

**Oral Argument 12(b)(6), Feb 9, 2018, 2:30pm Courtroom 518, 40 Foley Square
Hollander v. Bolger, Schaffer, Doe, 1:16-cv-09800, Judge Vernon S. Broderick**

Intro

Good afternoon you honor. My name is Roy Den Hollander, I'm the plaintiff and also an attorney admitted to this Court. I am representing myself in this case.

[What we have here is a defense lawyer who makes numerous misrepresentations and prevarications in the hope that one will stick.]

Francoeur and Defendants refuse to say exactly what Defendants stole from my iCloud or home computer.

Make no doubt about it. What they did was steal:

Under N.Y. Penal Code § 156.30, the theft of data through unauthorized duplication is a crime peculiar to the electronic medium. Unlike a traditional larceny—the wrongful taking and withholding of property—valued and valuable data can be taken quickly by electronic duplication without depriving the rightful owner of the data. William C. Donnino, McKinney Supplemental Practice Commentary.

The full extent of defendants' thievery and therefore the harm they have caused and are in an imminent position to cause me as a result of invading my iCloud or home computer are hidden behind this Francoeur's refusal and this Court's denial of my request for early discovery

Such increases the likelihood of 12(b)(6) dismissal with this Court ruling that my allegations concerning all of the materials on my iCloud or home computer as speculative even though such information is within Defendants' knowledge but not mine.

The premier treatise on Internet law recommends that when computer information is stolen, a party should consider not only traditional federal remedies, such as copyright and civil RICO, but also state actions, including trespass. Ian C. Ballon, *E-Commerce and Internet Law* at § 44.11, (2d ed. 2016). The treatise also recommends law enforcement involvement, *id.*

Discovery issue

I made a document request for all digital and paper copies that Defendants made from my iCloud or home computer (RDH Opp. E, Dkt. 37) but they refused (RDH Opp. F, Dkt. 37) and this Court denied my early discovery request (Order 5/16/17, Dkt. 32).

Francoeur never says what specifically defendants stole from my iCloud or my home computer other than the attorney work product and two screen shots. On information and belief — actually, they probably downloaded everything, but they refuse to say one way or the other.

Such creates a looming unknown in this case. The extent of the materials Defendants stole by copying or downloading from my iCloud or home computer.

Without discovery of the information that Defendants alone possess, my allegations on certain issues in this case face an unfair disadvantage that increases the chances of dismissal for failing to meet the plausibility standard.

The plausibility standard requires that allegations should be more than an unadorned: the-defendant-unlawfully-harmed-me accusations. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Without discovery this Court can simply say on the following issues that my allegations are nothing more than unadorned “the-defendant-unlawfully-harmed-me accusations” or the allegations only raise a possibility not a plausibility that Defendants engaged in the misconduct alleged:

1. Copyright infringement of registered, unpublished works by reproducing, distributing or displaying them without my permission faces serious jeopardy of not meeting the plausibility standard because exactly what they stole is known only to them.
2. Trespass to chattel because Defendants interference with my possessory interests would not be to just an attorney work product and the two screenshots but to megabytes of data, including attorney work product documents, attorney client privileged communications, financial information, security codes, writings, ideas, contacts, photos, music, videos, emails. That’s a trespass of a completely different magnitude.

Without discovery, Defendants have a betting chance to get away with their crimes, such as violations of N.Y. Penal Codes §§ 135.60(5), Coercion; 156.05, Unauthorized use of a computer 156.10; 156.30, Unlawful duplication of computer related material; 156.35, Criminal possession of computer related material; 165.50 criminal possession of stolen property.

As alleged in the FAC ¶¶ 21-23, 26, the Defendants copied, downloaded or reproduced much of or all of my iCloud or the materials on my home computer. That is millions of bytes of information. The sheer magnitude of their intentional efforts to amass so much information infers a malicious intent as required by the cause of action _____.

Yet, I am not allowed to know what they took, and with a dismissal of my case, I will never know what they stole until they start leaking it to their friends in the Pravda Correct press.

In effect, I am denied access to my property that was taken without my consent so as to prevent dismissal of certain issues in my FAC. Unfair is an understatement.

With the denial of early discovery, Defendants have received what they wanted—this case will likely not be investigated further; the legal system will forget about it—in effect granting them the right to keep everything they took without consent to use or sell as they wish. On top of that, a Trump supporter will be saddled with huge debts—just what the Defendants want.

Similar cases in the SDNY allowed early discovery before the Rule 26(f) conference.

Cases allowing early discovery

In *Twentieth Century Fox Film Corp. v. Mow Trading Corp.*, 749 F. Supp. 473, 475 (S.D.N.Y. 1990), on the issue of copyright infringement of the characters on the Simpson show, Fox received expedited discovery for the production of documents under Federal Rule of Civil Procedure 34 for among other reasons:

1. Determining the quantity of such infringing materials now in defendant's possession, custody or control.
2. Continuing infringement.

My motion for expedited discovery of documents was similar: to determine the full extent of defendants' nefarious activities, and therefore the harm they have caused and are in an imminent position to cause as a result of invading my law practice and personal life.

In *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 326 (S.D.N.Y. 2005), a Civil RICO action based in part on wire fraud, SDNY Judge Lynch granted early discovery to plaintiff against 3P banks to determine assets of defendants in those banks. Defendants had stolen plaintiff's money via the crime of fraud. Here, I am trying to determine which of my property obtained without my authorization is being held by Bolger and Schafer.

In *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2012), a copyright infringement action for downloading from the Internet copyrighted materials without authorization, expedited discovery was granted to determine who download the material. Here the request is for exactly what was download.

In *Stern v. Cosby*, 246 F.R.D. 453, 457 (S.D.N.Y. 2007), early discovery was allowed on the issue of obstruction of justice by tampering with two witnesses. Here too, early discovery is required to avoid obstruction of justice by Defendants hiding what they actually reproduced or downloaded without permission in violation of the Copyright Act and various NYS Penal provisions.

Standard

Rule 26(d) provides that a party to a civil action may not seek discovery before the parties have conferred as required by Ruled 26(f), except when authorized by Court order. The intention is to place the matter in the Court's discretion, rather than to impose a specific and rather stringent test. *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 326 (S.D.N.Y. 2005)

The standard in the SDNY courts for early discovery is a flexible standard of reasonableness and good cause. *Stern v. Cosby*, 246 F.R.D. 453, 457 (S.D.N.Y. 2007).

Standard for early discovery: In deciding on a matter merely of regulating the timing of discovery, it makes sense to examine the discovery request on the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances. *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 327 (S.D.N.Y. 2005)

Among factors considered in situations such as motion to dismiss for want of anemic fact-based allegations:

1. Legal urgency
2. Breath of discovery request
3. Purpose for request
4. Burden on defendants to comply
5. How far in advance of typical discovery

Moore's Fed Prac 3d, § 26.121(2)

RDH May 8, 2017 letter to the Court:

The First Amended Complaint also alleges that defendants copied, downloaded or reproduced most, if not all, of my iCloud. The iCloud contained privileged and confidential matters related to my law practice and personal life. It also contained materials that had been registered with the U.S. Copyright Office.

In accordance with Your Honor's Individual Rules & Practices in Civil Cases ¶ 3 and Fed. R. Civ. P. 26(d)(1), I requested early discovery from the defendants of all the materials other than the attorney work product that they copied, downloaded or otherwise reproduced from my iCloud.

Not knowing the extent of the materials and specific documents taken without my authorization puts me at a disadvantage in opposing defendants' motion to dismiss. Their motion brief is due May 15th, my opposition brief is due June 14th. All that is known now is that defendants took the attorney work product that they argue is a media release and therefore a public document. But what about the other attorney work products or client attorney communications from the other cases I worked on and were on my iCloud? Is the Court to assume all of those are media releases? Such is a ludicrous argument, but without early discovery, I am unable to show such.

In addition to the defendants copying my law practice records, they also must have reproduced numerous materials registered with the U.S. Copyright Office without my permission. Such violates the Copyright Act, which provides for statutory loss. 17 U.S.C. § 504(c). Since the attorney work product was obviously not registered with the Copyright Office, there cannot be any statutory loss for reproducing it. It is, therefore, incumbent on me to prove loss. But as far as the materials registered with the Copyright Office, all I need show in the way of loss is that they were registered.

Further, if as alleged in the First Amended Complaint ¶¶ 21 & 23, the defendants copied, downloaded or reproduced much of or the entire iCloud, that is millions of bytes of information. The sheer magnitude of their intentional efforts to amass so much information infers a malicious intent to destroy my law practice by releasing selective sections of confidential documents and spinning them in typical neo-McCarthyite-PC fashion. (First Amended Complaint ¶ 24).

Fed. R. Civ. P. 26(d)(1) allows for discovery prior to the Rule 26(f) conference when “by stipulation, or by court order.” Defendants refused my request to stipulate (Exhibit A); therefore, I am requesting a court order.

The defendants’ attorney, Joseph L. Francoeur, in his denial (Exhibit B) is clearly ducking the issue of the extent of his clients’ thievery from my iCloud. It’s as though burglars entered someone’s house while he was on vacation skiing in the Alps. The police want to know what was taken and its value so as to charge the thieves with larceny or grand larceny. The victim can’t tell them because he’s in Switzerland. All that the burglars will admit to taking is a confidential letter.

The reason for my request for early discovery is simple. The full extent of defendants’ nefarious activities, and therefore the harm they have caused and are in a position to cause are not fully known. Yet Francoeur argues this case should not be investigated further with discovery—the legal system should forget about it; thereby, granting his clients the right to keep everything they took without consent to use or sell as they wish.

True to form, Francoeur’s opposition to early discovery prevaricates and dissembles procedural events:

First, Francoeur complains about having to work on a weekend. (Exhibit B, p. 2). Francoeur’s firm received the request for an agreement on discovery at 10:35 am on Friday May 5th. (Exhibit C). Your Honor’s rules require a response within 72 hours or “a party may submit a letter without the opposing party’s contribution.” Individual Rules & Practices in Civil Cases ¶ 3. Francoeur submitted his portion of a joint letter 76 hours after receipt. Under Fed. R. Civ. P. 6(a)(2), “When the period is stated in hours: (A) begin counting immediately on the occurrence of the event that triggers the period; (B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays” So Francoeur’s apparent refusal to work on a weekend caused him to miss the deadline—that is not my fault.

Second, Francoeur quotes from Fed. R. Civ. P. 26(d)(1) but—true to form—leaves out the part of parties agreeing to early discovery or the court ordering such.

Third, Francoeur claims my request for documents did not state a time and place for providing copies. It didn’t request a time and place because it was a request that in the spirit of common courtesy we could work out mutually agreeable specifics—clearly not. If the Court orders early discovery, May 17th should provide sufficient time.

Fourth, Francoeur falsely claims this Court granted a stay in discovery that Francoeur requested in his pre-motion conference letter of January 31, 2017. (Francoeur letter at C. p. 3, Dkt. No. 14). Your Honor’s Order stemming from Francoeur’s letter requesting a pre-motion conference set a date for such. It did not grant Francoeur’s requested stay.

I am in receipt of Defendants' pre-motion letter, (Doc. 14), and Plaintiff's response thereto, (Doc. 16). The parties are directed to appear for a pre-motion

conference regarding the anticipated motion on April 7, 2017 at 3:30 p.m. in Courtroom 518 of the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, New York.

Dkt. No. 17.

Before the scheduled pre-motion conference, I filed a First Amended Complaint under Fed. R. Civ. 15 (a)(1)(B), Francoeur responded with a second letter dated April 5th requesting leave to file a motion to dismiss the First Amended Complaint. To which Your Honor Ordered:

I am in receipt of the parties' pre-motion letters and responses thereto. (Docs. 14-16, 20, 21.) In light of the fact that Plaintiff does not oppose Defendants' request for leave to file a motion to dismiss, (see Doc. 21), the April 7 pre-motion conference is hereby cancelled and Defendants are granted leave to file a motion to dismiss the amended complaint. The parties are directed to submit a joint letter on or before April 14, 2017 setting forth an agreed, proposed briefing schedule with respect to Defendants' motion.

Dkt. No. 22.

There is nothing in either of these decisions that grants the discovery stay Francoeur is deluding about. Francoeur also lies out right that I “specifically represented to the Court that [I] did not oppose [his] letter motions.” Not so—I wrote:

Francoeur’s [April 5th] opposition to the First Amended Complaint simply prevaricates and dissembles its way to requesting that he be allowed to make a motion to dismiss. Plaintiff agrees, he should be allowed to make his motion to dismiss.

Agreeing that a party should be able to make a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is not agreeing to a discovery stay.

Timing of Defendants hacking into iCloud

Exactly when the Defendants first hacked into and therefore stripped the codes from my iCloud or breached my home computer firewall may have been revealed if the documents I requested in early discovery had been produced.

Whether iCloud public

Discovery concerning the Columbia Alumni website will show that iCloud not public.

Court 5/15/17 denial of discovery:

“[A]ll discovery is hereby stayed until further court order.”

Facts

The N.Y.S. Court case *Hollander v. Shepherd, et al.*, 152656/2014 (N.Y. Sup. Ct. 2014) was brought by me as plaintiff and attorney against an Australian Rupert Murdoch newspaper published on the Internet by Murdoch's corporation and a different Australian newspaper also published on the Internet by another multi-billion corporation.

Both newspaper corporations were represented by the Defendants in this case: Katherine Bolger and Mathew Schafer.

That case stemmed out of the University of South Australia had offered for registration eight courses as part of a Males Studies Program—the first ever in higher education anywhere in the world. The courses were created by various professors in America and Australia. I was slated to teach a three-week section titled “Men and the Law” for one of the courses.

Six of the eight courses were canceled due to the fake news reporting of the two Internet newspapers. I then sued for injurious falsehood and interference with an economic advantage against the Internet newspapers and two reporters. One of the two reporters was also sued for libel.

Bolger moved to dismiss the FAC for lack of personal jurisdiction, failure to state a claim for relief and defense based on documentary evidence. (Oral Ex. 1, 2). I filed an Opposition, Bolger filed a Reply. (Oral Ex. 1).

Oral argument before Justice Milton Tingling with a November 14, 2014. (Oral Ex. 3). In sum and substance, Defendant Bolger argued the NY Sup Ct did not have personal jurisdiction because the Murdoch corporation and the other company did not have sufficient contacts with New York State for the court to have personal jurisdiction over them.

Justice Tingling responded that is a “fact question.” To which I made a standing motion for a trial on personal jurisdiction. Justice Tingling granted my request to make the motion and scheduled the submission of papers on whether a trial on the issue of personal jurisdiction should be held.

[Facing a Justice who considered that Bolger's arguments on personal jurisdiction raised issues of fact clearly threatened Bolger's hope for a quick dismissal. So the Defendants needed something from which to spin fake facts to turn the Justice against me.]

Defendants therefore hacked into my iCloud or home computer and took the attorney work product and as alleged other materials.

The spin of falsity that Bolger applied to the attorney work product was that it was a “Media Release”—meaning I had volitionally made it public to the press. Even Francoeur admits that Bolger repeatedly called the attorney work product a “Media Release.” (Def. Mem. at 6).

Then the case was transferred to Justice Peter Moulton who ended up with my 1/13/2015 request for an Order to Show Cause to withdraw the hacked document. He denied the Order to Show Cause but allowed me to make a motion by notice.

That motion to withdraw the hacked document accused Defendants of violating my right to privacy; unauthorized use of a computer, N.Y. Penal Code § 156.05; computer trespass, N.Y. Penal Code § 156.10; unlawful duplication of computer related material, N.Y. Penal Code § 156.30; computer tampering, N.Y. Penal Code § 156.20; violating 18 U.S.C. § 1030(a)(2)(C); and for Bolger committing perjury in swearing that the attorney work product was actually a “Media Release.”

The case was transferred again, this time to a new acting Justice, Jennifer Schecter. There was one hearing before Justice Schecter on May 27, 2015, which involved Defendant Bolger’s motion to dismiss, my motion for a trial on personal jurisdiction, and my motion for withdrawal from the record the attorney work product.

On my request that the hacked attorney work product be withdrawn, Justice Schecter asked whether I had any evidence of hacking to which I responded there had been no discovery, and added, “You’ve read the document, ask yourself what man in this day and age would make such public?” In my papers, besides swearing that my iCloud was protected by access codes, I argued that Defendant Bolger’s first motion to dismiss the N.Y.S. Court case on August 29, 2014 made clear that her team was trolling the Internet for information on my business because her papers had included various exhibits from the Internet. Defendants Bolger and Schafer say they found the attorney work product between December 30, 2014, and January 12, 2015. (FAC Ex. B & C). If my iCloud was open to the public, why didn’t Defendants find the attorney work product sooner? If my iCloud was open to the public, coupled with my knowing Defendants were scouring the Internet for any politically incorrect statements by me, why didn’t I protect it with access codes? In response, Bolger simply disparaged me and said they didn’t hack my iCloud. That was the totality of the hearing on my motion to withdraw the hacked attorney work product.

1/8/16 Justice Schecter issued a two sentence decision on my motion to withdraw the hacked document: “Denied. There is no basis for granting the relief sought. This constitutes the Decision and Order of the Court.” (Oral Ex. 4).

1/8/16 Justice Schecter issued her decision on Defendant Bolger’s motion to dismiss on personal jurisdiction grounds; “Defendants [Two newspapers and two reporters] move to dismiss for lack of personal jurisdiction. . . . In the end, there is no authority for subjecting defendants to jurisdiction in New York based on articles published outside New York for a non-New York audience.” (Oral Ex. 5 at 2, 9)

The FAC at ¶ 8 alleges that once the defendants broke into the iCloud “they stripped the access codes thereby making it viewable to them and the public at any time.”

The FAC makes clear that after extensive research the only places Defendants could have obtained the attorney work product and other materials were from my iCloud or home computer. (FAC ¶¶ 4, 28-32).

Info on iCloud and home computer: privileged statements, memoranda, correspondence, drafts, mental impressions and personal views concerning the litigation in the N.Y. Supreme Court case against their clients and any other information on the iCloud. The iCloud and home computer content: attorney work product documents, attorney client privileged communications, financial information, security codes, writings, ideas, contacts, photos, music, videos, emails—all the business and personal information that I kept protected in his iCloud and home computer. FAC ¶ 8, 21, 23, 26.

Before filing this action, I had orally informed a lawyer at LSKS that I would handle the theft of my documents when the N.Y.S Court case was over.

Defendants while representing a Rupert Murdoch newspaper in an action in the New York State Supreme Court accessed my iCloud or my home computer without my permission, copied an obvious attorney work product and as alleged everything else—some registered with the copyright office, some not. They then misrepresented the attorney work product as a press release and sent it and their misrepresentation over the wires to their clients and the N.Y. Supreme Court website. The N.Y. Supreme Court website made their misrepresentation and the attorney work product public. Defendants never refuted that the document was attorney work.

Fake Facts: Francoeur and Defendants multiple falsehoods

Screenshots (Def. Ex. T, Oral Ex.

Just compare Defendants Bolger and Schafer’s party opponent admissions as to when they admit but not necessarily first accessed my iCloud to the dates on the screenshots. (Def. Mem. Ex. S, T, Dkt. 35). The first screenshot submitted by Francoeur (Def. Mem. Ex. T, Schaffer Aff. Ex. 1) does not have a date, but does state “Tue 9:48 AM.” The second screenshot submitted by Francoeur (Def. Mem. Ex. T, Schaffer Aff. Ex. 2) does have a date in the bottom right hand corner of every page—January 13, 2015. January 13th was a Tuesday, which infers that the first screenshot was also taken on that day—meaning Schafer lied in his affidavit about taking the screenshot on December 30, 2014. (Def. Mem. Ex T ¶ 2). That’s why there is no date on the first screenshot as there is on the second screenshot—tricky.

January 13, 2015, is after Defendants stole the attorney work product because it was submitted to the N.Y.S. Court on January 12, 2014. At the very top of the first page on the second screenshot it states, “It is a snapshot of the page as it appeared on Jan 3, 2015 17:30:43 GMT.” So on January 3, 2015, my iCloud was public, but Francoeur admits, Defendants accessed my iCloud on December 30, 2014 (Def. Mem. at 14). Therefore, Defendants accessed my iCloud before any screenshots were recorded. That clearly enabled them to strip the access codes and subsequently view my iCloud at any time convenient to them—just as the FAC ¶ 8 alleges.

Francoeur has no unequivocal proof of when the first screenshot was taken.

Columbia Alumni Club website

Francoeur also alleges that evidence of my iCloud being public was that the Columbia University Alumni Club website listed its URL. (Def. Mem. at 14). The FAC at ¶ 19 states that when the link was clicked “page not found” came up.

NYS Court case *Hollander v. Shepherd, et al.*, 152656/2014 (N.Y. Sup. Ct. 2014)

Francoeur’s false characterization of the N.Y.S. Court case as merely a defamation case. (Def. Mem. at 1). The causes of action were injurious falsehood and interference with a prospective economic advantage leveled against all four defendants and libel against only one of the defendants, a reporter. The attorney work product stolen from my protected iCloud or home computer was filed in connection with, as Defendant Bolger swore, my “oral motion for an immediate trial pursuant to Rule 3211(c) of the New York Civil Practice Law and Rules” on the issue of personal jurisdiction. (FAC Ex. D, ¶ 1). It did not deal with the substance of defendant Bolger’s motion to dismiss as Francoeur falsely infers. (Def. Mem. at 1).

Bolger’s perjury in calling the attorney work product a “Media Release.”

Defendant Bolger’s affirmation in opposition to my motion for trial on personal jurisdiction (FAC Ex. D at ¶ 2), specifically swears that “A true and correct copy of the ‘Media Release’ available at Plaintiff’s MR Legal Fund website . . . is attached hereto as Exhibit 1.” Bolger did mention the accurate title once in her memorandum of law, but then proceeded to label it a media release eight times. (FAC Ex. E at pp. 9, 17, 18, 19).

The document is not a “Media Release” and is not titled “Media Release.” The document titled was “Responses to Media,” and the iCloud link to it was titled “Media Answers.”

Bolger intentionally committed perjury in order to mislead anyone viewing the court’s public filings into thinking that the privileged attorney work product was a “Media Release” made public to the press.

Francoeur emphasizes that his clients are accomplished lawyers who specialize in representing the news media. (Def. Mem. at 4). Therefore, they clearly knew the stolen document was not a media release and no one submits to the news media 17 pages of contingent questions and answers that are over 6,000 words long. (FAC Ex. D).

A press release, news release, media release, press statement or video release is a written or recorded communication directed at members of the news media for the purpose of announcing something ostensibly newsworthy. . . . [P]ress releases can be anywhere from 300 to 800 words. *Wikipedia*.

Such conduct makes clear that she intentionally misquoted the title and mischaracterized the document in order to trick the Court into believing the hacked document had actually been presented to the media, and, therefore, was a document available to the public and not an attorney work product.

When Plaintiff moved to have the attorney work product withdrawn, Bolger’s opposition failed to deny that the document was attorney work product. (FAC Ex. F). As such, Bolger waived her right to contest that the hacked document was not attorney work product. *See, e.g., Ambac Assur. Corp. v. DLJ Mortg. Capital, Inc.*, 92 A.D.3d 451, 452 (1st Dep’t 2012).

NYS Order to Show Cause over hacking

Justice Moulton ruled that I could bring a motion by notice instead of an Order to Show Cause—which I did. (Pl. Mem. Ex. A, Moulton’s Order at 3). Francoeur failed to mention that. He even tries to represent the Order to Show Cause as fully litigating and determining all the issues in this federal proceeding. (Def. Mem. at 2). If that were so, Justice Moulton would never have allowed me to make a motion by notice.

NYS Motion by Notice over hacking

Francoeur falsely claims the notice motion to withdraw the hacked document had “full briefing” before N.Y. Justice Jennifer G. Schechter. There was no transcript of the oral argument, and Defendants and I disagreed on what was orally argued. Both sides submitted “In Lieu of Transcript Statements” on appeal and those statements conflict, which shows a lack of clarity on the issues litigated and determined, see Restatement 2d, Judgments, § 27, Comment f. (Pl. Mem. Ex. B, in lieu of transcripts). Even Defendant Bolger said in her statement that “no issues of fact were resolved” and that I “was never allowed to introduce evidence” at the hearing on the motion to withdraw the attorney work product. (Pl. Mem. Ex. B, Bolger Stmt. at 3). Further, if there really was “full briefing,” then why did the N.Y.S. Court issue such a brief decision: “Denied. There is no basis for granting the relief sought.” (Pl. Mem. Ex. C).

Flashdancers case

At Def. Mem. at 6 n.4, Francoeur says that in another case involving me, an opposing “lawyer noted that [certain] articles ‘appeared on the internet.’” In truth, the opposing lawyer actually said, “it is my understanding ‘these’ articles appeared on the internet.” *Hollander v. Copacabana Nightclub*, et al., No. 07-cv-5873, Dkt. 24 at 4. That’s a big difference than stating flat out they appeared on the internet. That’s not the only Francoeur trick here. He does not cite the page number for the opposing lawyer’s quote. Why—because the document on the court’s website is not searchable; therefore, a busy clerk is unlikely to look it up and will accept Francoeur’s intentionally false characterization.

Home computer

Francoeur fails to address the allegation that Defendants may have stolen the attorney work product and other materials from my home computer, which is connected to the Internet. FAC ¶ 4, 7, 10, 22, 23, 26, 58, 65, 89, 99.

Plausibility standard for a Fed. R. Civ. P. 12(b)(6) motion to dismiss

This action alleges violations of the Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030(a)(2)(C); the civil Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et al.* by Defendants engaging in the predicate acts of wire fraud, 18 U.S.C. 1343 and robbery; and trespass to chattel under New York law. The injurious falsehood claim is withdrawn for failing to comply with the one year statute of limitations.

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) assumes that a plaintiff's allegations and reasonable inferences are true, providing that the

[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact), *see, e.g., Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (“Rule 12(b)(6) does not countenance . . . dismissals based on a judge’s disbelief of a complaint’s factual allegations”); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (a well-pleaded complaint may proceed even if it appears “that a recovery is very remote and unlikely”).

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-556 (2007).

Two key allegations by me are that my iCloud was protected by access codes and my home computer protected by a firewall. (FAC ¶¶ 4, 100). Defendants allege that my iCloud was not protected, but public. (Def. Mem. at 13). They say nothing about my home computer.

I swore to my allegations and they swore to their allegation, so on a motion to dismiss mine are considered true—not theirs.

Def. Mem. at 11-15 claims as a defense that because Defendants’ affidavits were included as exhibits in the FAC, that everything in them is assumed true and anything contrary in the FAC is assumed false. That the contradiction between the body of the FAC and these two exhibits means the FAC does not meet the plausibility standard. (Under New York law, affidavits as a primary source of proof of a defense must be ignored since they do not qualify as documentary evidence on a motion to dismiss. Siegel, N.Y. Prac. § 259 (5th ed.).

If the Court wants to rule that allegations in a complaint are assumed false whenever they contradict a statement by defendants that is included in the complaint for the purpose of providing the necessary notice about the nature of the cause of action under FRCP 8 and meeting the Plausibility Standard, then fine. I’ll just appeal that ruling because such a law would result in the dismissal of all complaints for fraud, wire fraud, defamation and other causes of action because the false statements required to be in the complaint will be considered true under FRCP 12(b)(6) or the contradiction will mean the Plausibility Standard is not met.

FRCP 9(b) requires that “in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”

Defamation requires the exact statements made by a defendant.

Francoeur admits to repeating this argument in his Reply at 3-4 and even cites to his Mem. of Law. (Def. Reply at 4). A reply, however, should avoid redundancy. Fed. Lit. Guide NY and Conn. § 9.132. Francoeur in his Reply at 3 last ¶ through 4 second ¶ merely repeats his argument in Def. Mem. 11-15.

This is not the first time that Francoeur has avoid the rules to create a false impression. In his letter January 31, 2017, Dkt. 14, Francoeur refers to two exhibits: the screenshot of Plaintiff's iCloud as visited by Mr. Schafer on December 30, 2014 (Ex. 1) and the screenshot of the Google-cache version of how the website appeared on January 3, 2015. Exhibits are not permitted in a pre-motion conference letter, but Francoeur is trying to create a fraudulent image in the Court's mind based solely on his dissembling description of the two documents. It's the perfect dissemblance because the Court did not review the documents to realize Francoeur's trick.

Additionally, Defendants do not address whether they hacked into my home computer.

Copyright

The Copyright Act of 1976, 17 U.S.C. § 101 et seq., gives copyright owners protection from unauthorized reproduction, distribution and displaying of their works. U.S. Copyright Office, Circular 1, p.1. Information stored on the Internet for longer than a transitory period is in fixed form. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 129-130 (2d Cir. 2008).

By reproducing my registered works from my iCloud or home computer without my permission, Defendants and distributing those reproductions to their Australian clients without my permission, Defendants violated 17 U.S.C. § 501(a).

Defendants are using their refusal to disclose all that they reproduced from my iCloud in order to argue for dismissal of the Copyright action under 17 U.S.C. § 411(a) (infringement action requires registration). Basically, they are saying the Court has to dismiss because we will not say what works we took without permission. So far the Court has allowed them to keep hidden exactly what they reproduced.

After the dispute over early discovery in my effort to determine everything, including copyrighted materials, Defendants took from my iCloud and this Court's denial of early discovery, Francoeur now argues that the FAC copyright cause of action does not include any documents other than the attorney work product. By not raising this objection earlier, Francoeur waived it.

Further the FAC does raise Defendants violating the copyrights of other documents on my iCloud:

FAC ¶ 21: [Defendants] eventually copied or downloaded everything from [my] iCloud such as attorney work product documents, attorney client privileged communications, financial information, security codes, writings, ideas, contacts, photos, music, videos,

emails—all the business and personal information that Plaintiff kept protected in his iCloud.

FAC ¶ 23: On information and belief, Defendants also copied or download all or much of the information that was on Plaintiff’s iCloud or his home computer.

FAC ¶ 92: The Copyright Act of 1976, 17 U.S.C. § 101 et seq., gives copyright owners of unpublished works protection from unauthorized reproduction, distribution and displaying of their works. U.S. Copyright Office, Circular 1, p.1.

FAC ¶ 99. The information on Plaintiff’s home computer and iCloud is his business or his personal property—some of which is even copyrighted.

FAC ¶ 123: Defendants stole from Plaintiff’s iCloud or his home computer the attorney work product document and, on information and belief, other data from Plaintiff’s iCloud or home computer.

FAC ¶ 124: Defendants continue to possess or control without Plaintiff’s authorization the attorney work product and, on information and belief, other data from Plaintiff’s iCloud or home computer in the form of copies—paper or digital or both.

FAC ¶143 Bolger and Schafer are now sitting on a mass of private and confidential personal and business information that they can use at will to engage in disparaging attacks against Plaintiff’s practice in other cases in which they are involved, or provide the data to attorneys in cases they are not involved with, or provide the data to the many news media clients that they represent, especially Murdoch newspapers. Such amounts to a clear intimidation that Plaintiff dare not exercise his First Amendment rights under the U.S. Constitution unless it conforms to their misandry beliefs.

In his duplicity, Francoeur failed to cite to these paragraphs, which clearly include the two screenshots that Defendants reproduced from my iCloud or home computer. (Def. Mem. Ex. T).

Further, inferences are drawn in favor of the complaint not the Defendants’ motion to dismiss. *Littlejohn v. City of N.Y.*, 795 F.3d 297, 306 (2d Cir. 2015); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir. 1993).

Francoeur also falsely says that I have not identified any specific copyright registered document that Defendants infringed because my subsequent application for registration of the screenshots “is not a sufficient prerequisite to a copyright infringement action. *See, e.g., Gattoni v. Tibi, LLC*, 2017 WL 2313882, at *3-4 (S.D.N.Y. 2017).” (Def. Reply at 5).

Assuming Francoeur got the law right, he got the facts wrong. Screenshot Ex. 2 of Def. Mem. Ex. T reproduces verbatim, except for a small amount, all of the text for which a certificate of copyright registration was issued on 1/9/2013 TXu001856032. That’s well before this case started on 3/24/17.

The problem in all of this is that only the Defendants know what they reproduced. If they reproduced registered materials that were not used in the NY Sup Ct, then there is not even the glimmer of fair use.

Defendants refuse to say what they reproduced, in fact, they argue that by my not alleging the other specific copyright registered documents they reproduced the copyright action should be dismissed. (Reply at 4-5). They clearly want to benefit from the fruits of their own stonewalling. My allegations for those documents are on “information and belief.”

The plausibility standard for pleading does not prevent a plaintiff from pleading facts alleged on information and belief where the facts are peculiarly within the possession and control of the defendants. *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010).

If this Court still refuses to allow limited discovery on what exactly Defendants reproduce from my iCloud or home computer, then Francoeur’s threat that Defendants should be awarded attorney’s fees and costs pursuant to 17 U.S.C. § 505 for being forced to bring the instant motion” (Def. Mem. at 16-17) may come true.

Francoeur wrongly bases his objection to the copyright cause of action on a Second Circuit “Summary Order” (Def. Mem. at 3, 6 n.4, 17, Dkt. 35) and again repeats his argument in his Reply at 5 Dkt. 38. The case Francoeur relies on is a Summary Orders and Summary Orders in the Second circuit do not have precedential value. Local Rule 32.1.1, Disposition by Summary Order. They are limited to that case and that case alone. Further, the facts here are different. For example, Francoeur’s Summary Order only dealt with the submission of copyrighted material in court. Here Defendants are also accused of distributing registered copyrighted documents (FAC ¶¶ 99, 143, Dkt. 18) not submitted in court to their Australian clients without my permission, which is infringement under 17 U.S.C. § 501. The problem again is that those materials are unknown because Defendants and this Court refuse to allow discovery of such.

Francoeur lamely tries to allege that because some of the documents his clients took were not registered with the Copyright Office, it means I am abandoning my claim of copyright infringement for the documents that were registered.

Trespass to chattel

My pleading of trespass to chattel action is also hamstrung by Defendants and this Court’s refusal to allow discovery to determine the full extent of Defendants’ thievery from my iCloud or home computer.

Once again the problem is that there is only evidence of the attorney work product and screenshots computer data being interfered with by copying and downloading when in reality the amount of data interfered with may amount to megabytes. We don’t know because Defendants and this Court refuse to allow discovery.

Interference in right of possession

The New York tort of trespass to chattel consists of intentionally using or interfering with a chattel in another's possession, *Hecht v. Components Intl., Inc.*, 22 Misc.3d 360, 369 (Nassau Cnty. Sup. Ct. 2008) (citing *Restatement 2d Torts* § 217), such as interfering with another's possessory right in property.

Computer data is property for the purposes of litigation, *People v. Versaggi*, 83 N.Y.2d 123, 128 (1994).

Interference with information stored on a computer gives rise to trespass to chattel if the condition, quality or value of the data is diminished as a result of defendants' duplication. *Twin Sec., Inc. v. Advocate & Lichtenstein, LLP*, 113 A.D.3d 565, 565–66 (1st Dept. 2014); see *Restatement 2d Torts* § 218, Comment e.

Francoeur in his Reply at 9, says that “Den Hollander concedes there was no injury to his computer or iCloud,” so the “trespass to chattels claim must be dismissed.” Francoeur prevaricated by leaving out the allegation in the FAC ¶ 107 that Defendant's trespass diminished the value of the data as a result of defendants' duplication. Something that even Francoeur admits in his Reply at 9 but tries to deceive the Court by asserting I only claimed harm to my computer or iCloud.

Defendants' interference is actionable because the interference hindered my use of the attorney work product for its own purposes. Having opposing lawyers copying it and making it public destroyed its value of confidentiality. CPLR 3101(c) recognizes the sanctity of the lawyer's mental impressions and strategic analyses, 3A Weinstein, *N.Y. Civil Prac.* 3101.42, which is why attorney work products are not legally discoverable. Defendants' theft and publication of the attorney work product destroyed its sanctity, confidentiality and, therefore, its value.

Whether the harm from trespass is direct or consequential is immaterial, so long as it is caused by the defendant's act. Prosser & Keeton, *Law of Torts* § 14 (5th Ed).

Defendants used the digital information obtained to not only gain an unfair advantage in the N.Y. Supreme Court case but also to cause consequential damage to Plaintiff's business and disparage its services and products to the public.

“[E]vidence of mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels” in the context of computer databases. *Register.com, Inc. v Verio, Inc.*, 126 F. Supp. 2d 238, 250 (S.D.N.Y. 2000), *aff'd in part and reversed in part on other grounds*, 356 F.3d 393 (2d Cir.2004). Defendants are alleged to have interfered with my exclusive right of possession of all the materials on my iCloud or home computer by copying or downloading them. FAC ¶¶ 21-23, 26.

Given the magnitude of the confidential business and personal information Defendants are alleged to be holding onto creates an imminent danger of extensive harm. Defendants could

simply publish out of context and falsely depict more of the stolen information or just publish personal financial and identity data.

In Francoeur's Reply at 9 n 6:

Francoeur lies that I rely on *AGT Crunch Acquisition LLC v. Bally Total Fitness Corp.*, 2008 WL 293055 (N.Y. Sup. Ct. 2008) for the proposition that merely accessing a computer or "iCloud" is sufficient to make out trespass to chattels claim. Pl.'s Mem. at 29. I use *AGT* as stated in RDH Mem at 29 for the proposition that the interference for trespass includes when "defendants copied names and addresses from a customer database, which data they then used to solicit business. Here, Defendants copied the attorney work product and used it to gain an unfair advantage in the N.Y.S. Court. Defendant Bolger relied almost exclusively on the attorney work product in oral argument before Justice Schechter on May 27, 2015. FAC ¶ 109."

Francoeur also falsely claims that *AGT* has been overturned—not according to Westlaw. Further, no subsequent cases have give it "negative treatment."

[In *Twin Sec., Inc. v. Advocate & Lichtenstein, LLP*, 113 A.D.3d 565, 565–66, 980 N.Y.S.2d 18 (2014) a spouse copied the other spouses computer data but then returned it three days later. On the trespass action, the Court found "no indication that [the value] . . . any of the information on the computer was diminished as a result of defendants duplication."

Register.com, Inc. v Verio, Inc., 126 F. Supp. 2d 238, 250 (S.D.N.Y. 2000), *aff'd in part and reversed in part on other grounds*, 356 F.3d 393 (2d Cir.2004) was cited for the holding that "Although Register.com's evidence of any burden or harm to its computer system caused by the successive queries performed by search robots is imprecise, evidence of mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels."

RDH Mem of Law at 28, 29, "Defendants interfered with my exclusive right of possession of the attorney work product and all the other materials by copying or downloading them from my iCloud or home computer without my authorization."

Intent

Trespass intent means Defendants knew their actions would interfere with my possessory rights in my computer data. Defendant Bolger clearly knew I had a home computer connected to the Internet because we communicated by email. She and Defendant Schafer also knew of the existence of my iCloud. (FAC Ex. F at 5) (illustrating how they found the iCloud address). As alleged, they also knew the home computer and iCloud were protected from public scrutiny, FAC at ¶¶ 98, 100, 101.

On information and belief, they concluded that both contained privileged and confidential digital information that could be used to demonize me in the N.Y.S. Court case in order to increase their

chances of winning as well as injure my business and disparage the services and products it offered. FAC 98.

Replevin

The problem that hamstring my Replevin allegations is that I do not know exactly what documents were stolen by Defendants and are in their possession, other than the attorney work product, which is not registered and the two screen shots of which most of the content is registered (Oral Ex. 7).

Under N.Y. Penal Code § 156.30, the theft of data through unauthorized duplication is a crime peculiar to the electronic medium. Unlike a traditional larceny—the wrongful taking and withholding of property—valued and valuable data can be taken quickly by electronic duplication without depriving the rightful owner of the data. William C. Donnino, McKinney Supplemental Practice Commentary.

Defendants are alleged to have stolen and to be in possession of my property that includes:

- financial information
- security codes
- writings
- ideas
- contacts
- photographs
- music
- videos
- emails
- attorney work product
- attorney client privileged communications

FAC ¶ 21

Preemption

Francoeur' argues that the Replevin action concerning all of the above materials that Defendants are in possession of by reproducing them without my authorization are preempted by the Copyright Act § 301. (Def. Reply at 5-6).

Francoeur only raises preemption as a defense for the Replevin action; therefore, he is barred from raising that defense for any of the other causes of action. Any defense that is available at the time of the original motion but is not included may not be the basis of a later motion. *Albany Ins. Co. v. Almacenadora Somex, S.A.*, 5 F.3d 907, 909 (5th Cir. 1993)

True to form, Francoeur prevaricates when he says, “[Federal] preemption extends to causes of action concerning unregistered works, as well as registered works.” (Def. Reply at 5). If that were true, than any document not registered with the Copyright Office or which the Copyright Office refused to registered would not allow the true owner to do anything. For example:

Attorney work product or attorney-client communication. If Copyright Law preempted any state cause of action unless registered or registration was refused, then an action under NY CPLR 3103(c) for a protection order under to suppress the wrongly obtained information would be preempted by Federal Copyright Law. Such would destroy the very purpose of confidentiality and along with it obviate CPLR 3101(b) & (c).

Bank statements produced by my bank would be preempted and Defendants could keep them to use or sell as they wished.

Security codes for the numerous websites that I like any modern day American use would continue to be held by Defendants to use or sell as they wished.

Business and personal contact information could be exploited by Defendants as it was in *AGT Crunch Acquisition LLC v Bally Total Fitness Corp.*, 2008 WL 293055 (Sup. Ct. NY Cnty. 2008), where the Court refused to dismiss a Replevin action. Defendants copied names and addresses from plaintiff's customer database, which data was then used to solicit business.

Personal and business emails by me and from others regarding various topics. Defendants could easily provide these emails to the reporter from the Murdoch newspaper in the NY Sup Ct case who writes a misandry column.

As for ideas: While a state law claim for idea appropriation will be preempted when the idea is embodied by the originator of the idea in an original work of authorship, where there is no original work of authorship and instead merely a pure, unfixed idea that is being pitched (such as, "my idea for the movie is the 'Terminator' meets 'Bedtime for Bonzo'"), there is no preemption. 6 Patry on Copyright § 18:15

According to Francoeur, Defendants have a right to continue to possess all of that data because none of it was registered.

The actual test for Copyright § 301 Preemption of state actions in this Circuit was cited and applied in *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 429 (2d Cir. 2012). [Involved state breach of contract action]

1. The work at issue "come[s] within the subject matter of copyright." "[W]orks may fall within the subject matter of copyright, and thus be subject to preemption, even if they contain material that is un-copyrightable under section 102. *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 429 (2d Cir. 2012).

And

2. No "extra element is required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action." *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 430 (2d Cir. 2012) citing *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716

(2d Cir.1992) (nonliteral elements of compatibility component of rewritten computer program were not substantially similar to copyrighted work). That is, State law claims may proceed when those claims contain “extra elements that make it qualitatively different from a copyright infringement claim.”

Applying this “extra element” test, the Second Circuit has held numerous categories of claims to be not preempted, such as

improper disclosure of confidential material with respect to trade secrets, *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 717 (2d Cir.1992),

threat to the very existence of the plaintiff's product, *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 853,

breach of confidential relationship, *Smith v. Weinstein*, 578 F.Supp. 1297, 1307 (S.D.N.Y.1984), *aff'd without opinion*, 738 F.2d 419 (2d Cir.1984).

These three sound strikingly familiar to Defendants disclosing my attorney work product, breaching privileged client communications, which in the end destroyed the value of them.

NY CPLR 7101 specifically provides for a cause of action to recover chattel. The purpose of the action in Replevin is simply to determine “which party has the ‘superior possessory right’ to the chattels” and restore the chattel wrongfully withheld. *Christie's Inc. v. Davis*, 247 F.Supp.2d 414, 419 (SDNY 2002); *Sinnott v. Feiock*, 165 N.Y. 444, 445-46 (1901). Copyright specifically protects the rights to reproduce, perform, distribute and display—not to possess.

Replevin also allows the plaintiff to utilize the services of the sheriff to repossess the chattel while the court's resolution of the ultimate right of possession was pending. Copyright does not provide for such. N.Y. C.P.L.R. 7101 *Practice Commentaries*, Vincent C. Alexander (McKinney).

Replevin is available when the defendants are in possession of certain property to which the plaintiff has a superior right of possession. *Batsidis v. Batsidis*, 9 A.D.3d 342, 343 (2d Dept. 2004). The New York Legislature has specifically protected computer data as property, *People v. Versaggi*, 83 N.Y.2d 123, 128-129 (1994).

Concerning the chattel stolen by Defendants, it is axiomatic that I have the superior right of possession to those copies or downloads.

Replevin is distinguished from conversion. Replevin is primarily recovery of possession of chattel with damages for unlawful detention while conversion only seeks damages for seizure. Carmody-Witt 2d § 82.9.

It is questionable that replevin lies where an action for conversion can be maintained, *Cutten v. Kostyrka*, 203 Misc. 940 (Sup 1952), because if no longer possesses the chattel, plaintiff does not have the option of recovering it. Conversion may lie for original

tortious taking and detention of chattel even where property returned to plaintiff, but not Replevin.

Even if the Court ignores the distinction, conversion based on physical possession and control of a copyrighted work may not be preempted because such a tort involves “acts ... qualitatively different from those proscribed by copyright law. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir.1983), *rev'd on other grounds*, 471 U.S. 539, (1985).

Copyright § 106 Exclusive rights

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Francoeur's cases:

Alexander Interactive, Inc. v. Leisure Pro Ltd., 2014 WL 4651942, at *6 (S.D.N.Y. Sept. 16, 2014) from which Francoeur intentionally prevaricates by failing to quote the entire test for preemption, deals with the NY action of unjust enrichment—not replevin.

Membler.com LLC v. Barber, 2013 WL 5348546, at *13 (E.D.N.Y. Sept. 23, 2013), actually holds that “to the extent that Plaintiff seeks relief for Defendants' retention of the work on the hard drive, it is not preempted.” Here, the Replevin action seeks return of all the material retained by Defendants.

CA, Inc. v. Rocket Software, Inc., 579 F. Supp. 2d 355, 366-67 (E.D.N.Y. 2008) the Court held that plaintiff's conversion claim depended on the same material present in the plaintiff's Copyright Act claims, so it was preempted. Here, the replevin claim is for materials separate from those registered with the Copyright Office.

As for trespass, Francoeur has not raised preemption on that issue; therefore, it is waived.

Rocket Software also included an unjust enrichment claim that the Court did not preempt because the “Court is without sufficient information to make a determination as to whether that portion of the claim is ‘qualitatively different’ from the plaintiffs' copyright claim.” *Id.* at 371. Just like here.

Copyright preemption

Section 301 of the Copyright Act expressly preempts a state law claim only if (i) the work at issue “come[s] within the subject matter of copyright” and (ii) the right being asserted is “equivalent to any of the exclusive rights within the general scope of copyright.” 17 U.S.C. § 301(b); see *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 892 (2d Cir.2011).

The Copyright Act preempts a state law claim when: “(1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103 [compilation or derivative works], and (2) the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106.” *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004). State law claims may proceed only if those claims contain “extra elements that make it qualitatively different from a copyright infringement claim.” *Id.*

Where a state claim is asserted with respect to subject matter not “encompassed” within the Copyright Act, there is no statutory preemption regardless of whether the rights asserted are equivalent to those granted in Section 106.

The factual content of the book did not remove the work as a whole (indisputably a literary work of authorship, see § 102(a)(1)) from the subject matter of copyright. *Harper & Row*, 723 F.2d at 200; see also *Barclays Capital*, 650 F.3d at 892, 902. Similarly, in *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296 (2d Cir.2004), we held that a novel fell within “the broad ambit of the subject matter categories” listed in section 102(a) despite containing uncopyrightable ideas. *Id.* at 306. *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 429 (2d Cir. 2012)).

While not protected by copyright a work might be considered within the subject matter of copyright. That does not, on its own, mean that a state claim concerning the work is preempted. The state law must also seek to protect rights equivalent to those “within the general scope of copyright.” 17 U.S.C. § 301. This is determined by the “extra elements” test, which looks at whether “one or more qualitatively different elements are required to constitute the state-created cause of action being asserted.” If so, the state law protects rights different than those that the Copyright Act protects and there is no preemption. 6 Patry on Copyright § 18:15

Computer Fraud and Abuse Act of 1986

The elements for a civil action under the Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. § 1030(a)(2)(C), are

1. accessing without authorization a computer that is used in interstate or foreign commerce
2. obtaining information there from, and
3. causing loss—in this case loss, not damages.

1. Hacking-unauthorized access

The only places the attorney work product and other materials existed from which Defendants could have been acquired via the Internet were my iCloud and home computer.

iCloud

Defendants hacking of iCloud alleged in FAC ¶¶ 4, 21, 30, 31, 57, 65, 100-102, 104.

Bolger claims to have accessed my iCloud 12/30/14 to 1/13/15. (Def. Mem. Ex. S, Dkt. 35). Schafer claims to have accessed my iCloud from 12/30/14 to 1/12/15. (Def. Mem. Ex. T, Dkt. 35).

Defendants swear they had authorization when they accessed my iCloud because it was public. (Def. Mem. Ex. S, T). I, however, swear that both my iCloud and home computer were not publicly available. (FAC ¶¶ 4, 100).

So it's a tossup over the iCloud and the only way to resolve it is through discovery.

One avenue of discovery is that Defendants Bolger and Schafer's Internet Service Provider ("ISP") will have tracked their Internet Protocol ("IP"), or computer address, when they used the Internet. Their ISP logs will show when Bolger and Schafer contacted my iCloud or home computer and how many times. If they lied as to when they contacted my iCloud or home computer, then they probably lied as to their hacking.

Another avenue is an expert's deposition, perhaps:

Joseph Steinberg, 2014 article for Forbes on hacked photos of Hollywood starlets. Covers cyber security and entrepreneurship has SecureMySocial company for protecting information on the Internet.

Kali Starkson security consultant for SiteLock, which protects against unauthorized access.

Defendants hacked by Brute Force or Phishing.

"Brute force" is a trial and error method in which a computer program repetitively tries different codes.

"Phishing" is when a person opens an email and clicks on a link or document in the email. During the NY Sup Ct case I often opened emails from Bolger and click on a document if one was included. That would allow the installation of malware that would revealed my iCloud's access codes.

Brute Force and Phishing do not exploit a host's security vulnerability and a host would not even be aware of such unauthorized access, as was my host, whom I contacted twice by telephone shortly after I learned on 1/12/15 that my iCloud was hacked. The next day I filed the Order to Show Cause, 1/13/15.

Enamestation, my host, stated it did not have access logs, so there was no way to find out if someone accessed my site who should not have by using Brute Force or Phishing.

European Union has a law that requires recording of every computer that accesses or tries to access an iCloud. These are called access logs—US did not have such a law in 2014-15.

There are private companies that provide such service, but I did not have one when Bolger and Schafer hacked my computer.

One such company is Site Lock, which I subsequently contacted:

My name is Kali Starkson and I am a website security consultant at SiteLock. I received the ticket you submitted wondering if we could see where the attacks are coming from. With [access log] services we can determine what type of attempt came from where and what IP. But we can not pinpoint after its been done who has gotten in and what they have changed.

[However, even with access logs, if the attack came from a public wifi, it will not show the IP address for attacking computer—just the public wifi address.]

Home computer

Defendants hacking of my home computer is alleged in FAC ¶¶ 4, 22, 30, 31, 58, 63, 100 -102, 104.

Francoeur's only challenge to these allegations is the conclusory allegation that they are speculative. (Def. Mem. at 15; Def. Reply at 4).

2. Obtaining information from my iCloud or home computer

Defendants' affidavits admit obtaining the attorney work product and two screenshots from my iCloud. The only way the screenshots could have existed is by Defendants stripping my iCloud's access codes. (FAC ¶ 8).

They could have also obtained the substance of the screenshots from my home computer.

The FAC ¶¶ 21-23, 26, also alleges Defendants obtained all or most of the information on my iCloud or home computer. But the only way to determine that is through discovery, which this Court and Defendants have denied.

Losses NOT damages

In order to cover up his legal mistake in failing to understand the distinction between losses and damages in the CFAA, Francoeur now lies in his Reply at 6, Dkt. 38 by saying his Mem. at 20 did object to RDH alleging "damages" but losses.

In his Mem at 19-20, Francoeur said:

“Specifically, Den Hollander fails to allege that he spent any time remedying any alleged damage to his "iCloud" or his data as is required to plead a sustainable CFAA claim.” (Def. Mem at 19).

“Den Hollander also alleges that he conducted "extensive searching" on the internet in order to determine how Defendants "hacked" his computer and obtained the Document. FAC ¶ 28-29, 31. But these allegations—amounting to little more than "Googling"—do not constitute an assessment of damage to his computer or its data, and thus are not compensable losses under the CFAA.” (Def. Mem at 20).

“Plaintiff's CFAA claim should be dismissed for failure to plead the requisite damages.” (Def. Mem at 20).

The FAC does not allege violation of 18 U.S.C. § 1030(a)(5)(B), which is what Francoeur quotes as requiring that unauthorized access “recklessly causes *damage*.” (Def. Mem. at 19, Francoeur’s emphasis). Having been caught in his sleight of hand of falsely claiming that I alleged “damages” rather than losses, Francoeur now acts as though he alleged all along that my FAC did not claim “losses.”

Damages

Under 18 U.S.C. § 1030(e)(8), “the term ‘damage’ means any impairment to the integrity or availability of data, a program, a system, or information.” Damage focuses on the actual harm caused to a machine, software or content. Includes deletion, destructin or corruption of electronic files. *E-Commerce & Internet Law* § 44.08(1), 44-132.

Copying data does not equal damage, *E-Commerce & Internet Law* § 44.08(1), 44-133, *e.g. NetApp, Inc. v. Nimble Storage, Inc.*, 2015 WL 400251, at *14 (N.D. Cal. Jan. 29, 2015), which is why Francoeur alleges that I am claiming “damage[s]” rather than losses and relies on cases from Courts that confuse the terms loss and damage by construing different statutory provisions of CFAA. *E-Commerce & Internet Law* § 44.08(1), 44-135.

Damages are required for a civil action under 1030(a)(5)(A), 1030(a)(5)(B), 1030(a)(7)(A), 1030(a)(7)(C), 1030(c)(4)(A)(i)(V), 1030(c)(4)(A)(i)(VI).

Damage and Loss under 1030(a)(5)(C).

This case alleges violation of 18 U.S.C. § 1030(a)(2)(C) (FAC ¶ 1a.)—not § 1030(a)(5)(B) as Francoeur falsely says. (Def. Mem. at 19).

§ 1030(a)(2)(C) violation occurs when without authorization a party obtains information from a computer used in interstate commerce—for which there is a civil action under 18 U.S.C. 1030(g). 1030(g) states “A civil action for a

violation of this section may be brought only if the conduct involves 1 of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i). This case only alleges a of violation of subsection (c)(4)(A)(i)(I), which is limited to economic losses.

This case does not involve damage as defined in § 1030(e)(8).

Losses

Under 18 U.S.C. § 1030(e)(11), “the term ‘loss’ means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data . . . or information to its condition prior to the offense”

Loss includes time and expenses in analyzing, investigating, assessing security of a computer, modifying computers to prevent further unauthorized access, and otherwise responding to the intrusion.

e.g., *A.V. v. iParadigms, LLC*, 562 F.3d 630, 645-646 (4th Cir. 2009) (district court wrongly excluded from consideration the costs of investigation undertaken by iParadigms to determine to determine how A.V. gained access to its site;

Facebook, Inc. v. Power Ventures, Inc., 844 F.3d 1058, 1066 (9th Cir. 2016) (plaintiff spent hours analyzing, investigating, and responding to defendant’s actions).

“The term ‘loss’ encompasses only two types of harm: costs to investigate and respond to a computer intrusion, and costs associated with a service interruption. *See Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F.Supp.2d 468, 472 (S.D.N.Y.2004), *aff’d*, 166 Fed.Appx. 559, 562–63 (2d Cir.2006).” *Quantlab Techs. Ltd. (BVI) v. Godlevsky*, 719 F. Supp. 2d 766, 776 (S.D. Tex. 2010)

Here there was no service interruption.

Lost revenue recoverable only when it results from interruption of services. *Nexans Wires S.A. v. Sark-USA, Inc.*, 166 F.Appx 559, 562-563 (2d Cir. 2006). FAC ¶ 121 about loss of one client does not apply to the CFAA action.

Based on the plain language of the CFAA, the Court concluded that a plaintiff can satisfy the CFAA's definition of loss by alleging costs reasonably incurred in responding to an alleged CFAA offense, even if the alleged offense ultimately is found to have caused no damage to the computer, data, data bases or interruption of service. *Navistar, Inc. v. New Baltimore Garage, Inc.*, 2012 WL 4338816, at *8 (N.D. Ill. Sept. 20, 2012)

“The CFAA allows recovery for losses sustained even if data or computers were not damaged.” *1st Rate Mortg. Corp. v. Vision Mortg. Servs. Corp.*, 2011 WL 666088, at *2 (E.D.Wis. Feb.15, 2011).

Allegations of loss related to security assessments are sufficient to allege loss for purposes of the CFAA. Plaintiffs have stated a CFAA claim by alleging that they incurred costs in investigating

an alleged CFAA offense. *Motorola, Inc. v. Lemko Corp.*, 609 F.Supp.2d 760, 768 (N.D.Ill. Feb.11, 2009)

Loss included the cost of performing a forensic investigation to determine what information may have been deleted from computer. *Lasco Foods, Inc. v. Hall*, 600 F.Supp2d 1045 (ED Mo 2009).

Held that the time and resources spent to research and assess the unauthorized transmission of confidential and proprietary information are costs explicitly identified in the CFAA's definition of "loss". *Dudick, ex rel. Susquehanna Precision, Inc. v. Vaccaro*, 2007 WL 1847435, *5 (M.D.Pa.2007).

Losses in excess of \$5,000.00, including but not limited to losses sustained in responding to defendants' actions, investigating defendants' actions and taking remedial steps to prevent defendants' further actions are explicitly identified in the CFAA's definition of "loss." See 18 U.S.C. § 1030(e)(11). *P.C. of Yonkers, Inc. v. Celebrations! The Party And Seasonal Superstore, L.L.C.*, 2007 WL 708978, at *5 (D.N.J. Mar. 5, 2007).

Even though an intruder neither damages the computer nor its information, her conduct allows the intruder to accumulate valid user passwords to the system, requires all system users to change their passwords, and requires the system administrator to devote resources to re-securing the system. Thus, although there is arguably no "damage," the victim does suffer "loss." If the loss to the victim meets the required monetary threshold, the conduct should be criminal, and the victim should be entitled to relief. S.Rep. No. 104-357, at 11 (1996).

Id.

The costs of responding to the offense are recoverable regardless of whether there is an interruption in service, and federal courts have sustained actions based on allegations of costs to investigate and take remedial steps in response to a defendant's misappropriation of data. *P.C. Yonkers, Inc. v. Celebrations! The Party and Seasonal Superstore, L.L.C.* 2007 WL 708978 (D.N.J.)

Time spent by plaintiff's President assessing the integrity of its computers counted toward the \$5,000 threshold to extent not part of litigation. *Health Care Advocates v. Harding*, 497 F.Supp2d 627 (E.D. Pa. 2007).

The cost involved in investigating hacking and unauthorized access, investigating the damage, and revealing the unauthorized invasion constitutes "loss" as defined by the CFAA. *Kaufman v. Nest Seekers, LLC*, 2006 WL 2807177, *8 (S.D.N.Y.2006).

CFAA claim was properly stated where a former consultant accessed copyrighted materials while still an employee of the consulting firm to be used for his personal benefit. *George S. May Int'l Co. v. Hostetler*, 2004 U.S. Dist. Lexis 9740 (N.D.Ill.2004)

Finding that the “loss” suffered by plaintiffs, in having to expend substantial sums to assess whether there was any physical damage to their website, is not lessened simply because no damage occurred. *E.F. Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577, 585 (1st Cir. 2001).

Money spent modifying computers to prevent further unauthorized intrusions. *Shugard Storage Centers v. Safeguard Self Storage*, 119 F.Supp2d 1121 (W.D. Wash. 2000).

As alleged in the FAC ¶¶ 28-33, 141-143, my investigation determined whether the work product existed in the filings of the N.Y.S. Court case or in some other publicly available case; determined whether the work product existed somewhere on the Internet; went through my entire iCloud and home computer to determine whether Defendants had deleted or modified any data; researched possible means by which Defendants broke-in; and contacted the host of my iCloud. After concluding that Defendants likely used “brute force cracking” on my iCloud or “phishing” on my home computer, I researched methods to prevent such in the future and instituted more costly security precautions. All my investigating, analyzing, assessing security of the computers, modifying the computers and responding to the intrusion cost me over \$5,000 over a one year period of \$5,000 or more as required by 18 U.S.C. 1030(g). The FAC does not allege damages, but does allege investigating whether damages had occurred to my data.

Such amounts to much more than “Googling” as Francoeur dissemblingly says. (Def. Mem at 20).

Francoeur dissembling about the cases he cites (Def. Reply at 6):

In *Reis, Inc. v. Spring11 LLC*, 2016 WL 5390896, at *9 (S.D.N.Y. Sept. 26, 2016), the Court did not hold that loss is construed narrowly as Francoeur falsely says. It dismissed the CFAA action because “Plaintiffs’ costs stem from their efforts to identify those who had obtained unauthorized access to the Reis Database, and not from any effort to investigate damage done to Reis computer systems or the Reis Database. . . . Costs associated with locating and collecting information about the hacker are not recoverable under the CFAA.”

Here, the FAC does not allege costs for identifying the Defendants.

B. USA, Corp, v. Ecogloves, Inc., 2009 WL 3076042, at *5-6 (S.D.N.Y. 2009), was a summary judgment action and the Court found that the evidence Plaintiff presented that the Defendant had exceeded her authorization in accessing data was insufficient and that the evidence of plaintiffs’ losses did not amount to \$5,000. “Plaintiffs have failed to marshal admissible evidence that would show that they have met the jurisdictional threshold” of \$5,000.

The action here is not a Summary Judgment Motion but a Motion to Dismiss the Complaint under FRCP 12(b)(6). Pleading evidence in the complaint is unnecessary and against the policy of Rule 8. *Geisler v. Petrocelli*, 616 F.2d 636, 640 (2d Cir. 1980)

Nexans Wires S.A. v. Sark- USA, Inc., 319 F. Supp. 2d 468, 476 (S.D.N.Y. 2004), was another motion for summary judgment. The Court found that Plaintiffs' affidavits were insufficient to show that travel costs were related to responding to the alleged CFAA offenses. Further, Court relied on *In re DoubleClick Inc. Privacy Litigation*, 154 F.Supp.2d 497 (S.D.N.Y.2001), which was decided on old version of statute before current definitions for loss and damages were included. *Nexans Wires* at 474

The action here is not a Summary Judgment Motion but a Motion to Dismiss the Complaint under FRCP 12(b)(6). Pleading evidence in the complaint is unnecessary and against the policy of Rule 8. *Geisler v. Petrocelli*, 616 F.2d 636, 640 (2d Cir. 1980)

Tyco Int'l (US) Inc, v. Does, 2003 WL 21638205, at *1-2 (S.D.N.Y. 2003). In a default judgment, Tyco was required to submit evidence for its claim compensatory damages of trying to determine who hacked into its email server. The Court "considered whether the cost of investigating the identity of a computer hacker could constitute compensatory damages under the CFAA. . . . [T]he court was clearly calculating damages, rather than determining "loss" for purposes of standing." *Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F. Supp. 2d 468, 475 (S.D.N.Y. 2004), *aff'd*, 166 F. App'x 559 (2d Cir. 2006). Tyco's investigative costs would be compensable only if the investigation was necessary in order to reveal the actionable activity—not track down the identity of the hacker. *Id.* at 3. The Court required Tyco to quantify costs beyond identifying the hacker.

Int'l Chauffeured Serv, v. Fast Operating Corp., 2012 WL 1279825, at *3_4 (S.D.N.Y. 2012), the Court found that the cost of the investigation into the hack did not amount to the threshold of \$5,000.

[*Del Monte Fresh Produce, N.A., Inc. v. Chiquita Brands Int'l Inc.*, 616 F.Supp.2d 805, 811 (N.D.Ill. Mar.19, 2009). "Just because plaintiff alleges it paid for a damage assessment does not make it so." Summary judgment action and plaintiff did not provide evidence of damage assessment by intrusion." In case Franco reaises case]

No preemption: Congress did not make the CFAA the exclusive law governing computer crimes. *United States v. Riggs*, 739 F. Supp. 414, 423 (N.D. Ill. 1990).

The CFAA may supplement oterh state and Federal causes of action for electronic theft and misappropriation. *E-Commerce & Internet Law* § 44.08(1), 44-138.

Civil RICO

No attorney immunity from RICO

Francoeur's lying has really gotten out of hand, and I request that this Court admonish him for such.

In his Reply at 7, Francoeur says that I “contend[] that ‘courts disagree’ as to whether normal litigation activities cannot be the basis of a RICO claim. [Citing] Pl.’s Mem. at 22-23.”

That is blatantly and intentionally false. The word “normal” does not appear in either my FAC or Opposition and Francoeur knows that. He intentionally tries to deceive this Court by claiming that I allege Defendants were engaging in “normal litigation activities.” That is false, unless in Francoeur’s world of litigation by deception, perjury, theft and wire fraud are “normal litigation activities.”

Litigation activities can be the bases for the RICO predicate act of wire fraud.

In *Feld Entertainment Inc. v. American Society for the Prevention of Cruelty to Animals*, 873 F.Supp.2d 288, 318-319 (D.D.C. 2012), the court refused to dismiss the RICO case based on attorney misconduct. In *Handeem v. Lemaire*, 112 F.3d 1339, 1349 (8th Cir. 1997), the court stated that “An attorney’s license is not an invitation to engage in racketeering, and a lawyer no less than anyone else is bound by generally applicable legislative enactments. Neither *Reves v. Ernst & Young*, 507 U.S. 170 (1993), nor RICO itself exempts professionals . . . from the law’s proscriptions, and the fact that a defendant has the good fortune to possess the title ‘attorney at law’ is, standing alone, completely irrelevant to the analysis dictated by the Supreme Court [in *Reves*].”

Francoeur uses an out of context quote from *Handeem* that “performing ordinary legal tasks” is unlikely to expose an attorney to RICO liability. He clearly intentionally took the quote out of context to invent a generalization to support his attorney immunity.

The context of the quote shows that the Court was not supporting Francoeur’s made up immunity but that for a lawyer to be liable under RICO required satisfaction of the element of “playing a part in the direction of the enterprises affairs,” which the FAC alleges for the Defendants here, FAC ¶¶ 77-87.

“Appreciation for the unremarkable notion that the operation or management test does not reach persons who perform routine services for an enterprise should not, however, be mistaken for an absolute edict that an attorney who associates with an enterprise can never be liable under RICO. An attorney’s license is not an invitation to engage in racketeering, and a lawyer no less than anyone else is bound by generally applicable legislative enactments. Neither *Reves* nor RICO itself exempts professionals, as a class, from the law’s proscriptions, and the fact that a defendant has the good fortune to possess the title “attorney at law” is, standing alone, completely irrelevant to the analysis dictated by the Supreme Court.¹² It is a good thing, we are sure, that we find it extremely difficult to fathom any scenario in which an attorney might expose himself to RICO liability by offering conventional advice to a client or performing ordinary legal tasks (that is, by acting like an attorney). [Francoeur’s out of context quote] This result, however, is not compelled by the fact that the person happens to be a lawyer, but for the reason that these actions do not entail the operation or management of an enterprise.” *Handeem v. Lemaire*, 112 F.3d 1339, 1349 (8th Cir. 1997)

Defendants Bolger and Schafer communicated the fraud over the wire three times to the *N.Y. Supreme WebCivil* site. (FAC ¶ 48).

On information and belief, they also communicated the attorney work product and their misrepresentations about it over the wires to their clients in furtherance of their scheme.

Wire fraud need only be in furtherance of a scheme, since “it is sufficient . . . to be ‘incident to an essential part of the scheme . . . or a step in the plot’.” *Schmuck v. U.S.*, 489 U.S. 705, 710-711 (1989) (citations omitted).

Francoeur relies on malicious prosecution and abuse of process cases to assert that litigation activities can never form the basis for the RICO predicate act of wire fraud. True to his litigation trickery, he fails to cite to cases that have found that alleged mail and wire fraud violations in such cases can be RICO predicate acts when there is more than just allegations of malicious prosecution or abuse of process.

U.S. v. Eisen, 974 F.2d 246, 254 (2d Cir. n1992), involved mail fraud violations arising out of a scheme by a law firm to deprive civil defendants and their liability insurers of money through perjury. The Second Circuit noted:

[T]here is some tension between the congressional decision to include federal mail [wire] fraud as a predicate offense and to exclude perjury, whether in violation of federal or state law. . . . [However, where] a fraudulent scheme falls within the scope of the federal mail [wire] fraud statute and the other elements of RICO are established, use of the mail [wire] fraud offense as a RICO predicate act cannot be suspended simply because perjury is part of the means for perpetrating the fraud. We do not doubt that where a series of related state court perjuries occurs, it will often be possible to allege and prove both a scheme to defraud within the meaning of the mail [wire] fraud statute as well as the elements of a RICO violation.

Francoeur’s clients are accused of doing exactly that. FAC ¶¶ 1g., 43-54, 136.

Francoeur pulls his usual prevarication and misrepresentation in his Reply at 7 n.5 quote “Eisen did not reach the issue here regarding whether litigation activities alone can suffice as RICO predicate acts of mail and wire fraud.” *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153 (E.D.N.Y. 2010), *aff’d sub nom. Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App’x 582 (2d Cir. 2011):

1. Francoeur intentionally failed to say that the Curtis Court found that “despite plaintiffs’ creative attempts to plead mail and wire fraud, the court finds that plaintiffs’ incomplete allegations at best attempt to make out a malicious prosecution claim. . . . [W]ithout more, [such] cannot constitute a viable RICO predicate act.” *Id.* 172.

2. Francoeur tries to again claim that the FAC only alleges Defendant’s were engaged in ordinary litigation activities. But as *Eisen* found, “where a series of

related state court perjuries occurs, it will often be possible to allege and prove both a scheme to defraud within the meaning of the mail [wire] fraud statute as well as the elements of a RICO violation.” *Eisen* at 254.

In *Lemelson v. Wang Laboratories Inc.*, 874 F.Supp. 430, 434 (D.Mass.1994), mail and wire fraud violations involving extortion and fraudulently obtaining patents through a pattern of litigation were RICO predicate acts.

In *Hall American Center Assoc. L.P. v. Dick*, 726 F.Supp. 1083, 1097 (E.D.Mich. 1989), allegations that defendants engaged in filing fraudulent litigation as part of a larger scheme were sufficient to be considered RICO predicate acts. The court found that lawsuits can be a component of a predicate act.

In *U.S. v. Paccione*, 751 F. Supp. 368, 372 (S.D.N.Y. 1990), aff’d, 949 F.2d 1183 (2d Cir. 1991), defendants were liable for mail fraud stemming from fraudulent statements given to the N.Y.S. Department of Environmental Conservation—a state government organization as is the NY Sup Ct—in order to obtain a permit to transport medical waste. Here, as part of an extensive scheme to destroy my business and advocacy for men’s rights, Defendants provided not just the N.Y.S. Court but the public at large fraudulent statements that the privileged attorney work product was a press release issued by me.

If such criminal conduct as that of Defendants Bolger and Schafer cannot be reached by wire fraud, then in this Internet age, any attorney can make up any outrageous lie, communicate it to his clients over the wires for their approval, and not only win an action, hammer an opponent into submission but also destroy an opponent’s business by broadcasting such a lie over a publicly available court website. FAC 56.

Francoeur cases in his Reply at 7 do not find that there exists a lawyer immunity to RICO:

Singh v. NYCTL 2009-A Tr., 2016 WL 3962009, at *8 (S.D.N.Y. July 20, 2016), aff’d, 683 F. App’x 76 (2d Cir. 2017), the Court held that RICO claims were not based on the legal positions taken by litigation adversaries in settlement talks. The complaint did not plausibly suggest that Defendants knowingly or intentionally misinterpreted New York law with the specific intent of harming Plaintiff when Defendants mistakenly told Plaintiff they had a right to collect attorneys’ fees and costs.

Estate of Izzo v. Vanguard Funding, LLC, 2017 WL 1194464, at *12 (E.D.N.Y. Mar. 30, 2017), the Court dismissed the Civil RICO action because that while the Plaintiffs’ allegations of fraudulent state court litigation may have merit, there was already an ongoing Foreclosure Action in State court entertaining the same allegations as in the Federal Court and that was the proper vehicle for relief.

Wire fraud under 18 U.S.C. § 1343

Francoeur argues there was no fraud. (Def. Reply at 8).

Wire fraud under Civil RICO requires:

1. A scheme or artifice to defraud by means of false pretenses or representations. Hon. Jed S. Rakoff, SDNY Judge & Howard w. Goldstein, *RICO Civil and Criminal Law Strategy*, § 2.01, 2-15, Law Journal Press (2017).

According to Judge Rakoff a “scheme or artifice to defraud” “include essentially any trickery, deceit, half-truth, . . . or affirmative misrepresentation and is interpreted broadly by the courts. *Id.*”

So what did Defendant Bolger do?

She introduced the attorney work product in her Affirmation in Opposition to my motion for immediate trial on personal jurisdiction as a “Media Release.” (Def. Mem Ex. K, Oral Ex. 8). On the first page of her Affirmation she slated the work product as Ex. 1 and swore: “A true and correct copy of the “Media Release” [that’s an exact quote] available at Plaintiff’s MR Legal Fund website, http://www.mensrightslaw.net/main/DownUnder/Press_Responses.pdf, is attached hereto as Exhibit 1.” She swore under “penalty of perjury pursuant to CPLR 2106” that it was a “Media Release.”

In her Mem of Law at 5 (FAC Ex. E, Oral Ex. 9) she mentioned the attorney work product had the title of “Responses to Media,” but cited to it in her Affirmation at page 1 and Exhibit 1 “Bolger Aff., Ex. 1 at 1 (“Release”)” which classified it as a “Media Release,” and in her Mem of Law attached the short hand moniker “Release” with a capital R

Bolger continued to use the term “Release” with a capital “R” in her Mem of Law at 9, 17. At 18, she referred to the attorney work product again as “Media Release” with capitals M & R and followed that cite with “Release” capitalized four times. At 19 she used Release once again.

So in her papers, Bolger mentioned the title of the document but swore it was a “Media Release” and called it a “Media Release” or for short a “Release” nine times in her Mem of Law.

Half-truth means a partially true statement meant to deceive. *Webster’s Third New International Dictionary* (1993). Bolger referred to the attorney work product 10 times as a Media Release but only once by its title “Responses to Media.” So Bolger’s truth isn’t a half truth but a one eleventh truth.

Deceit means a knowing or recklessly made false statement with the intent that someone else will act on it. *Black’s Law Dictionary*. Ten out of eleven times Bolger made a false statement about what the attorney work product exactly was. If she did not do it knowingly, it was clearly reckless.

Trickery means the use of subterfuge or stratagems [ability to devise cunning plans to achieve an end] to deceive. *Blacks' Law Dictionary*.

Bolger is not a fresh-minted law school graduate.

As her attorney Francoeur wrote “Ms. Bolger is an accomplished litigator and a partner [at a major law firm], in addition to an adjunct faculty member at Fordham Law. She has been recognized by Chambers & Partners as a leading media lawyer nationwide and by Best Lawyers as one of the preeminent media lawyers in New York.” (Def. Mem. at 4).

Such means that Bolger knew exactly what she was doing when referring to the attorney work product as a “Media Release.” She clearly wrote her Affirmation and Mem of Law in the NY Sup Ct case (Oral Ex. 8 & 9) so that a once read through would leave the reader whether the Court or public with the belief that the attorney work product was a “Media Release.”

That was the key to Bolger’s scheme. (FAC ¶¶ 52-54)

- a. To deceive viewers of the publicly available WebCivil Supreme website into believing that Plaintiff’s business and the services it provided, both legal and consulting, were inept because they not only made confidential and privilege information public but actually released such to the press.
- b. To use her perjury as a step in the plot to save her clients money by deceiving the N.Y. Supreme Court into ruling in their favor and to avoid continuing costly litigation by intimidating Plaintiff into giving up his action.
- c. To intimidate me that she or her misandry client-reporter Tory Shepherd will publicize the stolen materials from Plaintiff’s iCloud or home computer and continue to deceive the public concerning those materials so as to completely destroy Plaintiff’s business.
- d. Defendants also made the false representations to hide the fact that the stolen document was attorney work product and their use of such was unprofessional conduct. “Here [was] simply an attempt, without purported necessity or justification, to [exploit] written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties. . . . Not even the most liberal of . . . theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.” *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

[Other Wire fraud elements:

causing such misrepresentations to be transmitted or making a communication in furtherance of the scheme by wire, radio or television communication in interstate or foreign commerce; and intentionally devising, participating in, or abetting such a scheme, which is inferred by a person’s pattern of conduct and the nature of the scheme.]

Robbery predicate act

N.Y. Penal Code § 156.30 prohibits theft of computer related material. It is a Class E felony—punishable by more than one year.

Under 18 U.S.C. § 1961(A) “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical, which is chargeable under State law and punishable by imprisonment for more than one year” is a predicate act.

In *United States v. Forsythe*, 560 F.2d 1127, 1137 (3d Cir. 1977), the Court of Appeals pointed out that state offenses which involved the generic meaning of the crimes listed in 18 U.S.C. § 1961(A) were predicate acts.

“The legislative history of 18 U.S.C. s 1961(1)(A) specifically states that “State offenses are included by generic designation.” This statement manifests the legislative intent to incorporate the Supreme Court's holding in *United States v. Nardello*, 393 U.S. 286 (1969), into the RICO statute. *Nardello* stands for the proposition that alleging a state violation which falls within the generic category of the predicate offense is adequate to charge a violation of the Travel Act.” *Id.*

“The test for determining whether the charged acts fit into the generic category of the predicate offense is whether the indictment charges a type of activity generally known or characterized in the proscribed category” *ID.*

Simple theft under Federal Law, 18 USC § 2111 is a lesser offense included in the offense of robbery. *United States v. Walking Crow*, 560 F.2d 386, 388 (8th Cir. 1977), so it fits into the proscribed category.

Under N.Y. Penal Code § 156.30, the theft of data through unauthorized duplication is a crime peculiar to the electronic medium. Unlike a traditional larceny—the wrongful taking and withholding of property—valued and valuable data can be taken quickly by electronic duplication without depriving the rightful owner of the data. William C. Donnino, McKinney Supplemental Practice Commentary.

Francoeur’s Reply at 8 relies on the same argument from his Mem of Law at 24 with the only difference that he falsely asserts that “If and only if the state law crime is substantively equivalent to a predicate act” of robbery for which he cites “*See, e.g., United States v. Forsyth*, 560 F.2d 1127, 1137 (3rd Cir. 1977).”

Forsythe does not hold that. The words “substantially equivalent” cannot be found in the opinion.

Additionally, Francoeur’s use of the Blue Book signal “*e.g.*” which means there are other case holding his assertion, is just another one of his falsehood. There are no other cases because if there were, he would have cited them.

Forsythe also relied on the *Nardello* Court when it held that “. . . the inquiry is not the manner in which States classify their criminal prohibitions but whether the particular state involved prohibits the . . . activity charged. 393 U.S. at 295.”

N.Y. Penal Code § 156.30 prohibited the theft of material from my iCloud or home computer.

Francoeur wrongly asserts that just because NY specifically defines robbery as involving force, it means that robbery as used in the RICO statute does not include theft of electronic data.

Francoeur relies on two EDNY cases *Naples v. Stefanelli*, 2015 WL 541489, at *9 (E.D.N.Y. Feb. 7, 2015) and *Wood v. Inc. Vill. of Patchogue of New York*, 311 F. Supp. 2d 344 (E.D.N.Y. 2004) but those cases wrongly found that robbery under RICO is defined by state law. The Supreme Court in *Nardello* on which the Third Circuit relied in *Forsythe* disagrees.

Open-ended pattern

The FAC alleges that Defendants will continue trying to steal any “new information stored” on my iCloud or home computer. FAC ¶ 75. Further, the FAC at ¶¶ 24 & 143 alleges that Defendants will use the information already stolen in any way possible to destroy my business and my men’s rights advocacy.

Conspiracy

There are no allegations of a RICO conspiracy, nor is LSKS as a defendant or co-conspirator.

Enterprise

Levine Sullivan Koch & Schulz, LLP, the law firm at which Bolger and Schafer worked at the time. Only the Defendants violated 18 U.S.C. § 1962(c) not the law firm. FAC ¶¶ 36-40, 77-88.

Coercion

Francoeur failed to address in his papers the coercion allegation at FAC ¶¶ 110, 111; therefore, Defendants’ waived their opposition and it is presumed true.

Defendants filed their false claim about the attorney work and to intimidate me into giving up my action. In making the attorney work product public, defendants were also telling me that they will continue to publicize the materials they likely stole from my iCloud, or home computer, through their Murdoch client’s Internet news sites and continue to deceive the public concerning those materials so as to destroy my livelihood and my role as a men’s rights advocate.

By retaining materials other than the attorney work product from my iCloud or home computer, Defendants are engaging in coercion in the second degree under N.Y. Penal Law § 135.60(5)

because their possession of my personal and business data amounts to a continuing threat to expose secrets or publicize asserted facts, whether true or false, tending to subject me and my business to hatred, contempt or ridicule.

RDH May 10, 2017, to the Court on Defendants' attempted coercion:

In response to my raising the issue of an early discovery dispute under Your Honor's Individual Rules & Practices in Civil Cases ¶ 3 and Fed. R. Civ. P. 26(d)(1), (May 8, 2017, Letter Motion Dkt. 27), Defendants' attorney Joseph L. Francoeur sent me a threatening letter trying to coerce me into withdrawing that Letter Motion.

It's important to note that one of the key allegations in this case is that Defendants copied or download most and probably all of my iCloud. (First Amended Complaint ¶¶ 21 & 23). The iCloud contained privileged and confidential matters related to my law practice and personal life, which places Defendants, and now Francoeur, in a unique position of power over the survival of my law practice. All they need do in typical neo-McCarthyite-PC fashion is release selective information out of context with false or dissembling interpretations, and I'm back to driving a taxi. (First Amended Complaint ¶ 24).

Francoeur's threatening letter (Exhibit A [May 8, 2017 letter]) is logically read with the knowledge that Defendants and he have access to what was stolen from my iCloud. With that in mind plus the real world inference that winning is everything with most defense lawyers, makes Francoeur's words menacing, intimidating and bullying. His message is simple—unless I do what he says in this case, he will use the confidential information from my iCloud to depict me as a demon out of the TV show "Supernatural" to not only win this case but further harm my practice.

Francoeur wrote in part:

"We are writing to demand that you immediately withdraw you Letter Motion to the Court dated May 8, 2017 (Dkt. 27, Att. 2) If you fail to do so, we reserve the right to seek all appropriate relief from the Court."

By using "we" in his letter, Francoeur is clearly referring to his clients who possess the information from my iCloud. His words clearly verbalize the threat that he and they are willing to use that information in this Court to make their prevaricating and dissembling smears public and hopefully win this case.

Francoeur and Defendants have essentially engaged in coercion in the second degree, N.Y. Penal Law § 135.60(5), by threatening to expose secrets or publicize asserted facts, whether true or false, tending to subject my business to hatred, contempt or ridicule—a class A misdemeanor.

I, therefore, request that Francoeur and Defendants be restrained from using the information from my iCloud for *ad hominem* attacks and irrelevant accusatory

Other wrong doings

Francoeur does not even address these allegations; therefore, they are deemed admitted:

N.Y. Rule of Professional Misconduct 4.1: In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

N.Y. Judiciary Law § 90(4)(e): For purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state or any criminal offense committed in any other state, district, or territory of the United States and classified as a felony therein which if committed within this state, would constitute a felony in this state.

Defendants violated Rule 4.1 by committing perjury before the N.Y.S. Court that the attorney work product was a “Media Release,”

Defendants Bolger and Schafer violated *N.Y. Judiciary Law § 90(4)(e)* by violating N.Y. Penal Code 156.30:

A person is guilty of unlawful duplication of computer related material in the first degree when having no right to do so, he or she copies, reproduces or duplicates in any manner any computer data . . . and thereby intentionally and wrongfully deprives or appropriates from an owner thereof an economic value or benefit in excess of two thousand five hundred dollars

By stealing the attorney work product and publishing it, the two destroyed its value and harmed my business in an amount well over \$2,500 and committed a class E felony.

Defendants Bolger and Schafer violated N.Y. Judiciary Law § 90(4)(e) and continue to violate it by violating N.Y. Penal Code § 156.35 in which their possession of all the misappropriated compute data is a class E felony:

A person is guilty of criminal possession of computer related material when having no right to do so, he knowingly possesses, in any form, any copy, reproduction or duplicate of any computer data or computer program which was copied, reproduced or duplicated in violation of section 156.30 of this article, with intent to benefit himself or a person other than an owner thereof.

Collateral estoppel

The key determination for estoppel is whether the identical issues as raised in the current action were litigated and necessarily decided in the prior action. *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455 (1985).

Francoeur intentionally misreads my Mem., p. 32, Dkt. 37, that unless every single issue raised in this action had to be raised, litigated and decided in my motion in the NY Sup Ct. to withdraw

the hacked document, than collateral estoppel does not apply. That is not my argument. As my Mem. p. 32, states: The key determination for estoppel is whether the identical issues—all the issues raised above under Section II—were litigated and necessarily decided in the prior action. *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455 (1985). It’s an issue by issue determination. If one specific issue was litigated and decided in my motion in the NY Sup Ct, then it is estopped, but if another specific issue was not litigated or decided, then it is not estopped.

Francoeur also lies that my Mem asserts a different cause of action that includes the same issue avoid collateral estoppel. Reply at 2. My Mem at 32 states:

Collateral estoppel applies to issues rather than to whole claims or defenses, Siegel, N.Y. Prac. § 457 (5th ed.), unless the “causes of action are different, not in form only . . . but in the rights and interests affected. The estoppel is limited in such circumstances to the point[s] actually determined . . .” *Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 N.Y. 304, 307 (1929) (Cardozo, J).

So what my Mem argues, and not what Francoeur’s fake statements of what it argues, is that the specific issue or fact must have been raised, litigate and decided in my motion to withdraw the hacked document in the NY Sup Ct in order for estoppel to apply to that exact issue or fact in this action.

Further, “The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination” *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d at 456. That means Francoeur had to show that all the issues in Section II of my Mem. Dkt. 37 were litigated in the N.Y.S. Court motion and disposed of by its general verdict.

Francoeur only alleges that the allegation of Defendants hacking my iCloud was decided by the NY Sup Ct when it denied my motion to withdraw the hacked document. (Reply at 2).

Francoeur falsely says one of my arguments is that the NY Sup Ct decision on motion to withdraw the hacked document is “short.” (Reply at 2).

He also argues that the two sentence decision of the NY Sup Ct implicitly found no hacking for which he relies on *Irish Lesbian and Gay Organization v. Giuliani*, 143 F.3d 638, 645 (2d Cir. 1998), and *Wilder v. Thomas*, 854 F.2d 605, 620 (2d Cir. 1988).

The district court in *Irish Lesbian and Gay Organization* issued an extensive and in depth opinion of eight pages. The 2d Cir ruled that while the district court's opinion did not explicitly decide whether NYC Admin. Code §10–110 contained adequate standards to prevent government censorship of speech, it did find section 10–110 to be facially content neutral and a valid time, place, and manner regulation as applied. The explicit decision on time, place and manner regulation incorporate a decision on adequate safe guards because if the safeguards were not adequate, it would not be a valid time, place and manner regulation that the district court found it was. *See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130, (1992).

The district court in *Wilder v. Thomas*, 854 F.2d 605, 620 (2d Cir. 1988) issued an extensive and in depth opinion of eleven pages. The 2d Cir ruled that the same environmental adequacy issue on traffic and air quality that was decided by the state court was raised by plaintiffs now in federal court. Plaintiffs argued, however, that the state court only applied one standard and not the more stringent standard that they brought in the district court. The 2d Cir found that the state court had in effect applied the more stringent standard.

Neither of these arguments apply here because all we know is that the NY Sup Ct concluded that the document would not be withdrawn. Was that because the Defendants did not hack my iCloud; did not hack my home computer; even if they did hack my iCloud or home computer, the document was a press release distributed to the media; my motion to withdraw was frivolous as argued by Bolger in her opposition motion, NY Sup Ct. Dkt. 104; they did not violate any NYS Penal Codes; they did not violate my privacy rights under the US Constitution; they did not violate the Computer Fraud and Abuse Act. So which one or ones were the basis for the NY Sup Ct's cryptic decision—we don't know.

Here, it is impossible to determine from the two sentence decision in favor of the defendant what the determination was based upon. In this situation, the judgment entered cannot be made the basis of a collateral estoppel as to any of the grounds upon which it might have been based.

In determining the extent to which a judgment operates as an estoppel it is necessary to determine what issues were involved and decided in the action, and the burden is upon the person asserting the estoppel to establish it. *King v. Beers*, 145 A.D. 177, 177 (App. Div.), *aff'd*, 203 N.Y. 559 (1911).

From the cryptic judgment it cannot be determined exactly what issues in the motion to withdraw were decided. Even if all the issues in the motion to withdraw were decided what about issues here that were never touched on in that motion:

The following elements for RICO were not litigated or decided: Defendants' law firm as an Enterprise; wire fraud—the fraud in the N.Y.S. Court motion was falsely representing the attorney work product as a "Media Release," not communicating such over the wires in furtherance of Defendants' RICO scheme; robbery as a predicate act, theft of computer data under Penal Code § 156.30 was raised but not litigated, and it is unclear whether it was decided—probably not since it is a criminal statute that does not provide for a civil action as does RICO; two or more predicate acts made in furtherance of a scheme, such a scheme was unnecessary for the N.Y.S. motion's decision; predicate acts related in time and open to repetition so as to constitute a pattern of racketeering activity was unnecessary for the N.Y.S. motion's decision and unclear whether it was considered; Defendants participation in the conduct of the Enterprise's affairs through a pattern of racketeering activity was not an issue in the N.Y.S. motion, so never litigated, never determined and unnecessary for the decision.

As for copyright infringement, the N.Y.S. Court does not have subject matter jurisdiction over a copyright action, 28 U.S.C. § 1338(a), so it could not have been litigated or determined.

Trespass requires the interference of my exclusive right of possession in the attorney work product and other materials on my iCloud or home computer. The N.Y.S. Court never determined whether Defendants' possessory interference was sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels; Defendants' intent in trespassing to obtain information for their strategy of litigating by personal destruction to help win their case and harm my business was never determined by the N.Y.S. Court's motion decision; and punitive damages for trespass was never litigated.

As for replevin, Defendants continue to retain possession or control of all those other materials stolen from my iCloud or home computer—an issue never resolved by the N.Y.S. Court's motion decision.

In relation to theft of the attorney work product, Defendants breach of the policy behind CPLR 3101(c) by improperly using the attorney work product without permission was not addressed in the N.Y.S. Court's motion decision.

Defendants' violations of the N.Y. Professional Misconduct Rule 4.1 via perjury was never determined, Defendants' violation of Jud. Law § 90(4)(e) was never determined, Defendants coercion in the second degree, N.Y. Penal Law § 135.60(5), by retaining other materials from my iCloud or home computer for future use against me was never determined in N.Y.S. Court's motion decision.

Finally, the CFAA, 18 U.S.C. § 1030(a)(2)(C), was mentioned once in the papers but never argued during the short back and forth in front of Justice Schechter who never even mentioned the CFAA in her decision on the motion to withdraw.

The causes of action alleged in this federal case numerous rights and interests not even touched upon in the N.Y.S. Sup. Court motion. An issue is not actually litigated if, for example, the matter has not been placed in issue by proper pleading or proper motion of which the motion to withdraw was neither. See Restatement 2d, Judgments § 27 comments d.

The burden to show that all these issues were raised, litigated, decided and necessarily decided in the motion to withdraw is on Francoeur—not me. *King v. Beers*, 145 A.D. 177, 177 (App. Div.), *aff'd*, 203 N.Y. 559 (1911).

Francoeur was required to go through each and every issue raised in this federal action to show that it was also litigated and determined, and necessarily so, in the motion to withdraw in the NY Sup Court—he did not, even though he had ample space to do so with his 35 page allowance and his 10 page allowance in his Reply.

The N.Y.S. Sup. Court issued a bare general verdict on my motion to withdraw the attorney work product: “Denied. There is no basis for granting the relief sought. This constitutes the Decision and Order of the Court.” (Oral Ex. 4; Pl. Mem. Ex. C). Estoppel does not apply when the first decision is a general verdict because such does not clarify precisely what the court found on an issue that was actually raised, assuming it was, *see Manard v. Hardware Mutual Casualty Co.*, 12 A.D.2d 29, 30 (4th Dept. 1960), because it is impossible to say what issues were determined.

Francoeur, however, tries to depict this two sentence decision as not a general verdict. (Reply at 3). If it is not a general verdict, then it must be a special verdict. But a special verdict includes all of the court’s findings. *See Kret v. Brookdale Hospital Medical Center*, 93 A.D.2d 449 (2d Dep’t 1983), *aff’d* 61 N.Y.2d 861 (1984). A general verdict provides only the bottom line, Weinstein, NY Civ Prac. CPLR §4111.02, which is what the NY Sup Ct provided.

In another of Francoeur’s many prevarications he fails to distinguish NY Sup Ct decision on Bolger and Schafer’s motion to dismiss the NY Supt Ct case for lack of personal jurisdiction and my motion that they hacked my iCloud and copied the attorney work product. The only decision from which collateral estoppel might apply to this case is the two sentence decision on my motion.

Injury

As the FAC alleges, my legal and consulting clients have significantly diminished. I am now relegated to the lowest level of legal work—document review. Allegations and proof of a general loss of sales is sufficient, leaving it to the trier of the facts to determine whether the loss is properly to be attributed to the Defendants’ nefarious acts or not. *See Lake v. Dye*, 232 N.Y. 209, 213-214 (1921). One long term client who paid an annual retainer of \$1,000 a year has canceled his legal and business relationship with me as a result of Defendants Bolger and Schafer’s appalling conduct. I have incurred expenses in bringing this action, beginning with the \$400 filing fee, in order to counteract Defendants Bolger and Schafer’s publication and as a reasonable effort to minimize damages by showing that Bolger and Schafer falsely depicted the attorney work product as a publicly available press release so as to disparage my business product and services.

The FAC seeks economic losses for the harm to my business in the amount of \$500,000. Under civil RICO, a trebling of those losses to \$1.5 million and punitive losses under the trespass to chattel and injurious falsehood actions in the amount of \$2 million. After all, we are talking about the intentionally near complete destruction of my law and consulting business.

The FAC also requests that all the copies and downloads of materials from my iCloud or home computer and in the possession and control of Defendants be turned over to me, that Defendants be prohibited from making public any materials, Defendants provide the names of anyone involved in the theft and anyone possessing or in control of copies of such materials.

Criminal Complaints

Defendants are accused of criminal violations, such as the predicate acts under RICO, so I filed criminal complaints against them.

Franco: This is a civil action not a criminal action.

RDH: Then why does defendants' CNA malpractice insurance not cover this litigation costs and attorneys fees.

12/12/2016 filed compl with US Attorney's Civilian Crime Reports Unit—No response.

1/13/2018 filed another compl with US Attorney's Civilian Crime Reports Unit.

1/13/2018 sent letter to the Chief of the Investigations Division for Manhattan District Atty who put me in touch with an ADA with whom I have discussed the matter.

Francoeur

At the very beginning of his Reply, p. 1 Dkt. 38, Francoeur bemoans that I criticized him and acts as though he's an innocent victim when he's the one who started slinging the mud at the very beginning of this case with his request for a pre-motion conference. January 31, 2017, Letter Dkt. 14. Typical PC ideologue, they think they can say anything nasty, rotten and false about another human being (although whether lawyers are human beings maybe arguable) and when the person responds in kind, Francoeurians play the innocent victim.

If Francoeur wanted to avoid *ad hominem*s leveled against him, then he should have avoided slinging *ad hominem*s against me in his efforts to use the strategy of Lenin who said, "we must vilify and incite hatred against those with which we disagree" by slinging *ad hominem*s against me. Francoeur hoped his smear tactics would

1. bias the Court, which I don't think will work, and
2. intimidate me into giving up by communicating that he will drag me through the Pravda Correct mud until this town sees me as a pariah fit for exile or execution.

In response to Francoeur's first personal attack letter to the Court (Francoeur letter January 31, 2017, Dkt. 14), I raised this issue of Francoeur's mudslinging and did what any American man would do—defended myself to the Court. What did Francoeur expect? That I would apologize, apologize, apologize for defending my inalienable rights.

My letter of February 3, 2017, Dkt. 16 stated:

First, can't these defense attorneys get over their addiction to *ad hominem* attacks and invented accusatory dissemblings? I previously worked as an associate for a defense firm, Cravath, Swaine & Moore, and they never engaged in such prevaricating and dissembling garbage as Francoeur. For example, Francoeur writes or infers:

[Plaintiff is] "a serial litigant," [well so is the ACLU];
"Rule 11" [sanctions were threatened against Plaintiff by the Second Circuit, what does

that have to do with this case?];
[Plaintiff's] "attempts to establish a 'men's rights' course," [actually a program of eight courses created by various professors that was approved by a university until the Pravda Correct press demonized everyone involved];
"Judge Peter Moulton refused to sign [Plaintiff's] order to show cause," [but Judge Moulton did rule that the motion could be brought by noticed, and it was];
[Plaintiff] "violat[ed] a court order," [Plaintiff, semi-retired, could not afford the printing costs for 400 pages of irrelevant documents filed by Francoeur's clients];
[Plaintiff is] "seeking to relitigate . . . rejected fraud allegations," [the fraud allegations in this case are different, as is the fraud that Francoeur is trying to perpetrate with his pre-motion letter];
[Plaintiff] "purposely omitted the two exhibits," [see below for exposure of this Francoeur fraud];
[Plaintiff is engaged in] "harassing litigation," [Plaintiff has a First Amendment right to go to court against those who violate his rights]; and
[He is a] "vexatious plaintiff," [typical modern-day name calling].

Oh well, I'm not going to open a Twitter account to expose Francoeur's falsehoods, prevarications and dissemblings. I'll just ignore his calumny until my opposition to his motion to dismiss.

Second, can't these defense attorneys refrain from cheating by violating the spirit of a court's rules? Here Francoeur refers to two exhibits: the screenshot of Plaintiff's iCloud as visited by Mr. Schafer on December 30, 2014 (Ex. 1) and the screenshot of the Google-cache version of how the website appeared on January 3, 2015. Exhibits are not permitted in a pre-motion conference letter, but Francoeur is trying to create a fraudulent image in the Court's mind based solely on his dissembling description of the two documents. It's the perfect dissemblance because the Court cannot view the documents itself to realize Francoeur's trick.

Here's the deceit in this trick by Francoeur. The Complaint at ¶ 8 alleges that once the defendants broke into the iCloud "they stripped the access codes thereby making it viewable to them and the public at any time." Without the access codes, the website became public, so of course the defendants were then able to obtain a screenshot and a Google-cache version. In that sense, Francoeur actually got a fact right, since it admits his clients' hacking—they hacked in and then stripped the codes to make the iCloud public. Without the two documents, however, the Court is not able to see through Francoeur's subterfuge.

Also in Francoeur's Reply, p. 1, Dkt 38, Francoeur says "Den Hollander attacks . . . courts," but typically he doesn't cite to where in my Mem. of Law, Dkt. 37, are the alleged attacks. Just another unsubstantiated generalize *ad hominem* to demean his opponent.

Next in Francoeur's Reply, p.1, Dkt. 38, he does what most guilty people do—accuse others of what they are guilty of. Here Francoeur says my 35 page Mem. is filled with invectives, but once again he fails to cite to them.

From the tyrant next door to powerful lawyers, those who aim to exploit, control and silence others predictably turn to personal attacks, lies and deception as Francoeur does throughout his papers.

Francoeur consumes space and valuable Court time with his self-righteous, hypocritical and bigoted ideological attacks against me for resorting to the courts to defend my rights under the law. He and Defendants, like most lefties these days, are marked by a severe strain of intolerance toward anyone who does not believe as they do.

Francoeur requested additional time to respond to the complaint and I agreed. That gave him the month of January 2017 to put together his pre-motion personal attack letter. I only had three days, so when I had the time, I took a couple of weeks to continue my response with the First Amended Compl.

If this was 300 years ago, I'd challenge him to a duel. But it's not, which is why lawyers like him engage in litigation by personal destruction.

Somebody violates my rights—I'm going to fight back; otherwise, I have no rights.

What would the likes of Francoeur have me do—hire Russian goons to resolve this dispute? Having managed Kroll Associates in Moscow, I am well aware that such is a bad idea.

Francoeur “spearheaded” his firm’s involvement with the tax exempt organization “Safe Passage Project” that schemes to keep illegal alien youths in the U.S., such as MS-13 gang members.

Stephen Dinan, *Obama knew gang members part of illegal immigrant surge*, Washington Times, May 24, 2017:

[T]he image of unaccompanied alien children as little children is misleading. Out of nearly 200,000 UAC apprehended from 2012 to 2016, 68 percent were ages 15, 16 or 17.

Stephan Dinan, *Nearly 30% of illegal immigrant children at border have ties to MS-13 or other gangs*, Washington Times, June 21, 2017:

MS-13’s devastation on communities across the country is clear: killings and chaos, particularly among other immigrants — both legal and illegal. MS-13’s real money-making operation is extortion. The gang threatens families — including American citizens — with violence against relatives back in Central America unless those in the U.S. pay them off. Immigrants who fail to report crimes to local police are often not afraid of being deported by federal authorities, but rather fear retaliation from the gang members and other criminals who live in their neighborhoods.

Sen. Chuck Grassley said, ““The current system is fraught with abuse, systematic errors and a lack of effective cooperation.” Francoeur actively exploits that system.

Alex Pfeiffer, *Feds: More Than A Quarter Of Illegal Immigrant Minors In Our Care Are Gang Members*, Daily Caller, June 21, 2017:

59,170 unaccompanied illegal immigrant minors referred to Office of Refugee Resettlement in Fiscal Year 2016, 95 percent were from Honduras, Guatemala and El Salvador, all of which are nationalities that MS-13 recruits from.

Dan Springer, DREAMer *accused of brutally raping woman in Seattle suburb*, Fox News, Aug. 2, 2017

Witnesses

Katherine M. Bolger,
Matthew L. Schafer

GoDaddy.com, LLC owns Domains By Proxy, LLC, which is the registrant for Enamestation.com. Arne Josefsberg, Executive Vice President, Chief Infrastructure Officer and Chief Information Officer, 14455 N Hayden Rd., Ste 226, Scottsdale, AZ 85260 or an appropriate and knowledgeable officer of enamestation.

Motion to recuse

I have a First Amendment right to go to court against those who violate my rights and the rights of the group to which I belong; therefore, I make a standing motion that your honor recuse yourself under:

The impartiality statute 28 U.S.C.A. § 455(a),
The Due Process Clause of the Fifth Amendment to the U.S. Constitution, and
Canon 2 of the Code of Conduct for United States Judges

28 U.S.C.A. § 455(a)

“Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”

The term “partiality” includes bias and prejudice but is broader and also includes “intolerance.” *Liteky v. United States*, 510 U.S. 540, 552, (1994)(Scalia, J. wrote the majority opinion).

The question is not whether a judge is actually biased, prejudiced, or partial toward a party, but whether his actions make it appear so. *Liteky v. United States*, 510 U.S. 540, 548 (1994); *United States v. Brinkworth*, 68 F.3d 633, 637 (2d Cir. 1995)(citing H.R. Rep. No. 1453, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6351, 6355).

Your Honor’s

1. denial of early discovery to determine exactly what documents Defendants copied or download from my iCloud;
2. requiring me to provide evidence to prove my allegations on a Rule 12(b)(6) motion to dismiss, and

3. the Catch 22 of requiring me to provide evidence now at oral argument that my early discovery motion would have revealed had it not been denied creates the appearance of partiality in favor of Defendants.

The information requested in early discovery was necessary for me to adequately defend against Defendants' motion to dismiss.

Not knowing the extent of the materials and specific documents taken without my authorization treats me unfairly because it gives Defendants an unfair advantage in succeeding on their motion to dismiss.

In effect, the Court is allowing them to stonewall as to what they took.

All that is known now is that defendants took the attorney work product that they argue is a media release and therefore a public document and took a screenshot. But what about the other attorney work products or client attorney communications from the other cases I worked on and were on my iCloud? Is the Court to assume all of those are media releases? Such is a ludicrous argument, but without early discovery, I am unable to show such.

Further, they also likely reproduced without my permission materials from my iCloud that are registered with the U.S. Copyright Office. Such violates the Copyright Act, which provides for statutory losses. 17 U.S.C. § 504(c). But denial of early discovery again makes it impossible for me to show such.

By allowing Defendants to affirmatively hide, to keep secret what they took creates an appearance of partiality for them. Such partiality most likely stems from extra-judicial sources exploited by Defendants.

In two letter motions, defense attorney Francoeur and his clients rely on a strategy that exploits the political divisions currently dividing this country. Defendants depicted themselves as the followers of the only "appropriate" belief system—political correctness, or neo-bolshevism, while Plaintiff represents the evil American Trump supporter deserving only of liquidation. Attorney Francoeur called on past irrelevant events, dissemblings and prevarications in order to mobilize partiality for political correctness and disfavoring of those who opposed President Obama's policies, especially the supporters of President Trump.

Francoeur is attempting to win the day in court because I do not subscribe to the ideology of self-righteous PCers like him and his clients. To them and their zealot cohorts, this is sacrilegious of their political correctionalist beliefs that they hold as true over all others.

Francoeur's strategy paid off with the Your Honor denying early discovery—essentially permitting the covering up the full extent of Defendants criminal acts. This raises the appearance—as have been seen in so many US District Courts across this land—of a predisposition for intolerance and bias toward and Trump Administration and Trump supporters because they are believed to be the new post-modern devils.

Plaintiff requests the Court grant the motion for recusal for not the least of reasons that “[i]t is the daily; it is the small; it is the cumulative injuries of little people that we are here to protect” –Judge Learned Hand.

In court decisions that display a deep-seated favoritism or antagonism that would make fair judgment impossible. 7 U.S. v. Lentz, 524 F.3d 501 (4th Cir. 2008).

“The goal of section 455(a) is to avoid even the appearance of partiality.” *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 861(1988)

28 U.S.C.A. § 455(a) is an independent basis for mandatory disqualification which requires no determination of bias in fact, *U.S. v. Chantal*, 902 F.2d 1018 (1st Cir. 1990), but only the reasonably objective appearance of impartiality. *Federal Procedure Lawyer Ed.* § 20:152.

Recusal is required whenever the judge's impartiality might reasonably be questioned. *Liteky v. U.S.*, 510 U.S. 540 (1994). The hypothetical reasonable observer is not the judge or a judicial colleague but a person outside the judicial system, in the sense of a knowledgeable member of the public, or the average person on the street who knows all the relevant facts. *Federal Procedure Lawyer Ed.* § 20:65

The inquiry is limited to outward manifestations and reasonable inferences drawn therefrom, *Estate of Bishop v. Equinox Intern. Corp.*, 256 F.3d 1050 (10th Cir. 2001).

Where judicial remarks to counsel reveal such a high degree of favoritism or antagonism as to make a fair judgment impossible 4 U.S. v. Carlton, 534 F.3d 97 (2d Cir. 2008)

If there is any doubt as to whether judicial disqualification is required, the court should resolve the doubt in favor of disqualification. 28 U.S.C.A. § 455(a). *Doe v. Cabrera*, 134 F. Supp. 3d 439 (D.D.C. 2015).

No affidavit needed. A party may file a motion to disqualify under 28 U.S.C.A. § 455. The matter may be sufficiently raised by other means.

28 U.S.C.A. § 455 is more demanding than the due process clause or the Code of Conduct for United States Judges. *White v. National Football League*, 585 F.3d 1129, 74 Fed. R. Serv. 3d 1615 (8th Cir. 2009)

Due Process

All parties to a case have a constitutional right to a neutral and detached judge. *Ward v. Monroeville*, 409 U.S. 57, 62 (1972).

A fair [hearing] in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the [hearing] of cases. But our system of law has always endeavored to prevent even the probability of unfairness. ... [so] to perform [the courts'] high function in the best way “justice must satisfy the appearance of justice.” *In re Murchison*, 349

U.S. 133, 136 (1955)(words in quotation marks from *Offutt v. United States*, 348 U.S. 11, 14 (1954)(Frankfurter, J.)).

Code of Conduct for United States Judges

Canon 2A. An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.

Cases

A.V. v. iParadigms, LLC, 562 F.3d 630, 645 (4th Cir. 2009).

Students filed copyright infringement action against company that evaluated originality of written works for school in order to prevent plagiarism. Defendant filed counterclaim that plaintiff gained unauthorized access to defendant's website.

18 U.S.C. § 1030(e)(11) contemplates consequential losses of the type sought by defendant's counterclaim—costs incurred as part of the response to a CFAA violation, including the investigation of an offense. *See, e.g., Modis, Inc. v. Bardelli*, 531 F.Supp.2d 314, 320 (D.Conn.2008) (noting that “the costs of responding to the offense are recoverable” including “costs to investigate and take remedial steps”; *SuccessFactors, Inc. v. Softscape, Inc.*, 544 F.Supp.2d 975, 980–81 (N.D.Cal.2008) (holding that the cost of investigating and identifying the CFAA offense, including many hours of valuable time away from day-to-day responsibilities).

Facebook, Inc. v. Power Ventures, Inc., 844 F.3d 1058, 1066 (9th Cir. 2016).

Defendant website accessed computers for plaintiff's website without authorization in violation of CFAA. Plaintiff employees spent many hours, totaling more than \$5,000 in costs, analyzing, investigating, and responding to defendant's actions.

FindTheBest.com, Inc. v Lumen View Tech. LLC, 20 F. Supp. 3d 451, 460 (S.D.N.Y. 2014):

Plaintiff sued defendant for RICO alleging Hobbs Act extortion, mail and wire fraud because defendant had brought patent suits against plaintiff but plaintiff had won those suits.

In re DoubleClick Inc. Privacy Litig., 154 F. Supp. 2d 497, 523 (S.D.N.Y. 2001).

Corporation's storage of computer programs known as “cookies” on computer hard drives of Internet users who accessed Web sites that were affiliated with corporation. Losses to value of users' demographic information was not compensable economic losses under Fraud and Abuse Act.

Orbit One Commc'ns, Inc. v. Numerex Corp., 692 F. Supp. 2d 373, 385 (S.D.N.Y. 2010).

Defendant counterclaimed that former executives accessed defendant's computer system and data without authorization. As defendant's executives, they were granted unfettered access to defendant's computer system and information residing on it. In consequence,

defendant failed to adduce any evidence that they accessed its computer system without authorization or exceeded their authorized access in violation of the CFAA.

People v. Versaggi, 83 N.Y.2d 123, 128 (1994) – computer data is property.

Defendant convicted of computer tampering in the second degree (Penal Law § 156.20) for intentionally altering two computer programs of a corporation.

Weston Funding, LLC v. Consorcio G Grupo Dina, S.A. de C. V., 451 F. Supp. 2d 585, 587 (S.D.N.Y. 2006).

Weston involved an “Indenture” as documentary evidence not affidavits of defendants submitted in an action.

other inapposite cases Francoeur cites. (Def. Mem. at 12).

As of April 7, 2017

Pre-motion to dismiss conference April 7, 2017, 16-cv-9800, Judge Broderick

America is rapidly turning into a version of the former Soviet Union. If one is PC (political communist), whatever you say is considered true. In the former Soviet Union such a person would be a card carrying member of the Communist Party.) If one is not PC, then whatever you say is branded false—regardless of the facts.

Anti-Francoeur

Francoeur requested additional time to respond to the complaint and I agreed. That gave him the month of January to put together his pre-motion letter. I only had three days, so when I had the time, I took a couple of weeks to continue my response with the First Amended Compl.

Francoeur adopts the tactic of Lenin who said, “we must vilify and incite hatred against those with which we disagree.”

A Neo-McCarthyite fascho collaborator.

Litigation tactic of personal destruction by demonizing the opposition.

Francoeur “spearheaded” his firm’s involvement with the tax exempt organization Safe Passage Project that protects “unaccompanied minors” who illegally entered the U.S. from deportation. In effect, Safe Passage facilitates schemes to keep illegal alien youths, such as M-13 gang members in the United States. Just recently, U.S. Immigration and Customs Enforcement arrested eight gang members who illegally crossed the border as unaccompanied minors. These so-called innocent children engage in murder, racketeering and sex trafficking. Stephen Dinan, *Feds nab three Dreamers, 10 UAC in nationwide gang operation*, Washington Times, May 11, 2017.

Francoeur paints me as malicious because I brought this action that Francoeur describes as “harassing” litigation and describes me as a “serial litigant.” (Francoeur letters January 31, 2017, Dkt. 14; April 5, 2017, Dkt. 20). I have a First Amendment right to go to court against those who violate my rights. Francoeur emphasized in his letter that his clients “are lawyers who specialize in media and First Amendment law.” Francoeur would do well to consult his own clients before advocating that a U.S. does not have rights under the Constitution. What would the likes of Francoeur have me do--hire Russian goons to resolve the dispute? Having managed Kroll Associates in Moscow, I am well aware of how that turns out.

Francoeur whines over Plaintiff’s timing in submitting the First Amended Complaint—but Fed. R. Civ. P. 15 (a)(1)(B) does not. Plaintiff’s paralegal could have handed the First Amended Complaint to him at the scheduled conference. While that would have been fair given Francoeur’s conduct thus far, it would not have been fair to the Court.

Plaintiff initially made the mistake of granting Francoeur’s request for additional time in responding to the original complaint. That gave Francoeur a month to research his first letter for a pre-motion conference. Plaintiff had three days in which to respond. As for his second letter, Francoeur took a week and a half before serving it, which gave Plaintiff two days to respond.

Increased pages

Attorney Francoeur and his clients’ conduct thus far in this action make it clear that they will just use the additional space to continue their litigation of personal destruction. In their two letters to this Court, Francoeur and his clients, also defense attorneys, have raised irrelevant matters in order to engage in their neo-McCarthyite-PC smear tactics.

The additional pages will only provide more of their self-righteous, hypocritical and bigoted ideological rants against me for resorting to the courts to defend my rights under the laws and the U.S. Constitution.

Francoeur and his clients are marked by a severe strain of intolerance toward anyone who does not believe as they do. Especially, if that person worked as a volunteer in Donald Trump’s campaign for the presidency—as I did.

From the powerful to the tyrant next door, those who aim to exploit, control and silence others predictably turn to personal attacks, lies and deception.

Arguments

The Undiscovered Country

Refer Opposition.

The First Amended Complaint at ¶¶ 21 & 23 alleges that your clients copied, downloaded or otherwise reproduced without my permission documents on my iCloud other than the attorney

work product (First Amend. Compl. Ex. 4, Dkt. No. 18, Attachment 4)—this letter is a discovery request pursuant to Fed. R. Civ. P. 26(d)(1) for copies of all those documents. Clearly your clients’ original reproduction of those documents without authorization is evidence reasonably calculated to support my allegations of copyright infringement.

Attorney Sullivan for Levine Sullivan Koch & Schultz refused to say what was copied or downloaded even though he said he was familiar with the dispute.

Francoeur objects to early discovery by stating it would be burdensome and I would not be unfairly prejudice. *Am. Fedn of Musicians and Employers' Pension Fund v. Atl. Recording Corp.*, 2016 WL 2641122 at *1 (S.D.N.Y.8, 2016). A stay on discovery depends on the breadth of discovery and the burden of responding to it as well as unfair prejudice to me by denying such. The documents I am requesting in early discovery are simply all the materials Defendants took from my iCloud or home computer. True, that could amount to millions of bytes of data, but is discovery really dependent on how much someone steals—unlikely.

As for unfair prejudice to me, not knowing the extent of the materials and specific documents taken without my authorization puts me at a disadvantage in opposing defendants’ motion to dismiss. Their motion brief is due May 15th, my opposition brief is due June 14th. All that is known now is that defendants took the attorney work product that they argue is a media release and therefore a public document. But what about the other attorney work products or client attorney communications from the other cases I worked on and were on my iCloud? Is the Court to assume all of those are media releases? Such is a ludicrous argument, but without early discovery, I am unable to show such.

In addition to the defendants copying my law practice records, they also must have reproduced numerous materials registered with the U.S. Copyright Office without my permission. Such violates the Copyright Act, which provides for statutory loss. 17 U.S.C. § 504(c).

Further, if as alleged in the First Amended Complaint ¶¶ 21 & 23, the defendants copied, downloaded or reproduced much of or the entire iCloud, that is millions of bytes of information. The sheer magnitude of their intentional efforts to amass so much information infers a malicious intent to destroy my law practice by releasing selective sections of confidential documents and spinning them in typical neo-McCarthyite-PC fashion. (First Amended Complaint ¶ 24).

Fed. R. Civ. P. 26(d)(1) allows for discovery prior to the Rule 26(f) conference when “by stipulation, or by court order.” Defendants refused my request to stipulate (Exhibit A); therefore, I am requesting a court order.

The defendants’ attorney, Joseph L. Francoeur, in his denial (Exhibit B) is clearly ducking the issue of the extent of his clients’ thievery from my iCloud. It’s as though burglars entered someone’s house while he was on vacation skiing in the Alps. The police want to know what was taken and its value so as to charge the thieves with larceny or grand larceny. The victim can’t tell them because he’s in Switzerland. All that the burglars will admit to taking is a confidential letter.

The reason for my request for early discovery is simple. The full extent of defendants' nefarious activities, and therefore the harm they have caused and are in a position to cause are not fully known. Yet Francoeur argues this case should not be investigated further with discovery—the legal system should forget about it; thereby, granting his clients the right to keep everything they took without consent to use or sell as they wish.

12(b)(6)

The plausibility standard requires “a complaint with enough factual matter (taken as true) to suggest that” the elements of the cause of action are satisfied. *Arista Records LLC v. Doe*, 604 F.3d 110, 120 (2d Cir. 2010)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 556, 570 (2007)). This standard “is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 556).

In addition, the plausibility standard “does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant ...or where the belief is based on factual information that makes the inference of culpability plausible.” *Arista Records LLC*, 604 F.3d at 120 (internal quotations and citations omitted).

A court's determinations are context-specific. *Iqbal*, 129 S. Ct. at 1950; *South Cherry St., LLC v. Hennessee Group LLC*, 573 F.3d 98, 110 (2d Cir. 2009). Further, a court may consider any statements or documents incorporated into the complaint by reference, *Patane v. Clark*, 508 F.3d 106, 112 (2d Cir. 2007); see *Twombly*, 550 U.S. at 569 n. 13. A court may also consider public records of a legal nature and documents possessed by or known to plaintiff and upon which he relied in bringing the suit. *Id.*

According to the Supreme Court, the analysis begins with “taking note of the elements a plaintiff must plead to state a claim ...,” *Iqbal*, 129 S. Ct. at 1947, then proceeds in two steps:

1. Identifying the specific allegations in a complaint that are not entitled to the presumption of truth. *Iqbal*, 129 S. Ct. at 1950-1951; *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010). Those are statements that cut and copy the elements of a cause of action; that is, they are conclusory. *Twombly*, 550 U.S. at 555. The allegations should be more than an unadorned: the-defendant-unlawfully-harmed-me accusations. *Iqbal*, 129 S. Ct. at 1949. Some legal conclusions, however, are permissible when the defendants are given notice of the date, time and place of the alleged illegal conduct. *Iqbal v. Hasty*, 490 F.3d 143, 156 (2d Cir. 2007), rev'd sub nom. on other grounds, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

2. Next, the analysis considers the remaining factual allegations in a complaint as true and determines if they plausibly—not probably but more than possibly—infer that the defendant is liable for the misconduct alleged. *Iqbal*, 129 S. Ct. at 1950; *Twombly*, 550 U.S. at 556; *Hayden v. Paterson*, 594 F.3d at 161. In doing so, the courts “draw[] all inferences in favor of the plaintiff,” *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 692 (2d Cir. 2009), and a complaint cannot be dismissed based on a judge's disbelief of the factual allegations even if it strikes a judge that actual proof is improbable. *Twombly*, 550 U.S. at 556.

Computer Fraud and Abuse Act

Is not the exclusive law governing computer crimes.

If person allowed access, then exceeding use restrictions does not violate CFAA in Second Circuit. Person exceeds authorized access by circumventing access restrictions such as access codes. *E-Commerce & Internet Law* 44-139.

Liability may be based on aiding and abetting. *E-Commerce & Internet Law* 44-158-159; *U.S. v. Nosal*, 828 F.3d 865, 879-880 (9th Cir. 2016).

Proving hacking:

Not necessary to prove on a motion to dismiss because my allegations are taken as true, which includes that iCloud was protected by access codes.

There's been no discovery yet. One avenue is that Bolger and Schafer's Internet Service Provider does have to track her IP when she uses the Internet; therefore, her ISP logs will show when Bolger and Schafer first became aware of my iCloud and contacted it. The logs will show how many times they contacted it and when. If their initial contact was before they stated in their affidavits and they were unable to access, it infers they then found someone to hack into it subsequently.

Bolger swore first access December 30, 2014, last January 13, 2015. Schafer swore first access December 30, 2014, January 7 & 12, 2015.

Another discovery issue is that when the URL was clicked on the Columbia Business School Alumni Club of New York website, a message came up "page not found," since the iCloud was not available to the public. FAC ¶ 19.

Unlike in Europe, iCloud hosts in America are not required to keep logs of the IP addresses that access or try to access a particular iCloud. My iCloud server stated it does not have logs of access or attempted access and does not have logs of when access codes are active. That was no way to find out if someone got into my iCloud who should not have.

A white heterosexual male lawyer in this day and age would never make public that attorney work product. It not only violates the Professional Codes of Conduct, but given the vehement hatred that PCers hold for anyone who dares disagree with their cult-like ideology, the Political Commies, as did attorney Francoeur's clients, would vent Nancy Pelosi type outrage and deionization in an effort to economically destroy the author.

Under the CFAA, information obtained from a computer will occur when a person using a computer contacts or communicates with another computer. *E-Commerce & Internet Law* 44-120. Francoeur says that the screenshots, or unauthorized copies, that Defendant Schafer made included "links" to various other documents. (Def. Mem. at 7). Francoeur could not know they were links unless Schafer told him, and the only way Schafer could know they were links, rather than an outline, was to click on them. By doing so, he violated the CFAA.

2014 Celebrity Photo-Hack

Violated copyright law. Posters of photos knowingly accommodated, facilitated and perpetuated unlawful conduct.

Conduct does not have to involve interstate communication. *E-Commerce & Internet Law* 44-119.

Information obtained from computer will occur when person using a computer contacts or communicates with computer hosting iCloud. *E-Commerce & Internet Law* 44-120. Person's computer send electromagnetic signal to iCloud that then sends e-signals back to person's computer that appear on screen.

1. Francoeur: "Computer Fraud and Abuse Act claim, Hollander fails to plead a cognizable loss. *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 523 (S.D.N.Y. 2001)."

Francoeur's "cognizable loss" is somewhat unspecific. He relies on the interpretation of 18 U.S.C. § 1030(e)(8)(A) by *In re DoubleClick Inc. Privacy Litig.*, but that section no longer exists. It was amended after the *DoubleClick* decision. Loss and damage now have different meanings.

Loss = impairment to the integrity or availability of data, a program, a system, or information, § 1030(e)(8). Copying data does not equal loss. *E-Commerce & Internet Law* 44-133.

Loss = any reasonable cost to any victim, including the cost of responding to an offense, conducting a loss assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential losses incurred because of interruption of service, § 1030(e)(11). The proper measure of harm is "economic." § 1030(g).

§ 1030(g) provides for civil action for loss under 18 U.S.C. 1030(c)(4)(A)(i)(1) in economic losses over a period of any one year of at least \$5,000.

I plead loss at First Am. Compl. ¶ 141 from violation of 18 U.S.C. § 1030(a)(2)(C) because defendants without authorization accessed a protected computer, which is a computer used in interstate or foreign commerce, 18 U.S.C. § 1030(e)(2)(B).

--Time and expenses in analyzing, assessing security of computer, investigating, modifying computers to prevent further unauthorized access, and otherwise responding to the intrusion, e.g., *A.V. v. iParadigms, LLC*, 562 F.3d 630, 645 (4th Cir. 2009); *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1066 (9th Cir. 2016) (spent hours analyzing, investigating, and responding to Power's actions)

Such as

--Determining whether the work product existed in the filings of the N.Y. Supreme Court case or in some other publicly available cases;

--Determining whether the work product existed somewhere on the Internet;

--Going through my entire iCloud and home computer to determine whether Defendants had deleted or modified any data;

--Researching possible means by which Defendants broke in; and

--Contacting the host of his iCloud.

All of which involved numerous hours of investigation and analysis

After concluding that Bolger likely used “brute force cracking” on his iCloud or “phishing” on his home computer, researched methods to prevent such in the future and instituted more costly security precautions.

In all, my investigating, analyzing, assessing security of the computers, modifying the computers and responding to the intrusion cost him over \$5,000.

All of the specifics are appropriately addressed in discovery.

Access without permission and obtaining information is loss [check this]

2. Francoeur, “[A]ccessing a publicly available website cannot form the basis of a CFAA claim. *Orbit One Commc’ns, Inc. v. Numerex Corp.*, 692 F. Supp. 2d 373, 385 (S.D.N.Y. 2010).”

***Orbit* involved executives to whom computer access was lawfully given, so CFAA did not apply. Here, none of the defendants were ever authorized access to the iCloud, but they still accessed a protected computer without authorization. The iCloud was protected by access codes. Further, they were clearly never authorized access to my home computer, which was protected by a firewall.**

RICO

Wire Fraud

Daddona v. Gaudio, 156 F. Supp. 2d 153, 163 (D. Conn. 2000):

Those cases that have found that alleged mail and wire fraud violations arising out of malicious prosecution or abuse of process could be RICO predicate acts involved additional allegations of extortion or some other pattern of racketeering activity. See *United States v. Eisen*, 974 F.2d 246, 251–54 (2d Cir.1992) (mail and wire fraud violations arising out of scheme by law firm to deprive civil defendants and their liability insurers of money through the filing of fraudulent lawsuits, bribery and intimidation of witnesses and the creation of false photographs, documents and physical evidence of accidents for use before and during trial could be RICO predicate act); *Lemelson v. Wang Laboratories Inc.*, 874 F.Supp. 430, 434 (D.Mass.1994) (mail and wire fraud violations in case claiming extortion of millions of dollars through a pattern of litigation and subsequent settlement over fraudulently obtained patents were RICO predicate act); see also *Hall American Center Assoc. L.P. v. Dick*, 726 F.Supp. 1083, 1097

(E.D.Mich.1989) (finding that plaintiff's allegations that defendants engaged in filing lawsuits and notices of lis pendens as one part of a larger extortionate scheme to obtain plaintiff's property by encumbering it with liens that made it impossible for plaintiff to sell the property to anyone other than defendant were sufficient to state a cause of action under the Hobbs Act, and thus could be considered a RICO predicate act).

In Eisen, the Second Circuit noted that “there is some tension between the congressional decision to include federal mail fraud as a predicate offense and to exclude perjury, whether in violation of federal or state law.” 974 F.2d at 254. However, the court concluded, where a fraudulent scheme falls within the scope of the federal mail fraud statute and the other elements of RICO are established, use of the mail fraud offense as a RICO predicate act cannot be suspended simply because perjury is part of the means for perpetrating the fraud. We do not doubt that where a series of related state court perjuries occurs, it will often be possible to allege and prove both a scheme to defraud within the meaning of the mail fraud statute as well as the elements of a RICO violation. But in such cases, it will not be the fact of the perjuries alone that suffices to bring the matter within the scope of RICO. Id. (emphasis added).

Defendant Bolger, aided and abetted by Schafer, also communicated the attorney work product and her strategy of misrepresenting it as a “Media Release” over the wires to her clients in the N.Y. Supreme Court case as well as sending other stolen materials to their clients. FAC ¶¶ 16, 49, 50, 68, 87.

Bolger's clients did not have to be defrauded under RICO wire fraud because such communications were made “for the purpose of executing such scheme” of falsely depicting the work product as a media release. 18 U.S.C. 1343. Bolger needed her clients approval or at least their silence in carrying out her scheme.

Bolger's scheme at FAC ¶¶ 52, 53, 54:

52. Bolger's scheme included deceiving viewers of the publicly available WebCivil Supreme website into believing that my business and the services it provided, both legal and consulting, were inept because they not only made confidential and privilege information public but actually released such to the press.
53. Bolger's scheme was an extensive one with the objectives to not only harm my business but also use her perjury as a step in the plot to save her clients money by deceiving the N.Y. Supreme Court into ruling in their favor and to avoid continuing costly litigation by intimidating Me into giving up his action.
54. In making the attorney work product public via the WebCivil Supreme website, Bolger was also telling Me that she or her misandry client-reporter Tory Shepherd will publicize the stolen materials from my iCloud or home computer and continue to deceive the public concerning those materials so as to completely destroy my business.

The purpose of the wire fraud statute is to protect businesses and property. [cite]

I had a property interest in the attorney work product document, which was a product of his business as an attorney. He also had property and privacy interests in other material on his iCloud and home computer. FAC ¶ 45.

3. Francoeur, “litigation activities cannot form the basis of wire fraud as a RICO predicate act. *FindTheBest.com, Inc. v Lumen View Tech. LLC*, 20 F. Supp. 3d 451, 460 (S.D.N.Y. 2014).” *FindTheBest.com* dismissed the predicate act of wire fraud because the defendant “has not shown that any party’s reliance on [defendant’s] alleged misrepresentations caused it injury.” *FindTheBest.com* at 459. Here, I allege such at First Am. Compl. ¶¶ 76, 106, 141, 142.

Francoeur, however, relies on *dicta* in that case at p 460, which states that for malicious prosecution or abuse of process litigation in a situation that lacks a more extensive scheme of racketeering activity, wire fraud in the prior case is not a RICO predicate act. (A question that the Second Circuit has apparently not yet addressed.).

This case is not a malicious prosecution or abuse of process case. FAC ¶ 55. The parties are different and I did not prevail against the defendants in the NY Supreme Court.

FindTheBest.com cited to *Curtis & Associates, P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F.Supp.2d 153, 172 (E.D.N.Y.2010), which stated the reason that mail and wire fraud predicate acts did not apply was because “despite my creative attempts to plead mail and wire fraud, the court finds that my incomplete allegations at best attempt to make out a malicious prosecution claim. Without more, such allegations that the state court litigation is frivolous, fraudulent, or baseless—essentially claims of malicious prosecution—without more, cannot constitute a viable RICO predicate act.”

von Bulow By Auersperg v. von Bulow, 657 F.Supp. 1134 (S.D.N.Y.1987), stated “a careful reading of the complaint reveals that this alleged ‘scheme’ amounts to nothing more than a series of acts that, taken together, state a claim for malicious prosecution.” The von Bulow court in particular noted that it did “not address the situation where allegedly unjustified suits form a part of some more extensive scheme of racketeering activity, such as extortion.” 657 F.Supp. at 1145.

Even so, act were are *FindTheBest.com, Inc. v Lumen View Tech. LLC*, 20 F. Supp. 3d 451, 460 (S.D.N.Y. 2014), and *von Bulow by Auersperg v. von Bulow*, 657 F.Supp. 1134 (S.D.N.Y.1987. *FindTheBest.com* dismissed the predicate act of wire fraud because the defendant “has not shown that any party’s reliance on [defendant’s] alleged misrepresentations caused it injury.” *FindTheBest.com* at 459. Here, I allege such at First Am. Compl. 76, 106, 141, 142.

Francoeur actually relies on *dicta* in that case at 460, which states that for malicious prosecution or abuse of process litigation in a situation that lacks a more extensive scheme of racketeering activity, wire fraud in the prior case is not a RICO predicate act. (A question that the Second Circuit has apparently not yet addressed.). This case is not a malicious prosecution or abuse of process case. FAC 55. The parties are different and I

did not prevail against the defendants in the N.Y. Supreme Court, which malicious prosecution or abuse of process require.

FindTheBest.com cited to *Curtis & Associates, P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F.Supp.2d 153, 172 (E.D.N.Y.2010), aff'd, 443 F.App'x 582, which stated the reason that mail and wire fraud predicate acts did not apply was because "despite plaintiffs' creative attempts to plead mail and wire fraud, the court finds that plaintiffs' incomplete allegations at best attempt to make out a malicious prosecution claim. Without more, such allegations that the state court litigation is frivolous, fraudulent, or baseless—essentially claims of malicious prosecution—without more, cannot constitute a viable RICO predicate act."

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The RICO Scheme here is that defendants used perjury to depict my attorney work product as a "Media Release," FAC ¶¶ 46, 47; thereby disparaging my legal and business services as inept because they not only made confidential and privilege information public but actually released such to the press. Scheme to negatively impact my business and deter clients by falsely depicting his practice as unable to protect privileged data.

Additionally, defendants made the false representation as a step in their plot to save money by deceiving the court into ruling in their favor and to avoid continuing costly litigation by intimidating me into giving up his action and role as a men's rights advocate. In making the attorney work product public via the NY Supreme Court website, defendants were telling me that they will continue to publicize materials from his iCloud and continue to deceive the public concerning those materials so as to destroy me's livelihood.

Defendants communicated the fraud over the wire three times.

Wire fraud need only be in furtherance of a scheme. "[I]t is sufficient . . . to be 'incident to an essential part of the scheme . . . or a step in the plot'." *Schmuck v. United States*, 489 U.S. 705, 710 (1989).

Devising scheme to obtain money or property by false pretense. *E-Commerce & Internet Law* 44-23. [NY Sup Ct decision in favor of Bolgers clients]. Intangible intellectual property = property, *U.S. v. Brown*, 925 F.2d 1301 (10th Cir. 1991). Computer data is valuable property that can be misappropriated. *People v. Versaggi*, 83 N.Y.2d 123 (1994). N.Y. Penal § 165.50 criminalizes possession of stolen property such as computer data. *People v. Pena*, 169 Misc2d 366 (Sup. Ct. Bx. Cnty. 1996).

Hall Am. Ctr. Assocs. Ltd. P'ship v. Dick, 726 F.Supp. 1083, 1093–97 (E.D.Mich.1989) found that lawsuits can be a component of a predicate act.

The courts interpreted the wire fraud statute broadly. **In *United States v. Paccione*, 751 F. Supp. 368, 372 (S.D.N.Y. 1990), *aff'd*, 949 F.2d 1183 (2d Cir. 1991), defendants were liable for mail fraud stemming from fraudulent statements given to the New York State Department of Environmental Conservation in order to obtain a permit to transport medical waste.** Here defendants provided not just the NY State court but to the public at large fraudulent statements that the privileged attorney work product was a press release issued by me in order gain a decision in their favor from the NY court and disparage me's business.

If such criminal conduct as that of Bolger's and Schafer's cannot be reached by wire fraud, then in this Internet age, any attorney can make up any outrageous lie, communicate it to his clients over the wires for their approval, and not only win an action, hammer an opponent into submission but also destroy an opponent's business by broadcasting such a lie over a publicly available court website. FAC ¶ 56.

The First Amended Compl. also alleges that Bolger and Schafer communicated the attorney work product and their misrepresentations about it over the Internet to their clients.

Robbery

4. Francoeur, Plaintiff “failed to show how hacking— which involves neither physical force let alone force in the presence of the victim—constitutes robbery under New York law. *See, e.g., People v. Flynn*, 123 Misc. 2d 1021, 1024 (Sup. Ct. N.Y. Cnty. 1984).”

The predicate act of robbery under RICO, 18 U.S.C. § 1961(A), is “included by generic description,” David Smith, Civil RICO, ¶ 2.02(1), p. 2-4 to 6, which means a court can rely on other state offenses that are not specifically labeled robbery. *Id.*

The appeals court in *U.S. v. Forsythe*, 560 F.2d 1127, 1137 (3rd Cir. 1977), which incorporated the Supreme Court's holding in *U.S. v. Nardello*, 393 U.S. 286, 295 (1969), determined that RICO's legislative history, H.R. Rep. No. 1549, 91st Cong., 2d sess. 56 (1970), showed that the predicate act “inquiry is not the manner in which States classify their criminal prohibitions but whether the particular state involved prohibits the . . . activity.”

N.Y. Penal Code § 156.30 prohibits theft of computer related material. It is a Class E felony—punishable by more than one year; therefore, it satisfies 18 U.S.C.A. § 1961(A).

In this modern, electronic world, guns and baseball bats are archaic when it comes to stealing valuable information through the Internet. Today, the surrogate for the old use of physical force is the hacking technique of using a computer to hit a protected website with an electronically rapid succession of different codes until the right one is found—“brute force cracking.”

Bolger, Schafer and, on information and belief, Jane Doe(s) most likely forced their way into the iCloud at some point in time and left the front door open for future theft by stripping it of its access codes; or they forced their way into my home computer with some hacking technique.

Pattern

Bolger, aided and abetted by Schafer, committed three predicate acts of wire fraud by communicating their false representation of the attorney work product over the Internet to the WebCivil Supreme website. FAC ¶ 67.

On information and belief, Bolger, aided and abetted by Schafer, committed predicate acts of wire fraud by communicating to their clients over the wires the strategy of misrepresenting the attorney work product as a “Media Release” coupled with the attorney work product itself and making other communications with their clients in furtherance of Bolger’s scheme. FAC ¶ 68.

Bolger, Schafer and, on information and belief, Jane Doe(s) have committed at least two predicate acts of robbery. FAC ¶ 69.

Predicate acts are related and “open” in time. FAC ¶¶ 72-75

The predicate acts of wire fraud had the purpose that by falsely depicting the attorney work product as a public press release, such would disparage my business and the products and services it provides, and aid in winning the N.Y. Supreme Court case. The participants were Bolger, aided and abetted by Schafer; the target was the Me. Further, Bolger, aided and abetted by Schafer, used the wires for communicating the misrepresentation of the attorney work product to WebCivil Supreme and their clients as well as other communications with their clients in furtherance of the scheme.

The predicate acts by Defendants are of an “open” nature.

It became evident from Bolger’s first motion to dismiss the N.Y. Supreme Court case on August 29, 2014, that her team was trolling the Internet for information on my business.

On information and belief, Bolger’s team continues trolling the Internet for information on my business and continues to try to hack into my iCloud or his home computer to obtain any new information stored there so as to further harm my business and its services and products.

The Prohibited RICO 18 U.S.C. § 1962(c) Activity FAC ¶¶ 84-88

Bolger, Schafer and, on information and belief, Jane Doe(s) used their positions of authority and influence in the Enterprise to steal the attorney work product from my iCloud or his home computer.

Bolger and Schafer used their positions of authority and influence in the Enterprise to carry out Bolger's scheme by falsely depicting the privileged attorney work product as a press release—a public document.

Bolger and Schafer used their positions of authority and influence in the Enterprise to transmit Bolger's misrepresentations and the document to the court's website where it would be viewed by the public-at-large; thereby, harming my business by falsely depicting his business as incompetent, its services as inept, its products deficient and assist in winning the N.Y. Supreme Court case.

On information and belief, Bolger and Schafer used their positions of authority and influence in the Enterprise to transmit Bolger's misrepresentation strategy along with the document to their clients as well as engaging in other communications by wire with their clients in furtherance of Bolger's scheme.

The Defendants were motivated to maintain their income and positions in or with the Enterprise.

Copyright infringement

On May 22, 2017, I applied for copyright registration on the material that Francoeur admits Defendant Schafer reproduced from my iCloud. For an infringement action, 17 U.S.C. § 411 requires that the infringed work be already registered. According to Nimmer, once registration occurs, then an infringement action can be brought.

An author enjoys the “right to control the first public appearance of his undissemated expression,” the fair use of an unpublished work is narrow in scope. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 555 (1985) (“[T]he author's right to control the first public appearance of his expression weighs against such use of the work before its release.”). The attorney work product was unpublished when Defendants stole it and filed it three times on the WebCivil Supreme public website NY Supreme Court's public website and distributed it to their clients in Australia over the wires.

Wire fraud can apply even if copyright law applies. *U.S. v. Manzer*, 69 F.3d 222, 226 (8th Cir. 1995).

While the attorney work product was not registered with the Copyright Office and most of the material in the two screenshots were registered, there are other materials on my iCloud and my home computer that were registered. But without discovery, there is no way to determine whether Defendants infringed my rights in those registered materials. Defendants are using their refusal to disclose in order to argue for dismissal of the Copyright action under 17 U.S.C. § 411(a) (infringement action requires registration). Basically, they are saying the Court has to dismiss because we will not tell the Court what we took—even the registered copyrighted works.

The Copyright Act of 1976 (“Act”), 17 U.S.C. § 101 *et seq.*, gives copyright owners of unpublished works protection from unauthorized reproduction, distributing, and displaying of

their works. U.S. Copyright Office, Circular 1, p.1. Protection under the Act begins from the time the work is created in a tangible form. *Id.* at 2. Information stored on the Internet for longer than a transitory period is in fixed tangible form. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 129-130 (2d Cir. 2008) (“the definition of ‘fixed’ imposes both an embodiment requirement and a duration requirement”).

Defendants violated the Copyright act by just reproducing, distributing, or displaying the attorney work product and other unpublished materials without authorization. U.S. Copyright Office, Circular 1, p.1.

Most of the written documents the Defendants reproduced from my iCloud or home computer were copyrighted because they were the product of my creativity and fixed in tangible form. Some were even registered with the Copyright Office and most were unpublished. Defendants mere reproduction was infringement under 17 U.S.C. § 501. The attorney work product was not registered and unpublished.

Defendants distributed a copy of the attorney work product and other iCloud or home computer copyrighted documents without my permission to their Australian clients without my permission; therefore, it was copyright infringement under 17 U.S.C. § 501, FAC ¶ 96. Except for the attorney work product, these other materials were not used in the N.Y. Supreme Court case. Some were registered with the U.S. Copyright Office. FAC ¶ 99.

Defendants displayed the attorney work product on the N.Y. *WebCivil Supreme* site without my permission, which is arguably an infringement under 17 U.S.C. § 501 and not fair use because the document was unpublished.

Defendants first of three times filed the hacked attorney work product on the NY Supreme Court’s public website on January 12, 2015, as Exhibit 1 of Bolger’s sworn affirmation at ¶ 2 in opposition to my motion for trial on personal jurisdiction. The attorney work product had already been fixed in a tangible form; therefore, protected under the Act but not eligible for statutory loss, since it was not registered with the Copyright Office. In preparing and filing their papers, defendants, without authorization from the me,

- (1) made copies of the document;
- (2) distributed the document by uploading it to WebCivil Supreme, Dkt. No. 71, which is available free of charge to anyone with an Internet connection;
- (3) made the document available to the public via the Internet; and
- (4) put the document on display, since the general public can view it by using WebCivil Supreme.

Fair use for unpublished work

Because an author enjoys the “right to control the first public appearance of his undissemated expression,” the fair use of an unpublished work is narrower in scope. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 555 (1985) (“[T]he author’s right to control the first public appearance of his expression weighs against such use of the work before its release.”).

Moreover, it is clear that iParadigms' use of plaintiff's works did not have the "intended purpose" or "incidental effect" of supplanting plaintiff's rights to first publication. *Harper & Row*, 471 U.S. at 562. This is significant in that the primary basis for the close scrutiny courts give the use of an unpublished work is, as previously noted, an "author's right to control the first public appearance of his expression." *Id.* at 564. iParadigms did not publicly disseminate or display plaintiff's works and did not send them to any third party. *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 641 (4th Cir. 2009)]

Francoeur's objection to the copyright cause of action in the First Amended Complaint is based on a Second Circuit "Summary Order." Francoeur fails to mention that Summary Orders do not have precedential value. Local Rule 32.1.1, Disposition by Summary Order, (a) Precedential Effect of Summary Orders. Rulings by summary order do not have precedential effect. They are limited to that case and that case alone. [need cite] Further, the facts here are different.

Francoeur even tries to intimidate me into dropping the copyright cause of action with the threat of paying his exorbitant attorney fees and costs under 17 U.S.C. § 505. I am 70 year-old plaintiff who lives from paycheck to paycheck when there is work; otherwise, on the pittance of social security—who's he kidding. Besides, the recovery of full costs provision works both ways. More importantly, Francoeur's huffing and puffing over the copyright issue indicates that his clients not only absconded with the attorney work product but other documents of Plaintiff's—both registered and not registered with the U.S. Copyright Office.

Publication argument

The Copyright Act of 1976 defines "[p]ublication' [a]s the distribution of copies ... of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.... A public performance or display of a work does not of itself constitute publication." 17 U.S.C. § 101. The first sentence of the definition contains the following elements: (1) a distribution, (2) of copies of a work, (3) to the public, and (4) by sale or other transfer of ownership, or by rental, lease, or lending.

The legislative history states it is clear that any form of distribution in which the material object in which the work is fixed does not change hands is not a publication no matter how many people view the work. Copyright Act, House Report No. 94-1476, p. 138, Sept. 3, 1976; 94th Cong., 2nd Sess. 1976, 1976 U.S.C.C.A.N. 5659, 5754.¹ "[A] sine qua non of publication should be the acquisition by members of the public of a possessory interest in tangible copies of the work in question." *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 37 (1st Cir. 2003)(citing *M. Nimmer & D. Nimmer, Nimmer on Copyright* § 4.07, at 4-42 (2001)); see *Burke v. National Broadcasting Co., Inc.*, 598 F.2d 688, 693 (1st Cir. 1979), *superseded on*

¹ "[U]nder the definition of publication ... there would no longer be any basis for holding ... that the public display of a work of art under some conditions (e.g. without restriction against its reproduction) would constitute publication of the work." Copyrights Act, House Report No. 94-1476, p. 144, Sept. 3, 1976; 94th Cong., 2nd Sess. 1976, 1976 U.S.C.C.A.N. 5659, 5760. The 17 U.S.C. § 101 definition of publication "eliminates any ambiguity over display of works where there are no restrictions on copying, as it makes it quite plain that such display does not constitute a publication in any event." Schechter & Thomas, *Intellectual Property: The Law of Copyrights, Patents and Trademarks*, § 5.1, p. 81 (2003).

other grounds, *Canfield v. Ponchatoula Times*, 759 F.2d 493, 497 (5th Cir. 1985). In *Danielson*, the me had displayed drawings that were disseminated by cable television to the general public. “At most, Danielson ... showed the [drawings] to others; that did not constitute publication under the explicit terms of the statute.” *Danielson* at 37.

“It is clear ... that under the statutory language now in effect there has been no “distribution of copies ... to the public’ and hence no publication when a work is disseminated electronically.” Prof. Schechter & Thomas, *Intellectual Property: The Law of Copyrights, Patents and Trademarks*, § 5.1, p. 81 (2003). “The distribution right ... does not appear to encompass transmissions of copyrighted works over computer networks.” Prof. Reese, *The Public Display Right*, 2001 U. Ill. L. Rev. 83, 125-26 (2001). The reason is that transmissions over computer networks do not transfer tangible objects in which the works are fixed. William F. Patry, *Patry on Copyright*, § 13:11, p. 13-21, ed. 2008. Without the transfer of an existing material object or of an ownership or possessory interest in such an object, no distribution occurs. *Id.* Without distribution, there is no publication. 17 U.S.C. § 101.

A number of courts have also interpreted the Copyright Act to require the transfer of a material object for distribution to occur, rather than a mere transmission of a work: *Agee v. Paramount Communs.*, 59 F.3d 317, 325 (2d Cir. 1995)(“distribution is generally thought to require transmission of a ‘material object’”); *National Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993)(infringement of distribution right requires transfer of a material copy); *Arista Records, Inc. v. Mp3Board, Inc.*, 2002 WL 1997918 at *4 (S.D.N.Y. 2002)(distribution requires dissemination of copies).

Plaintiff’s iCloud, assuming it was publicly viewable, electronically transmitted the document over the Internet but did not transmit tangible copies of it; therefore, there was no publication. Any copies that were made had to be made by others, similar to a person video taping a play. The viewing of the document did not transfer to others any material objects, just as a play does not. In addition, under the Berne Convention to which the U.S. is a party “the communication by wire or the broadcasting of literary or artistic works ... shall not constitute publication.” *Berne Convention for the Protection of Literary and Artistic Works*, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221, Doc’t IV-B, art. 3(3).

There was also no sale or other transfer of ownership, or rent, lease or loan involved as required for publication by 17 U.S.C. § 101. In *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 197 (S.D.N.Y. 2006), the Court held that posting images of a play on the Internet “even assuming it constituted ‘distribution,’ did not involve ‘sale or other transfer of ownership, or by rental, lease or lending.’ Indeed, this result follows directly from the principle that ‘the projection or exhibition of a motion picture in theaters or elsewhere does not in itself constitute a publication.’”

Here, at most, the document was displayed on a website, similar to a television broadcast or the projection of a movie. “To ‘display’ a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process.” 17 U.S.C. § 101. A display, however, is not a publication. *Id.*

[The defendants rely on a case from the Southern District Court of N.Y. for the proposition that the display of a work on the Internet equals publication. *Getaped.Com, Inc. v. Cangemi*, 188 F.Supp.2d 398 (S.D.N.Y. 2002). In *Getaped*, a competitor of the pl copied and used the HTML code from Getaped’s website. HTML is the computer language used to give a website its visual appearance—color, graphics, spacing, font, point size, and animation. The words used for verbal expression are separate from the code. It was the code, not the verbal expressions, which the *Getaped* defendant used. The Court held that viewing the Getaped website on the Internet constituted the publication of its HTML code.]

[Commentators disagree over whether *Getaped* was correctly decided. Thomas F. Cotter, Prof. Law U. Minn., *Toward a Functional Definition of Publication in Copyright Law*, 92 Minn. L. Rev. 1724, 1727 (2007-08). Bruce P. Keller and Jeffrey P. Cunard, *Copyright Law, A Practitioner’s Guide*, § 6.1.2(B) n. 94, say:

The holding in *Getaped* is difficult to reconcile with the principle that a public display of a work is not a publication and may be an example of bad facts making bad law.... [T]he pl suffered little actual loss. As the infringement commenced before the [HTML] code was registered [but after the site went live] the pl could recover statutory loss only if it had published the [HTML] code and registered it within three months after first publication. The court equated the ability to make copies with a general publication and determined that the pl satisfied the prerequisites for entitlement to statutory loss.

[The *Getaped* decision relies on faulty reasoning that “if consistently applied, would mean that a broadcast such as a Major League Baseball game is published once a viewer makes a copy via a videocassette recorder or digital-video recorder.” Ray Ming Chang, *Publication” Does Not Really Mean Publication*, 33 AIPLA Q.J. 225, 226, 241 (2005).]

[In *Elliott v. Gouverneur Tribune Press, Inc.*, 2014 WL 12598275, at *3 (N.D.N.Y. Sept. 29, 2014), the Court ruled against Defendants:

Defendants argued that Me published her photographs when she posted them on the internet. The *Getaped.com* decision, however, has been widely criticized, and it is not clear that the decision should control on the facts of the present case. See, e.g., *Rogers v. Better Business Bureau v. Metropolitan Houston, Inc.*, 887 F. Supp. 2d 722, 730-31 (S.D. Tex. 2012) (noting that the “*Getaped.Com, Inc.* case has received a lot of attention, not all of which has been favorable. For example, one group of scholars stated, ‘The holding in *Getaped* is difficult to reconcile with the principle that a public display of a work is not a publication and may be an example of bad facts making bad law.’ Bruce P. Keller, et al., *Copyright Law A Practitioner’s Guide*, § 6:1.2 n.94 (2010). They emphasized that publication under the Copyright Act occurs, not when a work is publically viewable, but when the work is ‘reproduced in multiple copies that in turn are sold or offered for sale to the public’ “) (citation omitted). A 2006 opinion out of the same court stated that, assuming that the internet posting of a digital file of a show performance constituted distribution, it lacked the element of commercial exploitation required for publication. See *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 197 (S.D.N.Y. 2006). In a more

recent opinion, the same district court stated that posting images on a website was not publication. *See McLaren v. Chico's FAS, Inc.*, 2010 WL 4615772, *1 (S.D.N.Y. Nov. 9, 2010).]

[According to the U.S. Copyright Office: “It is unclear whether online availability for the user constitutes publication of the work under copyright law,” *Circular 65: Copyright Registration for Automated Databases*, 2 (2006), and “[t]he definition of ‘publication’ in U.S. copyright law does not specifically address on line transmission,” *Circular 66: Copyright Registration for Online Works*, 3 (2006).]

Even if the iCloud was public, it does not explicitly give permission as required by law to copy or download materials on it.

Trespass FAC ¶¶ 98-

The tort of trespass to chattel consists of intentionally using or intermeddling with a chattel in another’s possession. *Hecht v Components Intern., Inc.*, 22 Misc3d 360, 369-370 (Sup 2008) (citing Restatement [Second] of Torts § 217.)

Electronic signals generated and sent by a computer have been held to be sufficiently physically tangible to support interference in a trespass cause of action. [cite]

Intent:

Does not require defendants’ wrongful motives and still exists even when defendants had a reasonable but mistaken beliefs in their right to act. *Hecht v Components Intern., Inc.*, 22 Misc3d 360 (Sup. Ct. Cnty. Nassau 2008). Elements of trespass require that defendants knew their actions would physically interfere with me’s possessory rights in his chattel.

Defendants knew about my iCloud and home computer and that the iCloud was protected by security codes while the home computer was protected by a firewall. On information and belief, they concluded that both contained privileged and confidential digital information which could be used to assist in the N.Y. Supreme Court case as well as injure my business and disparage the services and products it offered.

The information on my home computer and iCloud is his business or his personal property—some of which is even copyrighted.

Interference:

Defendants electronically bulldozed through the borders of my iCloud or home computer for the purpose of accessing the stored information.

Electronic signals generated and sent by computer have been held to be sufficiently physically tangible to support a trespass cause of action.

Interference with information stored on a computer may give rise to trespass to chattel if information is impaired as to its condition, quality or value, *Hecht v Components Intern., Inc.*, 22 Misc3d 360 (Sup. Ct. Nassau Cnty. 2008).

Copying names and addresses from a customer database, which data was then used to solicit business, may also constitute interference, *AGT Crunch Acquisition LLC v Bally Total Fitness Corp.*, 2008 WL 293055 (Sup. Ct. NY Cnty. 2008) (Defendants interfered with Crunch's customer database by copying names and addresses, which were in turn used to make solicitations.).

Harm: Whether the harm is direct or consequential is immaterial, so long as it is caused by the defendant's act, Prosser & Keeton, *Torts* (5th Ed) 86 § 14.

One who intentionally interferes with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the quality, or value of the chattel. *Restatement (Second) of Torts* § 218, comment e (1965).

Defendants interfered with the exclusive right of possession of the attorney work product of my business and other materials by copying or downloading them from my iCloud or home computer.

As to the requisite degree of harm in the context of computer databases, "evidence of mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels" *Register.com, Inc. v Verio, Inc.*, 126 F. Supp. 2d 238, 250 (S.D.N.Y. 2000), *aff'd in part and reversed in part on other grounds*, 356 F.3d 393 (2d Cir.2004) (defendant held liable for harm to the chattel because unauthorized use of the database exceeded the scope of consent).

In *eBay, Inc. v Bidder's Edge, Inc.*, 100 F Supp 2d 1058, 1071 (N.D. Cal. 2000), the court explained that even if the alleged interference is negligible, the interference deprives the property owner to use its property for its own purposes—" [t]he law recognizes no such right to use another's personal property." *Id.*

There may, however, be situations in which the value to the owner of a particular type of chattel may be impaired by dealing with it in a manner that does not affect its physical condition. . . . the intermeddling is actionable even though the physical condition of the chattel is not impaired. *Restatement (Second) of Torts* § 218, comment h (1965).

Defendants interference is actionable even though the physical condition of the chattel was not impaired because the interference hindered my use of the attorney work product for its own purposes because accessing it and making it public destroyed its value of confidentiality.

Bolger and Schafer decided to use the digital information obtained to not only gain an unfair advantage in the N.Y. Supreme Court case but also to cause consequential loss to my business and disparage its services and products as well as to intimidate me into

withdrawing his action and refrain from bringing future civil rights lawsuits on behalf of men.

Bolger and Schafer sent me the message that if he persisted in fighting for the rights of men in the courts, they would thwart his efforts by destroying his business. They would publish out of context and falsely depict more of the stolen information and engage in more hacking of his iCloud or home computer. In effect, they were telling him—“resistance is futile, you will be assimilated” to our misandry beliefs or your business will be destroyed. Such is a violation of N.Y. Penal Law § 135.60(5), Coercion in the Second Degree.

Losses

If the chattel has no market value, or if the market value is substantially less than its actual value to the owner, as with wearing apparel or household goods, recovery will be based on the actual value to the owner, considering utility and similar factors, but excluding sentimental value, *see Lake v Dye*, 232 N.Y. 209, 213 (1921).

5. Francoeur, no trespass because no “actual injury to [my] claimed property interest in the iCloud. *Twin Sec., Inc. v Advocate & Lichtenstein, LLP*, 113 A.D.3.d 565, 565-66 (1st Dep’t 2014).”

Information on my iCloud is my personal property—some of which is even copyrighted. I protected this property by using the modern-day version of locks—access codes. Defendants picked those access codes as though they were picking the locks on my filing cabinets. Defendants then copied or downloaded the information, used an attorney work product to their own advantage in court, and made that privileged and confidential document public that harmed my business. All clear interference with and harm to my possessory rights.

CPLR 3101(c) recognizes the sanctity of the lawyer’s mental impressions and strategic analyses, 3A Weinstein, N.Y. Civil Prac. ¶ 3101.42, which is why it is not legally discoverable.

In *Twin*, a wife took husband’s computer during divorce proceedings and copied data from it, which contained trade secrets, and returned the computer three days later.

Court dismissed the action because husband “failed to sufficiently allege that defendants used those trade secrets to gain an advantage over” him. Here defendants used the hacked attorney work product as the basis for oral argument on their motion to dismiss on May 27, 2015, before Justice Schechter who granted their motion.

The *Twin* court also held on the trespass action that “there [was] no indication that the condition, quality or value of the . . . information on the computer was diminished as a result of defendants’ duplication” of it. Here, defendants accessed, duplicated and publicized my attorney work product. Such destroyed the value of

its confidentiality—one does not broadcast to ones enemies what one may do, and injured me’s business.

Conversion

Restatement (Second) of Torts § 242 (1965):

Conversion of Documents and Intangible Rights

(1) Where there is conversion of a document in which intangible rights are merged, the loss include the value of such rights.

(2) One who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to a liability similar to that for conversion, even though the document is not itself converted.

e. It was first held that the conversion of a document in which intangible rights were merged permitted recovery of loss for the appropriation of the rights so identified with it, as stated in Subsection (1). Then, as noted above, it came to be recognized by a number of courts that the recovery was for the interference with the intangible rights themselves, and that the conversion of the document was merely the means by which this was accomplished. The final step, which a good many courts have taken, was the recognition that there may be “conversion” of such an intangible right, of a kind customarily identified with and merged in a document, even though the document is not itself converted. This does not accord very well with the traditional common law limitations of conversion; and courts which prefer to adhere to the older theory may prefer to regard the liability as one for an intentional interference with the right, which is not identical with conversion, but is similar to it in its nature and legal consequences. It is, however, of very little practical importance whether the tort is called conversion, or a similar tort with another name. In either case the recovery is for the full value of the intangible right so appropriated.

Illustrations:

2. A purchases from B a certificate representing stock in C Corporation. A requests C Corporation to register the transfer of the stock on its books. The officers of C Corporation wrongfully refuse to do so, as a result of which A is deprived of the rights of a stockholder. C Corporation is subject to liability to A, similar to that for conversion, for its interference with such rights.

Thyoff v. Nationwide Mut. Ins. Co., 8 N.Y.3d 283, 291–92 (2007):

“It cannot be seriously disputed that society's reliance on computers and electronic data is substantial, if not essential. Computers and digital information are *292 ubiquitous and pervade all aspects of business, financial and personal communication activities. Indeed, this opinion was drafted in electronic form, stored in a computer's memory and disseminated to the Judges of this Court via e-mail. We cannot conceive of any reason in law or logic why this process of virtual creation should be treated any differently from production by pen on paper or quill on parchment. A document stored on a computer hard drive has the same value as a paper document

kept in a file cabinet. . . . Furthermore, it generally is not the physical nature of a document that determines its worth, it is the information memorialized in the document that has intrinsic value. . . . So too, the information that Thyroff allegedly stored on his leased computers in the form of electronic records of customer contacts and related data has value to him regardless of **9 whether the format in which the information was stored was tangible or intangible. In the absence of a significant difference in the value of the information, the protections of the law should apply equally to both forms-- physical and virtual.”

Injurious Falsehood

Injurious falsehood requires (1) intentional publication, (2) of false information about a person’s property, (3) done maliciously (common-law malice) or in reckless disregard for the truth or falsity, (4) a reasonably prudent person would or should anticipate that loss to another will naturally flow there from, and (5) results in loss measured by special losses. *PJI 3:55 Intentional Torts—Business Torts—Injurious Falsehood*.

Injurious falsehood under New York State law applies to publication, which includes Defendants clients, a knowingly false representation about my business product—the attorney work product. FAC ¶ 1(e).

Publication:

Publication is the communication of information, disseminated to a third person by any method. Thus, a statement rising to the level of an injurious falsehood may be made by an advertisement published in a newspaper or by a letter sent from one individual to another. *Coliniatis v. Dimas*, 848 F.Supp. 462 (S.D.N.Y.1994). Publication can also occur through spoken words, such as in a discussion, *Hirschhorn v. Town of Harrison*, 210 A.D.2d 587 (3d Dep’t 1994) or legal hearing, *Andrews v. Steinberg*, 122 Misc.2d 468 (Sup.Ct., N.Y. County, 1983). It is conceivable that injurious falsehoods may occur through illustrations, video, film and audio recordings. The essential criteria in determining whether a publication has occurred within the meaning of the tort is whether there is a dissemination of information in such a manner that it is communicated and comprehensible to at least one other person. *Kirby v. Wildenstein*, 784 F.Supp. 1112 (S.D.N.Y.1992).

Falsity:

Defendant Bolger falsely depicted the attorney work product, which was the property and product of my business, as a “Media Release” that had been submitted to news organizations.
Bolger falsely disparaged the ability of my business to keep privileged information private and protect confidences while creating the false impression that my business services are inept and downright harmful to its clients.

Publication:

Bolger, aided and abetted by Schafer, intentionally published the attorney work product of my legal business by placing it on the *WebCivil Supreme* website, which is available to anyone with access to an Internet connection at no cost.

Defendant Bolger, aided and abetted by Schafer, also communicated the attorney work product and her strategy of misrepresenting it as a “Media Release” over the wires to her clients in the N.Y. Supreme Court case. FAC ¶ 16.

Common law malice:

Malice = statement made without regard to the consequences, and under circumstances in which a reasonably prudent person should have anticipated that injury to another would follow. *Penn-Ohio Steel Corp. v Allis-Chalmers Mfg. Co.*, 7 A.D.2d 441, 444 (1st Dept. 1959), *modified*, 8 A.D.2d 808, 187 N.Y.S.2d 476.

Malice or at the very least reckless disregard is shown by Defendant Bolger changing the title of the attorney work product from “Responses to Media” to “Media Release.” (Ex D, Bolger affirmation at ¶ 2, Jan. 12, 2015). Defendant Bolger did this eight times in order to represent under penalty of perjury the attorney work product was a Media Release, which it was not.

Bolger and Schafer as lawyers experienced in representing media news organizations had to know that the document was not as they called it a “Media Release” but rather an attorney work product given its title, length—17 pages, contingent questions and possible answers to news media inquiries concerning the litigation of the N.Y. Supreme Court case.

It is enough for the injurious falsehood cause of action if the falsehood charged was intentionally uttered and did in fact cause me to suffer actual loss in his economic or legal relationships. [Need cite]

Special losses:

Allegations and proof of a general loss of sales is sufficient, leaving it to the trier of the facts to determine whether the loss is properly to be attributed to the injurious falsehood or not. *Tex Smith, The Harmonica Man, Inc. v. Godfrey*, 198 Misc. 1006, 1008–09 (Sup. Ct. N.Y. Cnty. 1951). FAC ¶ 120.

My legal and business clients have significantly diminished. Me is now relegated to the lowest level of legal work—document review.

One long term client who paid an annual retainer of \$1,000 a year has canceled his legal and business relationship with me as a result of Bolger and Schafer’s actions. Me has incurred expenses in bringing this action, beginning with the \$400 filing fee, in order to counteract Bolger and Schafer’s publication and as a

reasonable effort to minimize loss by showing that Bolger and Schafer falsely depicted the attorney work product as a publicly available press release so as to disparage my business product.

6. Francoeur, no injurious falsehood because “no material falsehood. *Newport Serv. & Leasing, Inc. v Meadowbrook Distrib. Corp.*, 2005 NY Slip Op 03659 (2nd Dept. 2005).”

In *Newport*, the court found that defendants’ criticism of plaintiff’s proposal in a memorandum to the distributors, was substantially true. Here, defendants falsely represented an attorney work product as a “Media Release.”

7. Francoeur invokes the litigation privilege for defamation and relies on *Singh v HSBC Bank USA*, 200 F. Supp. 2d 338, 340 (S.D.N.Y. 2002), a defamation and emotional distress action. Here, neither is an alleged cause of action.

Replevin

One of the purposes of New York computer theft law is to define computer data as property for purposes of litigation. *People v. Versaggi*, 83 N.Y.2d 123, 128 (1994). Computer data is valuable property capable of being misappropriated.

Francoeur argues that the replevin action is duplicate of the copyright action and therefore preempted by it. How can the replevin action be preempted by a Copyright infringement action when under 17 U.S.C. 411(a), infringement can only be brought for registered works and no one but Francoeur and his clients know which register works they infringed. Francoeur argues out one side of his mouth over copyright and another over replevin. What about all those other documents Defendants stole that were not registered? There’s no infringement action for them, but there is a replevin action.

5a. Replevin, 3 years S/L

Replevin is available when the defendant is in possession of certain tangible property of which I claim to have a superior right. *Batsidis v. Batsidis*, 9 A.D.3d 342 (2d Dept. 2004); *Pivar v. Graduate School of Figurative Art of the N.Y. Academy of Art*, 290 A.D.2d 212 (1st Dept 2002) (citing *G & S Quality v Bank of China*, 233 A.D.2d 215, 216 (1st Dept. 1996), *overruled on other grounds, Jamie v. Jamie*, 19 A.D.3d 330 (1st Dept. 2005)).

The replevin action simply requests this Court exercise its pendent jurisdiction to use a traditional New York State procedure for requiring all the materials copied by Francoeur’s clients be turned over to me, since they had no right to copy them in the first place

Unlike in *Twin*, here the “defendants continued to wrongfully retain the . . . [my] proprietary information” not only in the form of the attorney work product but megabytes of other material from my iCloud or home computer—both copyright registered and not. FAC ¶¶ 23, 26, 123.

The data Defendants possess or control is the personal property of my business, which makes the embodiment of that data in paper or digital form the personal property of my business.

Superior right of possession. *Pivar v. Graduate School of Figurative Art of the N.Y. Academy of Art*, 290 A.D.2d 212 (1st Dept. 2002) (citing *G& S Quality v Bank of China*, 233 A.D.2d 215, 216 (1st Dept. 1996), overruled on other grounds, *Jamie v. Jamie*, 19 A.D.3d 330 (1st Dept. 2005)).

I have the superior right to those copies over which Defendants are currently exercising control or possession and wrongly detaining. So if the Court finds no infringement in the copyright registered materials, it may still allow me to recover those materials because of my superior right in them.

Professional Misconduct Rule 4.1

Attorney work product

8. Francoeur says there is no cause of action for violating CPLR 3101(c) the attorney work product provision and cites to *Madden v. Creative Servs.*, 84 N.Y.2d 738, 741 (1995).

Madden deals with the attorney-client privilege under CPLR § 4503—not with attorney work product under CPLR § 3101(c).

Even if this Court holds there is no related cause of action for defendants breaching CPLR § 3101(c), then I request it find that defendants violated N.Y. Rule of Professional Misconduct 4.1.

CPLR 3101(c) recognizes the sanctity of the lawyer's mental impressions and strategic analyses. 3A Weinstein, N.Y. Civil Prac. ¶ 3101.42. Bolger and Schafer, however, do not.

By making the attorney work product public and knowingly making a false statement of fact to the Supreme Court that the attorney work product document was a press releases, Defendants violated N.Y. Rule of Professional Misconduct 4.1.

The purloined document was drafted during litigation in the N.Y. Supreme Court case and includes mental impressions, views and contingency tactics of me the attorney. An attorney's answers to possible questions from the news media are very much a part of an attorney's litigation strategy. The document was not presented to the press and not presented to anyone other than me until Defendants stole it.

Just because the words in the stolen attorney work product were memorialized in a draft instead of memorized, does not mean they were or would have been communicated to the press or that the work product privilege was waived.

“Here [was] simply an attempt, without purported necessity or justification, to [exploit] written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. . . . Not even the most liberal of . . . theories can

justify unwarranted inquiries into the files and the mental impressions of an attorney.” *Hickman v. Taylor*, 329 U.S. 495, 510.

Not even the most Politically Correct theories can justify unwarranted inquiries into the files and the mental impressions of an attorney. *See Hickman v. Taylor*, 329 U.S. 495, 510.

Coercion Second Degree

By retaining other materials from my iCloud or home computer, Defendants are engaging in coercion in the second degree under N.Y. Penal Law § 135.60(5), since defendants possession of my personal and business data from his iCloud or home computer amounts to a continuing threat to expose secrets or publicize asserted facts, whether true or false, tending to subject my business to hatred, contempt or ridicule. Class A misdemeanor. FAC ¶ 25(d).

Defendants will eventually do a WikiLeaks type release of all the material they hacked so as to allow the Murdoch newspaper to spin the data into further harming my law and consulting business and disparaging its products and services.

Defendants’ possession of my personal and business data from my iCloud or home computer amounts to a continuing threat to expose secrets or publicize asserted facts, whether true or false, tending to subject my business to hatred, contempt or ridicule. Class A misdemeanor. FAC ¶¶ 24, 54, 111.

Such is also a violation of NY Rule of Professional Misconduct 4.1.

N.Y. Penal Code 156.30

Even if defendants did not hack into my iCloud, they still violate N.Y. Penal Code 156.30:

A person is guilty of unlawful duplication of computer related material in the first degree when having no right to do so, he or she copies, reproduces or duplicates in any manner any computer data . . . and thereby intentionally and wrongfully deprives or appropriates from an owner thereof an economic value or benefit in excess of two thousand five hundred dollars FAC ¶ 25(c).

Such is a violation of Judiciary Law § 90(4)(e) and N.Y. Rule of Professional Misconduct 4.1.

Other N.Y. Penal codes violated that also violate Professional Misconduct Rule 4.1

- a. Unauthorized use of a computer, N.Y. Penal Code § 156.05 – knowingly accesses a computer without authorization, class A misdemeanor; FAC ¶ 25(a).
- b. Computer trespass, N.Y. Penal Code § 156.10 – knowingly accesses a computer without authorization and knowingly gains access to computer material, class E felony. FAC ¶ 25(b).

- c. N.Y. Penal Code § 156.35 Possession of misappropriated compute data is a felony. A person is guilty of criminal possession of computer related material when having no right to do so, he knowingly possesses, in any form, any copy, reproduction or duplicate of any computer data or computer program which was copied, reproduced or duplicated in violation of section 156.30 of this article, with intent to benefit himself or a person other than an owner thereof. Criminal possession of computer related material is a class E felony.

The guilty always claim the allegations against them are “baseless” and that the person seeking justice is “abusive.” (Francoeur letter April 5, 2017, Dkt. 20). Francoeur goes one better. He prevaricates over what exactly is alleged in the First Amended Complaint. It alleges his clients violated New York Rule of Professional Misconduct 4.1 and New York Judiciary Law § 90(4)—neither were specifically raised in the New York Supreme Court case.

Collateral estoppel under NY State law

The NY Sup Ct only issued a two sentence general verdict: “Denied. There is no basis for granting the relief sought.” Such shows that the NY Sup Ct motion procedures lack the extensiveness of the plenary action here, which is insufficient for collateral estoppel. *See Restatement 2d, Judgments*, § 28(3).

What did NY Sup Ct decide? Denied the motion but gave no reasons.

NY Sup. Ct. motion to withdraw attorney work product

The Racketeer Influenced and Corrupt Organizations Act, copyright infringement, trespass to chattel, injurious falsehood, replevin and violation of Professional Responsibility Rule 4.1 were never even raised in the N.Y. Supreme Court in regards to the defendants’ hacking of my iCloud or my home computer. As for the Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030(a)(2)(C), it was mentioned once in the papers and never argued during the short back and forth in front of the Justice over the plaintiff’s motion.

Factual issues

Did defendants hack into iCloud?

Did defendants stripped access codes? FAC ¶ 8.

Did defendants hack into home computer?

Did defendants copy attorney work product?

Was iCloud publicly viewable?

If my iCloud was ‘open to the public,’ why didn’t they find the attorney work product draft sooner?

“If my iCloud was “open to the public,’ coupled with Me knowing they were searching the Internet for any politically incorrect statements by him, why didn’t he protect the iCloud with access codes?”

Do Bolger and Schafer lack skills for breaking into computers?

Did Defendants copy other materials?

Law issues

Right to privacy under the U.S. Constitution;

18 U.S. C. § 1030(a)(2)(C) that proscribes intentional unauthorized access to a computer and obtaining information from a protected computer where the conduct involves interstate or foreign commerce;

Unauthorized use of a computer, N.Y. Penal Code§ 156.05;

Computer trespass, N.Y. Penal Code§ 156.10;

Unlawful duplication of computer related material, N.Y. Penal Code§§ 156.29, 156.30;

Computer tampering, N.Y. Penal Code§ 156.20;

Bolger perjury over attorney work product being a “Media Release.” FAC ¶¶ 46, 47. “A true and correct copy of the ‘Media Release’ available at my MR Legal Fund website ... is attached hereto.”

Relief sought:

- (1) Bolger withdraw a document that she submitted to this Court as part of her Affirmation ¶ 2 (Exhibit A of Pl.’s Affidavit) that was obtained by the Rupert Murdoch newspaper and defendant The Advertiser or by attorney Bolger or by one of the other defendants by hacking into my personal computer or his digital cloud;
- (2) that attorney Bolger and Defendants turn over to Me all paper and digital copies of Exhibit 1 and any other material obtained in the same manner that they are in possession or control of;
- (3) that attorney Bolger identify all the parties involved in obtaining Exhibit 1 so that they may be referred to the proper authorities;
- (4) that Bolger and Defendants be prevented from publicizing the document or other materials they obtained in the same manner;

(5) attorney Bolger and Defendants inform the Court of any other person that to their knowledge has copies of any data obtained from Mes remote-server or personal computer.

Collateral Estoppel: Issues raised by the First Amended Complaint:

1. Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030(a)(2)(C)

The Act was raised in the N.Y. Sup. Ct but was not the basis of its decision because Defendants admitted accessing and obtaining information without permission.

2. RICO

- A. Is Defendants' law firm an enterprise? Not an issue in NY Sup Ct, so never litigated, never determined and unnecessary for NY Sup Ct decision.
- B. Did Defendants commit wire fraud? Not raised, not litigated, not necessary for NY Sup Ct decision. The fraud in the NY Sup Ct was falsely representing the attorney work product as a "Media Release"—not communicating such over the wires in furtherance of Defendants' scheme.
- C. Did Defendants commit robbery? Theft of computer info under Penal Code § 156.30 was raised but not fully litigated, unclear whether decided—probably not since it's a criminal statute that does not provide for a civil action as does RICO.
- D. Did Defendants engage in two or more predicate acts? Predicate acts are those that are made in furtherance of a scheme and such a scheme was unnecessary for NY Sup Ct decision.
- E. Were Defendants' predicate acts related in time and open to repetition so as to constitute a pattern of racketeering activity? Unclear whether NY Sup Ct considered a pattern of racketeering activity and unnecessary for its decision.
- F. Did Defendants participate in the conduct of the Enterprise's (Levine Sullivan Koch & Schulz, LLP) affairs through a pattern of racketeering activity? Not an issue in the N.Y. Sup Ct, so never litigated, never determined and unnecessary for NY Sup Ct decision.

3. Copyright infringement

- A. Did the Defendants infringe my copyrights by copying, distributing and displaying documents from my computer or iCloud? The NY Sup Ct does not have subject matter jurisdiction over a copyright action. 28 U.S.C.A. § 1338, so it could not have been considered.

The attorney work product was an unpublished work, which Defendants copied, distributed and display without author's permission.

The remainder of the documents on the iCloud included unpublished works both copyright registered and non-registered. Defendants, on information and belief, copied those works without permission. Copying registered works carries statutory penalties. [See Copyright Law on publication below]

Francoeur relies on a Second Circuit "Summary Order" that has no precedential value here. Further, that Summary Order case had substantially different facts.

Replevin is broader than Copyright infringement under 17 U.S.C. § 505

4. Trespass under NY law

- A. Did Defendants interfere with the exclusive right of possession of the attorney work product of my business by copying or downloading it from my iCloud or home computer? NY Sup Ct. never ruled on possessory interference as sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels. Even if it had, it was unnecessary for the NY Sup Ct decision.
- B. Was Defendants' intent in trespassing to obtain information for litigation by personal destruction to help win their case and harm my business? Not litigated, NY Sup Ct. never determined and unnecessary for NY Sup Ct decision.

5. Injurious falsehood

- A. Did Defendants make false statements about my business product—the attorney product? NY Sup Ct. never determined such and unnecessary for NY Sup Ct decision.
- B. Does Defendants changing the title of the attorney work product from "Responses to Media" to "Media Release" show common law malice or reckless disregard? Not litigated, NY Sup Ct never determined and unnecessary for NY Sup Ct decision.
- C. Would a reasonably prudent person anticipate that loss to another will naturally flow there from? Not litigated, NY Sup Ct. never determined and unnecessary for NY Sup Ct decision.
- D. Did Defendants cause consequential loss to my business? Not litigated, NY Sup Ct. never determined and unnecessary for NY Sup Ct decision.

6. Replevin

- A. Do Defendants retain possession or control of other materials copied or downloaded from my iCloud or home computer? NY Sup Ct. never determined and unnecessary for NY Sup Ct decision.

- B. Are all those materials covered by copyright—never raised in N.Y. Sup. Ct.
7. Punitive losses for trespass and injurious falsehood never raised in NY Sup Ct.
 8. Attorney work product
 - A. Did Defendants breach the policy behind CPLR 3101(c) by improperly using attorney work product without permission? Not addressed by the NY Sup Ct and unnecessary for NY Sup Ct decision.
 9. Professional Misconduct Rule 4.1, ¶¶ 136-perjury; 138-39-judiciary law
 - A. Did Defendants knowingly make a false statement of fact under penalty of perjury to the N.Y. Supreme Court that the attorney work product document was a “Media Release”? NY Sup Ct. never determined and unnecessary for NY Sup Ct decision.
 - B. Did Defendants violate N.Y. Judiciary Law § 90(4)(e) by copying the attorney work product from Me’s iCloud or home computer without permission? Violation of Judiciary Law § 90(4)(e) never determined and unnecessary for NY Sup Ct decision.
 - C. By retaining other materials from my iCloud or home computer, are Defendants engaging in coercion in the second degree under N.Y. Penal Law § 135.60(5)? Never determined and unnecessary for NY Sup Ct decision.

Francoeur argues:

2. That after full oral argument, the NY Sup Ct dismissed the motion to withdraw the attorney work product. (Francoeur Ltr p. 2, ¶ 3). Problem is there was no transcript, and I and Defendants disagreed on what was orally argued. Both sides submitted “In lieu of Transcript Statements” on appeal and those statements conflict, which shows a lack of clarity on the issues. *See Restatement 2d, Judgments*, § 27, Comment f.
3. That affidavits submitted to show party opponent admissions against Defendants’ interests can actually be used to prove facts that favor their interests and cites to *Weston Funding, LLC v. Consorcio G Grupo Dina, S.A. de C. V.*, 451 F. Supp. 2d 585, 587 (S.D.N.Y. 2006). (Francoeur Ltr p. 2, ¶ 6). *Weston* involved an Indenture as documentary evidence not affidavits of the defendant. Under NY law, affidavits as a primary source of proof of a defense must be ignored since they do not qualify as documentary evidence on a motion to dismiss. Siegel, *N.Y. Prac.* at § 259 (5th ed.).
4. That the First Amended Complaint does not offer facts that allow the Court to determine liability. (Francoeur Ltr p. 3, ¶ 1). According to the U.S. Supreme Court, the Plaintiff must not be put to the test to prove his allegations at the pleading stage. *NOW, Inc v. Scheidler*, 510 U.S. 249, 256 (1994).

5. Francoeur says that the NY Sup Ct, and I quote, “has already decided that the same arguments . . . re-packaged here have no basis.” (Francoeur Ltr p. 2, ¶ 5). That’s a conclusory statement. The burden is on Francoeur to show that for each and every issue in this case, that issue in the NY Sup Ct case was:

- B. raised,
- C. litigated,
- D. identical,
- E. necessary for the NY Sup Ct decision.

Restatement 2d, Judgments, § 27, Comment f.

Francoeur argues that all the actions raised here are collaterally estopped. That means the N.Y. Supreme Court case could have proceeded on anyone of them. It is unclear, however, which one accounts for the actual decision; therefore, collateral estoppel does not apply.

“It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.” *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984).

Benjamin v. Coughlin, 905 F.2d 571, 575 (2d Cir.1990):

“In determining the preclusive effect given a state court judgment under 28 U.S.C. § 1738 (1982), a federal court must “give that judgment the same effect that it would have in the courts of the state under state law.” *Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *see Wilder v. Thomas*, 854 F.2d 605, 616 (2d Cir.1988), *cert. denied*, 489 U.S. 1053 (1989).

Siegel NY Prac:

Collateral estoppel applies to issues rather than to whole claims or defenses. *Siegel, N.Y. Prac.* § 457 (5th ed.).

As to the prior decision, “It is not conclusive, however, to the same extent when the two causes of action are different, not in form only . . . , but in the rights and interests affected. The estoppel is limited in such circumstances to the point actually determined . . .” *Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 N.Y. 304, 306-307 (1929) (Cardozo, J).

The estoppel inquiry is whether an issue involved here was disposed of there, and whether the party sought to be bound with it here was a party there, had a fair chance to have the issue determined in his favor there, and lost. *Zabriskie v. Zoloto*, 22 A.D.2d 620 (1st Dep’t 1965).

§ 462 Identity of issue test

The burden of showing that the issue on which collateral estoppel is sought is the same as one disposed of in the earlier action is on the party who wants the estoppel.

Schwartz v. Public Administrator, 24 N.Y.2d 65 (1969), a leading case in New York lists a number of factors for the court to consider in determining whether to award an estoppel. When one of these factors is cited by the party resisting the estoppel to get out from under it, that party carries the burden.

Its “crowning consideration” is fairness, that rigidity has no place in its application, and that “all the circumstances” of the prior action must be examined to determine whether the estoppel is to be allowed. *Read v. Sacco*, 49 A.D.2d 471 (2d Dep’t 1975).

If the earlier judgment could have proceeded on any of several distinct facts or theories and it is unclear which of them actually accounts for it, there can be no estoppel and the matter is open for litigation anew.

Estoppel does not apply when first decision is a general verdict because it does not clarify precisely what the court found on each issue: a finding on either of the issues could adequately account for the judgment, depriving it of its clarity and hence its estoppel use. See *Manard v. Hardware Mutual Casualty Co.*, 12 A.D.2d 29 (4th Dep’t 1960).

A special verdict embodying all of the jury’s findings in the form of answers to questions would clarify the findings and expedite their use for estoppel purposes in later actions. See *Kret v. Brookdale Hospital Medical Center*, 93 A.D.2d 449 (2d Dep’t 1983), *aff’d* 61 N.Y.2d 861 (1984).

§ 463. *Law and Fact, Ultimate and Evidentiary*

Applies to both law and fact issues.

If an examination of the record, going into as much detail as need be, reveals that enough was determined—and fairly determined—in the first action to conclude an issue in the second, it is of secondary importance that the fact found to do the job is an “ultimate” fact or something less. *Hinchey v. Sellers*, 7 N.Y.2d 287 (1959).

The Second Restatement rejects the attempt to draw a line between ultimate and evidentiary facts, suggesting that the more appropriate question to ask is whether, whatever the label, the parties and fact trier recognized the issue as important and necessary and tried and determined it accordingly. See *Restatement 2d, Judgments*, § 27, Comment j.

§ 464. *Underlying Facts Bind, Litigated or Not*

The rule that a fact or conclusion that is a necessarily part of a judgment will be entitled to an estoppel even if it was not actually litigated. Decisions on issues needed to be made to reach the final conclusion are estopped.

The estoppel doctrine will apply not only to matters actually litigated, but also to all that are necessarily established by the earlier judgment, litigated or not. The estoppel would attach to such a judgment even if it had been based only on a general verdict that did not expressly report

its underlying findings, for the reason that no other combination of findings could legally account for the judgment.

When a given finding necessarily underlies a judgment, and the judgment's very existence can be explained only by assuming the fact to be thus and so, the fact may become the basis of an estoppel even if it was not litigated in the earlier action. Estoppel does not invariably demand that the point be shown to have been disputed in the first action. "Whatever is necessarily implied in the former decision, is for the purpose of the estoppel deemed to have been actually decided," as are also "conclusions of law or fact, which necessarily flow from a judgment, although not expressly found." *Pray v. Hegeman*, 98 N.Y. 351, 358 (1885). Any finding essential to the judgment constitutes a component of that judgment and lends itself to an estoppel. *Hinchey v. Sellers*, 7 N.Y.2d 287 (1959).

§ 465. *Gratuitous Findings*

Even an issue actually litigated may be denied the estoppel if it was not necessary to the judgment.

To earn an estoppel, a fact must be shown to be material and relevant to the resolution of the legal issue involved in the first action. *Zabriskie v. Zoloto*, 22 A.D.2d 620 (1st Dep't 1965). Once enough has been found to justify a judgment, further findings lose their decisiveness and hence do not invite the responsibility, care, and attention that all judicial findings deserve.

Estoppel does not apply to unessential facts, and this is so even though they may be put in issue by the pleadings and directly decided. *Silberstein v. Silberstein*, 218 N.Y. 525 (1916).

§ 467. *The Full and Fair Opportunity Test; Factors to Consider*

Main authorities for the NYS factors in the test for collateral estoppel: *B. R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141 (1967); *Schwartz v. Public Administrator*, 24 N.Y.2d 65 (1969); *Restatement, 2d*, §§ 28 and 29:

1. ***Sameness of issue.*** It will always be necessary to determine that the issue is the same in both actions. The majority in DeWitt stressed this, finding that the issues as framed by the pleadings in that case were the same as those in the earlier action. **The door is always open to a showing that the issues differ, no matter how alike they may seem on the surface.**
2. Vigor of defense in first action. This is on the DeWitt list. The court there notes that the earlier action was in fact defended with full vigor.
3. No longer require privity
4. Size of claim. If the earlier claim was a small one, the court is free to determine whether it was too small to earn estoppel treatment for its result.
5. Forum of prior litigation. If from a court whose jurisprudence is suspect than second court may not apply estoppel. [Al for criticism NY Sup]

6. Use of initiative. Whatever factor the party against whom the estoppel is sought can show to justify a want of initiative in the earlier action, the door is open to convincing the second court to deny it estoppel effect.

7. Extent of the litigation. Take into account the context from which the issue, sought to be precluded, emerges in the first action. **If it was obscured by a mass of other issues in a complicated or prolonged litigation, the court would be free to find it too inadequately considered to deserve estoppel treatment.**

8. Incompetence and lack of experience of counsel may result in denial of estoppel.

9. Availability of new evidence. This item from the Schwartz list confirms that it may sometimes be permissible to deny an estoppel to a previously decided issue on the ground that new evidence has since come to the fore in the interim, which could have changed the result.

10. Indication of compromise verdict. If it appears that there was some ingredient in the earlier verdict to suggest that it was a compromise—based, for example, on sympathy or prejudice rather than strictly responsive to the law as applied to the evidence—the Schwartz case says that this can be considered by the court in determining whether to award an estoppel.

11. Differences in applicable law.

12. Foreseeability of future litigation. When a reasonably attentive lawyer diligently going about his business could not be expected to contemplate that what is being done here now can have repercussions there later.

[13. Different burdens of proof.]

[14. Avoidance of prejudice by joinder.]

[15. Inconsistency of prior determinations.]

16. Tactical oversight in prior action. When the result of an action is sought to affect a myriad of others, the Court of Appeals has indicated that the action had best show a strong, foible-free record. If a tactical oversight taints the record, the court is disinclined to give the judgment the broad impact that collateral estoppel has, however binding (and damaging) the oversight may have been on the loser in the earlier action itself. *Kaufman v. Eli Lilly and Co.*, 65 N.Y.2d 449 (1985).

+17. The Second Restatement leaves the door open to any “other compelling circumstances” that might be shown to suggest that an estoppel should be withheld. *Restatement 2d, Judgments*, § 29(8).

§ 469. Effect When Different Courts Involved

When a state court finding on an exclusively federal issue seeks recognition in a federal court, the state court finding might not support collateral estoppel. Were that issue the subject of a direct action (such as one for patent infringement), it would be a matter of exclusively federal jurisdiction.

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, **copyrights** and trademarks. **No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.** For purposes of this subsection, the term “State” includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands. 28 U.S.C.A. § 1338.

The test depends on the list of factors in § 467, above. Note particularly caption 5 on the list [Sup Ct competence on copyrights]. The Restatement also lists differences in courts as one of the factors warranting individual consideration in an estoppel test. *See Restatement 2d, Judgments*, § 28(3).

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: . . .

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between [the two courts]

§ 471. Recognition of Domestic Judgments; Full Faith and Credit

Each American court must recognize the validly rendered judgments of the others and give them essentially the same preclusive effect the rendering jurisdiction expects for its judgments. *See, e.g., Gargiul v. Tompkins*, 790 F.2d 265 (2d Cir. 1986).

Full faith and credit applies to the American judgment as long as the rendering court, F-1, had jurisdiction. [NY Sup Ct did not have jurisdiction over copyright issues.] Any error that F-1 made on the merits must be reviewed by direct attack in F-1 and not by collateral attack in F-2. *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

§ 473. Evidentiary Sources to Establish Matters Estopped

If the aggregate of the papers in the earlier action, including a trial transcript, do not reveal with clarity the issues disposed of, extrinsic evidence may be received. **Evidence [In lieu of statements in conflict] may even be received to show that the record in the prior action does not accurately reflect what issues were determined.** *See Restatement 2d, Judgments*, § 27, **Comment f.**

Restatement 2d, Judgments, § 27, Comment f:

The party contending that an issue has been conclusively litigated and determined in a prior action has the burden of proving that contention.

Extrinsic evidence may also be admitted to show that the record in the prior action does not accurately indicate what issues, if any, were litigated and determined.

§ 474. Estoppel Only for Given Issue

Collateral estoppel works on individual issues, not the whole case. **If the estoppel applies only a given issue without disposing of the whole case, the unprecluded issues must stand for trial.**

§ 475. Raising the Issue; Burden of Proof

The burden is on the party relying on the estoppel to show identity of issue and to establish that the issue was necessarily decided in the earlier action.

Losses:

Misappropriation

Black's Dictionary: The application of another's property dishonestly to one's own use. Intellectual property—common law tort of using non-copyrighted information or ideas that a person uses for profit to compete unfairly or copying a work whose creator has not yet claimed or been granted exclusive rights. The elements of misappropriation (1) pl. invested time, money or effort to obtain info, (2) def. took info without a similar investment, (3) pl. suffered competitive injury.

Barclays Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 894 (2d Cir. 2011):

“894 i. International News Service v. Associated PressThe NBA Court briefly summarized the Supreme Court's seminal 1918 “hot news” decision, International News Service v. Associated Press, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918) (“INS ”):INS involved two wire services, the Associated Press (“AP”) and International News Service (“INS”), that transmitted news stories by wire to member newspapers. Id. INS would lift factual stories from AP bulletins and send them by wire to INS papers. Id. at 231 [39 S.Ct. 68]. INS would also take factual stories from east coast AP papers and wire them to INS papers on the west coast that had yet to publish because of time differentials. Id. at 238 [39 S.Ct. 68]. The Supreme Court held that INS's conduct was a common-law misappropriation of AP's property. Id. at 242 [39 S.Ct. 68].NBA, 105 F.3d at 845.INS itself is no longer good law. Purporting to establish a principal of federal common law, the law established by INS was abolished by Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), which largely abandoned federal common law. But, as the NBA panel pointed out, “[b]ased on legislative history of the 1976 [Copyright Act amendments], it is generally agreed that a ‘hot-news’ INS-like claim survives preemption.” NBA, 105 F.3d at 845 (citing H.R.Rep. No. 94–1476 at 132).The House of Representatives Report with respect to the preemption provisions of the 1976 Copyright Act amendments commented in this regard:“Misappropriation” is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as “misappropriation” is not preempted if it is in fact based neither on a right within the general scope of copyright as

specified by [17 U.S.C. §] 106 [specifying the general scope of copyright] nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting “hot” news, whether in the traditional mold of [INS], or in the newer form of data updates from scientific, business, or financial data bases.H.R. No. 94–1476 at 132, reprinted in 1976 U.S.C.C.A.N. at 5748 (footnote omitted), quoted in NBA, 105 F.3d at 850. The House Report thus anticipated that INS-like state-law torts would survive preemption. It did not itself create such a cause of action or recognize the existence of one under federal law. It allowed instead for the survival of such a state-law claim.The NBA Court thus used INS as a description of the type of claims—“INS-like”—that, Congress has said, are not necessarily preempted by federal copyright law. Some seventy-five years after its death under Erie, INS thus maintains a ghostly presence as a description of a tort theory, not as precedential establishment of a tort cause of action.”

U.S. Golf Ass'n v. St. Andrews Sys., Data-Max, Inc., 749 F.2d 1028, 1034–35 (3d Cir. 1984):

“The doctrine has been applied *1035 to a variety of situations in which the courts have sensed that one party was dealing “unfairly” with another, but which were not covered by the three established statutory systems protecting intellectual property: copyright, patent, and trademark/deception as to origin.”

My business is that of providing legal and business consulting products and services.

Bolger, Schafer and, on information and belief, Jane Doe(s)’ hacking of my iCloud or his home computer has required Me to expend significant time and expense in analyzing and investigating Defendants’ breach of my computer and iCloud, assessing and modifying the security of both to prevent further unauthorized access, and otherwise responding to the intrusion by these Russian-like criminals of the Internet.

Bolger, aided and abetted by Schafer, in making available to the public the attorney work product stolen from my business and misrepresenting it as a “Media Release” has, as Bolger and Schafer intended, harmed my business because whenever a client hires him for litigation services, the opposing counsel will enlist the now publicly available work product against my business in representing a client.

For Bolger, aided and abetted by Schafer, to obtain approval from their clients to misrepresent the attorney work product as a Media Release required communications by wire.

Further, Bolger and Schafer are now sitting on a mass of private and confidential personal and business information that they can use at will to engage in disparaging attacks against v practice in other cases in which they are involved, or provide the data to attorneys in cases they are not involved with, or provide the data to the many news media clients that they represent, especially Murdoch newspapers. Such amounts to a clear intimidation that I dare not exercise his First Amendment rights under the U.S. Constitution unless it conforms to their misandry beliefs.

The near complete destruction of my business in the amount of \$500,000. Me is now relegated to the lowest level of legal work—document review.

Under civil RICO, trebling of those losses to \$1.5 million.

I also seeks punitive losses under the trespass to chattel and injurious falsehood actions in the amount of \$2 million.

Punitive losses for trespass and injurious falsehood

Such require proof of recklessness, or a conscious disregard of the rights of others. Manifest spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton, N.Y. Pattern Jury Instr.—Civil 2:278.

In *Walker v Sheldon*, 10 N.Y.2d 401, 491 (1961), the Court of Appeals held that, although punitive losses are generally not available in cases alleging ordinary fraud and deceit, such losses may be recovered where a fraud that is aimed at the public generally is gross and involves high moral culpability.

Other relief:

Turn over to my all paper and digital copies.

Identify all the persons involved in obtaining the attorney work product.

Be prohibited from publicizing information obtained.

Inform the Court of any other person that to their knowledge has copies of any data obtained.

Chronology

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|---------|--|
| 1/26/17 | Court ordered Fed. R. Civ. P. 12(f) conference for 2/15/17 and by 2/8/17 submit joint letter of discovery to be taken. |
| 1/31/17 | Francoeur's letter requesting pre-motion conf. |
| 2/3/17 | RDH letter in response |
| 3/24/17 | FAC filed |
| 4/5/17 | Francoeur's 2d letter requesting to file motion to dismiss |
| 4/5/17 | RDH response to Francoeur's 2d letter |

4/6/17 Ct Order, April 7 pre-motion conf. canceled and Francoeur allowed to move to dismiss.

4/13/17 Francoeur requests additional pages

4/13/17 RDH opposed additional pages

4/14/17 Ct Order allows additional pages

5/3/17 RDH letter to Francoeur requesting early discovery

5/8/17 Francoeur denys early discovery

5/8/17 RDH to Court re: discovery dispute

5/9/17 Francoeur's threatening letter

5/10/17 RDH letter to Court complaining about Francoeur's coercion attempt

5/11/17 Francoeur letter to Court requesting Court not allow early discovery

5/16/17 Court denies early discovery