

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CONNIE BOANE,)
)
 Plaintiff,)
)
 v.) No. 11-2565-TMP
)
 JAMES A. BOANE,)
)
 Defendant.)

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Before the court are plaintiff Connie Boane's Motion for Partial Summary Judgment, filed on February 1, 2013 (ECF No. 67), and defendant James A. Boane's Motion for Summary Judgment, filed on February 5, 2013.¹ (ECF No. 68.) James Boane filed a response in opposition to Connie Boane's motion on March 5, 2013, and Connie Boane filed a response in opposition to James Boane's motion on March 7, 2013. Connie Boane also filed a reply to James Boane's response on March 21, 2013.

For the following reasons, the court GRANTS in part and DENIES in part both parties' motions for summary judgment.

I. BACKGROUND

As an initial matter, the court notes that in support of her

¹James Boane's motion was filed on behalf of both himself and his current wife, Donna Boane, who was also named as a defendant in this action. However, the parties have since stipulated to the dismissal of all claims against Donna Boane. (ECF No. 74.)

motion for summary judgment, Connie Boane attached a statement of undisputed facts. James Boane did not respond to this statement of undisputed facts, nor did he provide his own statement of undisputed facts. This court's Local Rule 56.1 sets out requirements that must be met by both the moving and nonmoving parties when filing briefs in support of and in opposition to summary judgment. The rule states in relevant part:

(a) Moving Party. In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Fed. R. Civ. P. 56 shall be accompanied by a separate, concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by specific citation to the record. . . .

(b) Non-moving Party. Any party opposing the motion for summary judgment must respond to each fact set forth by the movant by either:

- (1) agreeing that the fact is undisputed;
- (2) agreeing that the fact is undisputed for the purpose of ruling on the motion for summary judgment only; or
- (3) demonstrating that the fact is disputed.

Each disputed fact must be supported by specific citation to the record. . . . In addition, the non-movant's response may contain a concise statement of any additional facts that the non-movant contends are material and as to which the non-movant contends there exists a genuine issue to be tried. Each such disputed fact shall be set forth in a separate, numbered paragraph with specific citations to the record supporting the contention that such fact is in dispute. . . .

(d) Failure to respond to a moving party's statement of material facts, or a non-moving party's statement of

additional facts, within the time periods provided by these rules *shall indicate that the asserted facts are not disputed for purposes of summary judgment.*

Local Rule 56.1 (emphasis added). Because James Boane did not respond to Connie Boane's statement of undisputed facts, the court finds that the facts set forth in Connie Boane's motion are undisputed. Those facts are as follows:

James Boane and Connie Boane were married and are now divorced. This case arises out of the alleged unauthorized access of Connie Boane's medical and health insurance information by James Boane. At all relevant times, Connie Boane maintained health insurance coverage with United Healthcare ("United"). Incident to the provision of health insurance coverage, United allowed Connie Boane access to her personal medical and health insurance records via a password-protected website. Prior to the events giving rise to this lawsuit, Connie Boane established a secure password to the United website, as well as a "security question" which, if answered correctly, would allow her to reset the password.

On December 21, 2010, James Boane accessed United's website. Using Connie Boane's account ID, James Boane indicated that the password for the account had been forgotten. James Boane then reset Connie Boane's password to her United online account and accessed the account with the new password. In accessing Connie Boane's United account, James Boane gained access to Connie Boane's medical and health insurance information. After gaining access to

the account, James Boane reviewed documents made available by United through the online account. Neither Connie Boane nor United authorized James Boane to access Connie Boane's online account.

Following the change of password, United provided notice to Connie Boane via an email alert that the password to her online account had been changed. With the assistance of her domestic relations attorney, Mitzi Johnson, Connie Boane conducted an investigation into the unauthorized access of her United account. As part of that investigation, Johnson, among other things, subpoenaed records from Bright House Networks, filed a motion, and obtained an order from a court over the "strenuous objections" of James Boane's domestic relations counsel. Connie Boane incurred no less than \$6,781.61 in expenses investigating the unauthorized access of her online account. These expenses consist of, *inter alia*, filing fees and attorney's fees for Johnson, but does not include attorney's fees incurred in pursuing the present lawsuit.

In her amended complaint, Connie Boane claims that James Boane's unauthorized access of her United account violates the following federal and state statutes: the Stored Communications Act ("SCA"), the Electronic Communication Privacy Act ("ECPA"), the Computer Fraud and Abuse Act ("CFAA"), Tennessee Code § 39-13-601 (also known as the Tennessee Wire Act, or "TWA"), and the Tennessee

Personal and Commercial Computer Act of 2003 ("TPCCA").² Connie Boane has also asserted common law claims of intentional infliction of emotional distress, reckless infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, and negligence.

On February 1, 2013, Connie Boane filed her Motion for Partial Summary Judgment, through which she moves the court to enter judgment in her favor on her claims under the SCA, CFA, and TPCCA. Connie Boane further requests that the court award her compensatory damages totaling \$6,781.61 as well as attorney's fees and punitive damages. On February 5, 2013, James Boane filed his own Motion for Summary Judgment. Through his motion, James Boane moves the court to enter summary judgment in his favor on all claims in the amended complaint. However, in his motion, he only provides substantive arguments with respect to the claims asserted under the SCA, ECPA, CFAA, and TWA.

II. ANALYSIS

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled

²In her original complaint, Connie Boane also asserted a claim under the Health Information Portability and Accountability Act. However, that claim was dismissed by the court prior to the filing of the amended complaint.

to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Geiger v. Tower Auto., 579 F.3d 614, 620 (6th Cir. 2009). In reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted). "The moving party bears the initial burden of production." Palmer v. Cacioppo, 429 F. App'x 491, 495 (6th Cir. 2011) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Once the moving party has met its burden, "the burden shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'" Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 200 (6th Cir. 2010) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "[I]f the nonmoving party fails to make a sufficient showing on an essential element of the case with respect to which the nonmovant has the burden, the moving party is entitled to summary judgment as a matter of law." Thompson v. Ashe, 250 F.3d 399, 405 (6th Cir. 2001). "The central issue is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Palmer, 429 F. App'x at 495 (quoting Anderson, 477 U.S. at 251-52) (internal quotation marks omitted).

B. The Stored Communications Act

Both parties move for summary judgment as to Connie Boane's

claim under the SCA. In relevant part, the SCA states that:

. . . whoever-

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided;

. . .

and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2701(a) (2012). The SCA provides a private cause of action to any person aggrieved by an intentional violation of the statute:

Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

18 U.S.C. § 2707(a) (emphasis added). The appropriate relief in such a civil action includes damages of no less than \$1,000 and "a reasonable attorney's fee and other litigation costs reasonable incurred."³ 18 U.S.C. § 2707(b). With respect to damages, "the court may assess . . . the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation[.]" 18 U.S.C. § 2707(c). Furthermore, "[i]f the

³Preliminary and other equitable or declaratory relief may also be appropriate for violations of the act, but such relief is neither requested nor appropriate in this case.

violation is willful or intentional, the court may assess punitive damages." Id.

Connie Boane contends that because the undisputed facts show that James Boane intentionally logged onto her online account without her authorization and reviewed documents made available by and through the online account, she is entitled to summary judgment on this claim. James Boane, however, contends that he is entitled to summary judgment because the SCA is not applicable to his alleged conduct. Specifically, James Boane argues that summary judgment is warranted because (1) United is not an "electronic communication service provider" as defined by the SCA, and (2) the type of information purportedly accessed is not an "electronic communication" under the SCA.

The court has already rejected James Boane's argument that United must qualify as an "electronic communication service provider" for there to be a violation of the SCA. In denying James Boane's previous Motion to Dismiss as to the SCA claim, the District Judge agreed with Connie Boane's contention that "liability does not hinge on whether United is a communication service provider." Order Partially Granting and Partially Denying Defendants' Motion to Dismiss, ECF No. 41 (citing Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 759 F. Supp. 2d 417 (S.D.N.Y. 2010) and Miller v. Meyers, 766 F. Supp. 2d 919 (W.D. Ark. 2011) as analogous to the instant case for purposes of this

analysis); see also Cardinal Health 414, Inc. v. Adams, 582 F. Supp. 2d 967, 977 (M.D. Tenn. 2008) (granting summary judgment to the plaintiff on its SCA claim where the defendant, a former employee of the plaintiff, used the user name and password of a current employee to log onto that employee's email account). Thus, because this court has already decided this issue, that prior decision is the "law of the case" and the court is bound by that decision. See, e.g., Yeschick v. Mineta, 675 F.3d 622, 633 (6th Cir. 2012) ("The doctrine [of the law of the case] 'precludes reconsideration of issues decided at an earlier stage of the case.'") (quoting Caldwell v. City of Louisville, 200 F. App'x 430, 433 (6th Cir. 2006)); Moses v. Bus. Card Exp., Inc., 929 F.2d 1131, 1137 (6th Cir. 1991) ("'[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'") (quoting Arizona v. California, 460 U.S. 605, 618 (1983)). Therefore, the only remaining issue is whether the documents to which James Boane obtained access constitute "electronic communications" as defined by the statute.⁴

"Electronic communication" is defined by the SCA as:

[A]ny transfer of signs, signals, writing, images,

⁴This argument was also raised by James Boane in his motion to dismiss. However, that issue was not previously addressed by the court, and thus there is no governing "law of the case" as to the issue of whether the documents contained in Connie Boane's United online account constitute "electronic communications."

sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects interstate or foreign commerce, but does not include-

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device []; or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds[.]

18 U.S.C. § 2510(12); see 18 U.S.C. § 2711(1) (adopting as part of the SCA the definitions of the terms defined in § 2510). The statute broadly defines "electronic communication" and enumerates a few narrow exceptions. James Boane claims that the "type of information accessed" - that is, personal health records and other insurance information - "does not qualify as an electronic communication under the SCA."⁵ The court disagrees. These types of records clearly qualify as a "writing," "images," and/or "data," and do not meet any of the listed exceptions. See, e.g., Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 876 (9th Cir. 2002) (finding

⁵James Boane claims through his interrogatory responses that he only viewed the "explanation of benefits" for his children. However, he does not dispute that he gained access to Connie Boane's medical and health information in accessing her account. Furthermore, the court sees no reason to distinguish the explanation of benefits document from any of the other documents contained in the account. Therefore, this disputed fact has no bearing on the court's analysis.

that the transfer of electronic documents from a website to a website user's computer, even where the documents are temporarily stored in a server until the user requests them, fits the definition of "electronic communication").⁶

Therefore, based on the undisputed facts, the court finds that James Boane violated the SCA as a matter of law. James Boane intentionally accessed without authorization a facility through which an electronic communication service is provided and thereby obtained access to an electronic communication while it was in electronic storage. Accordingly, James Boane's motion for summary judgment as to the SCA claim is DENIED. Connie Boane's motion for summary judgment as to the SCA claim is GRANTED as to James Boane's liability. However, any issues relating to damages shall be decided by the jury. Moreover, although Connie Boane seeks summary judgment on her SCA claim for attorney's fees and punitive damages, she has not presented the court with any substantive arguments as to why she is entitled to such relief as a matter of law. Her motion is DENIED to the extent she seeks summary judgment on damages and attorney's fees.

C. The Computer Fraud and Abuse Act

⁶James Boane also argues that because the documents he accessed do not fall under the listed exceptions to the statute, the documents do not qualify as an "electronic communication." He apparently has misinterpreted the statute, as it explicitly states that communications that fall within any of those categories are *not* electronic communications.

Both parties also move for summary judgment on Connie Boane's claim under the CFAA. The CFAA makes it unlawful 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). "Protected computer" is defined by the statute as including "a computer . . . which is used in or affecting interstate commerce or communication[.]" 18 U.S.C. § 1030(e)(2)(B). The CFAA permits any person who suffers damage or loss due to a violation of the statute to bring a civil action against the violator, so long as the alleged conduct involves one of the five factors listed under section 1030(c)(4)(A)(i). 18 U.S.C. § 1030(g). These five factors are:

(I) loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least \$5,000 in value;

(II) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;

(III) physical injury to any person;

(IV) a threat to public health or safety;

(V) damage affecting a computer used by or for an entity of the United States Government in furtherance of the administration of justice, national defense, or national security[.]

18 U.S.C. § 1030(c)(4)(A)(i) (hereinafter referred to as the "Additional Factors").

Connie Boane asserts that she "is entitled to summary judgment on the CFAA claim and an award of \$6,781.61 to compensate for economic damages incurred in reasonably responding to the intrusion." She states that "[b]ecause Defendant accessed Plaintiff's United Healthcare account via the internet without authorization and thereafter viewed documents, Defendant intentionally accessed a protected computer without authorization and obtained information in violation of the CFAA." James Boane, however, claims that he is entitled to summary judgment on this claim based on three separate grounds: (1) Connie Boane has no standing to bring an action under this statute; (2) the United computer is not a "protected computer" *vis a vis* Connie Boane; and (3) Connie Boane has not pleaded any damages recognized under the CFAA.

1. Standing and "Protected Computer" Arguments

James Boane's arguments for summary judgment on the CFAA claim are identical to those made in his previous motion to dismiss. This court previously considered and rejected the first two arguments - (1) that Connie Boane does not have standing and (2) that the United computer is not a "protected computer" - in its Report and Recommendation on James Boane's motion to dismiss.⁷ See

⁷James Boane's third argument regarding damages was raised previously in the motion to dismiss, and the undersigned magistrate judge agreed with James Boane that Connie Boane had not adequately pleaded any loss or damages resulting from James Boane's alleged violation. However, the District Judge subsequently granted Connie

Report and Recommendation, ECF No. 39. James Boane argues, as he did in the motion to dismiss, that because Connie Boane has no property rights or interest in the personal property of United, she has no standing to bring this claim. The court found that this argument had no merit, as 18 U.S.C. § 1030(g) provides a cause of action to any person who suffers damage or loss due to a violation as long as one of the Additional Factors is present. Id. Similarly, the court rejected James Boane's argument that he did not obtain information from a "protected computer," finding that "a computer or computer system accessible via the internet qualifies as a 'protected computer' under the CFAA." Id. Thus, the law of the case (as explained above) governs the court's determination of these issues. Accordingly, the court rejects James Boane's first two arguments for summary judgment and finds that James Boane, as a matter of law, violated the CFAA by intentionally accessing a computer, either without authorization or, at the very least, exceeding authorization, and thereby obtaining information from a protected computer. The only remaining issue is whether Connie Boane has sufficiently demonstrated losses resulting from James Boane's violation which would satisfy the first Additional Factor (requiring a loss aggregating at least \$5,000) and thereby entitle

Boane leave to amend her complaint to plead damages. Therefore, the court will reconsider the issue of damages in light of the amended complaint, which now contains an allegation of damages in excess of \$5,000.00.

her to damages under the CFAA.⁸

2. Loss Aggregating at Least \$5,000

As stated earlier, in order to bring a private cause of action for a CFAA violation, an individual aggrieved by the violation must satisfy one of the five Additional Factors. Under the first of these factors, the violation must have resulted in "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). The CFAA defines the term "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). When pursuing a claim based only upon the first of the Additional Factors, the statute adds the additional requirement that the requisite losses "are limited to economic damages." 18 U.S.C. § 1030(g).

In her amended complaint, Connie Boane claims that she "has sustained economic damages and/or loss in excess of \$5,000 . . . investigating and responding to Defendants' unauthorized access of

⁸While the Additional Factor also requires the loss to have occurred during "any 1-year period," James Boane does not argue that the loss occurred outside of a one year window. Furthermore, the events causing the loss occurred in December of 2010, and the complaint was filed against James Boane in July of 2011, only about eight months later.

Plaintiff's online health benefits account." She has submitted an affidavit from Mitzi Johnson, her domestic relations counsel, which states that expenses of at least \$6,781.61 were incurred in investigating the unauthorized access of Connie Boane's online account. Furthermore, James Boane does not dispute that Connie Boane incurred those expenses in investigating the unauthorized access. He does, however, argue that this type of expense is not recognized by the CFAA, and thus moves for summary judgment due to Connie Boane's failure to plead cognizable damages under the statute.

The court disagrees with James Boane's contention that the cost of investigating the unauthorized access is not a type of loss recognized by the CFAA. Such a cost clearly constitutes a "cost of responding to an offense" and is a form of "economic damages" which is recoverable under § 1030(g). Other courts have reached the same conclusion in situations where plaintiffs have incurred costs as a result of investigating the unauthorized access of an account or website. See, e.g., A.V. ex. Rel. Vanderhuy v. iParadigms, LLC, 562 F.3d 630, 645 (4th Cir. 2009) (holding that § 1030(g), including the limitation of only "economic damages" for claims pursuant to the first Additional Factor, "plainly contemplates consequential damages of the type sought by [the counter-claimant] - costs incurred as part of the response to the CFAA violation, including the investigation of an offense"); SuccessFactors, Inc.

v. Softscape, Inc., 544 F. Supp. 2d 975, 981 (N.D. Cal. 2008) (“[W]here the offender has actually accessed protected information, discovering who has that information and what information he or she has is essential to remedying the harm. In such cases courts have considered the cost of discovering the identity of the offender or the method by which the offender accessed the protected information to be part of the loss for purposes of the CFAA.”). Thus, the court finds that, as a matter of law, Connie Boane’s costs relating to the investigation of the unauthorized access of her health records is a recoverable form of loss under the CFAA. Therefore, James Boane’s motion for summary judgment on the CFAA claim is DENIED.

However, while it is undisputed that the *actual* cost to Connie Boane was greater than the statutorily required minimum of \$5,000, the statute defines “loss” as being any *reasonable* cost. The court cannot find, based on the undisputed facts, that Connie Boane’s expenditures were reasonable as a matter of law. The steps taken in investigating the violation, as set forth in Johnson’s affidavit, are described in very general terms (i.e., causing a subpoena to be issued, filing a motion, and obtaining an order “over the strenuous objections” of James Boane’s counsel to obtain records from Bright House Networks). The present case is similar to Sw. Airlines Co. v. BoardFirst, L.L.C., No. 3:06-CV-0891-B, 2007 WL 4823761 (N.D. Tex. Sept. 12, 2007). There, the district court

denied the plaintiff's motion for summary judgment, finding that the declaration submitted by Southwest Airlines, which stated it had spent "at least \$6,500 within a single one year period in investigating and responding to BoardFirst's unauthorized access to Southwest's computer system," was insufficient to prove "loss" as a matter of law. Id. at *16. The court stated that the declaration failed "to identify the precise steps taken by Southwest in 'investigating and responding to' BoardFirst's unauthorized access" and thus there was "no basis" upon which the court could determine "whether Southwest's responsive efforts constitute 'reasonable' costs incurred by the company due to BoardFirst's purported unauthorized access of Southwest's computer system." Id.

In the present case, a reasonable jury could conclude that the costs of the investigation were reasonable, thereby entitling Connie Boane to recover those losses. However, a reasonable jury could also conclude that some or all of the investigatory steps taken by Connie Boane were not reasonable, and that her reasonable costs should be for an amount less than the amount she seeks. Should the jury determine that the amount of reasonable costs to Connie Boane are less than the statute's requisite \$5,000 threshold, she would not be entitled to any recovery under the statute. See, e.g., Grant Mfg. & Alloying, Inc. v. McIlvain, No. 11-3859, 2012 WL 4497437, at *2 (3d Cir. Oct. 2, 2012) ("[T]he only

way Grant could survive summary judgment was by presenting evidence that would permit a jury to infer that at least \$5,000 of Fried's bill was attributable to a response to McIlvain and Williams's alleged CFAA violation."); Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 439 (2d Cir. 2004) ("[T]o succeed on the merits of a CFAA claim, [the plaintiff] must prove 'damage or loss' of at least \$5,000 attributable to an alleged violation of the CFAA. [] [A]ny civil action under the CFAA involving 'damage or loss' must satisfy the \$5,000 threshold.") (internal citations omitted);⁹ Cohen v. Gerson Lehrman Group, Inc., No. 09 Civ. 4352(PKC), 2011 WL 4336683, at *9 (S.D.N.Y. Sept. 15, 2011) (finding that, while it was undisputed that the counter-claimant incurred more than the threshold \$5,000 amount in expenses in attempting to recover deleted files, the court could not "decide at the summary judgment stage whether [the counter-claimant's] investigation costs were 'reasonable' pursuant to the CFAA's definition of 'loss'"); Ground Zero Museum Workshop v. Wilson, 813 F. Supp. 2d 678, 694 (D. Md. 2011) ("Plaintiffs provide no additional proof of [the \$8,079] payment, no itemization of the costs, nor any other facts from which one could determine that these were 'reasonable costs' as required under the CFAA."). Therefore, the court GRANTS Connie

⁹The court notes that this Second Circuit case involved an interpretation of the CFAA before the 2010 amendments, which altered the structure of the statute. However, the amendment did not affect the \$5,000 loss requirement.

Boane's motion to the extent that James Boane intentionally accessed a computer without authorization or exceeded authorized access, and thereby obtained information from a protected computer. The court DENIES her motion as to the remainder of the claim.

D. The Electronic Communications Privacy Act and Tennessee Wire Act

James Boane moves for summary judgment on the ECPA and TWA claims. As an initial matter, the Tennessee Wire Act ("TWA"), codified at T.C.A. § 39-13-601 et seq., mirrors the language of the ECPA, and courts have interpreted the two statutes similarly.¹⁰ Hayes v. Spectorsoft Corp., No. 1:08-cv-187, 2009 WL 3713284, at *9 (E.D. Tenn. Nov. 3, 2009) ("[C]ourts interpreting both the ECPA and the TWA have interpreted them in the same way using federal case authority due to the dearth of Tennessee cases interpreting the TWA."); Cardinal Health, 582 F. Supp. 2d at 979 ("This court agrees that whether both the TWA and the FWA have been violated here can be determined based on the FWA and its case law."). Therefore, the following analysis of the ECPA arguments applies to both the ECPA and TWA claims.

An individual violates the ECPA when he or she "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic

¹⁰Connie Boane's ECPA claim is brought under Title I of the ECPA.

communication[.]” 18 U.S.C. § 2511(1)(a).¹¹ The statute defines “intercept” as “the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.” 18 U.S.C. § 2510(4). The Sixth Circuit has not addressed the precise meaning of “intercept” within the ECPA. Several circuit courts, however, have done so and found that in order for a violation of the statute to occur, an interception must occur “contemporaneously with transmission” and cannot occur where the electronic communications are in “electronic storage.” Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 113 (3d Cir. 2003) (finding no interception where the defendant accessed the plaintiff’s email on its “central file server without his express permission,” and noting in its analysis that “[e]very circuit court to have considered [this matter of statutory interpretation] has held that an ‘intercept’ under the ECPA must occur contemporaneously with transmission”); United States v. Steiger, 318 F.3d 1039, 1050 (11th Cir. 2003) (finding no violation of the ECPA because “there is nothing to suggest that any of the information . . . was obtained through contemporaneous acquisition of electronic communications while in flight”); Konop, 302 F.3d 868, 878 (9th Cir. 2002) (“We therefore hold that for a website such as Konop’s to be ‘intercepted’ in violation of the

¹¹The ECPA modified the pre-existing Federal Wire Act (“FWA”), and courts refer to the two acts interchangeably when analyzing claims pursuant to 18 U.S.C. § 2511.

Wiretap Act, it must be acquired during transmission, not while it is in electronic storage."); Steve Jackson Games, Inc. v. U.S. Secret Serv., 36 F.3d 457, 463 (5th Cir. 1994) ("Congress did not intend for 'intercept' to apply to 'electronic communications' when those communications are in 'electronic storage.'"). In United States v. Szymuszkiewicz, the Seventh Circuit also followed these cases in analyzing the contemporaneity requirement for interception, but added that causing the immediate duplication and forwarding of an electronic communication constitutes interception and therefore a violation of the statute, even if the duplication and forwarding was done by the plaintiff's computer rather than through a server/router. 633 F.3d 701, 705-6 (7th Cir. 2010).¹²

In his motion for summary judgment, James Boane contends that: (1) the type of information accessed was not an "electronic communication," and (2) he did not "intercept" any electronic communication. In response, Connie Boane argues that James Boane contemporaneously intercepted electronic communications by pretending to be Connie Boane and logging onto her online account, thereby causing documents and data stored at another location to be transferred to his computer when they were intended for her. As previously discussed in this order, the court rejects the argument that the information accessed does not constitute "electronic

¹²In Szymuszkiewicz, the defendant set up a "rule" on his supervisor's computer which caused all emails received by his supervisor to be forwarded to him. Id. at 703.

communications." Therefore, the court will only address the second argument - that no interception occurred. For the following reasons, the court agrees with James Boane, and therefore GRANTS his motion for summary judgment on the ECPA and TWA claims.

In its order on James Boane's previous motion to dismiss, the court declined to dismiss the ECPA claim under Fed. R. Civ. P. 12(b)(6) because Connie Boane had sufficiently "alleged that defendants caused a duplicate email to be generated from her online United account." However, Connie Boane no longer makes that claim in her response to James Boane's motion for summary judgment, nor has she provided the court with any evidence to suggest such a duplication might have occurred. Instead, her argument now appears to be only that by logging onto Connie Boane's online account and pretending to be her, James Boane caused documents intended for Connie Boane to be transmitted to his computer, and that he intercepted the documents by accessing them.

As the cases cited above demonstrate, the courts have held that there is no violation of the ECPA where a defendant accesses electronic communications while they are in electronic storage. Rather, the electronic communication must be acquired contemporaneously with transmission in order for there to be an "interception." In Konop, the Ninth Circuit explained this interpretation in light of the legislative history of the ECPA and SCA:

We agree with the *Steve Jackson* and *Smith* courts that the narrow definition of "intercept" applies to electronic communications. Notably, Congress has since amended the Wiretap Act to eliminate storage from the definition of wire communication, such that the textual distinction relied upon by the *Steve Jackson* and *Smith* courts no longer exists. This change, however, supports the analysis of those cases. By eliminating storage from the definition of wire communication, Congress essentially reinstated the pre-ECPA definition of "intercept" – acquisition contemporaneous with transmission – with respect to wire communications. The purpose of the recent amendment was to reduce protection of voice mail messages to the lower level of protection provided other electronically stored communications. When Congress passed the USA PATRIOT Act, it was aware of the narrow definition courts had given the term "intercept" with respect to electronic communications, but chose not to change or modify that definition. To the contrary, it modified the statute to make that definition applicable to voice mail messages as well. Congress, therefore, accepted and implicitly approved the judicial definition of "intercept" as acquisition contemporaneous with transmission.

We therefore hold that for a website such as Konop's to be "intercepted" in violation of the Wiretap Act, it must be acquired during transmission, not while it is in electronic storage. This conclusion is consistent with the ordinary meaning of "intercept," which is "to stop, seize, or interrupt in progress or course before arrival." More importantly, it is consistent with the structure of the ECPA, which created the SCA for the express purpose of addressing "access to stored ... electronic communications and transactional records."

302 F.3d at 878-79 (citations omitted) (emphasis in original). From this, the court concludes that Connie Boane cannot claim that James Boane's actions in accessing her medical records in her online United account violate both the SCA and the ECPA.

In Konop, the plaintiff created and maintained a website on

which he posted bulletins about his employer (Hawaiian Airlines) and its management, and he controlled access to the site by requiring visitors to log in with a user name and password. Konop, 302 F.3d 868 at 872. The plaintiff restricted access to the site by creating a list of people who were eligible to access it, and then programming the site to allow access only when a person entered the name of an eligible person, created a password, and clicked "submit," indicating acceptance of the terms and conditions of use. Id. at 872-73. The terms and conditions prohibited any member of the airline's management from viewing the site, and prohibited users from disclosing the site's contents to anyone else. Id. at 873. The plaintiff sued the airline under the SCA and ECPA when the airline's vice president, who was not on the eligibility list, logged in using an eligible employee's name and accessed the site. Id. Similar to this case, the offender in Konop misrepresented to a website that he was a person authorized to view certain electronic communications and thereby caused the website to grant his computer access to those communications. In that case, the Ninth Circuit found that such conduct did not constitute an "interception" of an electronic communication in violation of the FWA. Id. at 879. Similarly, James Boane's unauthorized use of Connie Boane's account information to view documents in her account does not constitute an "interception" of those documents for purposes of the ECPA and TWA.

The court sees no reason to distinguish Connie Boane's online United account from any other type of online storage facility for electronic communications, such as an email account. United's online account system enables it to send electronic communications to a user's account, and those communications are stored and made viewable to the user anytime the user logs into his or her account using a user name and password. Courts, including those within the Sixth Circuit, have held that simply accessing a person's email account does not constitute "interception" for purposes of finding a violation of the ECPA, even where some of the messages in the account had not yet been viewed by the actual user. See, e.g., Fraser, 352 F.3d at 113; Global Policy Partners, LLC. v. Yessin, 686 F. Supp. 2d 631, 639 (E.D. Va. 2009) (The plaintiff's allegation that she had not yet read some of the email messages on the server when the defendant attempted to access them was deemed "irrelevant" to the inquiry of whether there was interception of the messages because, "irrespective of whether [the plaintiff] read the e-mail messages in question, they had reached their destination server. Accordingly they were no longer in transmission by the time [the defendant] allegedly accessed them."); Cardinal Health, 582 F. Supp. 2d at 979 ("[U]nless an e-mail is actually acquired in its split second transmission over a computer network, it cannot be 'intercepted' as that term is reasonably understood" by simply being "inappropriately reviewed in an e-mail inbox."); Bailey v.

Bailey, No. 07-11672, 2008 WL 324156, at *5 (E.D. Mich. Feb. 6, 2008) (granting summary judgment to the defendant on an ECPA claim where the defendant had used a "keylogger" program to secretly obtain his wife's email passwords and then used the passwords to access and copy her email and messages). Therefore, the court finds that James Boane's actions do not constitute "interception" under the ECPA and TWA as a matter of law. James Boane's motion for summary judgment as to the ECPA and TWA claims is GRANTED.

E. The Tennessee Personal and Commercial Computer Act of 2003

Finally, Connie Boane moves for summary judgment on her claim under the TPCCA. In relevant part, the TPCCA makes it unlawful to "intentionally and without authorization, directly or indirectly . . . access any computer, computer system, or computer network[.]" T.C.A. § 39-14-602(b)(1). The statute further provides for "[a]ny person whose property or person is injured by reason of a violation of any provision" to file a civil action and recover "any damages sustained and the costs of the civil action." T.C.A. § 39-14-604.

The undisputed facts show that James Boane intentionally and without authorization accessed United's computer network by logging into Connie Boane's online account. James Boane has presented no argument in opposition to Connie Boane's motion for summary judgment on this claim, and he does not dispute that he accessed her United account intentionally and without any authorization from her or United. The court GRANTS Connie Boane's motion for summary

judgment as to James Boane's liability for a violation of the TPCCA, but DENIES her motion as to damages, reserving that issue for the jury. James Boane's motion, to the extent he seeks summary judgment on the TPCCA claim, is DENIED.

F. State Law Claims

As stated earlier, James Boane has not presented any substantive arguments in support of his general request for summary judgment on Connie Boane's claims based on intentional infliction of emotional distress, reckless infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, or negligence. Because his motion does not address these remaining claims, his motion for summary judgment on these claims is DENIED.

III. CONCLUSION

For the reasons above, the court GRANTS in part and DENIES in part the parties' motions for summary judgment.

IT IS SO ORDERED.

s/ Tu M. Pham

TU M. PHAM

United States Magistrate Judge

April 19, 2013

Date