

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)**

DREAMHAMMER, INC.)	
Plaintiff,)	
)	Civil Action No. 1:08cv0806 LMB/JFA
v.)	
)	
BARBARA CASTANON, et al.,)	
Defendants.)	

DEFENDANT’S BRIEF IN SUPPORT OF THE MOTION TO DISMISS

Defendant, Barbara Castanon, hereby states as follows in support of her Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1).

BACKGROUND

Plaintiff commenced this case against Ms. Castanon and 50 unnamed individuals on or about August 1, 2008. The Complaint alleges violations of the Computer Fraud and Abuse Act (“CFAA”) as well as state law claims for violations of the Virginia Uniform Trade Secrets Act (Va. Code §59.1-336 *se seq.*)(“UTSA”); for violations of the Virginia Computer Crimes Act (§18.2-152.4 *et seq.*)(“VCCA”) and for conversion.

DreamHammer has failed to state a claim under the CFAA for three main reasons. First, the CFAA provides a civil cause of action only for the types of violations described in §1030(a)(5)(B); thus to the extent plaintiff attempts to bring a claim under §1030(a)(2)(C) those claims are barred. Second, DreamHammer has failed to allege that defendant’s alleged conduct resulted in an interruption in service as required by §1030(e)(11) or caused “damage” as that term is defined by §1030(e)(8). Third and finally, because the CFAA prohibits only the unauthorized access of information and not the misuse of information, DreamHammer cannot state a cause of action under the CFAA

for the alleged misappropriation of trade secrets that Ms. Castanon was authorized to access.

The CFAA count should thus be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). The remainder of plaintiff's complaint arises purely under Virginia law, and there is no allegation of diversity jurisdiction. In the absence of the CFAA claim, there is no independent jurisdiction in this Court over the remaining claims set forth in the Complaint, and the remainder of the Complaint should then be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

As with any Motion to Dismiss under 12(b)(6), the analysis begins with a review of the allegations of the Complaint, all of which must be read in the light most favorable to the Plaintiff.

THE ALLEGATIONS OF THE COMPLAINT

Barbara Castanon was employed by plaintiff from on or about 2004 until June of 2008. *Complaint*, ¶ 4. She was employed as a Senior Vice President for the Eastern Region, and was the third-highest ranking employee at DreamHammer. *Id.* Ms. Castanon had extensive access to DreamHammer's confidential trade secret information. *Complaint*, ¶ 4, 18.

She was provided with a significant amount of DreamHammer property as part of her employment. *Id.* This property included desktop computers and laptop computers. *Id.*, ¶ 4, 21. Ms. Castanon did in fact use this property to conduct business with DreamHammer customers, employees, vendors, partners, and others throughout the United States. *Id.*, ¶ 23. DreamHammer terminated Ms. Castanon's employment on or about June 13, 2008. *Id.*, ¶ 24. Ms. Castanon was authorized to use the computers and

information owned by plaintiff only in connection with her employment. *Id.*, ¶ 33. Immediately upon her termination, Ms. Castanon was no longer authorized to use company property in any manner. *Id.*, ¶ 25. Specifically, after her termination from employment, Ms. Castanon was no longer authorized to use DreamHammer computers to access, transmit, alter, remove, or use in any way the information or programs stored thereon. *Id.*, ¶ 25. Shortly after Ms. Castanon's termination, plaintiff sent her a letter demanding return of the property. *Id.*, ¶ 26, *Exhibit 3*. Plaintiff believes that since the date of Ms. Castanon's termination, she has accessed and otherwise used the computers and the information stored thereon, which access was either unauthorized or exceeded authorized access. *Id.*, ¶ 29. Ms. Castanon is alleged to have obtained information without authorization or in excess of her authorization. *Id.*, ¶ 36.

LEGAL STANDARD

Fed. R. Civ. P. 8(a) contains the pleading requirements for the allegations of a complaint. All that is required is a short and plain statement of the grounds for relief. While a complaint attacked by a Rule 12(b)(6) Motion to Dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). The pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable cause of action. *Twombly*, 127 S.Ct. at 1965.

ARGUMENT

I. PLAINTIFF CANNOT STATE A CLAIM TO RELIEF UNDER THE CFAA BECAUSE IT HAS ATTEMPTED TO STATE A CIVIL CLAIM UNDER THE WRONG SUBSECTION, AND BECAUSE IT HAS FAILED TO ALLEGE “LOSS” AS DEFINED BY THE STATUTE.

A. DreamHammer has tried to allege a cause of action for a violation of the statute that is not available to a civil plaintiff.

Paragraph 36 of the Complaint asserts that Ms. Castanon violated subsection (a)(2)(C) of the CFAA, which occurs whenever a person: “intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains... (C) information from any protected computer if the conduct involved an interstate or foreign communication.” 18 U.S.C. § 1030(a)(2)(C). It is not possible, however, for a private plaintiff to bring a civil cause of action for a violation of this subsection; rather, the CFAA is available only to those civil litigants with a claim under §1030(a)(5)(B). *See*, 18 U.S.C. §1030(g)(setting forth the requirements for a civil cause of action under the CFAA); *see also*, *Cenovo Corp. v. Celum Solutions*, 504 F.Supp.2d 574, 580 (D. Minn. 2007) *citing* *McLean v. Mortgage One*, 2004 WL 898440 (D.Minn. 2004). Because DreamHammer cannot state a claim under (a)(2)(C), to the extent it seeks to do so, the Complaint fails as a matter of law.

Furthermore, while the CFAA targets access “without authorization” in six separate offenses, (i.e., §§1030(a)(1)-(a)(4) and (a)(5)(ii)-(iii)), only three of these offenses also reach persons “exceeding authorized access” (i.e., §§1030(a)(1)-(2) and (a)(4)). All of the civil claims available to a plaintiff involve persons accessing “without

authorization;” therefore, to the extent DreamHammer attempts to allege that Ms. Castanon has exceeded her authorized access, it fails to state a claim under the civil sections available to a plaintiff.

B. DreamHammer has failed to state a claim because it inadequately alleges its losses under the statute.

The CFAA's private cause of action contains a two-part injury requirement in order to state a claim. Pursuant to subsection (g) of the statute, a civil plaintiff must: (1) suffer a root injury of damage or loss; and (2) suffer one of five operatively-substantial effects in subsection (a)(5)(B)(i)-(v). *See, Garelli Wong v. Nichols*, 551 F.Supp.2d 704 (N.D. Ill. 2008)(holding that plaintiffs must plead both elements of the statute in order to state a claim under the CFAA).

Of the operatively-substantial effects described in (a)(5)(B)(i)-(v), plaintiff apparently tries to assert (a)(5)(B)(i), which requires a loss in the amount of at least \$5,000. The CFAA defines “loss” as “any reasonable cost to any victim, including the cost of responding to the 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) (emphasis added).

Only certain, highly specific categories of losses qualify under the statute.¹ DreamHammer fails to allege this second prong of the loss requirement and therefore fails to state a claim. Significantly, there is no allegation that Ms. Castanon’s failure to respond or failure to return the computers and equipment listed in the addendum to the complaint in any way caused any damage to the company’s networks, computer systems,

¹ The definition of “damage” under the statute is discussed in full in the next section of the brief.

or any of its computers. In paragraph 37, plaintiff does make an unsupported allegation that the loss has or will amount to \$5,000, but there are no specific allegations as to how the statutory loss amount was reached or what categories were included in the calculation.

Instead, it is clear throughout the Complaint that the main thrust of plaintiff's allegations relates to the alleged misappropriation of trade secrets; this is in fact the only category of alleged damages, losses, or wrongdoing that is pled with any specificity at all. *See, Complaint*, ¶¶ 5, 19, 20-23, 28-30, 33, and 38. Because a loss must be related to an interruption in service in order to state a claim, an alleged loss of trade secrets cannot qualify to meet the \$5,000 jurisdictional threshold. *See, Gareli Wong*, 551 F.Supp.2d at 710. *See also, Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F.Supp.2d 468, 477-78 (S.D.N.Y.2004) (because § 1030(e)(11) limits "loss" to costs incurred because of interruption of service, loss of business due to defendant's use of proprietary information was not covered by the CFAA); *Resdev, LLC v. Lot Builders Ass'n, Inc.*, 2005 WL 1924743 2-5 (M.D.Fla. 2005) (rejecting the argument that "loss" can cover a trade secret's exclusivity value).

II. THE CONDUCT PLAINTIFFS ALLEGE DOES NOT FIT WITHIN ANY OF THE SUBCATEGORIES OF VIOLATIONS OF THE STATUTE.

As stated above, only certain violations of the statute give rise to a civil cause of action. The statute provides that whoever:

(5)(A)(i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage; and

(B) by conduct described in clause (i), (ii), or (iii) of subparagraph (A), caused (or, in the case of an attempted offense, would, if completed, have caused)--

(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; or

(v) damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security...

Reviewing each subsection, it is clear that none of the above violations apply to Ms. Castanon. There is no allegation, for example, that she “caused a transmission” that caused damage, as described in (5)(A)(i). Likewise, an attempted claim under (5)(A)(ii) or (iii) must fail also, because both of these subsections require that Ms. Castanon have accessed a protected computer “without authorization” and cause “damage” either “recklessly” or “intentionally.”

A very specific definition of the term “damage” is given in §1030(e)(8); that term is defined as “any impairment to the integrity or availability of data, a program, a system, or information...” Ms. Castanon would therefore have to have impaired the integrity or availability of data, a program, a system, or information *as a result of her unauthorized access* in order for DreamHammer to have a cause of action under the CFAA.

For example, in *U.S. v. Morris*, 928 F.2d 504 (2nd Cir. 2004) the defendant transmitted a computer “worm” to a federal interest computer without authorization; the

“worm” allowed him to access certain information about users of the computer system, and it eventually caused a loss of service. In a civil case on point, a hotel licensee violated the CFAA by repeatedly trying to access a competitor’s virtual private network (“VPN”) such that its attempts caused the VPN to become congested and useless to its legitimate users. *See, Four Seasons Hotels and Resorts v. Consorcio Barr*, 267 F.Supp.2d 1268 (S.D. Fla. 2003).

DreamHammer has not, and cannot, make such a claim in this case, and as a result, it fails to allege a cause of action under the CFAA.

III. MS. CASTANON DID NOT EXCEED HER AUTHORIZED ACCESS OR ACCESS A COMPUTER WITHOUT AUTHORIZATION.

In paragraphs 25, 26, 29, 33, and 35 of the Complaint, plaintiff attempts to state a claim that Ms. Castanon’s use of the computers in her possession either “exceed[ed] authorized access” or that her alleged access to these computers constituted accessing a computer “without authorization.” Ms. Castanon has already argued that plaintiff cannot state a claim for any alleged use of a computer in excess of her authorization. However, even if this Court were to find it possible for plaintiff to state a claim for generalized access without authorization or in excess of authorization, DreamHammer still would fail to state a claim.

The majority of the Courts to consider the matter have concluded that a violation of the statute for accessing information “without authorization” occurs only where initial access is not permitted, and a violation for “exceeding authorized access” occurs where initial access to some information is permitted but access of other information is not permitted. *See, Diamond Power International v. Davidson*, 540 F.Supp.2d 1322, 1343

(N.D. Ga. 2007). This is consistent with the fact that the CFAA focuses on access without authorization in six separate offenses, and access in excess of authorization in only three offenses.

Again, as with the arguments related to the alleged “loss,” the gravamen of DreamHammer’s allegations relate to Ms. Castanon’s alleged misappropriation of trade secrets, and not to the CFAA. Ms. Castanon had access to the exact computers and information plaintiff now complains about; she was thus authorized and in fact as the third-highest ranking person in the company it would have been difficult for her to exceed her broad authorization.

A. Ms. Castanon did not “exceed authorized access” as defined by the statute.

Defendants make what is at best a bare bones allegation that Ms. Castanon engaged in acts that “exceed authorized access.” The statute provides a very clear definition of this phrase in §1030(e)(6). The CFAA defines “exceeds authorized access” as follows: “to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled to so obtain or alter.” 18 U.S.C. §1030(e)(6).

There are no allegations in the Complaint that Ms. Castanon obtained information she was not entitled to obtain; in fact, the allegations are just the opposite.

DreamHammer alleges that, as the third-highest ranking person in the company, Ms. Castanon had extensive access to confidential trade secret information and property. *Complaint*, ¶ 4, 16-18. DreamHammer then alleges that any access by Ms. Castanon

after her termination was unauthorized or in excess of her authorization. Complaint, ¶ 29.

Because the Complaint focuses on her actions with regards to information that she was initially authorized to access, DreamHammer fails to state a claim. The CFAA "target[s] only] the unauthorized procurement or alteration of information, not its misuse or misappropriation." *See, Alliance Intern., Inc. v. Todd*, 2008 WL 2859095, 6 (E.D.N.C. 2008) *citing, Shamrock Foods Co. v. Gast*, 535 F.Supp.2d 962, 965 (D.Ariz.2008) (quotation and citation omitted) (collecting multiple cases and dismissing CFAA claim against former employee where employee allegedly "emailed numerous documents containing [plaintiff]'s confidential and proprietary information to his personal email account" and then took that information to a competitor); *see also International Ass'n of Machinists and Aerospace Workers v. Werner-Masuda*, 390 F.Supp.2d 479, 499 (D.Md. 2005) (dismissing CFAA claim by labor union against former secretary of local union branch alleging that she accessed union's confidential membership list in order to organize a rival labor union; "[t]he ... CFAA, ... do[es] not prohibit the unauthorized disclosure or use of information, but rather unauthorized access. Nor do[es its] terms proscribe authorized access for unauthorized or illegitimate purposes.").

B. Ms. Castanon did not access a computer without authorization.

Completely leaving aside for a moment the fact that Ms. Castanon would have to cause "damage" and a "loss" by accessing a computer "without authorization" in order to give rise to a claim under the CFAA, Ms. Castanon simply could not have accessed the information on the computers in her possession without authorization. The analysis here

is not a difficult one. Once Ms. Castanon was authorized to access the information stored on computers in her home, DreamHammer could not state a claim under this section.

The situation is factually analogous to that faced by the Court in *Lockheed Martin Corporation v. Speed*, 2006 WL 2683058 (M.D. Fla. 2006), in which numerous Lockheed Martin employees downloaded information to which they had access in a variety of ways prior to quitting their jobs. Because there was no indication that employees had in any way damaged the information they downloaded on Lockheed Martin's computer systems, Lockheed Martin could not state a claim.

Like the defendants in *Lockheed Martin Corp. v. Rush*, Ms. Castanon was authorized to access information on the computers in her home and use that information during her employment. And, like the employees in *Rush*, Ms. Castanon did not alter any information or impair DreamHammer's ability to access any information as a result of her access.

CONCLUSION

For the reasons stated, plaintiff has failed to state a CFAA claim pursuant to Fed. R. Civ. P. 12(b)(6); the CFAA claim should thus be dismissed, and the remaining state law claims should then be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

Respectfully Submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 25 day of August, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following: C. Craig Reilly, 111 Oronoco Street, Alexandria, Virginia, 22314.

Respectfully Submitted,

/s/

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