9 with regard to that and then submit your letter on or before
10 March 2nd.

11 MR. FRANCOEUR: Your Honor, I know we're all ready to
12 leave, but did I understand you correctly that the plaintiff is
13 going to reach out to the adversary? I thought I was going to
14 reach out to the vendors.

15 THE COURT: I am sorry. He is going to inform you on
16 how much time he believes the vendors are going to need to do
17 what they need to do.

18 MR. FRANCOEUR: Sure.

19 THE COURT: The first time you are hearing it will not
20 be in the letter to me.

21 MR. FRANCOEUR: Thank you, your Honor.

22 THE COURT: One of two things, either Mr. Hollander
23 has decided not to go forward with that or he has decided to go
24 forward with that and it is going to take a certain amount of
25 time. I just want to you be on the same page that you know how

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1 much time that is going to take.

2 MR. FRANCOEUR: Very good. Thank you, your Honor.

3 MR. HOLLANDER: What I am going to do is I am going to
4 contact again my host. I am going to talk to them. Say, You
5 got something you can show that is private or public. I will
6 get a response from them. I will tell him. If it is the
7 response he likes he can put together a motion to have me
8 disbarred and attach all my assets for what they are worth.

9 THE COURT: The issue, though, is just to be clear, it
10 won't necessarily be sort of -- there should be documentation
11 concerning when you created the website. I don't myself have
12 an iCloud. I would imagine that when you initially opened
13 something where you would be storing your documents that there
14 is some indication that only you would have access to it and no
15 one else.

16 MR. HOLLANDER: I will ask them for whatever documents
17 they have.

18 THE COURT: And with regard to the website itself.

19 MR. HOLLANDER: The website.

20 THE COURT: Anything else, Mr. Hollander?

21 MR. HOLLANDER: No. It was interesting practicing law
22 as long as I did.

23 THE COURT: To the extent there is going to be a
24 motion, I don't believe they are going to be seeking to have
25 your law license taken away.

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1 MR. HOLLANDER: Of course they will, your Honor. They
2 hate me.

3 THE COURT: Let's take a step back. I understand the
4 emotions are high. Once you start letting this idea that
5 somehow it is personal, that is when we start going down a
6 slippery slope. You filed a lawsuit. I have made my rulings.
7 You have an opportunity to amend your complaint. I have
8 indicated to you what the consequences could be depending upon
9 what the results of that are and you are continuing to pursue
10 the litigation depending upon what the answers are. I want it
11 to be clear that it is not something that I am making a ruling
12 on one way or another, but I am not precluding the defendants
13 from pursuing that.

14 MR. HOLLANDER: It was a pleasure appearing before
15 you, your Honor, but it is always personal.

16 THE COURT: Thank you very much.

17 MR. FRANCOEUR: Thank you, Judge.

18 THE COURT: We'll stand adjourned.

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