United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DANIEL DELACRUZ,

Plaintiff,

v.

THE STATE BAR OF CALIFORNIA, et al.,

Defendants.

Case No. 16-cv-06858-BLF

ORDER ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Plaintiff Daniel Delacruz ("Delacruz"), proceeding pro se, sues the State Bar of California, Thomas Mills, Robin Brune, Heather Abelson, Mark Torres-Gil, and Tony Tse (the "State Bar Defendants") for allegedly accessing Delacruz's website in violation of the Computer Fraud and Abuse Act, the California Constitution, and California Penal Code § 502. The State Bar Defendants move to dismiss the complaint. ECF 27. On March 24, 2017, the Court entered a stipulation by the parties to waive oral argument. ECF 36. On May 2, 2017, the Court referred the State Bar Defendants' motion to dismiss to Magistrate Judge Susan van Keulen for Report and Recommendation ("R&R"). ECF 38.

On June 2, 2017, Judge van Keulen issued her R&R, recommending that the Court grant the motion to dismiss with leave to amend in part. *See generally* R&R, ECF 39. Judge van Keulen recommends that this Court dismiss all claims for damages against the State Bar Defendants, including individuals sued in their official capacities, as barred by the Eleventh Amendment and provide leave to amend the claim for injunctive relief for insufficient pleading. R&R 3-4. As to the claims asserted against Defendants in their individual capacities, the R&R found that the complaint fails to allege unauthorized access that is actionable under the Computer Fraud and Abuse Act ("CFAA"). *Id.* at 7-10. The R&R further determines that the allegations

that individual Defendants provided false information to America Online and T34 Hosting in an attempt to obtain information from the email account of StateBarScandal@aol.com and web address of http://danieldlc.com are conclusory and inadequately pled. *Id.* at 10-11. Lastly, the R&R notes that Delacruz fails to adequately allege damages under the CFAA. *Id.* at 11. As to the CFAA claim against individual defendants in their personal capacities, the R&R recommends dismissal with leave to amend.

Delacruz timely objected to the R&R on July 3, 2017. Obj., ECF 44. The Court addresses below each of the objections to Judge van Keulen's R&R made by Delacruz.

I. LEGAL STANDARD

A district judge may not designate a magistrate judge to hear and determine a motion to involuntarily dismiss an action. 28 U.S.C. § 636(b)(1)(A); *Estate of Conners v. O'Connor*, 6 F.3d 656, 659 (9th Cir.1993) (" '[I]t was not intended that the magistrate would have the power to hear and determine dispositive motions"). A judge may, however, under § 636(b)(1)(B), designate a magistrate judge to hear a motion to dismiss and submit proposed findings of fact and recommendations for the disposition of such a motion. Where a party files written objections to the proposed disposition, "[t]he district judge to whom the case is assigned shall make a de novo determination upon the record." Fed. R. Civ. Proc. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to."); *Hunt v. Pliler*, 384 F.3d 1118, 1123 (9th Cir. 2004) ("With respect to dispositive matters, a magistrate is only permitted to make recommendations for final disposition by an Article III judge who reviews his findings and recommendation, if objected to, de novo.") (citation and alterations omitted).

II. DISCUSSIONS

A. Eleventh Amendment Immunity Applies to Defendants in Their Official Capacities

Delacruz contends that Eleventh Amendment immunity does not apply to Defendants sued in their official capacities because they waived this immunity pursuant to his website's terms of use. Obj. 1-2 (citing *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306 (1990)). Delacruz further argues that the Eleventh Amendment Immunity is abrogated because Defendants

violated his rights under the American Disabilities Act and the Fourteenth Amendment. Obj. 2-3.

First, the terms of use on Delacruz's website cannot constitute a waiver of Eleventh Amendment immunity. Delacruz relies on the terms of use to argue that Defendants "agree[d] to waive any and all defense of any kind whatsoever, whether federal, state, or local laws including but not limited to the Eleventh Amendment Immunity . . . . " Delacruz then argues that this language is not ambiguous, and thus is not analogous to the "ambiguous and general consent to suit provisions" rejected by *Feeney* as an insufficient waiver. Obj. 1-2 (citing *Feeney*, 495 U.S. at 306). However, Delacruz's reliance on the terms of use and *Feeney* is unpersuasive. *Feeney* concerned whether the states of New York and New Jersey had waived their immunity in federal court based on state statutory provisions governing suits against the port authority. *Id.* at 302. The Supreme Court in *Feeney* held that "in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*." *Id.* at 306 (emphasis in original). Even though the case here concerns a website term of use and not a state statue like in *Feeney*, Delacruz's allegation that Defendants entered a website containing certain terms of use is not the same as specifying an intention to subject themselves to suit in *federal court*. A state may waive its Eleventh Amendment immunity only by giving an "unequivocal indication" that it consents to suit in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). Accordingly, the Court does not find that Defendants have waived Eleventh Amendment immunity pursuant to the website terms of use.

As to Delacruz's argument that Eleventh Amendment immunity does not apply based on Defendants' violation his American Disabilities Act and equal protection rights, the Court finds this argument to be inapposite to the present case. While state sovereign immunity must give way in the face of congressional action under section 5 of the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), Delacruz's complaint does not contain any cause of action based on these purported violations of the Fourteenth Amendment. As such, Eleventh Amendment immunity is not abrogated in the present case.

With regard to the injunctive relief claim,[1] the Eleventh Amendment also applies to the State Bar of California so the injunctive claim against the State Bar of California is dismissed without leave to amend. *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995) ("The Eleventh Amendment bars suits which seek either damages or injunctive relief against a state, an 'arm of the state,' its instrumentalities, or its agencies"). In contrast, an injunctive relief claim may be asserted against state officials in their official capacities. *Allegrino v. California*, No. 06-05490-MJJ, 2007 WL 1450312, at *4 (N.D. Cal. May 14, 2007) (citing *Edelman v. Jordan*, 415 U.S. 651, 664 (1974)). However, the Court will dismiss with leave to amend the injunctive relief claim asserted against individual State Bar Defendants in their official capacities because it is insufficiently pled, as discussed in more detail below for the CFAA claim.

B. Complaint Fails to State a Claim for Relief under the CFAA

As a preliminary matter, Delacruz notes that his opposition to the motion to dismiss addresses the defects in his complaint and thus his complaint should be liberally construed given his pro se status. Obj. 3. Although a pro se litigant's pleading and papers should be construed liberally, argument in opposition cannot cure a defect in the pleading. *Yamauchi v. Cotterman*, 84 F. Supp. 3d 993, 1009 (N.D. Cal. 2015) (citing *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003)). "In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." *Broam*, 320 F.3d at 1026 n.2 (emphasis in original). As such, Delacruz's argument presented in his opposition cannot overcome the deficiencies in the complaint.

Delacruz further argues that the complaint has sufficient allegation for his CFAA claims. Specifically, Delacruz claims that he should not be required to identify specific acts taken by specific individual defendants prior to discovery. Obj. 3-4. Regardless, Delacruz contends that

[1] Delacruz asserts an injunctive relief claim pursuant to California Civil Code § 52.1(b): "Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief . . . ." Cal. Civ. Code § 52.1(b).

Exhibit A to the complaint corroborate that allegation that Defendants conspired to violate the CFAA. *Id.* at 4. First, Delacruz's need for discovery does not obviate the rule requiring a complaint to state plausible factual allegations in support of the asserted claims. Fed. R. Civ. Proc. 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). Second, the Court finds that the complaint, even after taking the attached Exhibit A into consideration, is deficient for not alleging any specific acts taken by each individual defendant. To state a CFAA claim against each of the defendants in their individual capacities, the complaint must state plausible conduct by each defendant that would meet all the elements of the claim. While it may be true that the overt act of one conspirator can be attributable to all conspirators, the complaint fails to adequately allege a conspiracy. *See, e.g., Copple v. Astrella & Rice, P.C.*, 442 F. Supp. 2d 829, 837 (N.D. Cal. 2006) (finding conclusory allegations of conspiracy insufficient to support a § 1983 claim).

Delacruz also contends that the complaint sufficiently pleads all elements required by the CFAA, including the element of "without authorization." Obj. 5 (citing *United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012)). Delacruz claims that Defendants accessed his private data contained in his website without authorization because the website contains a disclaimer that "No part of this page or site may be reproduced or transmitted . . . without the express written permission from the Webmaster." Obj. 6; *see also* Ex. A to Compl. (showing an email sent by Defendant Brune stating "Can you forward to your IT person and see what we can get, if anything, without agreeing to his disclaimer?"). Delacruz avers that his website disabled the print function and yet Defendants circumvented this technical barrier by obtaining screenshots of the website and printed its contents without his consent or authorization. Obj. 7. Delacruz also claims that he blocked the internet protocol addresses of Defendants' San Francisco and Los Angeles' offices. *Id.* at 7, 8.

To successfully state a claim under CFAA, 18 U.S.C. § 1030(g) based on a violation of § 1030(a)(2)(C), Delacruz must allege that Defendants: (1) intentionally (2) accessed a computer (3) without authorization or in such a way that exceeded his authorized access, and (4) obtained information (5) from any "protected computer," (6) resulting in a loss to one or more persons

during any one-year period aggregating at least $5,000 in value. As to a claim under § 1030(g) based on a violation of § 1030(a)(5)(C), Delacruz must plead that Defendants: (1) intentionally (2) accessed a "protected computer" (3) without authorization, and, as a result of such conduct, (4) caused damage and loss (5) to one or more persons during any one-year period aggregating at least $5,000 in value. As such, for either subsection of § 1030(g), the claims must adequately allege the element of "without authorization."

With regard to the allegation that Defendants took screenshots of the website despite the legal disclaimer prohibiting the reproduction of the website, Compl. ¶ 46; Obj. 6-7, the Court finds that this at best shows "misuse or misappropriation," but does not show "unauthorized" access. As the Ninth Circuit has held, the CFAA "target[s] the unauthorized procurement or alteration of information, not its misuse or misappropriation." *United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) (citation omitted). Taking screenshots would only be possible after Defendants had accessed the website. Delacruz must specifically provide factual allegations supporting that the *access* on its own was unauthorized, and not just the taking of screenshots. Delacruz also argues in the objections that he restricted access to his websites by blocking Defendants' Internet Protocol addresses. However, such factual allegations are not set forth in the complaint so they cannot remedy the complaint's deficiencies.

Turning to the allegation that Defendants falsely informed America Online and T35 Hosting to obtain information from Delacruz, the Court reiterates its determination above that such allegation is too conclusory to state a plausible claim against each of the defendants. As discussed above, the complaint must state plausible conduct by each defendant that would support a CFAA cause of action against each defendant in their individual capacities.

C. Complaint Fails to Allege Damages in excess of $5,000 under the CFAA

Lastly, Delacruz claims that he incurred over $90,000 in damages and loss by having to conduct a damages assessment and responding to Defendants' access to the confidential data and information. Obj. 8. Delacruz also asserts that he suffered over $47,000 in loss of good will and business based on Defendants' activities with T35 Hosting. *Id.* at 9. Delacruz further argues that he should also be entitled to damages based on the denial of a law license. *Id.*

The CFAA defines "loss" as:

> any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage 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 damages incurred because of interruption of service

18 U.S.C. § 1030(e)(11). The CFAA defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8); *see also Nexans Wires S.A. v. Sark-USA, Inc*., 319 F. Supp. 2d 468, 474 (S.D.N.Y. 2004) (concluding, based on the legislative history of the CFAA, that "loss" includes only costs actually related to computers).

Based on the definition of "loss" set forth above, the alleged damages from the denial of state bar admission and loss of prospective employment are not recoverable under the CFAA. *See* Compl. ¶ 50. As to other damages set forth in Delacruz's objections, including those from having to assess and respond to Defendants' alleged access to his confidential information, these damages are not alleged in the complaint. As such, the Court does not consider them to determine whether the claims are sufficiently pled. Nonetheless, in light of Delacruz's argument set forth in his objections, the Court will grant leave to amend in part.

The Court does not address the remaining state law claims at this time because the Court declines to exercise supplemental jurisdiction without a viable federal claim. Based on the foregoing de novo review, the Court agrees with the conclusions reached by Judge van Keulen and finds her R&R to be well-reasoned and based on a correct statement of the law, and thus adopts the R&R.

III. ORDER

For the foregoing reasons, the Court ADOPTS the R&R of Magistrate Judge van Keulen. Defendants' motion to dismiss the complaint is GRANTED with partial leave to amend as to the following:

1. The CFAA claim asserted against Defendants Thomas Mills, Robin Brune, Heather Abelson, Mark Torres-Gil, and Tony Tse in their individual capacities is dismissed with leave to amend; and
2. The injunctive relief claim pursuant to California Civil Code § 52.1(b) against

Defendants Thomas Mills, Robin Brune, Heather Abelson, Mark Torres-Gil, and Tony Tse in either their official or individual capacities is dismissed with leave to amend.

The Court GRANTS the motion to dismiss without leave to amend as to all claims against the State Bar of California and as to any CFAA claim seeking damages against Defendants Thomas Mills, Robin Brune, Heather Abelson, Mark Torres-Gil, and Tony Tse in their official capacities.

The Court declines to exercise supplemental jurisdiction and DISMISSES the remaining state law claims without prejudice.

Delacruz shall file an amended complaint on or before August 15, 2017. Failure to meet the deadline to file an amended complaint or failure to cure the deficiencies identified in this Order will result in a dismissal of Delacruz's claims with prejudice.

IT IS SO ORDERED.

Dated: July 24, 2017

BETH LABSON FREEMAN
United States District Judge

United States District Court
Northern District of California