



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROY DEN HOLLANDER,

Plaintiff,

- against -

KATHERINE M. BOLGER, MATTHEW L.
SCHAFFER, and JANE DOES,

Defendants

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16-CV-9800 (VSB)

ORDER

VERNON S. BRODERICK, United States District Judge:

The parties are scheduled to appear for oral argument regarding Defendants’ motion to dismiss on February 16, 2018 at 2:30 p.m. The parties should be prepared to discuss and answer the following questions:

- CFAA Claim
 - A violation of the Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. § 1030(a)(2)(C), requires unauthorized access to a “protected computer,”—computers that are either exclusively used in a financial institution or the U.S. government, or a computer that affects interstate or foreign commerce. How does this claim implicate a protected computer?
 - Plaintiff states in his reply brief that “Defendants’ theft of data from [his] iCloud or home computer caused [him] losses over a one year period of \$5,000 or more as required by 18 U.S.C. 1030(g).” (Pl.’s Mem. 22.)¹ Plaintiff also states in his

¹ “Pl.’s Mem.” refers to Plaintiff’s memorandum of law in opposition to Defendants’ motion to dismiss, filed June 14, 2017. (Doc. 37.)

Amended Complaint that the \$5,000 in losses is based on “extensive searching of the N.Y. Supreme Court case history and the Internet,” “numerous hours of investigation and analysis,” and “researching hacking and contacting the host of [his] iCloud.” (FAC ¶¶ 29–31.)² Is there documentation showing these losses amounted to \$5,000? If so, were the fees calculated hourly or in some other way? Who conducted the “searching”?

- Was there any damage to the home computer or to the iCloud? Did Plaintiff continue to have access to the home computer and iCloud after the alleged “hacking” behavior?
- Was there any damage or alteration to the “Responses to Media” document itself?
- Plaintiff states that Defendants “broke into [his] iCloud or home computer” and that Defendants do not address or challenge this allegation. (Pl.’s Mem. 21.) Why should not this statement be viewed as a conclusory allegation? How are Defendants alleged to have gained access to Plaintiff’s home computer?
- Defendants state that Exhibit 2 of the Schafer Affidavit in the state court submission, included as Exhibit T of the Francoeur Affirmation in the current case, (Doc. 34), is a “google cache” version of the website where they found the “Responses to Media” document, (Defs.’ Mem. 14).³ Where was the “google cache” found on the internet? Does it access only public websites? When was the “google cache” captured?

² “FAC” refers to Plaintiff’s first amended Complaint, filed March 24, 2017. (Doc. 18.)

³ “Defs.’ Mem.” refers to Defendants’ memorandum of law in support of their motion to dismiss, filed May 22, 2017. (Doc. 35.)

- What is the evidence that there was “hacking” behavior as Plaintiff alleges in his First Amended Complaint? (FAC ¶ 32.) What is the basis for the assertion that Defendants used “brute force cracking”? (*Id.*) Has any forensic analysis been conducted on either Plaintiff’s home computer or Plaintiff’s iCloud?
- RICO Claim
 - For a violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961–68, there must be a “pattern” of activity. What is the pattern of activity here? What is the threat of continuing activity?
 - Plaintiff’s brief cites to a case *Lemelson v. Wang Laboratories Inc.*, 874 F. Supp. 430, 434 (D. Mass. 1994), which held that repeatedly filing litigation can be considered a RICO predicate act. Are parties involved in any other litigation with each other? If so, which party initiated that other litigation?
 - Plaintiff’s memorandum states that he believes Defendants’ reference to the “Responses to Media” document as a “Media Release” in the state court proceeding constitutes wire fraud. (Pl.’s Mem. 24.) Why would counsel’s characterization of a document in litigation be considered wire fraud?
 - Under 18 U.S.C. § 1343, wire fraud involves “having devised or intending to devise any scheme or artifice to defraud.” What is the scheme to defraud that the Defendants are involved in?
 - Are Defendants alleged to have used the “Responses to Media” document anywhere else other than in connection with litigation?
 - Plaintiff claims that Defendants have committed the predicate act of robbery because New York Penal Code § 156.30 “prohibits theft of computer related

material.” (Pl.’s Mem. 25.) How does a violation of § 156.30 qualify as a robbery? What force, if any, was allegedly used as part of the “theft of computer related material”?

- New York Penal Code § 156.30 also requires that the act deprive an owner of “economic value or benefit in excess of two thousand five hundred dollars,” or that the person has an “intent to commit or attempt to commit or further the commission of any felony.” Did Defendants obtain an economic value or benefit in excess of two thousand five hundred dollars? Is there evidence that Defendants were intending to commit another felony using this data? Have defendants ever been charged with robbery in state court? Have they been charged under § 156.30?
- To establish a RICO claim, a plaintiff must allege that a person has used income derived from racketeering activity in “acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in . . . interstate commerce.” 18 U.S.C. § 1962(a). What is the “enterprise” that is being affected?
- Copyright Infringement Claim
 - Plaintiff claims that “[b]y reproducing [his] registered works from my iCloud or home computer without [his] permission, Defendants violated 17 U.S.C. § 501(a).” (Pl.’s Mem. 27.) This, in turn, requires that Plaintiff owned the copyright to the “Responses to Media” document and any other documents that Plaintiff alleges Defendants infringed. Which works, specifically, are Plaintiff alleging Defendants infringed? Does Plaintiff own a valid copyright to these works? Is there evidence of registration with the U.S. Copyright Office?

- Does Plaintiff own a valid copyright to the “Responses to Media” document? Is there evidence of registration with the U.S. Copyright Office with respect to this document in particular?
- In *Hollander v. Steinberg*, 419 Fed. App’x 44 (2d Cir. 2011), the Second Circuit found that opposing counsel’s use of two essays in litigation constituted fair use. How is use of the “Responses to Media” document in this action different from the *Steinberg* case?
- Have the parties disseminated the “Responses to Media” document anywhere other than the state court litigation and the current litigation?
- Replevin Claim
 - Was the “Responses to Media” document public at any time?
 - Has Plaintiff demanded return of the property?
 - Does Plaintiff still have access to the “Responses to Media” document? What is the basis for the statement in the First Amended Complaint that Plaintiff “conclude[ed] that data had not been deleted or modified”? (FAC ¶ 31.)
- Trespass to Chattels Claim
 - Is there evidence of actual injury to Plaintiff’s property? If so, what is the alleged injury?
 - Has the “Responses to Media” document been damaged in any way? If so, what is the alleged damage?
- Injurious Falsehood Claim
 - What is the harm that Plaintiff suffered for the purpose of the injurious falsehood claim?

- Was the “Media Release” reference only made during the state court litigation?
- Collateral Estoppel
 - In the state court motion to withdraw, the issues that were briefed related to unauthorized use of a computer under New York Penal Code § 156.05, computer trespass under § 156.10, unlawful duplication of computer related material under §§ 156.29 and 156.40, computer tampering under § 156.20, and 18 U.S.C. § 1030(a)(2)(C). (Francoeur Aff. Ex. Q, at 2.)⁴ How have the claims currently before me been actually litigated in state court for the purpose of collateral estoppel? Has the issue of Defendants’ use of “Media Release” been litigated?
 - Was the determination regarding whether the “Responses to Media” document was “hacked” essential to the prior judgment? What basis is there for a determination that the prior case was dismissed on merits rather than on jurisdictional grounds?
- General Questions
 - What is the basis of jurisdiction for the replevin, trespass to chattels, and injurious falsehood claims?
 - What documents do the parties believe can be appropriately relied upon, considering that this is a motion to dismiss rather than a motion for summary judgment?
 - Are there specific documents that the parties would like me to take judicial notice of, and on what basis may I take judicial notice of these documents?

⁴ “Francoeur Aff.” Refers to the Affirmation of Joseph L. Francoeur in support of Defendants’ first motion to dismiss Plaintiff’s amended complaint, filed May 22, 2017. (Doc. 34.)

SO ORDERED.

Dated: February 1, 2018
New York, New York

A handwritten signature in black ink, reading "Vernon Broderick". The signature is written in a cursive style with a large initial "V".

Vernon S. Broderick
United States District Judge