

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROY DEN HOLLANDER,

Plaintiff,

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

-against-

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

Defendants.

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

On the Brief:

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Defendants, Katherine M. Bolger and Matthew L. Schafer (collectively “Defendants”), submit this reply memorandum of law in further support of their Motion to Strike the 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

Plaintiff’s Opposition does nothing to cure the deficiencies in his Second Amended Complaint (“SAC”) and, thus, the SAC should be stricken, or, in the alternative, dismissed. First, Plaintiff’s Opposition confirms that he has not complied with the Court’s order granting leave to replead by failing to make the necessary showings to properly plead his causes of action under the Computer Fraud and Abuse Act (the “CFAA”) and the Copyright Act. Plaintiff also fails to demonstrate how the facts, as pleaded, constitute valid causes of action for which relief can be granted. As such, “[b]ecause the plaintiff[] here ha[s] not nudged [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”).

Because Plaintiff cannot rely on his SAC to defeat Defendants’ motion, Plaintiff takes another tactic – a “kitchen sink” approach of introducing all kinds of “evidence” that are outside the four corners of the SAC. However, Plaintiff is constrained by the allegations in his third attempt to make out his claims against Defendants. It is clear from his Opposition that neither of his two surviving claims (of his original seven) are adequately pleaded and thus, like the rest, must also be dismissed. Further, even if this evidence was considered, it would not save Plaintiff’s deficient claims.

ARGUMENT

Point I – THE COURT SHOULD STRIKE THE SECOND AMENDED COMPLAINT

A. Plaintiff Fails Comply with the Court’s Order.

Plaintiff’s SAC must be stricken because it fails to comply with the Court’s clearly articulated instructions. The Court set out, in no uncertain terms, that Plaintiff was only permitted to replead his cause of action for a violation of the CFAA if he could provide a statement from his service provider that “mensrightslaw.net” was not publicly available in December 2014 when Defendants accessed it. Plaintiff’s SAC fails to do so and his Opposition, which entirely misstates Defendants’ arguments on this point, fails to cure this dispositive deficiency. Similarly, Plaintiff was only given leave to replead his cause of action for copyright infringement if he could demonstrate that the screenshots of “mensrightslaw.net” that were produced by Defendants in the *Shepherd* Action contained registered material. However, Plaintiff has failed to demonstrate what material is registered, claiming in his SAC that he did not have access to a certified copy and then, in his Opposition, refusing to show Defendants and the Court the certified copy. This clearly does not comply with the Court’s Order and, as such, the Court should strike Plaintiff’s SAC pursuant to Fed. R. Civ. P. 12(f).

a. Plaintiff’s Opposition mischaracterizes Defendants’ arguments as to why the “website creator” affidavit is deficient.

In an attempt to avoid addressing his failure to comply with the Court’s clear directions at oral argument, Plaintiff entirely mischaracterizes Defendants’ arguments as to why the affidavit provided by the creator of “mensrightslaw.net” is deficient. Plaintiff’s Opposition incorrectly states that Defendants, in their motion, objected to the form of the sworn statement, claiming that Defendants argued that the Court required an affidavit rather than a sworn statement. *See* Pltf.’s Opp. at p. 13. Rather, Defendants actually argued that the proffered affidavit came from the

wrong source and did not contain the information required by the Court, specifically that the Court was seeking some kind of statement from the service provider that hosts the website and that the website's creator does not fulfill that requirement. *See* 2/16 Tr. 10:22-24; 15:12-17; 16:9-11; 19:8-18; Def. Motion at p. 9-10. Defendants also argued that the creator did not swear to the one fact that the Court asked him to swear to – that is, he did not state that the website was private in December 2014 when Defendants accessed it. *Id.* Plaintiff's representations regarding Defendants' arguments are thus nothing more than an attempt to avoid his failure to comply with the Court's instructions. Plaintiff did not produce any evidence that the website was private in December 2014. *See* Exhibit G, Exhibit H. As such, Plaintiff's CFAA claim should be stricken.

b. Plaintiff fails to demonstrate what work is allegedly registered.

Plaintiff's Opposition also fails to properly address Defendants' arguments regarding his failure to comply with the Court's instructions regarding his copyright claim. The Court stated that Plaintiff could only bring a cause of action for copyright infringement if he could show that the content filed by Defendants in the *Shepherd* Action contained registered material. *See* 2/16 Tr. 36:15-23. The SAC simply provides the registration number for "roydenhollander.com" and claims that he does not yet have a copy of what is registered. Defendants thus argued that these claims should be stricken because, without providing the registered work or alleging specifically infringing portions of the mensrightslaw.com website that Plaintiffs claims are infringed, Plaintiff did not comply with the Court's instructions.

Plaintiff's Opposition attempts to cure this deficiency by providing an affidavit from his paralegal who compared the registered work and the allegedly infringing document. *See* Pltf.'s Opp. at p. 20-21, Ex. J. This affidavit identifies certain sentences that were allegedly present on both the screenshot of MensRightsLaw.net and the roydenhollander.com exhibits filed in the *Shepherd* Action. However, Plaintiff once again fails to attach a copy of the registered work

despite now having access to it. Instead, Plaintiff attempts to disguise this mistake by attaching a different screenshot of “roydenhollander.com,” claiming that this too contains material also found in the screenshot of “mensrightslaw.net” that Defendants attached to affidavits in the *Shepherd* Action. In short, Plaintiff is attempting to assert a copyright claim on material that he does not know for sure is copyrighted. *See Cole v. John Wiley & Sons*, 2012 WL 3133520, *12-13 (S.D.N.Y. 2012) (“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.”). Therefore, as Plaintiff’s Opposition fails to bring him into compliance with the Court’s Order, Plaintiff’s copyright infringement claim should be stricken.

B. Plaintiff’s Unduly Prejudicial and Scandalous Allegations Should be Stricken.

Plaintiff’s SAC is replete with irrelevant and unduly prejudicial allegations against Defendant which clearly merit striking pursuant to Fed. R. Civ. P. 12(f) (“The Court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”). Plaintiff’s disregard for the Court’s Order and his attempts to justify his attacks on Defendants merits such action by the Court. Plaintiff’s Opposition essentially claims that because he did not enumerate causes of action other than what the Court allowed that he is permitted to put whatever he wants in the SAC as “background or historical material.” *See* Pltf.’s Opp. at p. 15. However, Plaintiff’s allegations regarding perceived political bias in the *Shepherd* Action or his attempts to pursue criminal remedies have absolutely no connection to the causes of action he was permitted to plead. Further, Plaintiff’s suggestion that Defendants’ waive their right to a jury trial so that he may keep these unfounded, irrelevant, and highly prejudicial allegations is absurd and an attempt to abuse the judicial process. *See* Pltf.’s Opp. at p. 14. Thus, the Court should strike Plaintiff’s Complaint in its entirety.

Point II - PLAINTIFF'S OPPOSITION CANNOT PREVENT DISMISSAL**A. Plaintiff's Supporting Material Cannot Be Considered on a Motion to Dismiss.**

On a motion to dismiss, Plaintiff is constrained to the facts as he has pleaded them, and cannot raise new facts in his Opposition. *See Mejia v. Robinson*, 2018 WL 3821625, at *3-4 (S.D.N.Y. 2018); *Russell v. NY Univ.*, 2017 U.S. Dist. LEXIS 111209, at *107-108 (S.D.N.Y. 2017); *Feldman v. Sanders Legal Grp.*, 914 F. Supp. 2d 595, 600 n.5 (S.D.N.Y. 2012).¹ Plaintiff, however, spends very little time discussing the allegations in the SAC, instead choosing to focus on alleged “evidence,” which is not properly before the Court at this stage.

Moreover, Plaintiff's assertion that some of his evidence could somehow be the subject of judicial notice is baseless. For documents such as reports generated by the Wayback Machine, Courts will take judicial notice to determine what statements the documents contain, not for the truth of the matters asserted. *See Porrazzo v. Bumble Bee Foods, LLC*, 822 F. Supp. 2d 406, 412 (S.D.N.Y. 2011), *quoting Schubert v. City of Rye*, 775 F. Supp. 2d 689, 698 (S.D.N.Y. 2011). But here, Plaintiff asserts that this Court can take judicial notice of the Wayback Machine to determine when and whether his website was private. Unlike the cases cited by Plaintiff, which take judicial notice of archived versions of particular websites, Plaintiff asks this Court to decide a contested issue of fact, which no court has done. Plaintiff asks this Court to take judicial notice of when the Wayback Machine saved versions of his website and then conclude based on those dates that that his website must have been private on all other dates. In other words, Plaintiff asks this Court to resolve a disputed issue of fact and “judicially notice” that his website—complete with links to it on other public websites,² a disclosure by plaintiff on the website that it

¹ While courts often relax this standards with regards to *pro se* litigants, where an attorney drafts the Complaint and Opposition, this relaxed standard does not apply. *Pietrangelo v. Alvas Corp.*, 686 F.3d 62, 63 n.1 (2d Cir. 2012). Here, Plaintiff is an attorney and does not get the benefit of the lower pleading standard.

² Plaintiff's Opposition claims that as the link on the Columbia Business School Website alumni page for Plaintiff does not work, that this proves that the website is, and has always been, private. *See* SAC at ¶¶ 60-63. The point of

constituted attorney advertising, and even a PayPal Donate button soliciting donations—was at all times private. That material fact is clearly inappropriate for judicial notice as it is “subject to reasonable dispute.” FRE 201. Plaintiff’s own brief makes this clear, as he spends pages upon pages attempting to prove—on a motion to dismiss—that his website was private. Thus, judicial notice is improper here. In any event, none of the “evidence” produced shows that “mensrightlaw.com” was not public on December 2014.³

B. Plaintiff’s Opposition Fails to Cure the Deficiencies Regarding his CFAA Claim

a. Plaintiff wrongly relies on unfounded, conclusory allegations.

Plaintiff bases the entirety of his CFAA claim on unfounded, illogical “inferences,” claiming that if “mensrightslaw.net” was public then Defendants must have hacked it, a statement with no support in fact or logic. Plaintiff justifies these claims by basing his allegations on “information and belief,” which the Court has already told him “does not mean [he] can just guess.”⁴ 2/16 Tr. 32:14-15. As discussed, *infra*, the basis for Plaintiff’s so-called logical inferences are unfounded and do not raise Plaintiff’s allegations to the plausibility standard set out in *Twombly* and its progeny. *See Gallop v. Cheney*, 642 F. 3d 364, 368 (2d Cir. 2011) (rejecting “unsubstantiated and inconsistent allegations” and noting that “courts have no obligation to entertain pure speculation and conjecture”); *JBC Holdings NY, LLC v. Pakter*, 931 F.Supp.2d 514, 524 (S.D.N.Y. 2013) (CFAA allegations that “someone, currently believed to be

Defendants argument, however, was not whether the link worked or did not, but rather that, if it were truly private, there would be no reason for a link to Plaintiff’s allegedly private website to show up on a public website.

³ Plaintiff attempts to argue that because a particular internet archive, the Wayback Machine, does not have an archived version of “mensrightslaw.net” that the website must have been private and Defendants must have hacked it. Even assuming the accuracy of the secondary sources cited by Plaintiff, Plaintiff himself states throughout his Opposition that there is only a 35-90% chance that public websites will be archived. *See* Pltf.’s Opp. at 4-5. Thus, Plaintiff’s statement that “[t]he logical inference is that MRL.net was not publicly available” because the Wayback Machine does not have an archive of it, is wrong. *See* Pltf.’s Opp. at p. 5.

⁴ Plaintiff faults Defendants on this point because, he says, the Court made that statement in the context of his Copyright Claim. *See* Pltf.’s at p. 18. However pleading requirements under *Iqbal/Twombly* govern all claims.

[defendant], or one of her agents, placed a flash memory drive on JBC and JP computer servers . . . in an effort to surreptitiously rip information from the drives” and further allegation that defendants placed spyware on the systems and that “it difficult, at this time, to say for certain [what happened]” were “precisely the sort of speculative, ‘naked assertion[s]’ that do not suffice to survive a motion to dismiss”) (citing *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555)). Accordingly, the Court should not consider these baseless statements and the SAC should be dismissed.

b. Plaintiff’s reliance on Defendants’ prior affidavits from the *Shepherd* Action is misplaced.

Plaintiff’s Opposition mischaracterizes Defendants’ argument regarding the SAC’s reliance on Defendants’ affidavits in the *Shepherd* Action, in an attempt to “prove” that Defendants hacked into his website. Defendants, however, did not argue that the Court simply must take the statements in these affidavits as true, as Plaintiff’s Opposition states. *See* Pltf.’s Opp. at p. 19. Rather, Defendants argued that Plaintiff cannot use the statements in the affidavits as evidence of a claim that is plainly contradicted by the statements in those affidavits. *See* Defendants’ Motion at p. 15. In those affidavits, Defendants state that they accessed “mensrightslaw.net,” which was public at that time, and that they did not hack into the site. However, in the SAC, Plaintiff cites to these affidavits for the proposition that Defendants hacked the website, which is the opposite of what these affidavits say. SAC at ¶¶ 54-66, 74-81. Defendants’ argument is not that the Court must always accept sworn affidavits as true, but rather that a party cannot cite to an affidavit, or any other document for that matter, to support an allegation that is contradicted by that document. *See Weston Funding, LLC v. Consorcio G Grupo Dina, S.A. de C.V.*, 451 F. Supp. 2d 585, 587 (S.D.N.Y. 2006) (“If 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.”); *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). Therefore, the Court should ignore Plaintiff’s argument and dismiss the SAC.

c. Plaintiff cannot meet the statutory threshold for loss by billing his own time.

Plaintiff claims that he met the statutory threshold for “loss” under the CFAA because he spent 37.3 hours of his own time “investigating” the alleged hacking and applying an hourly billing rate to this time. Plaintiff’s Opposition fails to address Defendants’ argument that he cannot simply apply his legal billing rate to these non-legal tasks he allegedly performed. He also fails to cite any cases demonstrating that his fees as a semi-retired attorney—entirely unrelated to any kind of computer expertise—are considered a loss. *See Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1066 (9th Cir. 2016) (cited by Plaintiff at p. 19) (“undisputed” that loss was greater than \$5,000); *AV Ex Rel. Vanderhuy v. iParadigms, LLC*, 562 F.3d 630, 646 (4th Cir. 2009) (“expressing no opinion” as to whether “loss” was satisfied) (cited by Plaintiff at p. 19). Instead, Plaintiff repeats the language of the statute and his SAC, giving the definition of loss without articulating how or whether his alleged actions actually fit into this definition.

Plaintiff also misinterprets Defendants’ use of *Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F. Supp. 2d 468 (S.D.N.Y. 2004), claiming that it is inapplicable because Plaintiff does not allege travel costs. While that case did discuss whether particular travel costs could be used to meet the statutory threshold for loss under the CFAA, the holding in that case was not specifically limited to travel costs. Rather, the Court determined that costs associated with the work of business executives, who were not computer experts, which happened to include their

travel costs, could not be used to meet the statutory threshold. Here, as in *Nexans*, Plaintiff is not a computer expert and has not adequately plead how his non-expert, attorney time actually comes under the definition. *See Fink v. Cable*, 810 F. Supp. 2d 633, 641 (S.D.N.Y. 2011) (“Plaintiffs’ pleadings as to loss, while sufficiently specific, nevertheless fall outside the kind of loss that the statutory definition requires—loss relating to damaged ‘data’ or ‘information,’ or a damaged ‘program’ or ‘system.’”). Thus, Plaintiff has not pleaded losses that meet the monetary threshold and, as such, the Court should dismiss his CFAA claim.

C. Plaintiff Fails to Defend his Meritless Claim for Copyright Infringement

Plaintiff’s claim for copyright infringement must be dismissed because the only infringement alleged in the SAC constitutes fair use as the allegedly infringing materials were only used in litigation. *See Den Hollander v. Steinberg*, 419 Fed. Appx. 44, 47 (2d Cir. 2011); *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 143 (2d Cir. 1998); *Jartech, Inc. v. Clancy*, 666 F.2d 403, 406-07 (9th Cir. 1982). Plaintiff’s Opposition argues that because the registered work was unpublished that Defendants cannot argue the use was fair. *See* Pltf.’s Opp. at p. 21-23. However, this argument is deficient, as whether or not a work is published is simply one factor in a four-part analysis to determine if a use is “fair” or whether it constitutes actionable copyright infringement. As the Second Circuit Court of Appeals articulated in another case involving Plaintiff, citing 17 U.S.C. § 107, “the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” *Steinberg*, 419 Fed. Appx. at 47. Plaintiff does not address the other factors because, as the Court found in *Steinberg*, a case with almost identical facts, the use of allegedly copyrighted materials as exhibits in litigation constitutes fair use and is not actionable. *Id.* (noting the balance

tipping in favor of fair use where documents were used in judicial proceedings).⁵ Thus, the Court should dismiss Plaintiff's claim of copyright infringement.

D. The Second Amended Complaint is Barred by Collateral Estoppel

Plaintiff's SAC is barred by collateral estoppel. In the *Shepherd* Action, Plaintiff moved to have the "Media Release" attached to Mr. Schafer's affidavit withdrawn from the record, claiming Defendants must have hacked his website to obtain it and that they were wrongly produced. SAC at ¶ 11. After thorough briefing by both parties and an oral argument, the New York Supreme Court denied Plaintiff's motion, stating that there was no basis for the relief sought. This same argument, which a court of competent jurisdiction has already found is unfounded, forms the basis of Plaintiff's entire SAC. While Plaintiff's Opposition argues that this decision is not binding because of its length, there is simply no legal basis for such a claim. Plaintiff's argument that it is "impossible to say what issues were determined" is also unfounded as the issues were fully briefed by the parties for the Court's review.

CONCLUSION

For the each and all of the foregoing reasons, Defendants respectfully request that this Court strike Plaintiff's Second Amended Complaint pursuant to Fed. R. Civ. P. 12(f), or in the alternative, dismiss Plaintiff's Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and grant such other further relief as this Court deems appropriate.

Dated: September 28, 2018
New York, New York

/s/
JOSEPH L. FRANCOEUR

⁵ Notably, the reason that Defendants were forced to submit the allegedly copyrighted exhibits was to defend themselves from Plaintiff's baseless allegations that Defendants somehow "hacked" his public website.