UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CREATIVE TOUCH INTERIORS, INC.,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 3:15-cv-860-J-34-JBT
	)	
STEVEN E. SPADE, et al,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION FOR SANCTIONS

Defendants move for sanctions against plaintiff Creative Touch and its attorneys and law firm, jointly and severally, pursuant to the Court's inherent authority and also Rule 11 and 28 U.S.C. § 1927, and in support say:

1. Creative Touch and its attorneys should be sanctioned because:

a. Creative Touch's Computer Fraud and Abuse ("CFAA") claims have no legal basis in this District and especially before the U.S. District Judge presiding over this action;

b. Creative Touch brought the CFAA claims as a pretext to forum shop when it filed this action after suffering an adverse ruling in a previously filed action in state court styled *Creative Touch Interiors, Inc. v. Steven E. Spade, David Triassi, Bobby Vallejos, William Matthews, Kathryn Jones, and Ally Building Solutions, LLC*; Circuit Court, Duval County, Florida; Case No. 16-2014-CA-3258 (the "State Action"); and

c. Creative Touch *compounded* its bad faith forum shopping and increased defendants' attorney's fees by moving to stay the previously filed State Action and opposing defendants' motion for abstention in this action.

2. Defendants' seek an attorney's fee award against Creative Touch for defending against Creative Touch's meritless CFAA claims in this action. Defendants also seek their fees for preparing defendants' motion for abstention (Doc. No. 10), which defendants filed in response to Creative Touch's forum shopping and because Creative Touch for whatever reason did not voluntarily dismiss the previously filed State Action before it filed this action.

3. "Federal courts, including bankruptcy courts, possess inherent authority to impose sanctions against attorneys and their clients." In re Evergreen Sec'y, 570 F.3d 1257, 1263 (11th Cir. 2009). "This power is derived from the court's need to manage its own affairs so as to achieve the orderly and expeditious disposition of cases." Id. "To impose sanctions under the court's inherent power, the court must find bad faith." Id. at 1273. A party can demonstrate "bad faith by delaying or disrupting the litigation…" Id. at 1273-74

4. Rule 11(b)(1), Fed.R.Civ.P., requires that complaints not be "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Rule 11(c)(1) gives the Court discretion to sanction a party's attorneys and law firm, jointly and severally, for violation of Rule 11(b).

5. Section 1927 provides that an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct."

Creative Touch's meritless CFAA claims

6. The CFAA makes anyone a *felon* who "intentionally accesses a computer without authorization or exceeds authorized access and thereby obtains...information from any protected computer." 18 U.S.C. § 1030(a)(2)(C); see also 18 U.S.C. § 1030(a)(4). 18 U.S.C. § 1030(g) provides a private cause of action against felons under the CFAA.

7. There is a split of authority on whether an employee, to whom an employer has given electronic access to employer information, is guilty of a CFAA felony when that employee uses the information in violation of employer policy. The issue hinges on the construction of "exceeds authorized access." The broader view of "exceeds authorized access" makes such activity a CFAA felony. The narrower view does not.

8. The majority of the District Judges within the Eleventh Circuit, and especially in the in the Middle District of Florida, follow the narrower view:

> [T]he Court agrees with the analysis of the majority of the district courts within the Eleventh Circuit, who have held that the CFAA's definition of "exceeds authorized access" does not reach an employee who has permission to access proprietary information, but subsequently uses it in violation of company policy.
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> ***

> As one [Court] put it, "quite simply, without authorization means exactly that: the employee was not granted access by his employer. Similarly, exceeds authorized access simply means that, while an employee's initial access was permitted, *the employee accessed information for which the employer had not provided permission*."
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> *Enhanced Recovery v. Frady*, 2015 WL 1470852 at *2 and 6 (M.D. Fla. Mar. 31, 2015) (emphasis added).[1]

[1] Seven of the eight District Judges in the Middle District who have addressed this issue applied the narrower definition of "exceeds authorized access." *Allied Portables v. Youmans*, 2015 WL 3720107 at *3-7 (M.D. Fla. June 15, 2015) (J. Chappell); *Enhanced Recovery v. Frady*, 2015 WL 1470852 at *2 and 6 (M.D. Fla. Mar. 31, 2015) (J. Howard); *Stirling Int'l v. Soderstrom*, 2015 WL 2354803 at *3-4 (M.D. Fla. May 15, 2015) (J. Byron); *Maintenx Mgmt. v. Lenkowski*, 2015 WL 310543 at *2-3 (M.D. Fla. Jan. 26, 2015) (J. Moody); *Trademotion v. Marketcliq*, 857 F.Supp.2d 1285, 1287 and 1291 (M.D. Fla. 2012) (J. Honeywell); *Clarity Services v. Barney*, 698 F.Supp.2d 1309, 1313-16 (M.D. Fla. 2010) (J. Merryday); *Lockheed v. Speed*, 2006 WL 2683058 at *4-8 (M.D. Fla. 2006) (J. Presnell); *but see, Aquent LLC v. Stapleton*, 65 F.Supp.3d 1339 (M.D. Fla. 2014) (J. Antoon).

A majority of the District Judges in the Eleventh Circuit who have addressed the issue concluded that *U.S. v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010), did not adopt the broader construction of "exceeds authorized access." *See Enhanced Recovery*, at n.9. *Enhanced Recovery* concluded that *Rodriguez* did not adopt the broader construction and also distinguished *Rodriguez*. *Enhanced Recovery*, at *9-10. *Rodriguez* involved a Social Security Administration policy prohibiting *access* to information for certain uses:

> *Rodriguez* did not involve an employee who, like Frady, had broad authorization to access confidential information but did so on a few particular occasions for non-business purposes, and in doing so violated non-removal and non-disclosure policies. While ERC's policies limited the use and disclosure of information, unlike the SSA's policies they did not limit Frady's access to the confidential information she is alleged to have accessed.
>
> *Enhanced Recovery*, at *10.

Here, Creative Touch alleges it has a Code of Business Conduct and Ethics (the "Code") and defendants Triassi, Vallejos and Jones acknowledged receipt and understanding of the Code (paras. 37-40). Creative Touch's quotes from the Code show Creative Touch's policy prohibited certain *uses* of Creative Touch information, but the Code does not limit employees' *access* to such information. In fact, it is clear from the allegations in the amended complaint that the CFAA defendants *did* have authorized access to this information.

9. Here, Creative Touch alleges defendants Triassi, Vallejos and Jones, *as part of their jobs at Creative Touch*, had computer access to the information these defendants allegedly used in excess of their authorized access (see, for example, Creative Touch's amended complaint, paras. 23, 25-26, 28-29, 41, 59, 67 and 72). Creative Touch's conclusory allegations to the contrary do not meet the *Iqbal* standard. *Maintenx,* 2015 WL310543 at *2 and 3 ("Maintenx conclusorily alleges that Lenkowski accessed Maintenx's computer without authorization, and that he exceeded his authorized access. But the facts Maintenx presents do not support either of these conclusions" and "To sufficiently allege that Lenkowski exceeded his authorized access, Maintenx must describe an attempt to restrict Lenkowski's access to its computer systems, and assert that Lenkowski violated that restriction;" emphasis added).

10. And as noted in footnote 1 above, the amended complaint alleges and quotes Creative Touch's Code of Business Conduct and Ethics (the "Code;" paras. 37-40). The Code contradicts Creative Touch's conclusory allegations that defendants did not have access to or exceeded their computer access to Creative Touch's information. Creative Touch's quotes from the Code show Creative Touch's policy prohibited certain uses of Creative Touch information, but the Code does not limit employees' access to such information. In fact, it is clear from the allegations in the amended complaint that defendants Triassi, Vallejos and Jones did have authorized access to this information. Creative Touch's quoted Code controls over Creative Touch's conclusory allegations. Bickley v. Caremark

RX, 361 F.Supp.2d 1317, 1323 (N.D. Ala. 2004) ("If an allegation in the Complaint is based on a writing and the writing contradicts the allegation, the writing controls; citing Assoc. Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (Former 5th Cir.1974)).

11. Moreover, before Creative Touch decided to bring CFAA claims, Creative Touch alleged in its May 9, 2014 initial complaint in the State Action that "in connection with their employment with CTI, Triassi, Vallejos, Matthews and Jones also were given access to trade secrets and confidential business information regarding CTI – including without limitation, customer lists, pricing information, client information, customer preferences, buyer contacts and market strategies" and the "trade secrets and confidential and proprietary information given to Triassi, Vallejos, Matthews and Jones by CTI are valuable, confidential and proprietary business assets of CTI" (Creative Touch's initial complaint in the State Action (Doc. No. 10-1), page 4, paras. 16-17; emphasis added). Similarly, Creative Touch's Regional Director swore in a declaration that employees in Creative Touch's Orlando branch with the same job descriptions as defendants Triassi, Vallejos, Matthews and Jones were given access to Creative Touch's alleged trade secrets (paras. 16, 18, 33, 35, 43, 48, 50, 70 of the declaration).[2]

[2] Creative Touch filed the declaration as Document No. 2-1 in the action styled *Creative Touch Interiors, Inc., d/b/a HD Supply Interior Solutions v. Carl Nicholson, et al.*; U.S. District Court, Middle District of Florida; Case No. 6:14-cv-2043-Orl-40-TBS. A copy is attached as Exhibit A.

The law on forum shopping

12. Forum shopping is bad: [3]

a. Forum shopping is "underhanded." *5-H Corp. v. Padovano*, 708 So.2d 244, 247 (Fla. 1997).

b. Forum shopping is a violation of Rule 4-8.4(d), Fla.R.Prof.Conduct, and prejudicial to the administration of justice, subjecting a forum-shopping attorney to discipline:

> The referee found that less than one month after the Lewis and Martin state litigation was filed, ***Klein filed an almost identical legal action in state court*** against Lewis and Martin without disclosing the existence of the already pending Lewis and Martin state litigation. The referee concluded that ***Klein was shopping for a more favorable forum, and found that Klein had violated rule 4-8.4(d) (conduct prejudicial to the administration of justice).*** Klein argues that the referee erred in basing this finding on a circuit court administrative order that was inapplicable.
>
> * * *
>
> The order dismissing the Westwood HOA's action against Lewis and Martin indicated that "[n]one of these three counts alleged in this lawsuit stated a cause of action independent and separate from [the Lewis and Martin state litigation]." The case was dismissed without prejudice to filing the claims "either as an affirmative defense or as a counterclaim in the original lawsuit." This dismissal provides competent substantial evidence to support the referee's finding that ***Klein was seeking a more favorable forum in which to litigate, despite the pendency of an almost***

[3] "The bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. Bad faith may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Roadway Express v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (citations and quotation marks omitted; construing "bad faith" in context of awarding fees for bad faith litigation).

> ***identical case*.** We therefore approve the referee's findings as to this issue.
>
> *The Florida Bar v. Klein*, 774 So.2d 685, 689 (Fla. 2000) (disbarring attorney; emphasis added).

c. Forum shopping constitutes manipulative chicanery:

> The Court thinks it wise to caution Foster's counsel to heed the admonition of *Matthews* … the Court would not hesitate to impose "swift" and "painful" sanctions for such manipulative forum-shopping chicanery.
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> *Foster v. River Birch Homes*, 2007 WL 841679, at *1 n.2 (S.D. Ala. 2007).

d. Jurisdictional statutes have been amended to avoid the gamesmanship of forum shopping:

> The 2011 amendments to § 1446 were intended to stop just this sort of gamesmanship and forum shopping. *See Barnett*, 973 F.Supp. at 1367 ("Bad faith can generally be inferred from amendment outside of the statutory bar" where the plaintiff "has provided no justification" for the delay.); *Saunders v. Wire Rope Corp.*, 777 F.Supp. 1281, 1284 (E.D.Va.1991) ("*Congress* did not intend plaintiffs, through gimmicks and artful maneuvering used in connection with the one year bar to removal, to straightjacket or deprive nonresident defendants of their legitimate entitlements to removal.")
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> *Hill v. Allianz Life Ins. Co. of N. Am.*, 51 F.Supp.3d 1277, 1282 (M.D. Fla. 2014).

e. Forum shopping is wholly unfair to the defendants:

> It is wasteful to prosecute two cases in two courts on the same or similar causes of action; it is wholly unfair to defendants to attempt to dismiss without prejudice the one in which plaintiff has suffered setbacks and proceed with the other.
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> *Spencer v. Moore Bus. Forms*, 87 F.R.D. 118, 123 (N.D. Ga. 1980).

f. Forum shopping is impermissible:

> It was in the immediate aftermath of that adverse ruling that the Plaintiffs first sought this Court's intervention, a procedural history that strongly suggests impermissible engagement in forum shopping. *See Allied Machinery Serv., Inc. v. Caterpillar* Inc., 841 F.Supp. 406, 410 (S.D.Fla.1993) (abstaining where, inter alia, the case's "procedural history create[d] the impression that Plaintiff filed its federal action in pursuit of a more sympathetic forum").
>
> *Tamar Diamonds v. Splendid Diamonds*, 2010 WL 2350889, at *3 (S.D. Fla. 2010).

13. Forum shopping is sanctionable under the Court's inherent authority:

> The instant case presents an example of when awarding fees and costs is most appropriate. Plaintiffs and their counsel have pursued multiple lawsuits, propounded voluminous discovery, and engaged in blatant forum shopping.
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> *Kutten v. Bank of America*, 2008 WL 4838152, at *4 (E.D. Mo. 2008) ("Court finds it has the inherent power to award fees and costs against Plaintiffs and their attorneys").

14. Forum shopping is sanctionable under Rule 11:

> Rather, [Predator's attempt to prosecute claims in federal court] appears to have been an attempt, in light of adverse rulings in the state court, to litigate these claims in a more favorable forum, resulting in the expenditure of significant time and resources on the part of Gamo and the Court. This type of forum shopping constitutes an improper purpose under Rule 11 and thus Predator's conduct is subject to sanction.
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> *Predator Int'l v. Gamo Outdoor*, 2014 WL 201662, at *6 (D. Colo.).

15. In the language of section 1927, Creative Touch's forum shopping, which defendants opposed by a motion for abstention in this action (Doc. No. 10), "multiplie[d] the proceedings in any case unreasonably and vexatiously," thus Creative Touch's attorneys "may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct."

Creative Touch's forum shopping

16. Creative Touch filed this action on May 8, 2015, but Creative Touch had filed the nearly identical State Action on May 9, 2014. Compare Creative Touch's initial complaint in this action (Doc. No. 1) with Creative Touch's amended complaint in the State Action (Doc. No. 10-3).

17. In the State Action, defendants moved to dismiss the initial complaint on June 9, 2014. The state court granted that motion and dismissed the

initial complaint without prejudice on March 12, 2015 (Doc. No. 10-4). That order details the initial state court complaint's numerous deficiencies.

18. Creative Touch viewed the state court's March 12, 2015 order as adverse, which led Creative Touch to forum shop. The next day, on March 13, 2015, Creative Touch's counsel of record called defendants' attorneys to inform them that Creative Touch had relieved him and his firm (Baker Hostetler) of their responsibilities and that LeClair Ryan was replacing them. On March 26, 2015, 14 days after the Court's March 12, 2015 order, LeClair Ryan, Creative Touch's new law firm, e-mailed to defendants' attorneys a draft consent motion to extend Creative Touch's deadline for filing an amended complaint (see Creative Touch's attorney's March 26, 2015 e-mail with draft motion, attached as Exhibit B). Creative Touch's draft motion noted Creative Touch's new desire to file an identical action in federal court (Creative Touch's attorney "recently discovered that a good faith basis might exist for filing the Amended Complaint in federal court" (Exhibit B, page 4)).

19. On May 8, 2015, less than two months after the dismissal order, Creative Touch filed its virtually identical action in this Court. Creative Touch also (improperly) moved the state court to stay the State Action in favor of this action. Creative Touch could have instead voluntarily dismissed the State Action and filed in this Court—but that would have made Creative Touch liable for defendants' attorney's fees in the State Action (which defendants now seek, see defendants' motion for fees in the State Action (Exhibit C)). But Creative Touch's

forum shopping and desire to avoid fee liability required defendants to incur even more fees opposing Creative Touch's forum shopping.

20. On June 8, 2015, defendants moved this Court for abstention (Doc. No. 10). As shown in that motion, Creative Touch (in order to avoid fee liability) invited the state court to depart from the essential requirements of law by staying the State Action in favor of this subsequently filed federal action (Doc. No. 10, page 10). Defendants cited *Sunshine State Service v. Dove Investments*, 468 So.2d 281, 284 (Fla. 5th DCA 1985) ("The second reason why the lower court departed from the essential requirements of law in staying the proceedings below, even if there were concurrent jurisdiction of the state claims and counterclaims in federal court, is that the instant [state court] case was initiated prior to the federal action.").

21. Creative Touch argued in its motion to stay the State Action that after the state court granted defendants' motion to dismiss, "CTI has discovered the basis for a claim under the Federal Computer Fraud and Abuse Act [the "CFAA"]" (Creative Touch's motion to stay (Exhibit D), para. 6). The facts and the law, however, show that Creative Touch's argument about a newly found basis to be in federal court was a *pretext*—and forum shopping was Creative Touch's actual motive to be in this Court:

a. As noted above, Creative Touch immediately went to general quarters after the state court granted defendants' motion to dismiss on March 12,

2015 (Creative Touch immediately fired its counsel of record, retained a new law firm, and within two weeks expressed its desire for a different forum).

b. When Creative Touch filed its initial complaint in the state court over a year ago, Creative Touch knew of "facts" that it now alleges in support of a "newly found" CFAA claim. For example, in Creative Touch's May 9, 2014 initial complaint in the State Action, Creative Touch alleged that defendant Matthews wiped his Creative Touch laptop and cell phone clear of all data in order to destroy evidence and hinder Creative Touch's business (Creative Touch's initial complaint in State Action (Doc. No. 1-1, para. 22). Creative Touch made the same allegation in this action in its initial complaint against defendant Matthews in support of Count X for violation of the CFAA (Doc. No. 1, paras. 43, 123 and 127).

c. Even without the CFAA claims, Creative Touch could have filed this action in this Court over a year ago pursuant to diversity jurisdiction. Creative Touch's initial complaint in the State Action shows diversity of citizenship and alleges damages in excess of $10 million (initial complaint in State Action (Doc. No. 10-1), paras. 3-9 and 30).

d. In other actions, Creative Touch alleges that other former employees accessed Creative Touch computers and stole and destroyed Creative Touch's trade secret information, but Creative Touch did not bring CFAA claims against those former employees in those actions. See operative complaints in *Creative Touch Interiors, Inc. v. Carl Nicholson, et al.;* U.S. District Court,

Middle District of Florida, Orlando Division; Case No. 6:14-cv-2043 and *Creative Touch Interiors, Inc. v. Bruce Horne, et al.*; U.S. District Court, Eastern District of Virginia, Alexandria Division; Case No. 1:14-cv-1704-T8E/JFA, attached as Exhibit E (see pages 16-20) and Exhibit F (see pages 9-10).

e. Creative Touch's CFAA claims have no merit, as discussed above.

22. For all of these reasons, Creative Touch brought the meritless CFAA claims as a pretext for forum shopping. Creative Touch's forum shopping, including Creative Touch's motion to stay the State Action and objections to defendants' motion for abstention in this action, were improper, harassing, and needlessly increased the cost of litigation. Accordingly, Creative Touch, its attorneys and its law firm should be sanctioned pursuant to the Court's inherent authority, Rule 11 and section 1927.

Ability to pay

23. In making a fee award, the Court should also consider the ability of Creative Touch, and its attorneys and its law firm to pay an award. *Fowler v. Ritz-Carlton*, 2015 WL 1001205, at *18-19 (M.D. Fla. Mar. 6, 2015). Creative Touch and LeClair Ryan have the ability to pay a fee award. Defendants do not know whether Creative Touch's individual attorneys have such ability.

24. Creative Touch, doing business as HD Supply Interior Solutions, is a large company:

> HD Supply Interior Solutions [Creative Touch's fictitious name] is the nation's largest premium interiors partner to the building industry. We offer turn-key supply and installation of multiple interior finish options and comprehensive design center services. HD Supply Interior Solutions has 50+ design centers with a geographical presence across the United States. In the residential market, we are a leading provider to homebuilders in the U.S. for exceptional interior finish products and installation services.
>
> Creative Touch's webpage at www.hdsupplyinteriors.com/en/AboutUs.aspx

25. LeClair Ryan is a large law firm, with offices all over the nation and almost 400 attorneys:

> With offices in California, Colorado, Connecticut, Georgia, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, Pennsylvania, Texas, Virginia and Washington, D.C., the firm has approximately 380 attorneys representing a wide variety of clients throughout the nation.
>
> LeClair Ryan's webpage at www.leclairryan.com/aboutus/xprCallOut.aspx?xpST=AboutUs

Local Rule 3.01 certification and request

Pursuant to Local Rule 3.01(g), defendants' attorneys conferred with Creative Touch's attorney, who does not consent to the relief sought in this

motion. Pursuant to Local Rule 3.01(j), defendants request oral argument on this motion and estimate 45 minutes would be required for argument.

SMITH HULSEY & BUSEY

By */s/ James A. Bolling*
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Certificate of Service

I certify that on August 5, 2015, I served the foregoing motion by U.S. Mail and electronic mail on Andrew L. Cole, Esq., LeClair Ryan, 180 Admiral Cochrane Drive, Suite 370, Annapolis, MD 20401-7356 (andrew.cole@leclairryan.com). I also certify that I certify that on November 20, 2015, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants: none.

/s/ James A. Bolling
Attorney

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Exhibits to defendants' motion for sanctions

Ex.	Description
A	Creative Touch's Regional Director's declaration Document No. 2-1 in the action styled *Creative Touch Interiors, Inc., d/b/a HD Supply Interior Solutions v. Carl Nicholson, et al.*; U.S. District Court, Middle District of Florida; Case No. 6:14-cv-2043-Orl-40-TBS.
B	Creative Touch's attorney's March 26, 2015 e-mail with draft motion for extension of time
C	Defendants' motion for attorney's fees and costs in state court action
D	Creative Touch's motion to stay state court action
E	Creative Touch's complaint in *Creative Touch Interiors, Inc. v. Carl Nicholson, et al.;* U.S. District Court, Middle District of Florida, Orlando Division; Case No. 6:14-cv-2043
F	Creative Touch's complaint in *Creative Touch Interiors, Inc. v. Bruce Horne, et al.*; U.S. District Court, Eastern District of Virginia, Alexandria Division; Case No. 1:14-cv-1704-T8E/JFA