UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

GULF SOUTH FOREST PRODUCTS, INC. **CASE NO.: 0:14-CV-62509-DPG**

Plaintiff,

v.

ROBERT P. BISHOP

Defendant.
_____/

DEFENDANT'S DISPOSITIVE MOTION TO DISMISS AS TO COUNT II AND IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AS TO COUNT II

COMES NOW, Defendant Robert Bishop ("Mr. Bishop"), by and through his undersigned counsel, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and hereby moves this Honorable Court to dismiss Count II of the Complaint (Doc. 1) which alleges a violation of the Computer Fraud and Abuse Act. In the alternative, Mr. Bishop hereby moves this Honorable Court to enter summary judgment in his favor and against Plaintiff Gulf South Forest Products, Inc. on Count II of the Complaint. Should this Honorable court dismiss or enter summary judgment as to Count II, Mr. Bishop respectfully requests that this Court refrain from exercising supplemental jurisdiction over the remaining state and common law claims. In support hereof, Mr. Bishop states as follows:

I. Procedural Posture

1. On or about November 4, 2014, Plaintiff Gulf South Forest Products, Inc. ("Gulf South") filed its Complaint (Doc. 1) against Mr. Bishop. Mr. Bishop was allegedly served with the Complaint on November 8, 2014 (Doc. 4).

2. On or about November 25, 2014, Mr. Bishop filed *Defendant's Unopposed Motion for Enlargement of Time to File Responsive Pleading and Incorporated Memorandum of Law* (Doc. 9) requesting that the deadline to file a responsive pleading be enlarged to December 19, 2014, which the Court granted (Doc. 10).

3. Contemporaneously herewith, Mr. Bishop filed his Motion to Stay and Compel Mediation.

4. The Complaint alleges the following causes of action against Mr. Bishop:

Count I- Violation of Florida Statutes §688.001, et seq.;
Count II – Violation of 18 U.S.C. §1030;
Count III – Tortious Interference with Prospective Business Relationships;
Count IV – Breach of Duty of Loyalty;
Count V – Conversion; and
Count VI – Breach of Contract.

5. Plaintiff alleges that this Honorable Court has federal question subject matter jurisdiction pursuant to 28 U.S.C. §1331 as Plaintiff alleges a violation of the Compute Fraud and Abuse Act ("CFAA"), 18 U.S.C. §1030. Compl. ¶4.

II. Standard of Review

6. When considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a federal court is to accept as true all facts set forth in the plaintiff's complaint. Grossman v. Nationsbank, N.A., 225 F.3d 1228, 1231 (11th Cir. 2000) (citation omitted); Fed R. Civ. P. 12(b)(6). Further, courts must draw all reasonable inferences in the light most favorable to the plaintiff. Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1273 n. 1 (11th Cir. 1999); Fed. R. Civ. P. 12(b)(6).

III. Factual Summary

7. Mr. Bishop was employed by Plaintiff from approximately April 2, 2012 through August 4, 2014. Compl. ¶10. As part of his employment, Mr. Bishop was provided with an email address and account by Plaintiff. *See*, Compl. ¶13 (alleging the email address in question belonged to Plaintiff). Gulf South provided Mr. Bishop with "access to Gulf South's confidential information…which he utilized and accessed in performing his duties and functions for Gulf South." Compl. ¶31. Mr. Bishop then utilized the permissions Gulf South had given him to access files and emails. Compl. ¶¶32-33; Declaration of Robert Bishop ("Bishop Declaration"), ¶ 12. The Bishop Declaration is attached hereto and incorporated by reference as **Exhibit "A."**

8. Gulf South alleges that Mr. Bishop used his permitted access to its computer system to copy and delete certain emails and address contacts. Compl. ¶33. Gulf South does not allege that Mr. Bishop accessed any computer or system without permission, authorization, or otherwise. *See*, Compl. ¶31 (Mr. Bishop was given access to Gulf South's computers); Id. at ¶32 (alleged misappropriation of data occurred while Mr. Bishop was still employed by Gulf South); Bishop Declaration ¶¶18-21 (Mr. Bishop had complete and unrestricted access to computer and email account).

IV. Plaintiff Fails To State A Cause Of Action For Violation Of The Computer Fraud And Abuse Act

9. Plaintiff alleges that Mr. Bishop violated two subsections of the CFAA: §1030(a)(2)(C) and §1030(a)(5). Compl. ¶¶86- 87.

10. Plaintiff fails to state a cause of action for violation of the CFAA because any damages Plaintiff may have suffered as a result of Mr. Bishop's alleged violations fail to meet the jurisdictional threshold for loss and should be properly dismissed. Additionally, Mr. Bishop had

authorization to access his email account that contained the emails and address book that were allegedly copied and deleted. Therefore, Plaintiff fails to state a claim for relief under the CFAA.

a. Any Damages Plaintiff May Have Suffered Fail To Meet The Jurisdictional Threshold Under The CFAA And Therefore Count II Should Be Dismissed

11. Count II fails to state a cause of action under the CFAA and should be properly dismissed. 12(b)(6), Fed.R.Civ.P. The CFAA is primarily a criminal statute against hacking, but it does contain a private right of action as well. 18 U.S.C. §1030(g); Lockheed Martin Corp. v. Speed, Case No. 6:05-cv-1580-Orl-31KRS, 2006 U.S. Dist. LEXIS 53108, 14-15 (M.D. Fla. Aug. 1, 2006). To state a cause of action for violation of the CFAA, a plaintiff must make a threshold showing of at least one of the five enumerated conditions precedent. 18 U.S.C. §1030(g); Id. at §1030(c)(4)(A)(I-V). Of these, Plaintiff relies on §1030(c)(4)(A)(I), which states, that there must have been a "loss to 1 or more persons during any 1-year period…aggregating at least $5,000 in value." Compl. ¶ 85.

12. The term "loss" is defined by the CFAA as "any reasonable costs to any victim, including the cost of responding to an offense, conducting a damages 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).

13. While Plaintiff alleges to have suffered from a loss of more than $5,000, these allegations are done in a conclusory manner and thus entitled to no weight when challenged on a motion to dismiss. *See*, Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1185 (11th Cir. 2003) ("conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." Id.).

14. The factual allegations made in the Complaint reveal that Plaintiff is basing its loss calculation of the costs to restore that allegedly deleted data, Compl. ¶35, and the business value of the allegedly copied email, *see,* Compl. ¶ 89 (alleging Mr. Bishop is using copied information to compete with Plaintiff and causing it to suffer "lost business and other consequential damages").

15. As to the first claimed loss, Plaintiff alleges that it recovered all of the emails and data that was allegedly copied and deleted. Compl. ¶35. Thus, the only relevant loss would be costs incurred to restore the allegedly deleted data. *See,* 18 U.S.C. §1030(e)(11) (loss includes costs of restoring data to its condition prior to the alleged violation).

16. In addition to the cost to restore the deleted email file, Plaintiff also includes the total business opportunity value of the information that was allegedly copied and deleted in its estimation of "loss." *See,* Compl. ¶89 (alleging lost business and other consequential damages).

17. However, the definition of "loss" under the CFAA is not as broad as Plaintiff makes it out to be. Rather, the CFAA is only concerned with the costs of recreating the information that a target has been deprived of, not the value of the information in the hands of a competitor. Resdev, LLC v. Lot Builders Ass'n, 2005 U.S. Dist. LEXIS 19099, No. 6:04-CV-1374, 2005 WL 1924743, at * 4 (M.D. Fla. Aug. 10, 2005) ("ResDev's position fails to acknowledge that allegedly ill-gotten revenues from a trade secret are neither a 'but-for' nor a proximate consequence of 'damage,' and nor do they fit within the grouping of 'loss.'"); Lockheed Martin Corp. v. Speed, 2006 U.S. Dist. LEXIS 53108, 9 (M.D. Fla. Aug. 1, 2006). *See*, 18 USC §1030(e)(11) ("loss" means "any reasonable **costs to** any victim…" Id.) (emphasis added). Calkins v. IPD Analytics, L.L.C., 2009 U.S. Dist. LEXIS 85702, 19 (S.D. Fla. Apr. 16, 2009) ("deletion of files alone does not constitute 'damage' under section 1030(a)(5) if the deleted data is still available to the plaintiff through other means.").

18. Further, only costs that are incurred as a result of an "interruption of service" may be included in the jurisdictional threshold amount of "loss." Cont'l Grp., Inc. v. Kw Prop. Mgmt., LLC, 622 F. Supp. 2d 1357, 1371 (S.D. Fla. 2009).

> Otherwise, it would appear that the second half of the "loss" definition is surplusage. If loss could be any reasonable cost without any interruption of service, then why would there even be a second half to the definition that limits some costs to an interruption of service. Rather, the better reading (though reasonable minds surely can differ until the Court of Appeals decides the issue) appears to be that all "loss" must be the result of an interruption of service. This conclusion is supported by the legislative intent in the CFAA, a criminal statute, to address interruption of service and damage to protected computers.

Cont'l Grp., Inc. v. Kw Prop. Mgmt., LLC, 622 F. Supp. 2d 1357, 1371 (S.D. Fla. 2009). *See*, Cohen v. Gulfstream Training Academy, 2008 U.S. Dist. LEXIS 29027, 2008 WL 961472 (S.D.Fla. Apr. 9, 2008).

19. In the present case, the only costs Plaintiff alleges to have suffered are those that were incurred to recover the data that was allegedly deleted, and not the value of the information copied in the hands of a business competitor, which Plaintiff has improperly included in its "loss" calculation.

20. In the present case, the amount of time needed to restore deleted emails on a system such as Plaintiff uses is relatively minimal, and is estimated to take between 15 minutes to 1 hour, depending on the manner in which the emails are backed up and the number of emails. Declaration of George Lakiotis, ¶¶ 7, 11-15. The Declaration of George Lakiotis is attached hereto and incorporated by reference as **Exhibit "B."** Under a worst case scenario, which is unlikely given the facts alleged in paragraph 33 and 34 of the Complaint, it may take up to 8 hours to restore a deleted email account. Id. at 16. The typical hourly rate for a Information Technology professionals is between $125.00 and $200.00 per hour for restoring emails and email accounts. Id. at 17.

21. Under the most generous calculation of losses suffered by Plaintiff for restoring the allegedly deleted emails is $1,600.00. See, Lakiotis Declaration, ¶¶ 16-17. However, under the most likely scenario, the expected costs to restore the allegedly deleted emails would range from $31.25[1] to $200.00.

22. Therefore, Plaintiff's losses incurred to restore allegedly deleted emails fail to meet the jurisdictional threshold of $5,000.00 and Count II should be properly dismissed.

b. Plaintiff Fails To State A Cause Of Action For Violation Of 18 U.S.C. §1030(A)(2)(C) And (A)(5) Where Mr. Bishop Had Full Access And Authority To Engage In The Alleged Conduct

23. Plaintiff alleges that Mr. Bishop violated two subsections of the CFAA, §1030(a)(2)(C) and §1030(a)(5), by accessing and deleting emails from Gulf South's computers, without authorization. Compl. ¶¶86- 87.

24. Subsection (a)(2)(C) of the CFAA prohibits the intentional access of a computer by a person "without authorization or [who] exceeds authorized access and thereby obtains information from any protected computer." 18 U.S.C. §1030(a)(2)(C). *See*, Compl. ¶86 (alleging violation of 18 U.S.C. §1030(a)(2)(C) through access without authorization[2]).

25. Subsections (a)(5)(B-C) of the CFAA each prohibit a person from "intentionally access[ing] a protected computer without authorization, and as a result of such conduct," recklessly causes damage or causes damage and loss. 18 U.S.C. §§1030(a)(5)(A-C).

26. Notably, neither subsection of §1030(a)(5) imposes liability for **exceeding authorized access** of a protected computer system. *Compare* 18 U.S.C. §1030(a)(2)(C) (prohibiting access "without authorization" and by "exceed[ing] authorized access") *with* 18

[1] 15 minutes at $125.00 per hour.
[2] Plaintiff does not allege that Mr. Bishop's "exceeded authorized access" when he allegedly copied files from Gulf South. Compl. ¶86. *See*, 18 U.S.C. §1030(a)(2)(C).

U.S.C. §1030(a)(5) (prohibiting access "without authorization" only). *See*, *also*, 18 U.S.C. §1030(a)(1) ("without authorization or exceeding authorized access"); 18 U.S.C. §1030(a)(3) ("without authorization"); 18 U.S.C. §1030(a)(4) ("without authorization, or exceeds authorized access"). The exclusion of the phrase "exceeds authorized access" from §§1030(a)(5)(A-C) but including such term in §§1030(a)(1-4) was intentional. In re AOL, Inc. Version 5.0 Software Litig., 168 F. Supp. 2d 1359, 1370 (S.D. Fla. 2001) (*citing* Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991)).

27. This distinction between exceeding authorized access and accessing without authorization is carried on through the definitions provided by the CFAA. *See*, 18 U.S.C. §1030(e). The term "exceeds authorized access" is defined by the CFAA and means "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. §1030(e)(6).

28. However, the term "without authorization" is not defined by the CFAA, and should thus be given its plain meaning. Am. Bankers Ins. Group v. United States, 408 F.3d 1328, 1332 (11th Cir. 2005).

> [I]t is plain from the outset that Congress singled out two groups of accessers, those "without authorization" (or those *below* authorization, meaning those having no permission to access whatsoever - typically outsiders, as well as insiders that are not permitted *any* computer access) and those exceeding authorization (or those *above* authorization, meaning those that go beyond the permitted access granted to them - typically insiders exceeding whatever access is permitted to them).

Lockheed Martin Corp. v. Speed, Case No. 6:05-cv-1580-Orl-31KRS, 2006 U.S. Dist. LEXIS 53108, 14-15 (M.D. Fla. Aug. 1, 2006) (finding that where an employer permitted defendants to access its computer system, the employees who allegedly misappropriated information did not access the information without authorization and did not exceed authorized access because

"Lockheed permitted the [e]mployees to access the precise information at issue." Id. at 15.). *See*, Clarity Servs. v. Barney, 698 F. Supp. 2d 1309, 1316, fn. 3 (M.D. Fla. 2010); (collecting cases); Lockheed Martin, 2006 U.S. Dist. LEXIS 53108, at 7 (noting that the agency definition of authorization "is especially disconcerting given that the CFAA is a criminal statute with a civil cause of action. To the extent 'without authorization' or 'exceeds authorized access' can be considered ambiguous terms, the rule of lenity, a rule of statutory construction for criminal statutes, requires a restrained, narrow interpretation." Id.)

29. The legislative history of the Computer Fraud and Abuse Act is consistent with this strict interpretation of "exceeds authorized access:"

> [I]n 1986 Congress amended the CFAA to substitute the phrase "exceeds authorized access" for the phrase "or having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend." S.Rep.No. 99-432, at 9, U.S.Code Cong. & Admin.News 1986, pp. 2479, 2486. By enacting this amendment, and providing an express definition for "exceeds authorized access," the intent was to "eliminate coverage for authorized access that aims at 'purposes to which such authorization does not extend,' " thereby "remov[ing] from the sweep of the statute one of the murkier grounds of liability, under which a [person's] access to computerized data might be legitimate in some circumstances, but criminal in other (not clearly distinguishable) circumstances that might be held to exceed his authorization." S.Rep.No. 99-432, at 21, U.S.Code Cong. & Admin.News 1986, pp. 2479, 2494-95.

International Ass'n of Machinists and Aerospace Workers v. Werner-Masuda, 390 F. Supp. 2d 479, 499 (D.Md. 2005) (*quoted in* Clarity Servs. v. Barney, 698 F. Supp. 2d 1309, 1315 n.4 (M.D. Fla. 2010).

30. In the present case, the facts alleged by the Plaintiff simply fall short of the conduct prohibited by the CFAA because Mr. Bishop had free and unrestricted access to copy and delete the files that he is alleged to have done. As part of his employment with Gulf South, Mr. Bishop was provided with an email address and account by Plaintiff. *See*, Compl. ¶13 (alleging the email

address in question belonged to Plaintiff). Gulf South provided Mr. Bishop with "access to Gulf South's confidential information…which he utilized and accessed in performing his duties and functions for Gulf South." Compl. ¶31. Mr. Bishop then utilized the permissions Gulf South had given him to access files and emails. Compl. ¶¶32-33. Mr. Bishop's access to the email account was completely unrestricted. Bishop Declaration, ¶¶18-21. *See*, Compl. ¶31 (Mr. Bishop was given access to Gulf South's computers); Id. at ¶32 (alleged misappropriation of data occurred while Mr. Bishop was still employed by Gulf South). At no point does Gulf South allege that it restricted his access to his email account or address book.

31. The facts of the present case substantially mirror those presented in Clarity Services v. Barney, 698 F. Supp.2d 1309 (M.D. Fla 2010). In that case, the defendant resigned from his former employer after beginning to work for a new employer. After resigning from the former employer, Barney obtained information through email that allegedly belonged to the former employer. Id. at 1314. Additionally, the defendant deleted every single file on the hard drive of a computer he used but that was owned by his former employer. Id. at 1316. The plaintiff claimed that obtaining the files by email after resigning and deleting data from a computer hard drive violated the subsection (a)(2)(C) of the CFAA. The Court granted summary judgment as to the defendant on both alleged violations of the CFAA because the defendant had authorization to read the email and also had authorization to modify and delete files on the computer hard drive. Id. at 1316-17. Thus, the defendant had authorization to engage in the alleged conduct and further did not "exceed authorized access." Id. at 1317. "[F]or purposes of the CFAA, when an employer authorizes an employee to use a company computer subject to certain limitations, the employee remains authorized to use the computer even if the employee violates those limitations." LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1133 (9th Cir. 2009).

32. Likewise in LVRC Holdings, summary judgment was affirmed where an employer alleged violations of the CFAA against a former employee who emailed documents to himself from his employer's computer for the purpose of starting a competing business. LVRC Holdings LLC v. Brekka, 581 F.3d at 1132. The employee did not violate the CFAA because he had authorization to access the files that were allegedly misappropriated. Id. at 1135.

33. Applying the definition of "without authorization" and "exceeds authorized access" to the facts alleged by Plaintiff necessarily leads to the conclusion that Mr. Bishop's alleged conduct does not violate the CFAA. Therefore, this Honorable Court should properly dismiss Count II (violation of 28 U.S.C. §1030).

V. In The Alternative, This Motion Should Be Considered As A Motion For Summary Judgment And Judgment Should Be Entered For The Defendants

34. Should this court determine that this matter is not properly before the Court on a Motion to Dismiss, Mr. Bishop respectfully requests this Honorable Court to consider this to be a Motion for Summary Judgment. *See,* Trustmark Ins. Co. v. ESLU, Inc., 299 F.3d 1265, 1267 (11th Cir. 2002) (converting a motion to dismiss into a motion for summary judgment considering documents outside of the pleadings); Jones v. Auto. Ins. Co. of Hartford, Conn., 917 F.2d 1528, 1531 (11th Cir. 1990) (same).

WHEREFORE, Defendant Robert Bishop respectfully request this Honorable Court enter summary judgment on Count II in his favor and against Plaintiff, grant reasonable attorney's fees and costs, and grant other relief as just and proper.

VI. This Honorable Court Should Refrain From Exercising Supplemental Jurisdiction Over The State Law Claims Where The One Count Asserting A Federal Question Is Dismissed

35. Should this Honorable Court determine that Count II (Violation of 18 U.S.C. §1030) should be properly dismissed, or proper for entry of summary judgment, then this Honorable Court should refrain from exercising supplemental jurisdiction over the remaining state law causes of action and dismiss the case its entirety.

36. Plaintiff relies on 28 U.S.C. 1331, which vests subject matter jurisdiction over this dispute because Plaintiff has alleged violation of a federal statute. Compl. ¶4. The only federal question at issue in this action is whether Mr. Bishop violated 18 U.S.C. §1030, which is the basis of Count II.

37. Plaintiff relies on 28 U.S.C. §1367 as the basis for this Honorable Court to determine the alleged violations of state law and common law. Compl. ¶4.

38. Should this Honorable Court dismiss Count II, then the action in its entirety should be properly dismissed. 28 U.S.C. §1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if the district court has dismissed all claims over which it has original jurisdiction." Id.).

39. "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them" United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." Id.).

40. In the present case, there are no considerations of judicial economy, convenience, or fairness to the parties present that are sufficient for this Honorable Court to exercise supplemental jurisdiction over the state law claims when the one federal law claim has been dismissed.

41. Therefore, this Honorable Court should properly refrain from exercising pendent jurisdiction over the claims based on state and common law.

WHEREFORE, Defendant, Robert Bishop, respectfully requests that should this Honorable Court dismiss or enter summary judgment in his favor on Count II (Violation of 18 U.S.C. §1030), then this Honorable Court should properly refrain from exercising pendent jurisdiction over the state and common law claims, dismiss this matter without prejudice, and grant other relief as just and proper.

[Certificate of Service on Following Page]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **December 18th, 201**4, I electronically filed the foregoing with the Clerk of Court by using CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized or do not receive electronically Notices of Electronic by U.S. Mail and Email at the addresses listed below

LAW OFFICE OF ROBERT D. ECKARD & ASSOCIATES, P.A.

s/ Robert Eckard
ROBERT D ECKARD, B.C.S.
LEAD TRIAL ATTORNEY
FBN: 0162655
JOELLE SCHULTZ, ESQUIRE
FBN: 0048204
TIMOTHY GOODWIN, ESQUIRE
FBN: 98971
3110 Alternate U.S. 19 North
Palm Harbor, FL 34683
(727) 772-1941 Telephone
(727) 771-7940 Facsimile
Robert@RobertEckardLaw.com

Counsel for Defendant

SERVICE LIST
Gulf South Forest Products, Inc. v. Robert Bishop
Case Number: 0:14-cv-62509
United States District Court, Southern District of Florida
Fort Lauderdale Division

Joshua B. Spector
Perlman, Bajandas, Yevoli & Albright, P.L.
1000 Brickell Avenue
Suite 600
Miami, FL 33131
Phone: (305) 377-0086
Fax: (305) 377-0781
Email: jspector@pbyalaw.com

Attorney for Plaintiff

Paul Dewey Turner
Perlman, Bajandas, Yevoli & Albright, P.L.
Museum Plaza
200 South Andrews Avenue
Suite 600
Fort Lauderdale, FL 33301
Phone: (954) 566-7117
Fax: (954)566-7115
Email: pturner@pbyalaw.com

Attorney for Plaintiff