

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROY DEN HOLLANDER,

Plaintiff,

-against-

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

Defendants.

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

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE,
OR IN THE ALTERNATIVE, MOTION TO DISMISS**

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Defendants, Katherine M. Bolger and Matthew L. Schafer (collectively “Defendants”), submit this Motion to Strike the Plaintiff’s Second Amended Complaint, pursuant to Fed. R. Civ. P. § 12(f) or, in the alternative, to Dismiss, pursuant to Fed. R. Civ. P. § 12(b)(6).

PRELIMINARY STATEMENT

At the hearing on Defendants’ motion to dismiss the First Amended Complaint, this Court provided Plaintiff Roy Den Hollander (“Plaintiff”) with directions to a narrow path to amend two counts of his Complaint and demonstrate to this Court that this lawsuit was designed to do something more than harass Defendants. Plaintiff simply refused to take those directions. As a result, his Second Amended Complaint both fails to comply with this Court’s order, permitting amendment to the claims for alleged violations of the Computer Fraud and Abuse Act (“CFAA”) and the Copyright Act, and is packed with irrelevant material designed to prejudice the Court against Defendants and should be stricken.

Specifically, the Court permitted the CFAA claim to be re-filed only if Plaintiff could demonstrate all three of the following: (i) a statement by his “service provider”; (ii) that the website was not publicly accessible; (iii) on the date in question. Plaintiff’s new claim actually fails to satisfy any of the Court’s three requirements. It merely includes bald assertions—in Russian—by the creator of the website (not the service provider) that it was not open to the public at the time of creation, which was more than two years before the date in question. As such, the CFAA claim must be stricken.

Similarly, in order to replead his copyright claim, Plaintiff was required to show that (i) the material registered on the “roydenhollander.com” website was present on the “mensrightslaw.net” website and (ii) the screenshot/cache included in the underlying motion in state court contained this registered material. Plaintiff has not demonstrated what was on the

copyrighted website “roydenhollander.com,” and has not shown whether any portion of the registered material was on the “mensrightslaw.net” website. Plaintiff’s failure to identify any such material is again a basis to strike the Second Amended Complaint.

In addition to the explicit grounds to strike noted by the Court, the Second Amended Complaint fails to state any claim for which relief may be granted, and thus is subject to dismissal pursuant to Rule 12(b)(6) for failure to state a claim. Plaintiff has failed to plausibly allege the most central allegation of a CFAA claim—i.e., that Defendants “hacked” his website—or that he has suffered the requisite “loss.” And Plaintiff’s claims regarding hacking and unlawful duplication are barred by collateral estoppel as the New York Supreme Court has already ruled that Plaintiff has “no basis” for such claims.

Finally, the claim for copyright infringement also fails to state a claim. The Second Amended Complaint abandons the prior basis for the copyright claim which was based solely on the “responses to media” document. Plaintiff bases his brand new copyright claim on two exhibits in the state court action of the “mensrightslaw.net” website. However, the Second Circuit specifically found in *Den Hollander v. Steinberg*, 419 F. App’x 44, 47 (2nd Cir. 2011), that attaching a registered work as an exhibit to a filing constitutes “fair use” and cannot support a claim for copyright infringement.

This lawsuit is and always has been a meritless claim brought to harass Defendants. This Court has provided Plaintiff with ample opportunity to provide otherwise and the Plaintiff has simply used these opportunities to continue to harass Defendants while failing to cure the fundamental deficiencies in his pleadings. This Court should end this lawsuit now by striking Plaintiff’s Second Amended Complaint or dismissing it in its entirety with prejudice.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Plaintiff Files Suit In State Court

In March 2014, Plaintiff filed a lawsuit in New York Supreme Court alleging that two Australian newspapers and two Australian journalists defamed him in several news articles describing his attempts to establish a “men’s rights” course at the University of South Australia (the “*Shepherd* Action”). See *Hollander v. Shepherd*, Index No. 152656/2014 (Sup. Ct. N.Y.); Dkt. 48 (“SAC”) at ¶¶ 4-8; Declaration of Joseph Francoeur (“Francoeur Decl.”), Ex. A (Summons & Complaint in *Shepherd* Action). Ms. Bolger and Mr. Schafer represented defendants in that case. *Id.* at ¶ 8.

The defendants moved to dismiss the complaint for lack of personal jurisdiction and on the grounds that the articles, which, among other things, called Plaintiff an “anti-feminist,” were true. *Id.* at ¶¶ 32. Plaintiff then moved for an immediate trial. *Id.* at ¶ 67. In the course of opposing that motion, Mr. Schafer conducted a Google search and discovered a publicly available website maintained by Plaintiff that included a document about the *Shepherd* Action entitled “Responses to Media.” *Id.* ¶ 57. A copy of that document was included as an exhibit to Ms. Bolger’s affirmation in opposition to the motion for immediate trial. See *id.* at ¶ 42; see also Francoeur Decl., Ex. B (Bolger Affirmation).¹

The next day, Plaintiff sought an order to show cause as to why Defendants should not be sanctioned for hacking his website in violation of criminal laws prohibiting the unauthorized use of a computer, computer trespass, computer tampering and the CFAA. SAC at ¶ 45. Ms. Bolger and Mr. Schafer then filed a letter noting that the order to show cause “is frivolous on its face

¹ A court may take “judicial notice of these state court filings.” *Taveras v. Morales*, 22 F. Supp. 3d 219, 228 (S.D.N.Y. 2014); see also *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir.1991) (courts may “take judicial notice of documents filed in other courts . . . to establish the fact of such litigation and related filings”).

and should be denied.” Francoeur Decl., Ex. C (Letter regarding Order to Show Cause). Justice Peter Moulton declined to sign the order, noting that “if appropriate” Plaintiff could bring the order by motion. *Id.*, Ex. D (Moulton Order); SAC at ¶ 45.

Undeterred, the next day, Plaintiff brought a “motion requiring defendants to withdraw illegally obtained document,” alleging that Ms. Bolger and Mr. Schafer “hack[ed] into Plaintiff’s personal computer or his digital cloud” to obtain the document. SAC at ¶ 46; Francoeur Decl., Ex. E (Motion to Withdraw). Ms. Bolger and Mr. Schafer opposed that motion and submitted affidavits in which they swore they did not hack Plaintiff’s website, the document was “freely available on Plaintiff’s website,” they lacked the skills to hack Plaintiff’s computer, and they did not direct anyone else to hack into the website. SAC at ¶ 48; Francoeur Decl., Exs., F (Defendants’ Opp. to Motion to Withdraw), G (Affidavit of Katherine M. Bolger), H (Affidavit of Matthew L. Schafer).² Mr. Schafer also attached to his affidavit a screenshot of Plaintiff’s website showing that Defendants visited a publicly available website “www.mensrightslaw.net/main/index.html” and that Google had cached a publicly available version of that website. SAC at ¶ 57; Francoeur Decl., Ex. H. Those exhibits also showed that Plaintiff was soliciting donations from the public through a “Donate” button.” Francoeur Decl., Ex. H.

B. Justice Schecter Holds That There Was “No Basis” For Plaintiff’s Motion

Justice Jennifer Schecter denied Plaintiff’s motion to withdraw because “[t]here is no basis for granting the relief sought.” SAC at ¶ 50; Francoeur Decl., Ex. I (Schecter Order). The court also dismissed the suit as against the Australian defendants for lack of personal

² Plaintiff attached these affidavits to his First Amended Complaint, but did not attach them to his SAC. Nevertheless, the Court may take judicial notice of the same either as state court filings, *supra* n.2, or as matters referenced in the complaint, *see Silsby v. Icahn*, 17 F. Supp. 3d 348, 354 (S.D.N.Y. 2014).

jurisdiction. SAC at ¶ 51; Francoeur Decl., Ex. J. Although Plaintiff appealed the dismissal as against the Australian defendants, he did not appeal the order denying his motion to withdraw the illegally obtained document. *Id.* at ¶ 52. Ultimately, the First Department dismissed Plaintiff's appeal, and the New York Court of Appeals denied him leave to appeal. SAC, Ex. F; Francoeur Decl., Ex. K, Ex. L.

C. Plaintiff Commences This Litigation

Less than a month after the final dismissal of his appeal in the *Shepherd* Action, Plaintiff filed the instant suit against Ms. Bolger and Mr. Schafer. Dkt. 1. Plaintiff alleged, as he had in state court, that Defendants hacked his computer or iCloud to retrieve the document and fraudulently described the document filed with the state court as a "Media Release" rather than "Responses to Media." *See generally id.* After Defendants filed a letter motion for a pre-motion conference seeking dismissal of the complaint, Plaintiff filed his Amended Complaint. *See generally* Dkt. 18.

Plaintiff's Amended Complaint sought millions of dollars in damages for alleged violations of the CFAA, RICO, trespass to chattel, injurious falsehood, and violation of attorney work product. *Id.* In the Amended Complaint, Plaintiff also added claims for alleged violations of the Copyright Act, *id.* ¶¶ 89-97, and replevin, *id.* ¶¶ 123-27. On May 15, 2017, Defendants moved to dismiss the First Amended Complaint. *See* Dkt. 33.

D. February 16, 2018 Hearing And The Court's Order Dismissing The FAC

On February 16, 2018, the Court held a hearing regarding Defendants' motion to dismiss the FAC. During the hearing the Court informed Plaintiff that the Court intended to dismiss the vast majority of Plaintiff's claims outright. *See* Dkt. 58 ("2/16 Tr.") 19:6-8 ("I was prepared to

dismiss your complaint today.”) The Court then stated that if Plaintiff could gather certain proof, he could amend his complaint to replead just two of causes of action: (1) the Computer Fraud and Abuse Act of 1986, and (2) the Copyright Act, 17 U.S.C. § 501. In particular, as to the CFAA claim, the Court stated: “There was no indication from your service provider that at the time of the complaint you actually had a website that was password protected or anything of that nature. Would you be able to actually get that from your website provider a document that said at this time you had a website that was protected?” *Id.* at 15:12-17. The Court further advised Plaintiff:

If what you are telling me that you believe you can add facts and the facts specifically relating to – again, I don’t know who your service provider is but to the extent that you have a service provider and you can get the information that basically shows that during this time period you had a website and that website – I don’t know what it would – that you had a website or a cloud or some sort of storage on the Internet that was protected. In other words, that no other individuals could access. That would be something that you would rely on in connection with your complaint.

Id. at 19:8-18.

As to the copyright claim, the Court explained what was required of Plaintiff in order to properly plead his copyright claim:

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

Id. at 36:15-23.

Thereafter, the Court dismissed Plaintiff’s complaint in its entirety, giving the Plaintiff the chance to replead only the CFAA and copyright claims. *See* Dkt. 43.

E. Second Amended Complaint

On March 9, 2018, Plaintiff filed the SAC before the Court granted him leave to do so.

See generally SAC; *see also* Dkt. 53 (noting that Plaintiff “filed before [the Court] made a determination with respect to the parties’ joint letter”). As to the CFAA claim, Plaintiff produced a Russian language affidavit—from Plaintiff’s French computer consultant—who claims to have created the website in 2012. *See* SAC, Ex. D (Aff. of James-Michel Marqua).³ The affidavit states that Mr. Marqua “create[d] a website” for Plaintiff in September 2012 and that at the time the website was created, it was protected by access codes. *Id.* Mr. Marqua never swears as to whether the website was private at the time Defendants allegedly accessed it more than two years later. *Id.* As to the copyright claim, the SAC also alleged that Plaintiff has a registration for a different website, “roydenhollander.com.” *Id.* at ¶ 112; *id.*, Ex. I. Plaintiff does not allege what content is subject to that registration, however, only vaguely stating that the website accessed and screenshotted by Defendants, “mensrightslaw.net” contained some of this material. *Id.* at ¶¶ 112, 116.

In addition, Plaintiff made a new series of attacks on Defendants, including alleging that Defendants violated the Penal Code. *Id.* at ¶¶ 120-23. Plaintiff attached communications showing that he had surreptitiously—and unsuccessfully—sought to institute criminal proceedings against Ms. Bolger and Mr. Schafer. *Id.* at ¶¶ 122-23; *Id.*, Ex. J.

In response, Defendants wrote to the Court, asking that the Court not entertain the SAC as it was filed without the Court’s permission and further asking for leave to move to strike the SAC should the Court allow the SAC to remain because, as will be discussed below, the SAC does not comply with the Court’s directives. *See* Dkt. 50. After a continued letter exchange between the parties, the Court stayed the action while it decided Defendant’s letter motion. Dkt. 53.

³ It is unclear whether Mr. Marqua, who Plaintiff describes as travelling in Russia at the time the affidavit was executed, speaks Russian, the language in which the affidavit was prepared. Dkt. 49.

On June 19, 2018, the Court deemed the SAC to be the operative complaint, and granted Defendants permission to make a motion to strike the SAC. Dkt. 60.

ARGUMENT

This Court should strike Plaintiff's SAC and/or dismiss it in its entirety. In allowing Plaintiff to amend his complaint, this Court gave Plaintiff ample opportunity to demonstrate that he had meritorious claims. However, the SAC makes clear that the true intent of this frivolous lawsuit is to harass Defendants. This Court should, therefore, strike the SAC for failure to comply with its order and for making prejudicial attacks on Defendants that have no bearing on the merits of this case. In the alternative, this Court should dismiss Plaintiff's SAC pursuant to Fed. R. Civ. P. 12(b)(6), because like the First Amended Complaint before it, it fails to state a claim for which relief can be granted.

POINT I - THE COURT SHOULD STRIKE THE COMPLAINT FOR PLAINTIFF'S FAILURE TO COMPLY WITH THE COURT'S ORDER

This Court should strike Plaintiff's SAC because Plaintiff failed to comply with the Court's Order. Federal Rule of Civil Procedure § 12(f) provides: "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Pleadings are considered immaterial where they have "no essential or important relationship to the claim for relief or the defenses being pleaded." *Castro v. Covenant Aviation Sec., LLC*, 2013 WL 3070319, *5 (S.D.N.Y. 2013) (internal citations omitted). Similarly, a pleading is considered to be impertinent if it "consists of statements that do not pertain, and are not necessary, to the issues in question." *Id.* In addition, a Court may strike a pleading in its entirety when the party does not comply with the the Court's Order.⁴ *See example Bain v.*

⁴ Throughout the SAC, Plaintiff makes various allegations that the Court has already rejected in dismissing the First Amended Complaint. While these are not enumerated as causes of action, Plaintiff is clearly attempting to interject them into the case while implying he complied with the Court's Order. As discussed below, these non-compliant

Cotton, 2009 WL 1660051, *2-3 (D. Vt. 2009) (striking amended complaint where it did not comply with the court's order regarding how plaintiff could replead); *Burke v. ITT Automotive, Inc.*, 139 F.R.D. 24, 37 (N.Y.W.D. 1991) (striking defendant's answer for failure to comply with court orders). Here, the Court was very clear at the motion to dismiss argument that Plaintiff could only replead these causes of action if certain requirements were met. Because Plaintiff has not complied with the Court's requirements, these causes of action should be stricken.

A. Plaintiff Did Not Show That His Website Was Private At The Time Defendants Accessed It

First, the Court explicitly conditioned Plaintiff's leave to replead his CFAA claim on providing evidence from the website's service provider that on the date Defendants accessed the website that it was protected.⁵ *See* 2/16 Tr. 7:8-9; 15:8-17; 16:9-11; 61:2-6. Yet, when Plaintiff filed his Second Amended Complaint, he attached an affidavit admitting that he cannot procure this evidence. *See* SAC, Ex. A; *id.* at ¶¶ 15-19 (“Technical Support told me that they cannot determine from my account records whether the Men's Right Law site has access codes or not.”). He also submitted an affidavit from the individual who created the website in 2012. *See* SAC, Ex. D. This affidavit is deficient in a number of ways. First, the Court repeatedly stated that it was seeking documentation from the website's service provider to substantiate Plaintiff's claims. 2/16 Tr. 10:22-24; 15:12-17; 16:9-11; 19:8-18. Mr. Marqua is not Plaintiff's service provider.

allegations are designed to prejudice the Court and distract from the issues Plaintiff was actually permitted to plead. For example, Plaintiff makes allegations regarding theft of computer related material and the New York Penal Code. *See* SAC at ¶ 43. However, this was raised as a cause of action in Plaintiff's First Amended Complaint and was dismissed. Plaintiff also claims that the “Responses to Media” document constitutes attorney work product and alleges that Defendants violated the privilege by attaching it as an exhibit to their motion in the Shepherd Action. *See* SAC at ¶¶ 93, 103-11. At the oral argument on the motion to dismiss the Court specifically told Plaintiff that the “Media Release” document is not work product. *See* 2/16 Tr. 30:15-21. In sum, these claims are completely erroneous, violate the Court's order, and should be stricken.

⁵ The Court preliminarily granted plaintiff to replead his allegations regarding “malware” by submitting a declaration from a forensics expert, but the Court withdrew this permission when it was pointed out by Defendants that these allegations were not in the Amended Complaint. 2/16 Tr. 61:13-25.

SAC at ¶ 87 (describing Mr. Marqua as a “computer consultant”). Second, even if the affidavit was from the website’s service provider, as the Court ordered, it still does not provide the information requested. The Court was not questioning whether Plaintiff’s website was private at the time it was created, but rather whether it was private at the time Defendants accessed it. 2/16 Tr. 19:8-18. Plaintiff, therefore, has not complied with the Court’s order. Whether the website creator placed protection measures on it in September 2012, more than two years before the alleged “hacking,” is simply irrelevant. SAC at ¶ 115. Were there any doubt, Plaintiff’s affiant made no representations at all as to whether he knew the website was locked at the time defendants accessed it. *See generally id.*, Ex. D. Therefore, the CFAA claim should be stricken.

B. Plaintiff Has Not Cured The Pleading Defects With Regards To The Copyright Claim

Second, as to Plaintiff’s copyright claim, the Court was very clear that Plaintiff could only replead his cause of action for copyright infringement if he alleged that the content filed by Defendants in state court had been published on Plaintiff’s prior website, “roydenholladner.com,” which had been registered with the Copyright Office. *See* 2/16 Tr. 36:15-23. Specifically, at oral argument, the Court explained that Plaintiff was required to show that the website accessed by Defendants, “mensrightlaw.net” (referred to as the “.net website” by the Court), contained material that was registered as part of the “roydenhollander.com” (referred to as the “.com website” by the Court). *Id.* Plaintiff was further required to demonstrate that the registered material was the infringed material. *Id.* As the Court put it, “[T]he document that has copyright on it doesn’t indicate with any sort of specificity what the purported copyrighted material is. I guess what I would say to you Mr. Hollander, as stated I would dismiss the copyright claim based on the current allegations in the complaint.” *Id.* at 33:14-19.

However, Plaintiff has failed to meet this requirement. In the SAC, Plaintiff merely

alleges that he has a registered copyright for “roydenhollander.com” and that portions of that copyrighted work appeared on “mensrightslaw.net,” and therefore when Defendants attached the screenshot and cache of the “mensrightslaw.net” website to an affidavit in the *Shepherd* Action, Defendants reproduced, and thus infringed, his copyright in the “roydenhollander.com” website. *See* SAC at ¶ 112-15. Plaintiff, however, neither attached a certified copy of the registered work nor specified which portions of the screenshot and/or cache of “mensrightslaw.net” contained registered works, making it impossible for Defendants or the Court to determine whether the website Defendants viewed even contained any registered material. Because Plaintiff has not indicated what specifically was subject to the copyright on “roydenhollander.com” or specifically identified what part of that registered work was reproduced on “mensrightslaw.net,” he has not pleaded a copyright claim in accordance with the Court’s order.

Because Plaintiff failed to satisfy the Court’s order setting forth the requirements for repleading his CFAA and copyright claims, the SAC should be stricken in its entirety.

C. The Allegations In Plaintiff’s Second Amended Complaint Serve No Purpose Other Than An Attempt To Prejudice The Court

The SAC should also be stricken on the additional ground that it contains substantial material that is irrelevant to the two claims asserted and is clearly designed to prejudice the Court and harass Defendants. The law is clear that “allegations may be stricken if they have no real bearing on the case, will likely prejudice the movant, or where they have criminal overtones.” *G-I Holdings v. Baron & Budd*, 238 F. Supp. 2d 521, 555 (S.D.N.Y. 2001); *see also Oram v. SoulCycle, LLC*, 979 F. Supp. 2d 496, 512 (S.D.N.Y. 2013) (holding materials must be stricken when it is “immaterial and irrelevant to [a] case” and “serves no purpose except to inflame the read and accordingly will be stricken”). Thus, Plaintiff’s superfluous and prejudicial allegations must be stricken as having no conceivable relationship to the merits of Plaintiff’s claims. *See*

Arias-Zeballos v. Tan, 2006 WL 3075528, *10-11 (E.D.N.Y. 2006); *see also Impulsive Music v. Pomodoro Grill, Inc.*, 2008 WL 4998474, *3 (W.D.N.Y. 2008).

Here, when this Court allowed Plaintiff to amend his First Amended Complaint, the Court acknowledged that Defendants “believe this lawsuit is pure harassment plain and simple.” 2/16 Tr. 40:16-17. The Court then remarked, “I am not opining on that one way or another, but I will say that if one were to look at the history of things, I understand the argument that they are making.” *Id.* at 40:17-20. The Court then advised that Plaintiff should, therefore, be cautious in seeking to amend a complaint. *Id.* at 40:20-25. (“I am not precluding them from if we go down this path and you amend your complaint and the information comes out that doesn’t support the allegation that the defendants hacked into your computer⁶ or that they improperly accessed your iCloud, I will hear from them with regard to what if any remedies they would like to take.”).

Plaintiff clearly did not heed that caution. Instead, the SAC contains myriad allegations that are irrelevant, immaterial, and have no purpose other than trying to prejudice the Court and harass Defendants. In Paragraphs 34 through 40 of the SAC, for example, Plaintiff makes numerous allegations about the role of “feminism” in *Shepherd* Action and his interpretation of the term “feminism.” *See* SAC at ¶¶ 34-40. In paragraphs 48-49, he spends significant time criticizing Ms. Bolger’s litigation tactics in defending the *Shepherd* Action. *See id.* at ¶¶ 48-49. In paragraphs 120-123, he goes further accusing Defendants of numerous Penal Code violations and reveals his attempts to file criminal complaints against Defendants. *Id.* at ¶¶ 120-23; *id.*, Exs. J & K (criminal complaints filed by Plaintiff against Defendants). These allegations are completely irrelevant and immaterial to this case, and are meant to create the false impression that Defendants are out to get Plaintiff and prevent him from asserting his rights, when in reality

⁶ In the SAC, Plaintiff voluntarily withdrew his allegations regarding hacking into his computer. SAC at ¶ 12 n.2.

Defendants were simply attorneys who successfully represented a client in defeating Plaintiff's prior lawsuit. These allegations are clearly irrelevant and improper and must be stricken.

Point II - PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(6)

In the alternative, this Court should dismiss Plaintiff's SAC in its entirety because, on his third try, he has still not plausibly plead either a CFAA claim or a copyright claim. A complaint can survive a motion to dismiss only if it "state[s] a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action," "supported by mere conclusory statements, do not suffice" to state a viable claim. *Iqbal*, 556 U.S. at 678. Instead, a claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (emphasis added); *see also Twombly*, 550 U.S. at 545.

Although a court should generally assume the truth of allegations in a complaint for purposes of a motion to dismiss, it "need not feel constrained to accept as truth conflicting pleadings that make no sense," "would render a claim incoherent," or "are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely, or by facts of which the court may take judicial notice." *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405 (S.D.N.Y. 2001). In fact, "[i]f the allegations of a complaint are contradicted by documents made a part thereof, the document controls and the court need not accept as true the allegations of the complaint." *Weston Funding, LLC v. Consorcio G Grupo Dina, S.A. de C.V.*, 451 F. Supp. 2d 585, 587 (S.D.N.Y. 2006); *see also Beauvoir v. Israel*, 794 F.3d 244, 248 (2d Cir. 2015) ("threadbare recitals" in a complaint did not refute contradictory letter attached as an exhibit to the complaint); *Feick v. Fleener*, 653 F.2d 69, 75 (2d Cir. 1981) (dismissal proper

when power of attorney annexed to complaint contradicted plaintiffs' claims). This is so even where documents are referenced by but not attached to the complaint. *See Rapoport v. Asia Electronics Holding Co., Inc.*, 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000) (affirming dismissal in part because newspaper article and prospectus referenced in complaint "call[ed] into question and, apparently, contradict[ed]" allegations in complaint). Here, Plaintiff has failed to plead either his CFAA or copyright claims.

A. Plaintiff Did Not Adequately Plead That Defendants Violated The CFAA

Plaintiff failed to plead his CFAA claim in three ways. First, Plaintiff has failed to plausibly allege facts that establish the sine qua non of the CFAA claim—the alleged hacking of his website. When considering a motion to dismiss, wholly speculative and unsupported allegations need not be taken as true. "A court may dismiss a claim as 'factually frivolous' if the sufficiently well-pleaded facts are 'clearly baseless' – that is, if they are 'fanciful,' 'fantastic,' or 'delusional.'" *Gallop v. Cheney*, 642 F.3d 364, 368 (2d Dep't 2011) (citing *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992)); *see also Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App'x 582, 585 (2d Cir. 2011) (rejecting "conclusory and speculative [RICO] allegations" against prior opposing counsel). Or, as this Court put it at the oral argument on the motion to dismiss the First Amended Complaint, pleading on "[i]nformation and belief does not mean you can just guess." 2/16 Tr. 32:14-15.

In this case, fanciful guesses are all that Plaintiff has offered. He alleges "on information and belief" that Defendants (i) "deduced" that Plaintiff had an "iCloud"⁷ accessible via the

⁷ Plaintiff claims that Defendants wrongfully accessed his "iCloud," implying that they had accessed his personal documents. *See* SAC at ¶ 70. However, at oral argument Defendant conceded that he does not have an iCloud, which is a specific form of storage, not a generic term, and that what was accessed was actually a website. *See* 2/16 Tr. 7:4-16. Similarly, Plaintiff repeatedly pleads that Defendants admitted to accessing his "iCloud." That is wrong as Defendants explained in their affidavits, they simply visited Plaintiff's publicly available website. *See* Francoeur Aff., Ex. G, Ex. H. Plaintiff's affiant also notes that he created a "website" for Plaintiff—not an iCloud. *See* SAC, Ex. D.

internet, (ii) engaged in a specific form of hacking that is not traceable (i.e. “brute force cracking”), (iii) stripped the access codes and (iv) made the “iCloud” public. *See* SAC at ¶¶ 69-82; *see also id.* at ¶¶ 13, 15, 59, 78 (relying on “inferences”, “logical inferences” and stating something “logically follows); *id.* ¶¶ 12, 60, 67, 69, 70, 74 (allegations based only on information and belief). Plaintiff, however, fails to plead even a single fact to provide a basis for such conclusory and outlandish statements.

To the contrary, many of Plaintiff’s “inferences” purport to be based on affidavits submitted by Defendants in the *Shepherd* Action which specifically deny that they engaged in hacking and explicitly state that Defendants did not access an “iCloud,” but rather they accessed a public website as they would any other website. *See* SAC at ¶ 57; Francoeur Aff., Exs. F & G. A plain reading of the SAC makes clear that Plaintiff himself has no idea if, how or when this alleged hacking occurred, presenting nothing more than mischaracterizations of Defendants’ averments that they did not hack and an ever evolving hypothetical (and fabricated) scenario of how Defendants may have possibly accessed his website and documents contained therein. *See, e.g.,* SAC at ¶¶ 59-74 (supporting allegations again with “on information and belief” and inferences). Such claims are not pled with sufficient particularity and are not plausible. As such, Plaintiff cannot maintain his CFAA claim and as such, it should be dismissed.

Second, Plaintiff’s CFAA claim must fail because accessing a publicly available website cannot form the basis of CFAA claim. *See, e.g., Orbit One Commc’ns, Inc. v. Numerex Corp.*, 692 F. Supp. 2d 373, 385 (S.D.N.Y. 2010) (rejecting argument that CFAA prohibits “an employee’s misuse or misappropriation of information to which the employee freely was given access and which the employee lawfully obtained”); *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 932-934 (E.D. Va. 2010) (rejecting CFAA claim based on gathering data from publicly

available website). As discussed *supra*, the screenshot and cache of “mensrightslaw.net” demonstrate beyond doubt the implausibility (to say the least) of Plaintiff’s allegations that the website was private. Francoeur Decl., Ex. H. For example, Plaintiff admits in the SAC that “mensrightslaw.net” is designed to be accessible through the Columbia Business School Alumni website. *See* SAC at ¶ 60. If Plaintiff had intended this website to function like an iCloud—*i.e.*, as private, personal storage—it defies logic that he would have taken proactive measures to have it linked on his public profile. Furthermore, the cache of the website shows that it contained a “Donate” button soliciting money from the public, which would not be present if Plaintiff was truly only using it for storage. *See* Francoeur Decl, Ex. H. There can be no reasonable dispute: Plaintiff’s website was public. For this reason, the cause of action alleging violation of the CFAA should be dismissed.

Finally, Plaintiff’s CFAA claim must be dismissed for failure to adequately plead loss. In order to plead a private cause of action under the CFAA, one must plead at least \$5,000 of loss or damages. *Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F. Supp. 2d 468, 471 (S.D.N.Y. 2004). Moreover, the loss or damage must be related to “computer related constructs.” *See, e.g., Schatzki v. Weiser Capital Mgmt., LLC*, No. 10 Civ. 4685, 2012 WL 2568973, *2 (S.D.N.Y. 2012) (“damages and losses are limited to ‘computer-related constructs.’”); *Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F. Supp. 2d 468, 474 (S.D.N.Y. 2004) (“there is nothing to suggest that the ‘loss’ or costs alleged can be unrelated to the computer”). Here, Plaintiff now claims that he met this threshold because he spent 37.3 hours of time “investigating” the alleged hacking and the damage. *See* SAC at ¶¶ 98, 138. Plaintiff calculates the value of this time by using his hourly billing rate as an attorney, which is improper given the non-legal tasks he allegedly performed. *See id.* at ¶¶ 98, 99. Plaintiff is essentially claiming loss of attorney’s fees that he allegedly

would have recognized as a “semi-retired attorney,” *see id.* at ¶ 27, which is simply not cognizable. *See Nexans Wires S.A.*, 319 F. Supp. 2d at 476 (loss inadequately pleaded where “no facts are alleged showing that preventive measures were added to the computers or that the system was augmented to tighten security — after all, these were discussions between senior executives — not computer experts” (emphasis added)). Therefore, Plaintiff has failed to plead loss pursuant to the CFAA and his cause of action should be dismissed.

B. Plaintiff Fails To State A Claim For Copyright Infringement.

Plaintiff has similarly failed to adequately plead a claim for copyright infringement because Plaintiff has failed to plausibly allege either ownership of registered materials or that Defendants infringed his registered materials.

In order to sustain a claim for copyright infringement, Plaintiff must plead ownership of registered material that has been infringed. “Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a ‘short and plain statement of the claim showing that the pleader is entitled to relief.’ In applying this rule to copyright infringement actions, courts have required that particular infringing acts be alleged with specificity.” *See DiMaggio v. International Sports, Ltd.*, 1998 WL 549690, *1 (S.D.N.Y. 1998); *see also Cole v. John Wiley & Sons*, 2012 WL 3133520, *12-13 (S.D.N.Y. 2012). As one court in this district summed it up, “Courts have repeatedly rejected the use of the type of conclusory and vague allegations . . . as a substitute for allegations that specify the original works that are the subject of a copyright claim.” *Cole*, 2012 WL 3133520, at *12.

As discussed above, Plaintiff’s SAC fails to sufficiently allege what is actually covered by his registration of “roydenhollander.com” website that appears on the separate “mensrightslaw.net” website. Instead, Plaintiff vaguely claims that portions of the registered material, or material substantially similar to the registered material, were present in the portions

of “mensrightslaw.net” that were used in the *Shepherd* Action. See SAC at ¶¶ 112-19. Plaintiff, however, does not attach a copy of the deposit materials for “roydenhollander.com” or specify which portions of the screenshots of the mensrightslaw.net include that material. As such, the facts as pleaded do not allow for a determination of whether the registration actually covers the work at issue—i.e., the screenshotted/cached portions of “mensrightslaw.net.” In fact, Plaintiff admits that he does not actually know what was registered or if any registered material was contained on “mensrightslaw.net” because he has not obtained a copy of his own deposit materials. See SAC at ¶ 116. Plaintiff has not specified which portions of the screenshots/cached copies of “mensrightslaw.net” contain registered works and thus, he has not sufficiently pleaded that Defendants violated his copyright when they allegedly reproduced those works in the *Shepherd* Action.⁸

Second, Plaintiff’s claim for copyright infringement must be dismissed because the only use alleged in the Complaint—i.e., the use of screenshots/caches of “mensrightslaw.net” in litigation—is considered “fair use” and thus, is not actionable. See *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 143 (2d Cir. 1998) (listing use in judicial proceedings as an example of having a transformative use that warrants fair use protection); *Scott v. WorldStarHiphop, Inc.*, 2011 WL 5082410, *7-8 (S.D.N.Y. 2011) (“Using this analysis, courts have repeatedly held that the reproduction of copyrighted works as evidence in litigation is fair use.”); *accord Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003) (finding that use of copyrighted manuscripts as evidence in trial was fair use); *Jartech, Inc. v. Clancy*, 666 F.2d 403, 406-07 (9th Cir. 1982) (finding that copies of films made for use in judicial proceedings constitutes fair use).

⁸ Additionally, it should be noted that Plaintiff’s allegations regarding his copyright claim for the cache are simply inaccurate. Plaintiff alleges that Defendant Bolger obtained a cache of roydenhollander.com, the actually registered website. See SAC at ¶ 113. However, the affirmation cited by Plaintiff actually states that Defendant Bolger viewed and obtained a cache of “mensrightslaw.net,” not “roydenhollander.com.” See Francoeur Decl., Ex. G.

In fact, it was a case that Plaintiff brought against another opposing counsel that established that rule in this Circuit. In *Den Hollander v. Steinberg*, Plaintiff alleged that the attachment of multiple registered works to a motion infringed his copyright in those works. The Second Circuit disagreed, holding that this constitutes “fair use” and cannot support a claim for copyright infringement. 419 Fed. App’x at 47. In discussing the effect of using registered works in litigation as opposed to commercial use, the Court pointed out that Congress specifically listed use in “judicial proceedings” as an example of fair use. *Id.* There can be no reasonable dispute but that *Steinberg* precludes recovery here.⁹

This is true despite Plaintiff’s creative pleading wherein he does not now explicitly contend that infringement occurred when the screenshot/cache were filed but rather upon Mr. Schafer taking the screenshot and Ms. Bolger distributing them to her clients. SAC at ¶¶ 144-45. Plaintiff’s end run on *Steinberg*, however, is meritless. *Steinberg* stands for the proposition that a use of copyright material in litigation is a fair use. 419 Fed. App’x at 47. Whether Plaintiff pleads use upon taking the screenshot, transmitting it to the client, or filing the material with the court, the common denominator—and the fatal defect of this claim—is that all are uses “in litigation.” Nimmer on Copyright § 13.05[D][2] (2011) (“[I]t seems inconceivable that any court would hold such reproduction to constitute infringement . . . by the individual parties responsible for offering the work in evidence.”). As such, they are fair uses in this Circuit.

POINT III - PLAINTIFF’S REMAINING CLAIMS ARE BARRED BY COLLATERAL ESTOPPEL

Even if Plaintiff’s SAC did not fail to comply with the Court’s order and on the merits, it would still be subject to dismissal as barred by issue preclusion/collateral estoppel. Collateral

⁹ Ironically, Plaintiff’s own exhibits show why this kind of use is fair use. Indeed, in Exhibit G to the SAC, Plaintiff reproduces substantial portions of an article authored by Defendants’ former client. See SAC, Ex. G. Under Plaintiff’s interpretation of copyright law, he infringed the copyright in that work by reproducing it here.

estoppel “bars the relitigation of an issue that was raised, litigated, and actually decided by a judgment in a prior proceeding, regardless of whether the two suits are based on the same cause of action.” *M.J. Woods, Inc. v. Conopco, Inc.*, 271 F. Supp. 2d 576, 580 (S.D.N.Y. 2003). The issue of hacking and unlawful duplication have been fully litigated before the New York State Supreme Court, which found that Plaintiff had “no basis” for these claims, *see* SAC at ¶ 50, and thus, they cannot be relitigated here. *See Polur v. Raffae*, 912 F.2d 52, 55 (2d Cir. 1990) (decision on a sanctions motion estops relitigation of same in federal court).

Defendants note the Court’s concern at oral argument that the underlying action was dismissed on personal jurisdiction grounds and thus collateral estoppel may not apply. Defendants respectfully submit that collateral estoppel should apply here. While the *Shepherd* Action may have been dismissed for lack of personal jurisdiction over the defendants in that case, the state court had jurisdiction over Plaintiff, Ms. Bolger, and Mr. Schafer, all members of the Bar of the State of New York, to consider a sanctions motion concerning those individuals and separately ruled on the motion. *See* Judiciary Law § 90(2) (“The supreme court shall have power and control over attorneys and counsellors- at-law and all persons practicing or assuming to practice law.”); *see also In the Matter of Wong*, 275 A.D.2d 1, 5 (1st Dept. 2000) (“The principle that attorneys are subject in the first instance to the power and control of the courts is also firmly embedded in New York jurisprudence . . .”). Thus, the state court had jurisdiction to decide—and did decide—precisely the same issues before this Court as between the lawyers here.

Moreover, even though the *Shepherd* Action was ultimately dismissed on jurisdictional grounds, this does not bar the application of collateral estoppel here because that fact, while relevant to the question of whether *res judicata* applies, is not relevant to the application of

collateral estoppel. *See, e.g., Taylor v. N.Y.C. Transit Auth.*, 309 F. Supp. 785 (E.D.N.Y. 1970) (“While res judicata, in its primary sense, does not serve as a bar [where underlying decision was “not on the merits and d[id] not create a judgment”], this Court is bound under the doctrine of collateral estoppel to accept as true any material facts necessarily found by the state courts.”), *aff’d on relevant grounds*, 433 F.2d 665, 668 (2d Cir. 1970); *see also, e.g., St. Pierre v. Dyer*, 208 F.3d 394, 401 (2d. Cir. 2000) (previous dismissal for lack of standing did not bar subsequent claim but did bar relitigation of finding that plaintiff was not loss payee on insurance policy); *Transareo, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 731 (2d Cir. 1998) (giving collateral effect findings of fact made in prior decision dismissing suit for lack of personal jurisdiction). As such, Defendants respectfully submit that the remaining claims are barred by issue preclusion/collateral estoppel.

POINT IV - DEFENDANTS RESERVE THEIR RIGHT TO MOVE FOR SANCTIONS AGAINST PLAINTIFF

As discussed above, Plaintiff has abused the legal process by using the opportunity to cure the deficiencies in his FAC to further harass Defendants. The Court specifically warned that if Plaintiff could not follow the narrow path it had set out to replead the CFAA and copyright claims, the Court would “hear from [Defendants] with regard to what if any remedies they would like to take with regard to that.” 2/16 Tr. 40:16-41:1. Plaintiff has failed to comply with the Court’s order or meet the pleading standard for either cause of action and instead wastes Defendants’ and the Court’s time making the same unsupported allegations meant only to harass them. For this reason, Defendants reserve their right to make a motion for sanctions should the SAC not be stricken or dismissed in its entirety pursuant to this motion.

