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E-FILED on 05/20/09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

METTEYYA BRAHMANA,

Plaintiff,

v.

PHILLIP CHARLES LEMBO; CYBERDATA
CORPORATION; NUMONIX, INC.; AND
CONQUEST TECHNOLOGY LIMITED,

Defendants.

No. C-09-00106 RMW

ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM;
GRANTING MOTION TO QUASH SERVICE
AND DISMISS COMPLAINT FOR
INSUFFICIENT SERVICE OF PROCESS;
GRANTING MOTION TO CONTINUE CASE
MANAGEMENT CONFERENCE

[Re Docket Nos. 17, 20, 38]

Defendants Phillip Charles Lembo ("Lembo") and CyberData Corporation ("Cyberdata"), et al., move to dismiss *pro se* plaintiff Metteyya Brahmana's ("Brahmana") complaint for failure to state a claim. Defendant Conquest Technology Limited ("Conquest") also moves to quash service and dismiss the complaint against it for insufficient service of process. Brahmana opposes both motions. For the reasons stated below, the court grants in part and denies in part the motion to

1 dismiss for failure to state a claim and grants the motion to quash service and dismiss for insufficient
2 service of process.

3 I. BACKGROUND

4 Brahmana was employed by Cyberdata from August 1, 2005 until October 24, 2008. First
5 Amended Complaint ¶ 9 ("FAC"). Brahmana started his employment as a "Director of Sales and
6 Marketing" and was responsible for CyberData's Voice-Over-Internet-Protocol ("VoIP") and Point-
7 of-Sale hardware products. *Id.* at ¶ 10. After a conflict arose between Lembo and Brahmana over
8 CyberData's relationship with Conquest, Brahmana took a different position doing technical support
9 and product management for the VoIP hardware business. *Id.* at ¶ 16. Some time after October of
10 2007, plaintiff was again tasked with sales and marketing of VoIP products. *Id.* at ¶ 20-21. On
11 October 24, 2008, Lembo laid off Brahmana, citing the credit liquidity crisis as the reason.

12 While plaintiff was still employed with CyberData, he alleges that someone with the alias
13 "SuperDooperCDsnooper" sent an email on July 29, 2008 to several CyberData employees
14 "[i]mplying falsely that [Brahmana] did not have a bachelor's degree from UC Berkeley or a
15 [m]aster's degree in [b]usiness [a]dministration, had a restraining order filed against him by his ex-
16 wife, and that plaintiff considered himself to be the 'fifth (upcoming) Buddha" because his first name
17 is similar to the last name of the Aria Metteyya Buddha who is supposed to appear in the distant
18 future." *Id.* at ¶ 26. After Brahmana complained to Lembo, Lembo responded, "I know it is a
19 CyberData employee sending the email, but my suggestion is to increase your sales to stop these
20 emails." *Id.* at ¶ 27. Other CyberData employees were uncomfortable around Brahmana after the
21 email was sent. *Id.* at ¶ 28.

22 After Brahmana's departure from CyberData, he states that he had a disagreement with
23 Lembo about some outstanding wages, and indicated that a "wage claim would be filed" if his wages
24 were not paid. *Id.* at ¶ 31. Lembo allegedly wrote "Go for it...and make sure you copy Joe Henard
25 at the Santa Cruz District Attorneys office." *Id.* at ¶ 33. Brahmana states that he had never
26 discussed his contact with Joe Henard from the Santa Cruz District Attorney's office with anyone.
27 *Id.* at ¶ 35. Brahmana also states that his contact concerned a driver's license renewal application.

1 *Id.* Brahmana later learned from other CyberData employees that Lembo used monitoring tools,
2 such as "Local Area Network Analyzers and keyloggers" to monitor the activities of CyberData
3 employees. *Id.* at ¶ 36. He alleges that Lembo intercepted his password with a key logger tool,
4 logged into his personal email account, and read his personal email. *Id.* at ¶ 39-40. Brahmana states
5 that he never gave any defendant permission to access his personal email accounts or permission to
6 intercept any personal communication when logging into his personal email account. *Id.* at ¶ 37. He
7 also states that he has never shared his personal email password with anyone. *Id.* at ¶ 38.

8 Brahmana filed suit on January 9, 2009, and filed an amended complaint on January 12,
9 2009. His amended complaint includes causes of action for violation of his privacy rights under the
10 Fourth Amendment, violation of the Electronic Communications Privacy Act ("ECPA"), and
11 California state law claims for a false-light tort, hostile work environment, wrongful constructive
12 discharge, and wrongful termination. Defendants now move to dismiss all of Brahmana's federal
13 claims and to dismiss the action for lack of jurisdiction. Defendant Conquest has also moved to
14 dismiss the action for insufficient service of process. Finally, Lembo moved on May 6, 2009 to
15 continue the case management conference schedule for Friday, May 22, 2009.

16 II. ANALYSIS

17 A. Plaintiff's Fourth Amendment Claim

18 Brahmana's first claim is for violation of his "privacy rights" under the Fourth Amendment to
19 the United States Constitution. But "[t]he Fourth Amendment gives protection against unlawful
20 searches and seizures, and as shown in the previous cases, its protection applies to *governmental*
21 *action*. Its origin and history clearly show that it was intended as a restraint upon the activities of
22 sovereign authority, and was not intended to be a limitation upon *other than governmental*
23 agencies;". *Burdeau v. McDowell*, 256 U.S. 465, 474-475 (1921) (emphasis added); *see also United*
24 *States v. Jacobsen*, 466 U.S. 109, 118 (1984). Brahmana has not alleged any connection between
25 defendants' complained-of actions and the government. The fourth amendment claim is therefore
26 dismissed.

27 B. Plaintiff's Electronic Communications Privacy Act Claim

28 ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM;
GRANTING MOTION TO QUASH SERVICE AND DISMISS COMPLAINT FOR INSUFFICIENT SERVICE OF PROCESS;
GRANTING MOTION TO CONTINUE CASE MANAGEMENT CONFERENCE—No. C-09-00106 RMW

1 In 1986, Congress passed the ECPA, which was intended to extend privacy protection to
2 electronic communications. *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 874 (9th Cir. 2002).
3 Title I of the ECPA amended the federal Wiretap Act, which until then addressed only wire and oral
4 communications, to cover the "interception of electronic communications." *Id.* The amended
5 Wiretap Act makes it an offense to "intentionally intercept[] . . . any wire, oral, or electronic
6 communication." 18 U.S.C. § 2511(1)(a). The Act further proscribes "the intentional[] use[of] . . .
7 the contents of any wire, oral, or electronic communication, knowing or having reason to know that
8 the information was obtained through the interception of a wire, oral, or electronic communication .
9 . ." 18 U.S.C. § 2511(1)(d).

10 In support of his ECPA claim, Brahmana alleges first that Lembo used "software and
11 hardware monitoring tools such as local area network analyzers and key loggers" to obtain the
12 password to his personal email account. And second, Brahmana alleges that Lembo's accessed
13 Brahmana's personal email account using the logged password.

14 As an initial matter, the law in the Ninth Circuit is clear that gaining access to stored
15 electronic information does not constitute a violation of § 2511. *Konop*, 302 F.3d at 878. That is,
16 to "intercept" electronic communications means to acquire it during transmission, not while it is in
17 electronic storage. *Id.* In *Konop*, the court concluded that the access to a protected section of a
18 website does not constitute a violation of the Wiretap Act, reasoning that there is no interception of
19 electronic communications, but only access to stored electronic information. *Id.* at 872-873, 879.
20 Brahmana's claim that Lembo's access to his stored personal email by itself violates § 2511(1)(a) is
21 precluded by *Konop*, and therefore does not constitute a violation of § 2511(1)(a).¹

22 Brahmana's claim that Lembo's use of a key logger or network analyzer violates § 2511
23 potentially fares better. A key logger records each keystroke entered by the user of a particular
24 computer. *See United States v. Ropp*, 347 F.Supp. 2d 831 (C.D.Cal. 2004). Although it is not

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26 ¹ Depending on whether the alleged interception of Brahmana's keystrokes constitutes a violation of
27 the Act, the use of the intercepted password may nonetheless constitute a violation of 2511(1)(d),
28 which forbids the intentional *use* of information acquired through the interception of electronic
communications, when the user knows or has reason to know of the interception. 18 U.S.C.
2511(1)(d).

1 defined in the pleadings, it seems that a network analyzer performs a similar function but over a
2 network connection. In *Ropp*, the court considered whether a hardware-based key logger – a device
3 attached between the keyboard and the computer's central processing unit ("CPU") – intercepted
4 electronic communications in violation of § 2511. *Id.* The Wiretap Act defines "electronic
5 communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of
6 any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or
7 photooptical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12). Because
8 the key logger in *Ropp* recorded the keystroke information in transit between the keyboard and the
9 CPU, the court found that the system transmitting the information did not affect interstate commerce
10 as the statute requires. *Ropp*, 347 F.Supp. 2d 837-38. The keystroke signals, therefore, were not
11 "electronic communication" under the Wiretap Act. *Id.* Assuming *Ropp's* construction of the Act is
12 correct, focus on whether the transmitting system affects interstate commerce is the appropriate
13 inquiry in this case.

14 The court in *Porter v. Havlicek*, 2007 WL 539534 (S.D.Ohio 2007), however, questions
15 whether *Ropp's* construction of "affecting interstate commerce" is correct. It suggests that *Ropp*
16 reads the statute as requiring that the communication must be traveling in interstate commerce as
17 opposed to merely "affecting interstate commerce." *Id.* at *9. The keystrokes, while not traveling in
18 interstate commerce, do "affect interstate commerce." *Id.* The court does not need to resolve at this
19 time whether *Ropp* or *Porter's* analysis of "affecting interstate commerce" is correct.

20 According to the complaint, Lembo recorded Brahmana's keystrokes entering his email
21 password using "software and hardware monitoring tools such as local area network analyzers and
22 key loggers." FAC at ¶ 36. Brahmana supports his claims concerning Lembo's actions by alleging
23 that Lembo knew of the contents of his private email, and that Brahmana had learned from other
24 CyberData employees that such tools were used to monitor the activities of CyberData employees.
25 *Id.* at ¶ 33, 36. These allegations are sufficient to render plausible the claim that Brahmana's
26 communications were monitored in some way, but they do not specify whether the particular means
27 of monitoring might monitor keystrokes that had actually affected interstate commerce. The issue of
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1 how any alleged monitoring took place and whether it allegedly affected interstate commerce is
2 better resolved after some discovery. Because, under the complaint, some means of the alleged
3 monitoring may constitute a violation of the Wiretap Act, dismissal of Brahmana's complaint for
4 violation of ECPA is premature. Lembo's motion is therefore denied.

5 **C. Plaintiff's Claim for Hostile Work Environment**

6 Lembo argues in his motion to dismiss that Brahmana fails to state a claim for a Title VII
7 hostile-work-environment claim. But the complaint itself seeks relief for a hostile work
8 environment only under California law. FAC at ¶ 49. While Brahmana argues in his opposition
9 that the complaint sufficiently states a Title VII claim, the court must adjudicate the motion to
10 dismiss on the basis of the pleadings alone. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
11 (9th Cir. 2001). The court therefore will not consider whether a claim that does not appear in the
12 complaint should be dismissed.

13 **D. Conquest's Motion to Quash Service and Dismiss the Complaint**

14 Conquest also moves to quash service on Conquest and dismiss the complaint against it
15 because Lembo, who Brahmana served on behalf of Conquest, is not authorized to receive service
16 on its behalf. Brahmana argues that service was proper because Lembo is a 10% shareholder in
17 Conquest and has a managerial role in Conquest. Opp. to Mot. to Quash 2.

18 Rule 4(h)(1)(B) allows service on a corporation "by delivering a copy of the summons and of
19 the complaint to an officer, a managing or general agent, or any other agent authorized by
20 appointment or by law to receive service of process." Fed. R. Civ. P. 4(h)(1)(B). The relevant
21 inquiry is not the percentage of stock owned, but whether the individual served is "so integrated with
22 the organization that he will know what to do with the papers. Generally, service is sufficient when
23 made upon an individual who stands in such a position as to render it fair, reasonable, and just to
24 imply the authority on his part to receive service." *Direct Mail Specialists, Inc. v. Eclat*
25 *Computerized Technologies, Inc.*, 840 F.2d 685, 688 (9th Cir. 1988). Merely owning a 10%
26 shareholder stake in Conquest does not constitute sufficient authority for Lembo to receive service
27 on behalf of Conquest. As for Lembo's managerial role, the evidence Brahmana offers does not
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1 establish that Lembo has sufficient managerial responsibilities to constitute a proper agent for
2 service. The emails in Brahmana's declaration do not establish that Lembo has any managerial role.
3 See Decl. of Metteyya Brahmana ISO Opp. to Mot. to Quash Exs. A-C. The court therefore quashes
4 the service on Conquest as inadequate, and dismisses the complaint against it without prejudice.
5 The court questions, however, whether insisting on technically proper service will assist the parties
6 in effectuating an economical and speedy disposition of the case.


7 **E. Lembo's Motion to Continue the Case Management Conference**

8 On May 6, 2009, Lembo moved to continue the Case Management Conference scheduled for
9 May 22, 2009 for 60 days because the present order had not issued. The court concludes that
10 approximately 30 days continuance is sufficient to allow the parties to adequately prepare for the
11 Case Management Conference.

12 **III. ORDER**

13 For the foregoing reasons, the court grants the motion to dismiss the Fourth Amendment
14 claim with prejudice and denies the motion as to the claim under the Electronic Communications
15 Privacy Act. The court finds that the complaint does not include a Title VII claim. The court grants
16 the motion by Conquest Technology Limited to quash service and dismiss the complaint for
17 insufficient service of process. Plaintiff shall have 20 days leave to amend except as to the Fourth
18 Amendment claim. The Case Management Conference currently scheduled for May 22, 2009 is
19 continued to June 19, 2009.

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22 DATED: 05/20/09



RONALD M. WHYTE
United States District Judge

