____	____	____	____	____

Applicant Number

July 2024
Georgia Essay Questions

Do not touch this packet or start the exam until you are instructed to do so.

- Once the exam begins, you may work on the four essay questions in any order, but remember to type your answers in the appropriate answer window (or write your answer in the appropriate answer book if you are handwriting).

- For each of the four attached essay questions, there is one blank sheet for your use as scratch paper, and you may take notes on any of the attached pages if you wish. You may remove the staple or tear out any pages, but you will need to put the packet back in order when the exam session is over.

- On each essay question, remember to demonstrate not merely your memory but also your ability to think clearly and to analyze the issues.

- Assume the questions arise under the laws of Georgia unless otherwise indicated.

ESSAY 1

Laptop applicants: Answer this question in the **FIRST** answer window.

Handwriting applicants: Answer this question in the **BLUE** answer book.

We have been asked to advise John Wright in connection with a demand that he return to his employer, APF, Inc., $3 million in bonus compensation that he received in 2022 and 2023. APF has also informed Mr. Wright that it does not intend to pay any bonus to him in 2024.

APF claims that it mistakenly failed to deduct "debt service expenses" from its pretax income before calculating Mr. Wright's bonuses in 2022 and 2023. Mr. Wright says he is entitled to the disputed sums under the terms of his Amended Employment Agreement and because APF approved the payments.

Mr. Wright has served as Chief Financial Officer of APF for the last ten years. During this time, APF executives were paid bonus compensation based on a profit-sharing pool of APF's pretax income. The bonus compensation payments were made at the end of each calendar year, and the payments were routinely approved by APF's Board of Directors.

In July 2021, World Corporate Purchasers ("WCP") approached APF's Chairman about purchasing an interest in APF, and WCP and APF agreed to a refinancing transaction. To facilitate the transaction, the funds that WCP borrowed to purchase APF's stock would be repaid by APF as a "debt service expense" of the company out of APF's pretax income.

This additional "debt service expense" from the WCP transaction would reduce, if not potentially eliminate, APF's pretax income. Mr. Wright states that APF's General Counsel told him that APF and WCP had an understanding that this newly instituted debt service expense would be excluded from the calculation when determining the size of the profit-sharing pool used to pay APF's executive bonuses.

Based on the above, APF asked Mr. Wright to enter into an Amended Employment Agreement in January 2022, which provided for an initial term of three years. The proposed Amended Agreement was identical to Mr.

Wright's prior employment agreement except that it increased Mr. Wright's base compensation. APF authorized its Chairman to execute the Amended Agreement on its behalf. General Counsel was directed to present/offer the Amended Agreement to Mr. Wright.

Mr. Wright signed the Amended Agreement but made a handwritten edit to the provision about bonus payments. The original provision stated, ". . . such bonus will be paid in accordance with the terms and conditions of the bonus pool," and there was no mention of "debt service expenses." However, Mr. Wright added that "for purposes of calculating bonus compensation, 'debt service expense' shall not be deducted from APF's pretax income." That edit was shown to APF's General Counsel, who said, "that's fine." General Counsel also stated that she would have the handwritten note typed up and the revised page inserted into the Amended Agreement instead of the page with the handwritten note.

General Counsel's assistant made the edit, but in compiling the original signed Amended Agreement, mistakenly re-inserted the original unedited page instead of the retyped page. That error, apparently, went unnoticed until APF's recent demands were made. In the meantime, the next two years' bonus payments and calculations were made in December 2022 and December 2023 without deducting the "debt service expense" from APF's pretax income.

Mr. Wright believes he was entitled to the 2022 and 2023 bonuses and that he will be entitled to a bonus at the end of 2024. He claims that APF's refusal to pay the 2024 bonus and demand that he return the entire 2022 and 2023 year-end bonus payments constitutes an anticipatory repudiation and breach of the express terms of his Amended Agreement, or breach of the terms of the Amended Agreement as modified by the parties' conduct and performance.

Analyze and discuss the following:

1. Did Mr. Wright's handwritten note become an enforceable part of the Amended Agreement? Explain your answer.

2. Do the facts and law support Mr. Wright's claims for breach of contract and anticipatory breach of contract? Explain your answer.

3. Does Mr. Wright have a claim against General Counsel/APF for mistake, apparent authority, fraud, or negligent misrepresentation?

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ESSAY 2

Laptop applicants: Answer this question in the **SECOND** answer window.

Handwriting applicants: Answer this question in the **YELLOW** answer book.

Big City Apartments, Inc. ("Big City") constructs luxury high-rise apartment buildings in Georgia. Big City has a building under construction in Atlanta, which is scheduled to be ready for occupancy by September 1. Each of the 100 apartments in the building will have a built-in entertainment center that will be furnished with a 55-inch TV.

Big City normally purchases TVs for its apartments from a supplier in Atlanta but decided to shop for lower prices. Big City found that the prices were lowest at a company called Smith TV Wholesalers, Inc. ("Smith") located in Savannah. Big City has never purchased from Smith before.

In May, Big City sent a purchase and service order to Smith for 100 TVs. The purchase and service order specifically required that the TVs be 55-inch, that they be delivered in a single shipment no later than the last Monday of July, and that Big City's right to inspect the TVs was a condition to payment. The order also specified that Smith would install all of the TVs in the built-in cabinets, because Big City does not employ technicians with the expertise and knowledge to perform that job. The order said nothing about warranties, disclaimers, or remedies. Smith accepted the purchase and service order, forming a valid and enforceable contract.

On the designated last Monday in July, Smith delivered the TVs about 10 minutes before quitting time for Big City's onsite work crew. The Big City foreman did not have time that day to inspect the TVs, but it was the first thing he did the next morning. He discovered that 40 of the TVs were 65-inch and, therefore, too large to fit in the entertainment centers. Big City has no use for the 65-inch TVs, but it knows that Dogwood Apartments, which is another apartment builder in Atlanta, is planning to use 65-inch TVs in its current construction project. Big City has not paid the purchase price under the contract or taken any action yet with

respect to the TVs but wasted no time in contacting you for advice after the foreman inspected the TVs.

1. Does Article 2 of the Georgia Uniform Commercial Code ("UCC") govern the contract between Big City and Smith? Why or why not?

2. Assuming the contract is governed by the UCC, what rights does Big City have under the UCC as the buyer of the TVs given the nonconforming delivery by Smith, and what would be the best way for Big City to proceed to protect and exercise its rights?

3. Assuming the contract is governed by the UCC, what duties, if any, does Big City have to Smith regarding both the 55-inch and 65-inch TVs? Can Big City sell the 65-inch TVs to Dogwood? Explain your answer.

4. Assuming the contract is governed by the UCC, does Smith have the right to cure its nonperformance?

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ESSAY 3

Laptop applicants: Answer this question in the **THIRD** answer window.

Handwriting applicants: Answer this question in the **PINK** answer book.

Chicken Parma John, Inc. ("CPJ") is a Georgia-based manufacturer of signature chicken-flavored vegetable products, from soup to nuggets.

Each year, CPJ supplies a variety of vegetable seeds to Jimmy Bob Jones, a local farmer and landowner near Macon. CPJ contracted with Jones to plant and grow the vegetables. Jones does not like to do the harvesting and loading work, especially with forklifts, because he knows how dangerous forklifts are. He owns forklifts but does not operate them.

CPJ separately contracted with Picking & Packing LLC, ("P&P") to harvest Jones's crops, place them in large plastic containers, and use forklifts owned by Jones to load the containers onto delivery trucks for pickup.

Finally, CPJ contracted with Veggie Hill Hauling LLC, to provide pickup of the crops for delivery to CPJ, where they are processed into veggie-based food products with the logo "Tastes Like Chicken."

In September 2023, a Veggie Hill truck arrived at the Jones farm before daybreak to receive the first load of vegetable containers for the season's crop. Veggie Hill employee Vic Hall was the driver, and he was accompanied by his co-worker Vivian Harper. Vic and Vivian exited the truck when they arrived at the loading zone, which was barely lit. They engaged in small talk in the loading zone, and they moved aside as the first forklift approached with a container. Pedro Parker, P&P's forklift driver, made three trips to the truck before backing up the forklift to pick up a fourth container. But before picking up the container, Pedro needed a bathroom break. He jumped off the forklift and left it running with the key in it.

Anxious to get going, Vivian walked back to the forklift, mounted it, grabbed a container with the lift, and headed for the truck. She loaded the container, backed up the forklift, and accidentally ran over Vic. P&P employees came running; Pedro burst out of the Porta-Potty; and the P&P crew leader said, "Vivian, I've told you ten times that you are not authorized to drive the

forklifts. But you have repeatedly violated the rules. And now, look what you have done!" Vivian's eyes filled with tears as she replied, "I never thought Vic would still be standing in the loading zone. He knows how risky that is. Oh, Vic, I am so sorry, so sorry!"

Vic survived but is paralyzed from the waist down, and one of his arms had to be removed. He has been in extreme pain and is clinically depressed.

Your law firm has been hired to represent Vic. As a law clerk, you are asked to advise on what claims might be made against P&P and Jones. You are advised that no claims can be filed against CPJ and Veggie Hill due to the worker's compensation employer immunity statute. There is no plan to pursue any claims against Pedro (as an individual) or Vivian, as they are not a likely source of any substantial recovery. You are instructed to assume the case will be filed in Georgia, will be governed by Georgia law, and will be proper in all respects with respect to venue and the statute of limitations.

Please prepare a memorandum addressing in Part A, the claims that might be made against P&P, the elements of any such claims, and the defenses P&P might assert; and in Part B, the claims, elements, and defenses as to Jones. With respect to each claim, element, and defense, offer your assessment of the potential merits thereof.

In Part C of your memorandum, please describe the kinds of damages that Vic might be able to seek.

Finally, in Part D, assume that the jury finds Vic is 30% at fault, P&P is 60% at fault and Jones is 10% at fault. If the damage award is $5 million, how much will Vic recover and from whom?

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ESSAY 4

Laptop applicants: Answer this question in the **LAST** answer window.

Handwriting applicants: Answer this question in the **TAN** answer book.

The City of Lumpkin Island is on the Georgia coast and is known for its pristine marshes, natural beaches, and quiet residential neighborhoods. As with many coastal areas, Lumpkin Island has seen an increase in vacation travelers. Many travelers are renting houses and townhomes on a short-term basis (with stays of generally no more than one week at a time) via online website platforms that specialize in short-term rentals.

As a result of the surge in short-term rentals, the following have occurred: (1) local and national investors—several of whom are corporate investors based in New York—have started purchasing homes in Lumpkin Island, which has reduced the availability of homes for purchase and driven up home prices; (2) the residential character of the City's neighborhoods has become more transient; (3) many houses that are occupied by short-term renters are not being regularly maintained and have become popular for vacationers traveling in large groups who often host loud parties into the night; (4) the City's population is becoming less culturally and economically diverse as there are now fewer affordable opportunities to purchase single-family homes; (5) the few hotels that exist on Lumpkin Island are seeing their vacancies rise as a result of travelers renting houses on a short-term basis rather than renting hotel rooms, leading to a reduction in the workforce in those hotels; and (6) there has been an uptick in crime associated with the transient nature of the short-term residents.

The residents of Lumpkin Island have become vocal in their opposition to short-term rentals. The City Attorney for Lumpkin Island has engaged you to advise the City on the potential constitutionality of a proposed ordinance the City intends to enact to restrict short-term housing rentals. The City has prepared a summary of the proposed ordinance for your

review before the ordinance is formally drafted for approval and enactment. The summary of the proposed ordinance is as follows:

For any rental of a dwelling unit (single family home, townhome, multifamily unit, etc.) that is less than 30 days, the following requirements must be satisfied:

1. The "*primary occupant*" of the dwelling unit must reside in the dwelling unit for the duration of the rental (this is referred to as the "home-share requirement");
2. A "*primary occupant*" is a natural person who resided in the dwelling unit for the prior six months and intends to reside in the unit for the six months following the date the license referenced in item 6 below is obtained/renewed. Thus, a primary occupant may be either the owner or long-term tenant of the dwelling unit;
3. The total number of occupants during the rental may not exceed two persons per bedroom (excluding children under 18);
4. A transit occupancy tax of 10% of the gross rental fees paid for the rental must be paid to the City of Lumpkin Island;
5. The dwelling must maintain certain safety standards (e.g., smoke detectors, carbon monoxide detectors, fire extinguishers, etc.); and
6. The owner of the dwelling must obtain a license to rent on a short-term basis and sign an application for such license in which the owner certifies that the dwelling meets the requirements set forth above. The license is to be renewed annually.

The proposed ordinance would take effect 90 days after being enacted and would apply to all dwelling units, including those for which owners have already entered into agreements for future short-term rentals.

The City Attorney has requested that you provide counsel on the following two questions. Please explain your answers.

1. Is the proposed new ordinance in violation of the "dormant" Commerce Clause of the U.S. Constitution?

2. Does the proposed ordinance constitute an "inverse condemnation" under the "Takings Clause" of the U.S. Constitution?

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July 2024
MPT-1
Item

In re Girard

In re Girard

FILE

LIBRARY

Collins & Timaku LLP
Attorneys at Law
800 Bagby St., Suite 150
Franklin City, Franklin 33715

MEMORANDUM

TO: Examinee
FROM: Hannah Timaku
DATE: July 30, 2024
RE: Laurel Girard matter

We represent Laurel Girard in a landlord-tenant dispute. Girard rents an apartment at the Hamilton Place apartment complex. Yesterday morning, she received a "Three-Day Notice to Cure or Quit" (Notice) from her landlord, Hamilton Place LLC (Hamilton). The Notice alleges that Girard failed to pay a portion of her rent and also violated the no-pet clause in her lease.

The Notice gives Girard three days to either "cure" the alleged lease violations or "quit" (vacate) the premises. Hamilton is threatening to file an eviction action against Girard seeking a court order terminating the lease if she remains in the apartment and does not cure the alleged violations within the three-day time frame. Needless to say, this is a time-sensitive matter that requires our immediate attention.

Please prepare an objective memorandum to me analyzing whether the alleged violations in the Notice are valid bases for termination of Girard's tenancy. Be sure to explain and support your conclusions. In addition, based on your analysis, let me know what steps we should advise the client to take. Once I have reviewed your memorandum, I will determine the appropriate legal response to the Notice and pass along your advice to the client.

Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your conclusions.

Collins & Timaku LLP
Attorneys at Law

MEMORANDUM TO FILE

FROM: Hannah Timaku
DATE: July 30, 2024
RE: Laurel Girard matter

Today I met with Laurel Girard regarding a dispute with her landlord. This memorandum summarizes the interview:

- This morning, Girard received a Notice to Cure or Quit from her landlord referencing her failure to pay rent and her ownership of a cat.
- Since January 2023, Girard has lived at the Hamilton Place Apartments, where she rents a one-bedroom apartment from her landlord, Hamilton Place LLC.
- Her initial monthly rent was $1,500. On June 1, 2024, Hamilton notified Girard that her rent would be increasing to $1,650, effective July 1, 2024.
- Girard was alarmed by the 10% increase in her rent and felt it was unfair, so for the month of July she paid only $1,500 and did not pay the additional $150.
- When I spoke with her, she specifically asked if she is required by law to pay the additional $150 of rent. I told her we would research the matter.
- We then talked about Girard's cat.
- Girard told me that she experiences anxiety. She often feels overwhelmed and, at times, has panic attacks. The medication she is taking helps somewhat, but it does not eliminate her symptoms.
- About six months ago, Girard's therapist, Sarah Cohen, recommended that Girard consider getting an emotional support animal to help alleviate the symptoms of her mental health condition.
- Initially Girard resisted her therapist's advice because she was working long and unpredictable hours in a retail position and didn't think she would have the time to properly care for an animal.

- But about two months ago, Girard got a new job as an office assistant, with set hours and a very predictable work schedule.
- Shortly after starting her new job, Girard visited the local animal shelter and adopted a kitten, whom she named Zoey.
- Girard is already very attached to Zoey and has noticed a dramatic improvement in her overall mental well-being since she brought Zoey home from the animal shelter. She has fewer panic attacks and generally feels a lot less overwhelmed. After she gets home from work and eats dinner, she watches TV on the couch while Zoey snuggles on her lap. Even the simple act of petting Zoey makes Laurel feel relaxed and, in her own words, "like I can handle anything that comes my way, no matter how stressful and challenging."
- Two weeks ago, Girard needed to take Zoey to the veterinarian for a 12-week vaccination booster shot. She put Zoey in a cat travel carrier and was walking with Zoey to her car when she ran into the on-site property manager for Hamilton Place. When the manager saw Zoey in her travel carrier, the manager told Girard that she was not allowed to have pets. When Girard responded that Zoey is her emotional support animal, the property manager rolled her eyes and sarcastically commented, "Sure! Whatever!"
- That day, Girard asked her therapist, Sarah Cohen, if she could write a letter explaining how important Zoey is for Girard's mental well-being. Girard just received the letter from Cohen a few days ago.
- She told me she loves living at Hamilton Place but will move out if that's the only way she can keep Zoey.

RESIDENTIAL LEASE AGREEMENT

This Residential Lease Agreement (Lease) is entered into and effective as of January 1, 2023, by and between Hamilton Place LLC (Landlord) and Laurel Girard (Tenant).

FOR AND IN CONSIDERATION OF the mutual promises and agreements contained herein, Tenant agrees to lease the Premises (as hereinafter defined) from Landlord under the following terms and conditions:

1. **PREMISES:** 7700 Riverside Drive, Franklin City, Franklin 33725, Apartment 12, a one-bedroom, one-bathroom apartment on the first floor (the Premises).

2. **RENTAL AMOUNT:** Beginning January 1, 2023, Tenant agrees to pay Landlord the sum of $1,500 per month by no later than the 3rd day of each calendar month. Said rental payment shall be delivered by Tenant to Landlord at [address omitted]. Rent must be actually received by Landlord in order to be considered in compliance with the terms of this Lease.

3. **RENT INCREASES:** Tenant agrees that Landlord may raise the rent no sooner than 12 months after the commencement of this lease.

4. **SECURITY DEPOSIT:** Tenant shall deposit with Landlord the sum of $1,500 as a security deposit to secure Tenant's performance of the terms of this Lease. After Tenant has vacated the Premises, Landlord may use the security deposit for cleaning the Premises, any damage or unusual wear and tear to the Premises, or any other rent or amounts owed pursuant to this Lease.

5. **INITIAL PAYMENT:** Tenant shall pay the first month's rent of $1,500 and the security deposit in the amount of $1,500 for a total of $3,000. Said payment shall be made by cashier's check or money order and is due prior to occupancy.

6. **TERM:** The Premises are leased on the following two-year lease term: from January 1, 2023, until December 31, 2024. This Lease will automatically renew on a month-to-month basis following the initial lease term, unless Landlord or Tenant provides 30 days' advance written notice of termination to the other party.

* * *

10. **LATE CHARGE/BAD CHECKS:** A late charge of $50 shall be incurred if rent is not paid when due. If rent is not paid when due and Landlord issues a "Notice to Cure or Quit," Tenant must tender payment of any amounts owed by cashier's check or money order only.

* * *

15. **PETS:** No pet of any kind (including but not limited to any dog, cat, bird, fish, or reptile) may be kept on the Premises, even temporarily, absent Landlord's written consent. If Landlord consents to allow a pet to be kept on the Premises, Tenant shall sign a separate Pet Addendum and pay the required pet deposit and additional monthly rent, as set forth in the Pet Addendum.

* * *

20. **DEFAULT:** Tenant agrees that Tenant's performance of and compliance with each of the terms of this Lease constitutes a condition on Tenant's right to occupy the Premises. If Tenant fails to comply with any provision of this Lease within the time period after delivery of written notice by Landlord specifying the noncompliance and indicating Landlord's intention to terminate this Lease by reason thereof, Landlord may terminate this Lease.

* * *

LANDLORD:

Jim Fortnum Dated: January 1, 2023

For Hamilton Place LLC

TENANT:

Laurel Girard Dated: January 1, 2023

Hamilton Place LLC
2000 Greens Blvd., Suite 201
Franklin City, FR 33705

June 1, 2024

Ms. Laurel Girard
7700 Riverside Drive, Apt. 12
Franklin City, Franklin 33725

Re: Rent Increase for Lease dated January 1, 2023

Dear Ms. Girard:

Please be advised that effective July 1st, 2024, the monthly rent on your existing Residential Lease Agreement will increase from $1,500 to $1,650 per month. This is a $150 increase.

Payment of the new monthly rent will be due in accordance with your existing Residential Lease Agreement.

Sincerely,

Jim Fortnum

Leasing agent
Hamilton Place LLC

THREE-DAY NOTICE TO CURE OR QUIT

TO: Laurel Girard (Tenant)

ADDRESS: Hamilton Place Apartments, 7700 Riverside Drive, Apartment 12
Franklin City, Franklin 33725 (Premises)

NOTICE TO THE ABOVE-NAMED TENANT(S) OF THE ABOVE-REFERENCED PREMISES:

You are in violation of the following provisions set forth in the Residential Lease Agreement dated January 1, 2023 (Lease):

Paragraph 2, which requires rent to be paid in full by the 3rd day of the month

Paragraph 15, which prohibits pets from being kept on the Premises

Please cure the above violations by taking the following actions immediately:

1. Pay the sum of $150 in rent owed for July 2024, plus the $50 late fee imposed under Section 10 of the Lease, by cashier's check or money order.

2. Remove any and all unauthorized pets from the Premises.

PLEASE TAKE NOTICE THAT if you fail to cure the above violations or deliver possession of the Premises to Hamilton Place LLC **WITHIN THREE (3) DAYS**, Hamilton Place LLC will declare a forfeiture of the Lease and institute legal proceedings against you to recover possession of the Premises and to have the Lease forfeited, which could result in a judgment against you including rent, damages, costs, and attorneys' fees. If a judgment is entered against you, your credit rating and ability to obtain rental housing may be negatively impacted.

Dated: July 29, 2024

Jim Fortnum

Leasing agent
Hamilton Place LLC

SARAH COHEN, M.Ed., LPC Wellington Counseling Associates Inc.	FRANKLIN #72386 Phone: 664-555-1970

Re: Laurel Girard (DOB 06/17/1998)
Need for Emotional Support Animal

Date: July 26, 2024

To: Hamilton Place LLC

The above-mentioned individual is currently under my care. I have been treating this individual for the past four years, and I am familiar with her history and the functional limitations imposed by her mental health condition. Her emotional difficulties meet the definition of disability under the Franklin Fair Housing Act.

Due to her emotional disability, Ms. Girard has certain limitations related to coping with anxiety. To help alleviate these difficulties and to enhance her ability to function optimally, she is in possession of an emotional support animal (a cat named Zoey). The presence of this animal is necessary for Ms. Girard's emotional/mental health because its presence mitigates the symptoms she is currently experiencing. In particular, the presence of this animal assists Ms. Girard in regulating psychological distress associated with anxiety and panic attacks.

Please let me know if any other information is needed.

Sincerely,

Sarah Cohen

Sarah Cohen, M.Ed., LPC
Franklin Licensed Professional Counselor #72386

Franklin Tenant Protection Act
Franklin Civil Code § 500 *et seq.*

§ 500 Applicability

(a) Notwithstanding any other law, after a tenant has continuously and lawfully occupied a residential real property for 12 months, the owner of the residential real property shall not terminate the tenancy without just cause, which shall be stated in the written notice to terminate tenancy.

(b) For the purposes of this statute, the following definitions shall apply:

(1) "Owner" includes any person, acting as principal or through an agent, having the right to offer residential real property for rent.

(2) "Residential real property" means any dwelling or unit that is intended for human habitation.

(3) "Tenant" means a person lawfully occupying residential real property for 30 days or more, including pursuant to a lease.

(4) "Tenancy" means the lawful occupancy of residential real property by a tenant.

§ 501 Termination for Cause

(a) Just cause to terminate tenancy includes any of the following:

(1) Material breach of a term of the lease.

(2) Maintaining or committing a nuisance.

. . .

(b) Before an owner of residential real property files an eviction action seeking to terminate a tenancy for just cause that is a curable lease violation, the owner shall first give notice of the violation to the tenant with an opportunity to cure the violation.

. . .

(g) Any waiver of the rights under this section shall be void as contrary to public policy.

§ 505 Limitation on Rent Increase

(a) An owner of residential real property shall not, within any 12-month period, increase the rental rate for a dwelling or a unit more than 10 percent.

. . .

Franklin Fair Housing Act
Franklin Civil Code § 750 *et seq.*

§ 755 Definitions As used in this Act, the following definitions apply:

. . .

(c) "Disability" shall be broadly construed to mean and include any of the following definitions:

i. "Mental disability" includes, but is not limited to, having any mental or psychological disorder or condition that limits a major life activity. Examples of mental disability include, but are not limited to, anxiety, post-traumatic stress disorder, or clinical depression.

ii. "Physical disability" [definition omitted]

. . .

(m) "Service animals" [definition omitted]

(n) "Support animals" are animals that provide emotional, cognitive, or other similar support to an individual with a disability. A support animal does not need to be trained or certified. Support animals are also known as comfort animals or emotional support animals.

(o) "Assistance animals" include service animals and support animals, as described in subsections (m) and (n) above. An assistance animal is . . . an animal that . . . provides emotional, cognitive, physical, or similar support that alleviates one or more identified symptoms or effects of an individual's disability.

§ 756 Assistance Animals

(a) Tenants, occupants, invitees, and others with disabilities are permitted to have assistance animals as defined in § 755(o) in all dwellings (including common and public use areas), subject to the restrictions set forth in subsection (c) below.

(b) Information confirming that the individual has a disability, or confirming that there is a disability-related need for the accommodation or modification, may be provided by any reliable third party who is in a position to know about the individual's disability or the disability-related need for the requested accommodation or modification, including a medical professional . . . [or] health-care provider. A support animal certification from

an online service that does not include an individualized assessment from a medical professional is presumptively considered not to be information from a reliable third party.

(c) Provisions applicable to all assistance animals as defined in § 755(o) include:

i. An individual with an assistance animal shall not be required to pay any pet fee, additional rent, or other additional fee, including additional security deposit or liability insurance, in connection with the assistance animal.

ii. An individual with an assistance animal may be required to cover the costs of repairs for damage the animal causes to the premises, excluding ordinary wear and tear.

iii. No breed, size, and weight limitations may be applied to an assistance animal (other than specific restrictions relating to miniature horses as service animals under the Americans with Disabilities Act).

iv. Reasonable conditions may be imposed on the use of an assistance animal to ensure that it is under the control of the individual with a disability or an individual who may be assisting the individual with a disability, such as restrictions on waste disposal and animal behavior that may constitute a nuisance, so long as the conditions do not interfere with the normal performance of the animal's duties. For example, a "no noise" requirement may interfere with a dog's job of barking to alert a blind individual to a danger or someone at the door, but incessant barking all night long or when the individual is not at home may violate reasonable restrictions relating to nuisance.

v. An assistance animal need not be allowed if the animal constitutes a direct threat to the health or safety of others (i.e., a significant risk of bodily harm) or would cause substantial physical damage to the property of others, and that harm cannot be sufficiently mitigated or eliminated by a reasonable accommodation.

. . .

Westfield Apartments LLC v. Delgado
Franklin Court of Appeal (2021)

Plaintiff Westfield Apartments LLC rented an apartment to defendant Maria Delgado. Westfield brought a successful eviction action against Delgado and obtained an order from the trial court forfeiting the lease agreement and terminating Delgado's tenancy. The issue on appeal is whether Delgado's failure to obtain renter's insurance justified forfeiture of the lease and termination of her tenancy. We hold that the breach was not material and reverse the trial court's order.

BACKGROUND

Delgado and Westfield entered into a residential lease agreement in August 2018. The lease contained a forfeiture clause stating that "any failure of compliance or performance by Renter shall allow Owner to forfeit this agreement and terminate Renter's right to possession" (Forfeiture Clause). The lease also contained an insurance clause stating that Delgado "shall obtain and pay for any insurance coverage necessary to protect Renter" "for any personal injury or property damage" (Insurance Clause). After two years of Delgado's failure to obtain this insurance, Westfield gave Delgado a three-day "notice to perform or quit," which required Delgado to either obtain the insurance or vacate the premises within three days. Delgado refused to obtain renter's insurance or move out.

Westfield then commenced an eviction action against Delgado. The trial court concluded that the failure to obtain renter's insurance constituted a material breach of the lease. As a result, the trial court held that Delgado had breached the lease by failing to obtain renter's insurance and Westfield was entitled to forfeit the lease.

DISCUSSION

The lease in question is subject to the Franklin Tenant Protection Act, Fr. Civil Code § 500 *et seq.* (FTPA). Where, as here, the tenant has lived in the premises for more than 12 months, the landlord must have "just cause" to terminate the lease. "Just cause" includes "material breach of a term of the lease." Fr. Civ. Code § 501(a)(1).

Materiality

Courts have consistently concluded that "a lease may be terminated only for material breach, not for a mere technical or trivial violation." *Kilburn v. Mackenzie* (Fr. Sup. Ct.

2003). Although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated. *Id.* To be material, the breach "must 'go to the root' or 'essence' of the agreement between the parties," such that it "defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract." *Id.* (quoting WALKER'S TREATISE ON CONTRACTS § 63 (4th ed. 1998)). This materiality limitation even extends to leases that contain clauses purporting to dispense with the materiality limitation.

In *Vista Homes v. Darwish* (Fr. Ct. App. 2005), the landlord brought an eviction action against a tenant who failed to pay $10 of the total $1,000 rent owed to the landlord. The court observed that payment of the rent in accordance with the terms of the lease is one of the essential obligations of the tenant, and the failure of the tenant to properly discharge this obligation is a legal cause for dissolving the lease. However, because the rent shortfall was *de minimis* (only 1% of the rent amount owed), the court concluded that the breach was not material. *See also Pearsall v. Klein* (Fr. Ct. App. 2007) (no material breach where tenant left minor amounts of debris outside apartment because debris did not damage apartment and landlord could remove debris and back-charge tenant for the cost). *But cf. Sunset Apartments v. Byron* (Fr. Ct. App. 2010) (harboring a pet when a lease contains a "no-pet clause" constitutes a material breach of the lease agreement).

Westfield argues that the Forfeiture Clause forecloses any materiality argument or defense by Delgado because the Forfeiture Clause allows the landlord to regain possession of the premises if there is "any failure of compliance or performance" by the tenant. It is Westfield's position that the Forfeiture Clause trumps the FTPA's "material" breach requirement. However, the FTPA makes clear that its tenant protection provisions cannot be waived. FR. CIV. CODE § 501(g).

Not every default by a tenant justifies the landlord's termination of the tenancy, especially where the breach involves a nonmonetary covenant in the lease and/or a lease provision that is for the tenant's benefit. Here, the Insurance Clause was not related to the payment of rent. Notably, Westfield had the ability to detect and cure the breach far in advance of bringing suit but chose not to do so. Moreover, the Insurance Clause benefited Delgado, not Westfield, by protecting her against loss of her personal property in the apartment. Delgado's failure to comply with the Insurance Clause was a trivial breach,

and Westfield has no ground to argue that it was harmed by Delgado's failure to obtain insurance.

Public Policy Considerations

Public policy and other considerations also lead us to conclude that the failure to obtain renter's insurance is not a material breach of the lease. The FTPA was born out of the shortage of affordable housing. Among other things, it prohibits landlords from terminating leases without a specific enumerated "just cause," Fr. Civil Code § 501(a), and also seeks to safeguard tenants from excessive rent increases, Fr. Civil Code § 505(a), by imposing certain statutory limitations and obligations on landlords that landlords would otherwise not be subject to under normal freedom-to-contract principles. *Stark v. Atlas Leasing* (Fr. Ct. App. 2003). While the freedom to contract is important, the Franklin legislature has determined that free-market principles do not apply to residential leases due to the unequal bargaining power between landlord and tenant resulting from the scarcity of adequate housing. *Id.* Here, Delgado and Westfield's lease reflects the unequal bargaining power recognized by *Stark* and other courts in that the unilateral forfeiture clause entirely benefits Westfield as the landlord. The Forfeiture Clause makes any breach by Delgado grounds for Westfield to forfeit the lease and imposes no obligations at all on Westfield.

Permitting landlords like Westfield with superior bargaining power to forfeit leases based on minor or trivial breaches would allow them to strategically circumvent FTPA's "just cause" eviction requirements and disguise pretext evictions under the cloak of contract provisions. FTPA's public policy goals of providing stable affordable housing to Franklin residents and preventing pretext evictions outweigh the free-market and freedom-to-contract principles allowing a landlord to include a unilateral forfeiture clause in a residential rental contract.

A materiality requirement has the added benefit of preventing potentially unmeritorious litigation. Permitting forfeiture for trivial breaches of a lease could unleash a torrent of unmeritorious evictions. Without the protection of a materiality requirement, tenants potentially are in jeopardy of defending frivolous eviction actions for trivial breaches. For example, Delgado's lease prevents her from even bringing a musical instrument onto the premises. If we upheld the forfeiture clause as Westfield argues, Delgado could risk forfeiture of the lease, and eviction, for absurdly trivial reasons, e.g., if she hung a violin with no strings on

her wall for decoration because it was a family heirloom or if for a few days she had in her apartment a gift-wrapped electronic keyboard for a niece's upcoming birthday. This court will not uphold forfeiture clauses that could result in such frivolous litigation.

Reversed.

July 2024
MPT-2
Item

CDI Inc. v. Sidecar Design

CDI Inc. v. Sidecar Design LLC

FILE

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Breen & Lennon LLP
Attorneys at Law
520 Jackson Blvd.
Bristol, Franklin 33708

MEMORANDUM

TO: Examinee
FROM: Damien Breen
DATE: July 30, 2024
RE: Sidecar Design matter

We have been consulted by Yolanda Davis, the manager of Sidecar Design LLC, an internet design firm. About a week ago, Sidecar received a letter from the attorney for a former client, Conference Display Innovations Inc. (CDI), demanding $606,000 in damages. Davis has asked for advice about what damages, if any, Sidecar Design may be required to pay to CDI.

This dispute arises from Sidecar's work on a web-based payment system for CDI. According to Davis, one of Sidecar's own employees, John Smith, accessed the payment system, billed one of CDI's customers, and transferred the money to himself.

As you'll see, CDI's demand letter identifies several different legal claims. I would like you to prepare a memorandum to me analyzing the claim that Sidecar has violated the federal Computer Fraud and Abuse Act (CFAA). Another associate is researching the remaining claims, including whether Sidecar has liability under the doctrine of *respondeat superior*. For purposes of this memorandum, however, you should assume that Sidecar is liable for Smith's actions.

Your memorandum should analyze the following two questions:

(1) Is Sidecar Design liable to CDI under the CFAA?

(2) Assuming that Sidecar Design is liable, what damages, if any, can CDI recover under the CFAA?

Do not include a statement of facts in your memorandum. Instead, be sure to integrate the facts as appropriate into your legal analysis.

Breen & Lennon LLP
Attorneys at Law

FILE MEMORANDUM

FROM: Damien Breen
RE: Summary of Interview with Yolanda Davis
DATE: July 26, 2024

This memorandum summarizes an interview with Yolanda Davis, the manager of Sidecar Design LLC. Sidecar is a website design and creation business. On July 23, 2024, Sidecar received a demand letter from CDI Inc., a business that designs display installations for conventions and business gatherings.

CDI contracted with Sidecar to create a website and a secure payment system so that CDI could expand its business nationwide. According to Yolanda Davis, the staff at CDI "knew nothing about websites or how to operate them." CDI and Sidecar signed a written contract; we do not yet have a copy of that contract.

Pursuant to their contract, Sidecar built a payment system that allowed CDI's customers to pay invoices from CDI with a credit card. The payment system stored credit card information for each customer. CDI used that information to bill its customers, and the system deposited the payments received into a CDI bank account. The amounts charged through this system could be substantial, from around $60,000 to over $200,000.

During the period in which it was creating the website and payment system, Sidecar had a password that gave it full access to all the data present in the system, including customer credit card information. CDI staff members knew this; indeed, CDI asked Sidecar to create the password-protected system to secure customer information. CDI also repeatedly insisted that Sidecar not use any of CDI's customer data once it had been entered, and Sidecar consistently agreed not to do so.

Nonetheless, as it built the system for CDI, Sidecar's login credentials gave it the ability to reach and even to alter customer data as well as CDI's own bank account information. This allowed anyone with the password to charge a customer's account without the customer's knowledge. For example, a person with the password could temporarily change the deposit account to which improperly billed funds would be deposited.

During this time, Sidecar hired John Smith, a software engineer, to work on the project. Smith programmed the payment system for CDI and set up the customer accounts. Unknown to anyone at Sidecar, and before the system had been completed, Smith charged $25,000 to one of CDI's customers and arranged to transfer those funds to his own bank account.

Sidecar eventually finished its work and transferred control of the website and payment system to CDI. At that point, Sidecar's work under its contract with CDI ended. CDI repeated its request that Sidecar not use any of CDI's data. In return, Sidecar advised CDI to change its login credentials for the payment system. Within two days, using the as-yet-unchanged login credentials, Smith charged an additional $50,000 to the same CDI customer and deposited those funds to his own bank account.

Shortly afterward, this CDI customer discovered the fraudulent billings and requested that CDI refund the total amount taken: $75,000. That customer also terminated a pending contract with CDI worth $125,000.

CDI immediately changed the password that Sidecar had used. CDI then hired a cybersecurity firm to investigate and remedy the data breach. That investigation identified Sidecar as the source of the data breach. Acting on the cybersecurity firm's recommendation, CDI shut its website down for five days. The security firm charged CDI $4,000 to investigate and fix the problem. The firm charged CDI an additional $500 to upgrade its security system with stronger protections. CDI estimates that it paid its own employees $1,500 in overtime to help with the security firm's investigation.

CDI's counsel sent a demand letter to Sidecar Design. The letter requested payment of damages totaling $606,000. The letter threatened several different civil causes of action against Sidecar, including one arising under the Computer Fraud and Abuse Act.

After receiving the letter, Yolanda Davis verified that CDI had changed the password to its payment system. John Smith left his position at Sidecar a few days before the first contact from CDI about the data breaches. He disappeared, and Davis is now trying to track him down, so far without success.

Breen & Lennon LLP
Attorneys at Law

FILE MEMORANDUM

FROM: Damien Breen
DATE: July 28, 2024
RE: Sidecar Design LLC

This chronology summarizes the results of my investigation into the events that occurred during and after Sidecar Design's work for CDI Inc.

5/31/2024	Sidecar Design begins work on a website and payment system for CDI.
6/5/2024	John Smith, a new Sidecar employee, begins work on the payment system. This work includes entering credit card information into customers' accounts.
6/28/2024	Using his access to CDI's payment system, Smith charges a CDI customer $25,000 and deposits that amount to his bank account.
7/2/2024	Sidecar completes building the website, and its contractual relationship with CDI ends. Sidecar instructs CDI to change the password for the payment system. CDI does not change the password.
7/5/2024	Using this password, Smith charges another $50,000 to the same CDI customer and deposits that amount to his bank account.
7/8/2024	Smith resigns from Sidecar Design and leaves no forwarding information.
7/9/2024	The customer charged by Smith contacts CDI, demanding reimbursement of $75,000. This customer also terminates a $125,000 contract with CDI.
	CDI changes the password on the payment system. CDI also pays the customer $75,000.
7/11/2024	CDI hires a cybersecurity firm to investigate and fix the data breach and assigns an employee to work with this firm. On the firm's advice, CDI shuts down its website and payment system.
7/16/2024	CDI restores its website and payment system.

Jameson & Brooks, PC
63 Lockwood Road, Suite 600
Centralia, Franklin 33758

July 19, 2024

Ms. Yolanda Davis
Sidecar Design LLC
5564 Orbit Road
Bristol, Franklin 33716

RE: Claim for Damages from CDI Inc.

Dear Ms. Davis:

This letter serves as a formal demand for payment of $606,000 to CDI Inc. as damages for losses arising from Sidecar Design's access to and use of customer data held by CDI Inc. These losses were caused by your unauthorized billing of a CDI customer and your deposit of the amounts so obtained into accounts not held by CDI.

We seek damages in the following amounts:

Cost of investigating and correcting data breach	$6,000
Restitution to improperly billed customer	$75,000
Contract with customer terminated	$125,000
Punitive damages	$400,000
TOTAL	$606,000

If you do not pay the total amount demanded in this letter within 30 days of receiving it, we will commence legal action against you. We will assert claims based on breach of contract, trespass to chattels, intentional interference with contractual relations, fraud, and violation of the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

If you retain an attorney, we will provide further detail to that attorney about the dates and amounts of the transactions in question.

Sincerely,

Henry Brooks

Henry Brooks, Esq.
Counsel for CDI Inc.

COMPUTER FRAUD AND ABUSE ACT

18 U.S.C. § 1030: Fraud and related activity in connection with computers

(a) Whoever—

. . .

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer; [or]

. . .

(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value . . .,

shall be punished [as provided in a separate section] . . .

(e) As used in this section—

. . .

(6) the term "exceeds authorized access" 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;

. . .

(11) the term "loss" means 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 . . .

(g) Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves [losses to the claimant during any one-year period totaling at least $5,000]. Damages for a violation involving only [such] conduct . . . are limited to economic damages.

HomeFresh LLC v. Amity Supply Inc.
(D. Frank. 2022)

Defendant Amity Supply has moved for summary judgment seeking dismissal of all those claims by plaintiff HomeFresh LLC that are based on the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030. The court grants Amity's motion in part and denies it in part.

We take the facts as stated in HomeFresh's reply to Amity's motion as true. HomeFresh employed Joseph Flynn as its Vice President of Human Resources. During his employment, HomeFresh provided Flynn with a laptop computer that allowed him password-protected access to HomeFresh's servers both in the office and remotely.

Flynn's position gave him digital access to HomeFresh's personnel policies as well as the employment records for all its employees. While his employment contract and HomeFresh's employment policies prohibited him from accessing anything but personnel data, his company-provided computers and login credentials allowed access to all HomeFresh data. Thus, as a vice president, using his login credentials, he had access to any information stored on HomeFresh's servers, of any kind, including customer lists, account information, and contracts.

HomeFresh and Amity compete as suppliers of foodstuffs to food processing companies nationwide. Amity offered Flynn a job similar to his position at HomeFresh but at a much higher salary. Flynn and Amity negotiated the terms of the new position for several weeks before finalizing it. Flynn then gave HomeFresh two weeks' notice of his resignation but did not disclose that he would be joining Amity. During those two weeks, acting at Amity's suggestion and using his HomeFresh-provided laptop and login credentials, Flynn downloaded information on HomeFresh's principal customers. After he left HomeFresh, Flynn kept the laptop; no one at HomeFresh requested that he return it or deactivated his access credentials. Flynn then used the laptop to download additional customer data.

HomeFresh did not learn of Flynn's access until one of its customers informed it that Amity had full details about the customer's contract with HomeFresh. HomeFresh hired experts to investigate and learned that the laptop assigned to Flynn had accessed HomeFresh's customer data both before and after the date that Flynn left HomeFresh's employ to join Amity. At that point, HomeFresh terminated Flynn's user account, changed the password, and sent a cease-and-desist letter to Flynn. In the letter, HomeFresh demanded

that Flynn refrain from further access to HomeFresh's data and that he return the laptop. Flynn complied with these requests.

In its complaint, HomeFresh alleges several grounds for relief from both Amity and Flynn, including violation of the CFAA. With respect to that claim, HomeFresh alleges that Flynn's access to its data was either unauthorized or beyond the scope of his authorized access. In its motion, Amity counters that Flynn's access was authorized because HomeFresh failed to create technical barriers that would prevent Flynn's access to its customer data.

Congress enacted the CFAA in 1986 to address a growing public concern with access to computers by hackers. The Act was later expanded to cover information from any computer "used in or affecting interstate or foreign commerce or communication," a provision now uniformly held to apply to any computer that connects to the internet. 18 U.S.C. § 1030(e)(2)(B); *Van Buren v. United States*, 141 S.Ct. 1648, 1652 (2021). While the CFAA initially imposed criminal penalties, Congress later amended it to permit civil actions against a violator. 18 U.S.C. § 1030(g). Courts have uniformly held that courts should apply the statute consistently in both civil and criminal contexts. *U.S. v. Nosal,* 676 F.3d 854, 858 (9th Cir. 2012).

To maintain a civil action under the CFAA, a plaintiff must show, among other things, that the defendant accessed a computer either "without authorization" or in a way that "exceeds authorized access." 18 U.S.C. § 1030(a)(2), 1030(a)(4). In 2021, the United States Supreme Court decided *Van Buren*, which resolved a circuit split as to the meaning of the phrase "exceeds authorized access." In *Van Buren*, a police sergeant in Georgia was convicted under the CFAA after he used his work computer and login credentials to search a police database for a woman's license plate in exchange for payment from a third party. Through his work computer, the sergeant could reach the departmental database, and his login credentials gave him access to license plate information. No technical barrier to accessing that information existed. Rather, it was only a departmental policy that barred him from using that data for non-law-enforcement purposes.

The Supreme Court reversed Van Buren's conviction, concluding that an individual "exceeds authorized access" only when a person accesses data that the person does not have the technical right to access. "[A]n individual 'exceeds authorized access' when he accesses a computer with authorization but then obtains information located in particular

areas of the computer—such as files, folders, or databases—that are off limits to him." 141 S.Ct. at 1662. Because Van Buren had a computer and login credentials that gave him access to license plate data, he did not violate the CFAA, even if the purpose for his access violated departmental policy.

In this case, HomeFresh permitted Flynn to use computers, including a laptop, that gave him access to all its data, and his login credentials gave him access to data that included customer information. Even though HomeFresh's employment policies put customer data outside the scope of Flynn's duties, he could still reach that data using HomeFresh's computers. In effect, at the time he accessed customer data, Flynn was not a hacker—he did not need to use technical means to circumvent the password protection in HomeFresh's system because he had valid password access. In short, Flynn's use of the data while still employed by HomeFresh may have violated HomeFresh's employment policies, but it did not violate the CFAA.

HomeFresh next argues that, even if Flynn's access during his employment did not violate the CFAA, any access *after* he left HomeFresh necessarily violated the CFAA because his right to use HomeFresh's computers ended when his employment ended. This argument poses a question that the Supreme Court left explicitly unresolved in *Van Buren*: whether liability under the CFAA turns "only on technological (or 'code-based') limitations on access or instead also looks to limits contained in contracts or policies." *Id.,* 141 S.Ct. at 1658, fn. 8.

If only technological limitations, such as password protection, will suffice to terminate access for purposes of the CFAA, then it would not be until Flynn downloaded data after HomeFresh revoked his password that his actions violated the CFAA. By contrast, if the termination of his right to use HomeFresh's computers terminated his access as defined by the CFAA, any data downloaded *after* Flynn left HomeFresh would violate the Act. Indeed, courts in other jurisdictions have reached differing results on this question. This court, however, finds the latter approach more persuasive. That is, once an employee leaves a job, the employee no longer has the legal right to use the employer's computers or to use the passwords or login credentials that allow the employee access to those computers. An employee who does so may be held liable under the CFAA.

For these reasons, Amity's motion for summary judgment as to any data accessed after Flynn left HomeFresh is denied. A triable issue of fact exists as to the alleged violations of the CFAA during that period. At the same time, the court grants Amity's motion as to any data Flynn downloaded while still employed by HomeFresh.

So ordered.

Slalom Supply v. Bonilla
(15th Cir. 2023)

At issue in this appeal is the district court's award of damages for violations of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030. Plaintiff Slalom Supply (Slalom) is an online retailer of cold weather gear and sporting supplies. In 2019, Slalom hired defendant Sam Bonilla as a bookkeeper. Like many of Slalom's employees, Bonilla worked remotely from home. In October 2021, Slalom discovered that many accounts were in disarray and that Bonilla had failed to pay a key supplier. Bonilla had been devoting most of his working hours to his own consulting business.

Slalom terminated Bonilla's employment effective November 1. Bonilla's duties had covered all of Slalom's business accounts for customers, suppliers, and facilities. As a result, Bonilla had had password access to all Slalom's records using the internet from his home computer. In light of this, Slalom made sure to change all its system passwords that same day, including those passwords that had allowed Bonilla remote access.

In early December 2021, Bonilla hacked into Slalom's network and diverted two payments from customers—a total of $85,000—to his own account. After discovering this attack, and to preserve its relationship with these customers, Slalom fulfilled these orders at its own expense. Slalom then hired a cybersecurity firm to investigate the breach, which necessitated shutting down its website for four hours early on a Sunday morning during the holiday season. The investigation revealed that Bonilla had used hacking software to bypass the new passwords and had exploited his knowledge of Slalom's accounts to divert the two payments to his own account.

Two months later, Slalom sued Bonilla, asserting violations of the CFAA as well as other claims. Following a bench trial, the district court found that Bonilla had violated the CFAA and awarded Slalom damages under the Act. On appeal, Bonilla does not challenge the finding that his actions violated the CFAA but argues that the district court erred in its award of damages. We address each category of damages in turn.

Costs of Investigation and Remedy

The district court awarded Slalom $7,000 for damages associated with the cost of remedying Bonilla's hacking attack: $4,000 for the investigation, $1,500 to upgrade Slalom's

security system against future cyberattacks, and $1,500 for employee time devoted to protecting the data in its system.

To the extent that the issue of whether a defendant violated the CFAA involves the interpretation of the CFAA, it is a question of law that we review de novo. The CFAA permits recovery of "losses" only if the claimant's losses exceed a threshold amount of $5,000 during any one-year period. 18 U.S.C. § 1030(g). Bonilla argues that Slalom can recover only the cost of the investigation, that is, the $4,000 paid to the cybersecurity firm. According to Bonilla, any employee time or the amount spent to upgrade Slalom's system do not meet the CFAA's definition of compensable "losses." Under § 1030(e)(11), losses include "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."

We agree with Bonilla that the $1,500 spent to upgrade the security system does not meet the statutory requirement that costs relate to "restoring the . . . system . . . to its condition prior to the offense." *Id*. The statute's plain language suggests that a victim of hacking cannot use the violation as a means of improving its own security or system capability. That said, Slalom can recover the amount paid to its own employees to assist the cybersecurity firm during the investigation. Nothing in the statutory language requires a hacking victim to rely only on external help to remedy a breach. Further, the district court found that the $1,500 for employee time related solely to working on the investigation and did not relate to the upgrade to Slalom's system.

Thus, we agree with the district court that Slalom had pled and proven losses sufficient to meet the statutory $5,000 requirement. We reverse only that portion of the award, $1,500, relating to the costs of upgrading the system.

Lost Business

The district court awarded Slalom $85,000 as consequential damages resulting from the breach. This amount consists of the value of the goods that Slalom shipped to customers whose payments Bonilla diverted to his own account. In support of this award, Slalom submits that the definition of compensable "loss" under the CFAA includes "any revenue lost, cost incurred, or other consequential damages incurred *because of interruption of service*." 18 U.S.C. § 1030(e)(11) (emphasis supplied). Unfortunately for

Slalom's argument, the plain text of the Act limits compensable losses to only those that result specifically from an "interruption in service."

Case law supports a narrow reading of § 1030(e)(11). "Lost revenues and consequential damages qualify as losses only when the plaintiff experiences an interruption of service." *Selvage Pharm. v. George* (D. Frank. 2018) (dismissing complaint that failed to allege facts constituting an interruption of service, e.g. installation of a virus that caused the system to be inoperable). *See also Next Corp. v. Adams* (D. Frank. 2015) ($10 million revenue loss resulting from misappropriation of trade secrets not a CFAA-qualifying loss because it did not result from interruption in service). Most cases based on lost revenue and consequential damages involve such things as the deletion of critical files that cost the plaintiff a lucrative business opportunity, *Ridley Mfg. v. Chan* (D. Frank. 2015), or the alteration of system-wide passwords, *Marx Florals v. Teft* (D. Frank. 2012). Courts have awarded such damages even where the interruption is only temporary, provided that the alleged damages result from the interruption. *Cyranos Inc. v. Lollard* (D. Frank. 2017) (affirming award of damages specifically tied to deactivation of website for two days during peak sales).

In the case at hand, Bonilla's hacking redirected two customer payments; it did not otherwise impair or damage the functionality of Slalom's computer system. The hacker did not delete any files or change any passwords in the system. The parties, however, agree that Slalom experienced a four-hour interruption in service when its website was subsequently shut down at the recommendation of experts. Slalom offered no evidence that specifically tied any losses to the four-hour shutdown of its website. To the contrary, its sales figures were comparable to those of previous years. In short, the only costs established by Slalom to have been "because of" this interruption were the amounts it paid to investigate the hack and protect its data. By contrast, Slalom's business decision to fulfill the two customers' orders happened *before that interruption*, not as a result of it. Since the interruption in service did not cause the claimed losses, we reverse the district court's award of $85,000.

Punitive Damages

Finally, the district court awarded Slalom $300,000 in punitive damages. On appeal, Bonilla argues that this award is out of proportion to the costs that Slalom incurred to remedy the breach.

We do not reach the proportionality issue because the CFAA limits the recovery of damages in civil cases to "economic damages." Courts have consistently refused to include punitive damages within the definition of "economic damages." "[T]he plain language of the CFAA statute precludes an award of punitive damages." *Demidoff v. Park* (15th Cir. 2014).

Accordingly, we affirm that portion of the judgment awarding Slalom the cost of investigating the data breach. The award of consequential and punitive damages is reversed.

So ordered.