STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: August 30, 2013]

DANIEL WILLIAMS	:	
	:	
V.	:	**C.A. No. PC 2012-3664**
	:	
LEAH STODDARD f/k/a LEAH WILLIAMS, PAUL M. MARTELLINI, in his capacity as Acting Chief of Police of the North Providence Police Department, NORTH PROVIDENCE POLICE DEPARTMENT, and THOMAS MASSARO, in his capacity as The Finance Director of the Town of North Providence	:	

DECISION

GIBNEY, P.J. Before this Court is Plaintiff Daniel Williams' Motion for Leave to File a Second Amended Complaint. Defendants North Providence Police Department, North Providence Acting Chief of Police Paul M. Martellini, North Providence Finance Director Thomas Massaro, and Leah Stoddard (collectively, Defendants) have objected to Plaintiff's motion.

I

Facts and Travel

At all times relevant to this matter, Plaintiff Daniel Williams (Plaintiff or Mr. Williams) was employed as a police officer with the North Providence Police Department (Department). (First Am. Compl. ¶ 20.) From 2009 to 2010, Mr. Williams was married to Defendant Leah Stoddard (Ms. Stoddard). See id. at ¶ 10. Sometime in 2009, unbeknownst to Mr. Williams, Ms.

Stoddard installed a spyware program on a laptop computer that Mr. Williams frequently used.[1] See id. at ¶ 11. The spyware program tracked and recorded, inter alia, Mr. Williams' internet activity, log-in data, passwords, email account usage, and online conversations with third parties. See id. at ¶ 16.

In or around October 2010, Ms. Stoddard provided the Department with certain information about Mr. Williams' online activities that she had obtained through use of the spyware program. See First Am. Compl. at ¶ 21. Sometime thereafter, the Department initiated an investigation of Mr. Williams. See id. at ¶ 22. On March 28, 2012, the Department filed an internal affairs complaint against Mr. Williams based, at least in part, on evidence it had garnered directly and indirectly from the information received from Ms. Stoddard. See id. at ¶¶ 24-25. In the complaint, the Department charged Mr. Williams with conduct unbecoming an officer, incompetence, violation of user rules of behavior, insubordination, and conducting personal business while on duty. Id. at ¶ 26. The Department suspended Mr. Williams and relieved him of his duties as a police officer. Id. at ¶ 27.

Mr. Williams invoked his right to a hearing under § 42-28.6-4(a) of the Law Enforcement Officers' Bill of Rights (LEOBOR). See First Am. Compl. at ¶ 28. As required by § 42-28.6-5(c), North Providence Acting Chief of Police Paul Martellini (Chief Martellini) notified Mr. Williams on April 3, 2013 of the evidence and testimony that the Department intended to introduce at the LEOBOR hearing. Id. at ¶ 29. In particular, Chief Martellini notified Mr. Williams that the Department intended to introduce evidence of Mr. Williams' internet activity. (Defs.' Mem. in Supp. of Obj. to Pl.'s Mot. 2.)

[1] Ownership of the computer is disputed. See Tr. 12-13, 15, Aug. 14, 2013.

On July 17, 2012, Mr. Williams filed a complaint in Superior Court naming Ms. Stoddard, the Department, and Chief Martellini as defendants. The initial complaint asserted eight counts against Ms. Stoddard for violations of various federal and state statutes (Counts I-VII) and sought to recover damages from Ms. Stoddard pursuant to G.L. 1956 § 9-1-2, which provides civil liability for criminal conduct (Count VIII). See Compl. at ¶¶ 29-62. In particular, Count VIII of the initial complaint alleged that Ms. Stoddard is civilly liable to Plaintiff under § 9-1-2 for violations of G.L. 1956 §§ 11-52-3 and 11-52-4.1, and 18 U.S.C. § 2701. See Compl. at ¶¶ 63-64. Mr. Williams also alleged that the Department and Chief Martellini unlawfully intercepted electronic communications in violation of § 12-5.1-1 (Count IX) and § 18 U.S.C. 2511 (Count X). Id. at ¶¶ 63-69. The initial complaint sought compensatory, statutory and punitive damages, attorneys' fees, and costs. Mr. Williams further requested that this Court: (1) issue an injunction to prevent the Department and Chief Martellini "from using, disclosing, and offering into evidence" at the LEOBOR hearing any information that Ms. Stoddard had gained from use of the spyware program and any evidence that the Department had discovered as a result of the information that Ms. Stoddard provided (Count XI); and (2) grant him declaratory relief (Count XII). Mr. Williams' LEOBOR hearing was stayed pending resolution of his legal claims. (Defs.' Mem. in Supp. of Obj. to Pl.'s Mot. 5.)

Mr. Williams moved for leave to file an amended complaint on January 4, 2013. His First Amended Complaint added Finance Director for the Town of North Providence Thomas Massaro as a defendant. See Mot. to File First Am. Compl. at 1. No objection having been filed, Plaintiff's motion was granted on January 13, 2013, pursuant to Superior Court Rule of Civil Procedure 7(b)(3).[2]

[2] Rule 7(b)(3) of the Superior Court Rules of Civil Procedure provides, in relevant part:

On August 6, 2013, Mr. Williams filed the instant Motion for Leave to File a Second Amended Complaint. Mr. Williams' proposed Second Amended Complaint does not contain any new factual allegations but asserts an additional cause of action against Ms. Stoddard under 18 U.S.C. § 1030, the Federal Computer Fraud and Abuse Act (Count IX). See Second Am. Compl. at ¶¶ 65-69. Mr. Williams also seeks to alter Count VIII to hold Ms. Stoddard civilly liable under § 9-1-2 for three additional statutory violations: § 11-52-2, 18 U.S.C. § 1028A, and 18 U.S.C. § 1343. See id. at ¶ 63. Defendants Chief Martellini, the Department, and Thomas Massaro have filed an objection to Plaintiff's Motion for Leave to File a Second Amended Complaint. See Defs.' Obj. to Pl.'s Mot. to Amend, Aug. 6, 2013.

This Court heard oral arguments on Plaintiff's motion to amend on August 14, 2013. Ms. Stoddard indicated at the hearing that she objects to Plaintiff's proposed amendments and wishes to incorporate the arguments made by the Department, Chief Martellini, and Thomas Massaro in opposition to Plaintiff's motion. See Tr. 2, 12, Aug. 14, 2013.

II

Standard of Review

Rule 15 of the Superior Court Rules of Civil Procedure governs amendments to pleadings. Pursuant to Rule 15(a), a party is permitted one amendment "as a matter of course at

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> "The following motions shall be deemed to be granted as a matter of course and shall not be placed on the motion calendar unless objection stating the particular ground therefor is served and filed at least 3 days before the time specified for its hearing:
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> . . . .
>
> (v) a motion to amend pleadings under Rule 15." Super. R. Civ. P. 7(b)(3).

any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar . . . within 20 days after [the pleading] is served." Super. R. Civ. P. 15(a). Thereafter, any amendments are "only by leave of court or by written consent of the adverse party[.]" Super. R. Civ. P. 15(a). Rule 15(a) further instructs that "leave shall be freely given when justice so requires." Super. R. Civ. P. 15(a).

A "liberal interpretation of Rule 15(a) encourages the allowance of amendments in order to facilitate the resolution of disputes on their merits rather than on blind adherence to procedural technicalities." Inleasing Corp. v. Jessup, 475 A.2d 989, 992 (R.I. 1984). Nonetheless, "the final decision whether to allow or to deny an amendment rests within the sound discretion of the trial justice." Mainella v. Staff Builders Indus. Servs., Inc., 608 A.2d 1141, 1143 (R.I. 1992) (citing Dionne v. Baute, 589 A.2d 833, 835-36 (R.I. 1991)) (additional citations omitted). Among the reasons for which a proposed amendment may be denied are "undue prejudice, delay, bad faith, and failure to state a claim." Id. (citing Faerber v. Cavanagh, 568 A.2d 326, 329 (R.I. 1990)) (internal citation omitted).

III

Law and Analysis

Defendants argue that Mr. Williams' Motion for Leave to File a Second Amended Complaint should be denied because: (1) Defendants would suffer undue prejudice if the amendments are granted; and (2) the proposed amendments would be futile because they fail to state claims upon which relief could be granted. The Court will address each of Defendants' arguments in seriatim.

A

Prejudice

The issue of prejudice to the nonmoving party "is central to the investigation into whether an amendment should be granted." Faerber, 568 A.2d at 329. "The burden rests on the party opposing the motion to show it would incur substantial prejudice if the motion to amend were granted." Wachsberger v. Pepper, 583 A.2d 77, 78-79 (R.I. 1990) (citing Babbs v. John Hancock Mut. Life Ins. Co., 507 A.2d 1347, 1349 (R.I. 1986)).

In support of their objection, Defendants argue that Plaintiff's excessive delay in seeking to amend his complaint will cause them substantial prejudice if Plaintiff's amendments are granted. They claim that Plaintiff's new causes of action will require them to undertake additional discovery. In response, Mr. Williams argues that Defendants will not be unduly prejudiced because the proposed amendments do not introduce any new factual allegations.

Our Supreme Court has repeatedly propounded that "'mere delay is an insufficient reason to deny an amendment.'" Harodite Indus., Inc. v. Warren Elec. Corp., 24 A.3d 514, 531 (R.I. 2011) (quoting Wachsberger, 583 A.2d at 79) (additional citation omitted). Rather, this Court must find that "such delay creates substantial prejudice to the opposing party." Id. (internal quotation omitted). Delay may be grounds for denying a proposed amendment if "'the opposing party will not have an adequate opportunity to prepare his [or her] case on the new issues raised by the amended pleading.'" Vincent v. Musone, 572 A.2d 280, 283 (R.I. 1990) (quoting 6 Wright, Miller, and Kane, Federal Practice and Procedure: Civil § 1488 (2d ed. 1990)). "'An addition of a new claim close to trial when discovery is essentially complete and trial strategy already planned invariably delays the resolution of a case[.]'" Faerber, 568 A.2d at 330 (quoting Andrews v. Bechtel Power Corp., 780 F.2d 124, 139 (1st Cir. 1985)). Thus, to determine the

existence of possible prejudice, this Court considers delay, proximity to trial, and any additional preparation that the nonmoving party may need to undertake to address the proposed amendments. See Harodite Indus., 24 A.3d at 532 (discussing Weybosset Hill Invs., LLC v. Rossi, 857 A.2d 231, 237 (R.I. 2004)).

In this case, Mr. Williams seeks to file his Second Amended Complaint approximately seven months after filing his First Amended Complaint and one year after initiating this action. While such a lapse of time constitutes a delay, it is not necessarily an excessive one. See Wachsberger, 583 A.2d at 79 (delay of three years was not grounds for disallowing amendment where trial had yet to commence and nonmoving party would suffer no prejudice); cf. Faerber, 568 A.2d at 330 ("[A] wait of twelve years constitutes undue and excessive delay."). More importantly, allowing Plaintiff's amendments would not deprive the Defendants of an adequate opportunity to prepare for trial. While there was a date scheduled for a hearing on Mr. Williams' request for an injunction,[3] no date has yet been set to try any of Mr. Williams' other claims. Furthermore, the only additional discovery that Defendants claim they will potentially need to undertake is to depose Plaintiff regarding his new causes of action. With a trial date yet to be set, there is no reason to conclude that Defendants will not have ample time to finish deposing Plaintiff, if necessary, and adequately prepare a defense to Plaintiff's proposed amendments.[4] Cf. Vincent, 572 A.2d at 284 (allowing amendment on first day of trial caused defendants substantial prejudice by precluding pretrial discovery relative to new strategy and theory).

[3] The injunction hearing was originally scheduled for August 14, 2013. On that date, the Court instead heard arguments on the instant motion.

[4] In addition, it appears that Plaintiff's discovery is incomplete. According to Mr. Williams, the Department has yet to comply with his request that it produce or make available for inspection certain physical evidence. See Pl.'s Reply Mem. at 3-5. He further asserts that he is awaiting an opportunity to depose Ms. Stoddard. See id. at 4.

Accordingly, the Court finds that Defendants have failed to meet their burden of demonstrating that Plaintiff's proposed amendments will cause them substantial and undue prejudice.

B

Futility

"[I]f a complaint as amended could not withstand a motion to dismiss . . . then the amendment should be denied as futile." Wright, Miller and Kane, 6 Federal Practice and Procedure: Civil § 1487 (2010); see also Mainella, 608 A.2d at 1143 (amendment may be denied for failure to state a claim). If, however, the amendment "is not clearly futile, then denial of leave to amend is improper." Wright, Miller and Kane, 6 Federal Practice and Procedure: Civil § 1487 (2010).

Defendants argue that Mr. Williams' Motion for Leave to Amend should be denied because his proposed amendments are futile. According to Defendants, the proposed additional causes of action would be subject to dismissal for failure to state claims upon which relief can be granted. In particular, Defendants argue that Mr. Williams has failed to plead sufficient facts to show that he is entitled to recovery under 18 U.S.C. § 1030. They further argue that the additional statutory violations that Plaintiff seeks to assert under Count VIII of his Second Amended Complaint require a showing of intent to defraud and Plaintiff has failed to plead such fraud with the particularity required by Rule 9(b) of the Superior Court Rules of Civil Procedure.[5]

[5] In his reply memorandum, Mr. Williams argues that Chief Martellini, the Department, and Thomas Massaro lack "standing" to object to his Second Amended Complaint on futility grounds since the proposed amendments assert claims solely against Ms. Stoddard. Plaintiff has not cited any law in support of his standing argument. Irrespective of the accuracy of Plaintiff's legal position, Ms. Stoddard indicated at the hearing that she objects and wishes to incorporate the arguments of the other defendants. See Tr. 2, 12, Aug. 14, 2013. Thus, this Court considers any standing issue moot.

1

Count IX: Civil Cause of Action under 18 U.S.C. § 1030

Count IX of Mr. Williams' proposed Second Amended Complaint asserts a claim against Ms. Stoddard for violating 18 U.S.C. § 1030, the Federal Consumer Fraud and Abuse Act (CFAA). The CFAA makes it a criminal offense, inter alia, to "intentionally access[] a computer without authorization or exceed[] authorized access and thereby obtain . . . information from any protected computer[.]" 18 U.S.C. § 1030(a)(2)(C). Subsection (g) of the CFAA provides a civil cause of action for "[a]ny person who suffers damage or loss by reason of a violation of this section[.]" 18 U.S.C. § 1030(g). Mr. Williams alleges that Ms. Stoddard "accessed [his] electronic data without his authorization and used the [laptop] in a manner in excess of her right or permission." (Second Am. Compl. ¶ 67.) He further alleges that Ms. Stoddard "accessed and used [his] computer data knowingly and with the intent to defraud." Id. at ¶ 68.

Defendants generally assert that Mr. Williams' claim under the CFAA is futile because the laptop on which the spyware was installed is not a "protected computer" within the meaning of the statute. In reply, Mr. Williams maintains that the "protected computer" at issue in this case is not the laptop on which the spyware was installed but rather certain host computers operated and maintained by the websites that Mr. Williams accessed.

Under the CFAA, a "protected computer" includes one that "is used in or affecting interstate . . . commerce or communication[.]" 18 U.S.C. § 1039(e)(2)(B). It is well established that the internet is an instrumentality and channel of interstate commerce whose regulation falls within Congress' commerce clause powers. See, e.g., U.S. v. Sutcliffe, 505 F.3d 944, 953 (9th Cir. 2007); U.S. v. Horne, 474 F.3d 1004, 1006 (7th Cir. 2007); U.S. v. MacEwan, 445 F.3d 237, 245 (3rd Cir. 2006); U.S. v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004). Accordingly,

other courts have broadly interpreted the term "protected computer" in the CFAA to include computers connected to the internet. See U.S. v. Trotter, 478 F.3d 918, 921 (8th Cir. 2007) (defendant's admission that computers were connected to the internet demonstrated that computers fell within statutory definition of "protected computer"); NCMIC Fin. Corp. v. Artino, 638 F. Supp. 2d 1042, 1060 (S.D. Iowa 2009) ("Because NCMIC's computers were connected to the Internet, NCMIC's computers were part of a system that is inexorably intertwined with interstate commerce" and thus "protected computers" within the meaning of CFAA). Furthermore, the location of the attack or access is not determinative of whether the computer is one that affects interstate commerce. See U.S. v. Mitra, 405 F.3d 492, 496 (7th Cir. 2005) (notwithstanding the fact that harm to network was locally inflicted, computerized communication network was a "protected computer" within the meaning of the CFAA since the spectrum on which the network operated was a channel of interstate commerce); see also Freedom Banc Mortgage Servs., Inc. v. O'Hara, 2012 WL 3862209, *6 (S.D. Ohio 2012) ("A computer that is connected to the internet therefore satisfies § 1030(e)(2)'s interstate commerce requirement even if the plaintiff used that connection to engage in only intrastate communications.").

In this case, the laptop on which the spyware was installed was connected to the internet and able to send and receive email. See Second Am. Compl. at ¶ 16. It is specifically alleged that Ms. Stoddard unlawfully recorded Mr. Williams' internet and email activity. See id. at ¶¶ 15-16. Thus, the Court cannot agree with Defendants' assertion that Plaintiff's CFAA claim would clearly be futile for failure to allege access of a "protected computer."

The Court nevertheless finds that Plaintiff's proposed CFAA claim is futile for other reasons. The CFAA's civil remedy is expressly limited. A plaintiff seeking to recover under

§ 1030(g) must plead one of five enumerated injuries. The only one of the five injuries potentially applicable in this matter is a "loss to 1 or more persons during any 1-year period . . . aggregating at least $5,000 in value[.]" 18 U.S.C. § 1030(c)(4)(A)(i)(I). Losses recoverable for this particular category of injury are limited to economic damages. 18 U.S.C. § 1030(g). The statute further 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).

Courts have consistently interpreted cognizable "losses" under the CFAA's civil remedy provision to be limited to those that have some connection to the "remedial costs" of investigating damage to the computer, remedying the damage, and "any costs incurred because the computer cannot function while or until repairs are made." Wilson v. Moreau, 440 F. Supp. 2d 81, 109-10 (D.R.I. 2006) (quoting Nexans Wires S.A. v. Sark-USA, Inc., 319 F. Supp. 2d 468, 477 (S.D.N.Y. 2004), aff'd, 166 F. App'x 559 (2d Cir. 2006)); see also Modis, Inc. v. Bardelli, 531 F. Supp. 2d 314, 320 (D. Conn. 2008) ("[C]ourts have sustained actions based on allegations of costs to investigate and take remedial steps in response to a defendant's misappropriation of data."). The CFAA permits recovery of lost revenue only when the loss is related to the impairment or unavailability of the system or computer. See Nexans Wires S.A. v. Sark-USA, Inc., 166 F. App'x 559, 562 (2d Cir. 2006); Modis, Inc., 531 F. Supp. 2d at 320; see also Quantlab Techs. Ltd. (BVI) v. Godlevsky, 71 F. Supp. 2d 766 (S.D. Tex. 2010) (absent allegations of interruption of service or costs incurred to investigate or respond to employee's access of computer, employer's losses from employee's misappropriation of trade secrets and

confidential information failed to state a cognizable loss under CFAA); Andritz, Inc. v. Southern Maint. Contractor, LLC, 626 F. Supp. 2d 1264 (M.D. Ga. 2009) (lost revenue from stolen trade secrets is not "loss" within meaning of CFAA). Similarly, attorneys' fees do not count towards the $5000 statutory loss threshold unless they are directly incurred as a result of the harm to the computer, such as the costs of retaining counsel to assist in investigation and reporting an intrusion. See NCMIC Fin. Corp., 638 F. Supp. 2d at 1065 (S.D. Iowa 2009); Wilson, 440 F. Supp. 2d at 110 ("[A]s a matter of law, the costs of litigation cannot be counted towards the $5,000 statutory threshold."). Thus, "there is nothing to suggest that the 'loss' or costs alleged can be unrelated to the computer." Wilson, 440 F. Supp. 2d at 109-10 (internal quotation omitted). "Even cases which have taken an expansive view of the CFAA jurisdictional threshold have not suggested that 'loss' can include a cost unrelated to the computer." Nexans Wires, 319 F. Supp. 2d at 476 (citation and internal citation omitted).

In Count IX of his Second Amended Complaint, Mr. Williams alleges that "[a]s a direct result of [Ms.] Stoddard's unlawful conduct, [he] has incurred and continues to incur attorneys' fees, and has suffered and will continue to suffer substantial emotional distress, damage to his reputation, and lost wages and benefits." (Second Am. Compl. ¶ 69.) In addition to the fact that Count IX, as amended, fails to plead losses in excess of $5000, it also fails to allege any losses that arise from the costs of remedying the spyware's intrusion on the laptop. Mr. Williams' lost wages and benefits are not costs of remedying the intrusion on the laptop nor are they lost revenue from an interruption of service. Mr. Williams has also failed to allege that any of his attorneys' fees were directly incurred to remedy the intrusion on the laptop. In light of Mr. Williams' failure to allege $5000 of losses, or even any loss, cognizable under the CFAA, the Court denies his proposed amendment to add a claim under that statute as futile. See Mainella,

608 A.2d at 1143 (amendment may be denied for failure to state a claim); see also Caro v. Weintraub, 2010 WL 4514273, *12 (D. Conn. 2010) (denying motion to amend to add a CFAA cause of action as futile for failure to plead any cognizable losses).

2

Count VIII: Civil Liability under § 9-1-2 for Violations of § 11-52-2, 18 U.S.C. § 1028A, and 18 U.S.C. § 1343

Under § 9-1-2, "any person [who] suffer[s] any injury to his or her person, reputation, or estate by reason of the commission of any crime or offense . . . may recover his or her damages for the injury in a civil action against the offender[.]" Sec. 9-1-2. It is immaterial whether criminal charges have been brought. See § 9-1-2. Plaintiff seeks to amend Count VIII of his complaint to recover additional damages under § 9-1-2 from Ms. Stoddard for her alleged violations of § 11-52-2, 18 U.S.C. § 1028A, and 18 U.S.C. § 1343. See Second Am. Compl. at ¶ 63. All three additional statutory violations alleged under Plaintiff's proposed amendment to Count VIII include an element of fraud or intent to defraud. See 18 U.S.C. § 1343 (prohibiting wire fraud); 18 U.S.C. § 1028A (providing enhanced sentence for certain enumerated felonies that involve identify theft); § 11-52-2 (prohibiting access of computer for purpose of devising or executing scheme to defraud).

Claims for fraud are subject to a heightened pleading standard. Rule 9(b) of the Superior Court Rules of Civil Procedure directs that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Super. R. Civ. P. 9(b). The particularity required by Rule 9(b) "necessarily depends upon the nature of the case[.]" Kent et al., Rhode Island Civil and Appellate Procedure, § 9:2 (2006). Nonetheless, the particularity requirement "should always be determined in light of the purpose of the rule to give fair notice to the adverse party and to enable him [or her] to prepare his [or her] responsive

pleading." Id.; see also Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 161 (R.I. 2001) (Rule 9(b)'s "purpose [is] giving fair and specific notice of the alleged fraud"). "Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Super. R. Civ. P. 9(b).

Defendants argue that Mr. Williams' proposed amendments to Count VIII should be denied as futile because Mr. Williams has failed to meet Rule 9(b)'s requirement that allegations of fraud be pled with particularity.[6] Mr. Williams argues in reply that Rule 9(b)'s pleading requirements apply less rigorously to claims of statutory fraud than to claims of common law fraud. He maintains that the allegations in his Second Amended Complaint are pled with sufficient particularity to provide Defendants with adequate notice of the claims asserted against them.

Statutory claims that sound in, or are grounded in, fraud are subject to the requirement that the circumstances constituting fraud be pled with particularity. See, e.g., Chubb & Son v. C & C Complete Servs., LLC, 919 F. Supp. 2d 666 (D. Md. 2013) (plaintiffs were required to plead claims under state consumer fraud statutes with particularity since those claims sounded in fraud); E-Shops Corp. v. U.S. Bank Nat. Ass'n, 795 F. Supp. 2d 874, 879 (D. Minn. 2011) ("The heightened pleading requirement of Rule 9(b) applies equally to statutory fraud claims."); In re WellPoint, Inc. Out-of-Network UCR Rates Litigation, 865 F. Supp. 2d 1002, 1049 (C.D. Cal. 2011) (Pleading requirements of Federal Rule 9(b) apply to claims under state's false advertising statute since those claims are "grounded in fraud.") (internal citation omitted); cf. In re Lupron Mktg. and Sales Practices Litigation, 295 F. Supp. 2d 148, 181-82 (D. Mass. 2003) ("Common-

[6] Defendants also argue that Plaintiff has failed to plead his claim under the CFAA with sufficient particularity. In light of this Court's finding that Plaintiff's proposed CFAA claim in Count IX of his Second Amendment Complaint is futile for other reasons, the Court need not decide if Count IX meets Rule 9(b)'s particularity requirement.

law fraud is no more exempt than is statutory fraud from [Federal] Rule 9(b)'s requirement that 'the circumstances constituting fraud or mistake shall be stated with particularity.'"). Nonetheless, where a statute plainly "eliminates one or more of the traditional elements of a fraud claim[,]" a plaintiff obviously need not plead all of the elements of common law fraud, i.e., a false representation intended to induce reliance and upon which the plaintiff justifiably relies to his or her detriment. Wright, Miller, and Kane, 5A Federal Practice and Procedure: Civil, § 1297 (2004). "When the governing fraud law is less stringent than the traditional law of fraud, therefore . . . the application of Rule 9(b) must be adjusted accordingly." Id.

The elements of wire fraud under 18 U.S.C. § 1343 are (1) knowing and willing participation in a scheme or artifice to defraud with the specific intent to defraud; and (2) the use of interstate wire communications in furtherance of the scheme. U.S. v. Czubinski, 106 F.3d 1069, 1073 (1st Cir. 1997) (citing U.S. v. Sawyer, 85 F.3d 713, 723 (1st Cir. 1996)) (internal citations omitted). A scheme or artifice to defraud includes "unauthorized dissemination or other use" of certain kinds of confidential information "[w]here such deprivation is effected through dishonest or deceitful means[.]" Id. at 1074. "[M]erely accessing confidential information," however, "without doing, or clearly intending to do, more" is not a deprivation of property within the meaning of the wire fraud statute. Id. "[T]o 'deprive' a person of their intangible property interest in confidential information under section 1343, either some articulable harm must befall the holder of the information as a result of the defendant's activities, or some gainful use must be intended by the person accessing the information[.]" Id. Unauthorized computer browsing motivated by "curiosity alone will not sustain a finding of participation in a felonious criminal scheme to deprive [a plaintiff] of [his or her] property." Id. at 1076.

In his proposed Second Amended Complaint, Mr. Williams alleges:

> "15. Stoddard installed the Spyware for the purpose of and with the intent to (i) monitor Williams' internet activity, (ii) track Williams' keystrokes, (iii) capture Williams' logon data and passwords for various email accounts and websites, (iv) capture incoming and outgoing emails, (v) capture Williams' online conversations with third parties, and (vi) periodically and automatically capture entire screen snapshots.
>
> "16. In 2009 and 2010, Stoddard successfully used the Spyware to track, monitor, capture, and record all of Williams' internet activity, keystrokes, logon data and passwords, emails, and online conversations with third parties as well as entire screen snapshots . . . .
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> . . . .
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> "19. Williams did not authorize Stoddard to track, monitor, capture, or record his activity on the Computer.
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> . . . .
>
> "21. In or about October 2010, Stoddard took the Protected Information that she compiled and maintained to Chief Martellini, the North Providence Police Department and/or the Town of North Providence.
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> "22. As a result, Chief Martellini, the North Providence Police Department, and/or the Town of North Providence initiated an investigation of Williams.
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> . . . .
>
> "27. . . . Williams . . . was suspended and relieved of duty as a police officer." (Second Am. Compl. ¶¶ 15, 16, 19, 21, 22, and 27)

Mr. Williams' Second Amended Complaint therefore alleges that some harm has befallen him due to Ms. Stoddard's unauthorized access and dissemination of his confidential information. See Czubinski, 106 F.3d at 1074. Thus, the Court cannot state at this early stage that Mr. Williams' claim under 18 U.S.C. § 1343 is clearly futile. In addition, the above allegations state the who, what, when, and how of the alleged fraudulent activity. See New England Data Servs.,

Inc. v. Becher, 829 F.2d 286 (1st Cir. 1987) (Rule 9 generally requires allegations of wire fraud to include the manner, content, and timing of the alleged fraud, as well as identify by whom it was perpetuated). Mr. Williams has therefore given Ms. Stoddard adequate and fair notice of the fraud she is alleged to have perpetuated. See Women's Dev. Corp., 764 A.2d at 161 (Rule 9(b)'s "purpose [is] giving fair and specific notice of the alleged fraud").

The elements of § 11-52-2 are similar to those of wire fraud under 18 § U.S.C. 1343. Compare § 11-52-2 (making it a crime to "directly or indirectly access[] . . . any computer . . . for the purpose of . . . devising or executing any scheme or artifice to defraud"), with, 18 U.S.C. § 1343 (criminalizing the use of interstate wire communications in furtherance of a scheme or artifice to defraud). The Court therefore also declines to find that Mr. Williams' claim for a violation of § 11-52-2 is clearly futile in light of his allegations that Ms. Stoddard surreptitiously accessed and divulged his confidential information to the Department to deliberately harm him.

Furthermore, wire fraud under 18 USC § 1343 is one of the predicate felonies for aggravated identity theft under 18 U.S.C. § 1028A. See 18 U.S.C. § 1028A(c)(5). A violation of 18 U.S.C. § 1028A requires that commission of the predicate felony involve a knowing transfer, possession, or use of a means of identification of another person without authorization. See 18 U.S.C. § 1028A(a)(1). Here, Mr. Williams has alleged that Ms. Stoddard impermissibly possessed various passwords and log-in information gathered through her use of the spyware program. See Second Am. Compl. at ¶¶ 15-16. Again, the Court cannot say based on the allegations contained in Mr. Williams' Second Amended Complaint that his claim for civil damages for Ms. Stoddard's alleged violation of 18 U.S.C. § 1028A is clearly futile. See U.S v. Barrington, 648 F.3d 1178, 1193 (11th Cir. 2011) ("usernames and passwords, considered together, constitute[] a 'means of identification'" within the meaning of 18 U.S.C. § 1028A).

The statutory violations that Mr. Williams alleges in his proposed amendments to Count VIII rest on somewhat novel theories of recovery, the finer points of which have yet to be fully explored. Nonetheless, the Court is mindful of the fact that Rule 15's liberal spirit is intended to encourage resolution of disputes on the merits rather than on technicalities. See Inleasing Corp., 475 A.2d at 992. For resolution of the motion currently before this Court, it is sufficient for the Court to find that the claims are not clearly futile, that the above-cited allegations give the Defendants fair notice of the conduct they allegedly committed, and that Defendants will not suffer undue prejudice. Thus, Mr. Williams' request for leave to amend Count VIII to add claims under § 9-1-2 for violations of 18 U.S.C. § 1343, 18 U.S.C. 28A, and § 11-52-2 is granted. See Wright, Miller and Kane, 6 Federal Practice and Procedure: Civil § 1487 (2010) (If the proposed amendment "is not clearly futile, then denial of leave to amend is improper.").

IV

Conclusion

For the reasons discussed herein, Mr. Williams' motion for leave to amend is granted as to Count VIII and denied as to Count IX of his Second Amended Complaint. Counsel shall prepare and submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Daniel Williams v. Leah Stoddard, et al.
CASE NO:	PC 12-3664
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 30, 2013
JUSTICE/MAGISTRATE:	Presiding Justice Alice Bridget Gibney
ATTORNEYS:	
For Plaintiff:	Stephen J. Brouillard, Esq.; John R. Grasso, Esq.
For Defendant:	John B. Harwood, Esq.; John A. Tarantino, Esq.; Vincent F. Ragosta, Jr., Esq.