IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.:09-60202-CIV-COHN-SELTZER

THE CONTINENTAL GROUP, INC.
A Florida Corporation,

Plaintiff,

v.

KW PROPERTY MANAGEMENT, LLC d/b/a KW PROPERTY MANAGEMENT AND CONSULTING, LLC, a Florida Limited Liability Company; KW HOLDING ONE, LLC d/b/a KW PROPERTY MANAGEMENT AND CONSULTING, LLC, a Florida Limited Liability Company; THE GRAND PRESERVE AT NAPLES LLC d/b/a KW PROPERTY MANAGEMENT AND CONSULTING, LLC, a Florida Limited Liability Company; and MARCY KRAVIT, an individual,

Defendants.
_____/

**DEFENDANTS' MOTION TO DISMISS**

Defendants, KW PROPERTY MANAGEMENT, LLC, KW HOLDING ONE, LLC, and THE GRAND PRESERVE AT NAPLES LLC (collectively referred to as "KW"), by and through their undersigned counsel, file this their Motion to Dismiss, and in support thereof state as follows:

**SUMMARY**

Plaintiff's Verified Complaint for Injunctive Relief and Damages (hereinafter the "Complaint") should be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. In order for the federal court to maintain jurisdiction in

this action, The Continental Group, Inc. (hereinafter "Continental") must plead and prove that it has stated a claim pursuant to the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (hereinafter the "CFAA) as the CFAA is the sole and exclusive basis for federal jurisdiction.[1] As such, Continental must plead and prove (1) that its computers were used in or affected interstate commerce, and (2) that it suffered a loss as a result of an interruption in service in the minimum jurisdictional amount of $5,000. If the Court concludes that it lacks subject matter jurisdiction, the Court must dismiss Continental's Complaint in its entirety. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). However, as will be discussed, Continental's computers, business, and employees are all located in Florida. Continental does not allege that it solicits customers outside of Florida, nor does it allege that it maintains a computer network outside of Florida. Continental also has not suffered any loss as defined in the CFAA. Therefore, this Court does not have subject matter jurisdiction over Continental's claims.

Even if the Court were to find that it has subject matter jurisdiction over the CFAA claims, the Complaint should still be dismissed because Continental has failed to state a claim under CFAA §§ (a)(2)(C) and (a)(4). If the Court grants KW's Motion to Dismiss because Continental failed to state a claim under the CFAA, the court has the discretion to exercise jurisdiction over the pendent-state law claims. *Id.* However, the federal law claims and the state law claims must derive from a common nucleus of operative fact. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 349 (1988). In addition, when exercising its discretion, the Court must consider the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over the pendent state law claims. *Id*. at 350. When the balance

[1] As will be discussed below, the clear trend is for the Federal Courts to resist attempts by Plaintiffs to expand Federal jurisdiction into what is a purely state law matter by "bootstrapping" an alleged CFAA violation to create the appearance of Federal jurisdiction.

of these factors indicates that a case properly belongs in state court, as when the federal law claims have been dismissed in its early stages and only state law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice. *Id.*

Assuming *arguendo* that this Court has subject matter jurisdiction, the Complaint should nonetheless be dismissed because in order to maintain its action under the CFAA, a criminal statute, Continental must plead and prove that it has suffered "loss" or "damage" due to an interruption of service because of unauthorized access to its computers or because Plaintiff's former employee, Marcy Kravit (hereinafter "Kravit"), exceeded her authorized access to its computers. Continental has not sufficiently alleged that it suffered any "loss" or "damage," as defined in the CFAA, because it does not allege that Kravit deleted any files from Continental's computers, nor does Continental allege that it suffered a computer service interruption as required by the CFAA. Importantly, Continental does ***not*** allege that Kravit was unauthorized to access the documents she allegedly copied (i.e. there are no hacking allegations). Although Kravit allegedly copied certain information, copying alone (even if it's contrary to company policy) is not enough to sustain a claim under the CFAA, which requires "damage" or "loss" as a result of an ***interruption*** in service.

Furthermore, Continental's claims against KW must also be dismissed because Continental has not adequately pled that Kravit was acting as an agent of KW, nor has Continental pled that KW participated, counseled, commanded, aided, or abetted Kravit in violating the CFAA.

Finally, Continental's claim for tortious interference with contractual relationships should be dismissed as a matter of law because Continental has not alleged that the noncompete agreements, or any other agreements, it had with Kravit and other Continental employees were

valid or enforceable, nor has Continental alleged that KW knew the agreements were valid or enforceable and intentionally interfered with them.

## STANDARD OF REVIEW

Pursuant to Fed. R. Civ. Pro. 12(b)(1), a party may move to dismiss a complaint for lack of subject matter jurisdiction. It is well settled that "[s]ubject matter jurisdiction can be challenged on a Rule 12(b)(l) motion either facially or factually." *Sinaltrainal v. Coca-Cola Co*., 256 F. Supp. 2d 1345, 1351 (S.D. Fla. 2003). "A facial challenge presumes the allegations in the complaint to be true and tests whether they are sufficient." *Id*. In a facial attack, the question is whether the allegations, if proven, would establish subject matter jurisdiction. *Id.*

In contrast, "[i]n a factual challenge, the defendant tests the accuracy of the allegations by establishing facts that contradict the allegations and show a lack of subject matter jurisdiction." *Id*. As such, "[a] factual challenge requires the court to look beyond the pleadings and review other evidence such as testimony and affidavits." *Id.* A defendant raising such a challenge bears "the burden to produce evidence to contradict the plaintiff's allegations." *Id* When the defendant meets this burden, "the allegations do not carry a presumption of truthfulness" and the court may dismiss the Complaint. *Id.* Here, as discussed below, KW's "facial challenge" to subject matter jurisdiction demonstrates that this case should be dismissed.[2]

Rule 12(b)(6) provides that "dismissal of a claim is appropriate when 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *See Behrman v. AllState Life Ins. Co.*, 2005 U.S. Dist. LEXIS 7262 at *6 (S.D. Fla. Mar. 23, 2005) (citing *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994)). "A motion to

[2] KW is only "facially challenging" subject matter jurisdiction for purposes of ***this*** Motion, and reserves the right to "factually challenge" subject matter jurisdiction at a later time.

dismiss under Rule 12(b)(6) tests not whether the Plaintiff will ultimately prevail on the merits, but rather whether the Plaintiff has properly stated a claim." *See Behrman*, 2005 U.S. Dist. LEXIS 7262 at *5. When ruling on a motion to dismiss under Rule 12(b)(6), the court must "accept the Plaintiff's allegations in the Complaint as true, and view those allegations in a favorable light to determine whether the Complaint fails to state a claim for relief." *Id.* at *6. If based on "a dispositive issue of law no construction of the factual allegations will support the cause of action, dismissal of the complaint is appropriate." *See Plante v. USF&G Specialty Ins. Co.*, 2004 WL 741382 at *2 (S.D. Fla. Mar. 2, 2004) (citing *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993)).

## ARGUMENT

### I. Incorporation of Kravit's Motion to Dismiss

As an initial matter, KW incorporates, to the extent necessary, Kravit's legal arguments presented in her Motion to Dismiss.

### II. Lack of Subject Matter Jurisdiction

#### A. Continental's Computers Are Not "Protected Computers."

Pursuant to the CFAA, 18 U.S.C. § 1030 (g), a party may maintain a civil action against one who intentionally accesses a "protected computer" without authorization or exceeds authorized access, and thereby obtains[3] information. CFAA § (e)(2)(B) defines a "protected computer" as a computer "which is used in or affecting interstate or foreign commerce or communication. . . ."

[3] Our research indicates that Florida Federal Courts which have considered the CFAA have agreed with the more recent decisions holding that obtaining information merely by copying it is not a violation of the CFAA. *See, e.g., Lockheed Martin Corp. v. Speed*, No. 6:05-CV-580-ORL-31, 2006 WL 2683058 (M.D. Fla. Aug. 1, 2006) and *Cohen v. Gulfstream Training Academy, Inc.*, No. 07-60331, 2008 U.S. Dist. LEXIS 29027 (S.D. Fla. Apr. 9, 2008) (holding that any loss must be related to an interruption in service, and the mere copying of files does not constitute an interruption in service.)

The legislative history of the CFAA reveals that Congress intended that the CFAA "protect against ***interstate*** or foreign theft of information by computer." S. Rep. No. 104-357, at 3 (1996) (emphasis added). Congress did not intend that a computer qualify as a "protected computer" merely because it just happened to also be connected to the internet.[4] Were it so, virtually every single computer in the U.S. would be a "protected computer." *See Condux Int'l, Inc. v. Haugum*, No. 08-4824, 2008 WL 5244818, at *6 (D. Minn. Dec. 15, 2008) (holding that the court "declines the invitation to open the doorway to federal court so expansively when this reach is not apparent from the plain language of the CFAA."); *see also Cleveland v. U.S.*, 531 U.S. 12, 24-25 (2000) (rejecting a "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress."). Congress intended to protect computers that provide access to worldwide communications through applications accessible through the internet and parties who maintain an interstate computer network on which files are stored. *See Patrick Patterson Custom Homes, Inc. v. Bach*, 586 F. Supp.2d 1026, 1032-33 (N.D. Ill. 2008).

Continental does not assert that any of Kravit's allegedly unauthorized actions occurred outside of Florida, and Continental alleges that its computer network is located in Florida. Thus, no interstate or foreign communication was involved, and as a result, this Court lacks subject matter jurisdiction. *See Nordstrom Consulting, Inc. v. M & S Tech., Inc.*, No. 06 C 3234, 2008 WL 623660, at *11 (N.D. Ill. Mar. 4, 2008) (holding that Nordstrom's unauthorized access of M & S Tech.'s computers did not violate the CFFA because Nordstrom's unauthorized access took place entirely within Illinois). Merely alleging that the computers at issue qualify as "protected

[4] In its Motion for Preliminary Injunction, Continental cites to two cases to support its contention that its computers are "protected computers" (i.e. the Court has jurisdiction), namely *US GreenFiber v. Brooks*, No. 02-2215, 2002 WL 31834009 (W.D. La. Oct. 25, 2002) and *U.S. v. Trotter*, 478 F.3d 918 (8th Cir. 2007). However, those two cases are clearly distinguishable from the instant case because in those two cases (1) the plaintiffs had offices **throughout** the U.S. and the computers were used for **interstate** business, and (2) the defendants **deleted** files from the computers **after** their termination from the companies, allegations which are notably absent in the instant lawsuit.

computers" under the CFAA is not enough. Because there are no factual allegations that the computers were ***used*** in interstate commerce to cause "loss" or "damage" from an interruption in service, the Court must dismiss Continental's claim for lack of subject matter jurisdiction.

B. Continental has not adequately pled that it suffered the minimum jurisdictional amount of "damage" or "loss" as defined in the CFAA

CFAA § (g) provides that "[a]ny person who suffers damage[5] 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 relief." In 2001, the CFAA was amended to include definitions for "damage" and "loss." *See Cohen,* 2008 U.S. Dist. LEXIS 29027, at *11. Damage is defined as "any impairment to the integrity or availability of data, a program, a system or information." CFAA § (e)(8). Loss is defined as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred ***because of interruption of service***." CFAA § (e)(11) (emphasis added). As will be explained below, because Continental merely accuses Kravit of copying files, and because Continental does not allege that there was any damage to its computer system or deletion of data as a result of Kravit's actions, Continental has not adequately pled that it suffered "damage" or "loss" as defined in the CFAA. *See Cohen*, 2008 U.S. Dist. LEXIS 29027, at *12 (holding that any "loss" must related to an interruption of service, and simply copying files is not a "loss" causing interruption of service).

[5] As will be discussed below, it is doubtful whether Continental can even state a civil claim for "damage" under the CFAA. Under CFAA § (g), "[a] civil action for a violation of this section may be brought only if the conduct involves one of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i)." None of the subclauses of subsection (c)(4)(A)(i) mentions "damage" to a computer, other than a computer used by or for an entity of the U.S. Government.

Based upon the assertions of the Complaint, it appears that Continental will rely on the pre-2001 amendment case *Shurguard Storage Centers, Inc. v. Safeguard Self Storage, Inc*., 119 F. Supp.2d 1121 (W.D. Wash. 2000), which has not been followed by the modern and predominant trend of cases. In *Shurguard*, the court stated that the word "integrity" within the definition of "damage" (see our FN 4) contemplates maintaining the data in a protected state such that, if a former employee infiltrated a former employer's computer network and collected and disseminated confidential information, although no data was physically changed or erased, then the former employer has been damaged. *Id.* However, various courts in Florida and elsewhere have dispelled the holding in *Shurguard* because of its "unusual and extraordinary interpretation of the word 'integrity' within the CFAA's definition of damage.'" *Resdev, LLC v. Lot Builders Ass'n Inc.*, No. 6:04-cv-1374-Orl-31DAB, 2005 U.S. Dist. LEXIS 19099, at *13 n.3 (M.D. Fla. Aug. 10, 2005). As the court in *Resdev* stated, "'integrity' ordinarily means 'wholeness' or 'soundness,' and contemplates, in this context, some diminution in the completeness or usability of data or information on a computer system." *Id.* (citations omitted). Mere copying does not constitute damage. *See Id.*

Continental alleges that "Kravit accessed in [Continental's] computer network financial, proprietary and trade secret information belonging to [Continental] and downloaded and copied such information, including transferring certain information to a removable media device or thumb device." *See* Complaint at ¶ 38. However, Continental does not allege that Kravit deleted any files. As the court stated in *Lockheed Martin Corp.*, "the copying of information from a computer to a CD or PDA is a relatively common function that typically does not, by itself, cause permanent deletion of the original computer files." 2006 WL 2683058, at *8. The same holds true even if the information copied consisted of trade secrets and proprietary information.

*See Andritz, Inc. v. S. Maint. Contractor, LLC*, No. 3:08-CV-44 (CDL), 2009 WL 48187, at *1 (M.D. Ga. Jan. 7, 2009) (holding that even though the former employees accessed the plaintiff's computer network after their resignation and obtained files containing the plaintiff's secrets and proprietary information, the plaintiff did not suffer any damage or loss as defined by the CFAA because no data was deleted from the computers). Thus, Continental has not adequately pled that it suffered any damage as contemplated by the CFAA.

Continental has not adequately pled that it suffered any loss either. As this Court stated in *Cohen*, any loss acquired must be related to ***interruption of service***. 2008 U.S. Dist. LEXIS 29027, at *12; *see also Andritz, Inc.*, 2009 WL 48187 at * 3 (granting Defendant's motion to dismiss in part because Plaintiff did not allege that it lost revenue or incurred costs because of an ***interruption of service***). In *Cohen*, this Court stated that simply copying files is not a loss because there is no interruption of service. *Id*. at *13. As stated previously, Continental merely alleges that Kravit downloaded and copied files; it does not allege that Kravit deleted any files. Furthermore, Continental does not allege that the files copied by Kravit, such as the Hurricane Preparedness Planning materials, materials relating to Continental's "green" initiative, a comprehensive customer service and maintenance program manual, a financial pricing and burden analysis for several properties, and confidential information regarding Continental's employees, caused an interruption or damage to Continental's computer system.

Because Continental has not adequately pled that it ***any*** suffered "damage" or "loss," and the minimum jurisdictional amount is $5,000, this Court does not have subject matter jurisdiction over Continental's CFAA claims. In addition, CFAA § (g), provides that a civil action may be maintained only if the conduct involves one of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i). However, the subclauses of subsection (c)(4)(A)(i) do not

provide for a cause of action for "damage" to a computer other than a computer sued by or for an entity of the U.S. Government. Thus, it appears that the civil cause of action is for "loss" due to an interruption of service whereas the criminal cause of action is for "damage," which includes deletion of files from a computer. As such, even if the Court were to find that Continental suffered "damage," Continental's CFAA claims must be dismissed because the CFAA does not provide a civil remedy for "damage."

## III. Continental Failed to State a Claim under the CFAA

### A. Continental Has Not Adequately Pled that Kravit Did Not Have Access to its Computers

It appears from the assertions in its Complaint that Continental will rely on the Restatement (Second) of Agency § 112 (1958)[6] and *Int'l Airport Ctrs., LLC v. Ctirin*, 440 F.3d 418 (7th Cir. 2006) to support its contention that Kravit was not authorized to access its computer system once she allegedly breached her duty of loyalty to Continental while still employed by Continental. However, Continental's reliance is misplaced because courts have properly rejected the strained reasoning in *Citrin*. In *Lockheed Martin Corp.*, the court stated that it was not persuaded by the analysis in *Citrin* because it relies "heavily on extrinsic materials, particularly the Second Restatement of Agency . . ., to derive the meaning of "without authorization." No. 6:05-CV-1580-ORL-31, 2006 WL 2683058, at *4 (M.D. Fla. Aug. 1, 2006). The court went on to state that

> If Congress has used clear statutory language, a court need not consider extrinsic materials, such as legislative history, and certainly should not derive from such materials a meaning that is inconsistent with the statute's plain meaning. . . . It is plain from the outset that Congress singled out two groups of accessors, those

[6] We found no cases that indicate that Florida has expressly adopted Restatement (Second) of Agency § 112. From the reading of *Citrin*, it appears that Illinois has expressly adopted § 112. As such, Continental's reliance on § 112 is misplaced.

> 'without authorization' (or those below authorization, meaning those having no permission to access whatsoever – typically outsiders, as well as insiders that are not permitted any computer access) and those exceeding authorization (or those above authorization, meaning those that go beyond the permitted access granted to them – typically insiders exceeding whatever access is permitted to them).

*Id.* at *4-5. Thus, Kravit was an "insider" who was permitted to access Continental's computers while she was working there. Continental does not contend that Kravit ever accessed its computers after she resigned. Therefore, Kravit was authorized to access Continental's computers at all times relevant to this action.

B. Continental Has Not Adequately Pled that Kravit Exceeded Authorized Access

Continental alleges that Kravit violated CFAA §§ (a)(2)(C) and (a)(4). Both of these sections require that a person intentionally access a protected computer without authorization, or in excess of authorization. Pursuant to CFAA § (e)(8) 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 accessor is not entitled to obtain or alter." As the court in *Lockheed Martin Corp*. stated, "[t]o the extent 'without authorization' or 'exceeds authorized access' can be considered ambiguous terms, the rule of lenity, a rule of statutory construction for criminal statutes, requires a restrained, narrow interpretation." 2006 WL 2683058, at *7; *see also Pasquantino v. U.S.,* 544 U.S. 349, 383 (2005) (explaining that "[w]e have long held that, when confronted with two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.")). The rule of lenity applies to the CFAA even if it is being alleged in a civil cause of action. *See Leocal v. Ashcroft,* 543 U.S. 1, 12 n. 8 (U.S. 2004) (explaining that, if a statute has criminal applications, "the rule of lenity applies" to the Court's interpretation of the statute even

in immigration cases because of the need to "interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context). Thus, the rule of lenity should be applied and the terms "without authorization" and "exceeds authorized access" should be given their plain statutory meaning. *Lockheed Martin Corp.*, 2006 WL 2683058, at *7.

In order to determine if an employee exceeded her authorized access, three questions must be analyzed (1) what access the employee was authorized to have at the times in question, (2) what the employee accessed at the times in question, and (3) whether the employee obtained or altered information in the computer that she was not entitled to so obtain or alter. *First Mortgage Corp. v. Baser*, No. 07 C 6735, 2008 WL 4534124, at *14 (N.D. Ill. Apr. 30, 2008). Continental does not allege that Kravit accessed its computer system after her resignation. Rather, Continental alleges that Kravit accessed its computer system and copied information ***before*** she resigned. Continental does not allege that Kravit, as part of her duties as District Manager, did not already have authorized access to the Hurricane Preparedness Plan, the "green" initiative, the customer service and maintenance program manual, the financial pricing and burden analysis for several properties, or information regarding Continental's employees. In fact, Continental alleges that "its computer system is password protected and is provided only to those employees with a need to utilize those systems in the performance of their work for [Continental]," and Kravit already had ***authorized access*** to Continental's "confidential, proprietary and trade secret information and other valuable information belonging to [Continental]." *See* Complaint at ¶¶ 30 and 20.

A violation of the CFAA does not depend upon the employee's alleged unauthorized ***use*** of information, but rather upon the defendant's unauthorized ***access***. *Diamond Power Int'l, Inc. v. Davidson*, 540 F. Supp.2d 1322, 1343 (N.D. Ga. 2007). If a computer is permissibly accessed,

like in this case, that access can only be improper if the employee accesses information to which she was prohibited to access. *Id*. at 1341. Although Continental alleges that Kravit used Continental's information inappropriately, that is not enough to sustain a claim under the CFAA. *See Id.* at 1343 (holding that there was no violation of the CFAA when the employee was authorized to initially access the computers and obtain information, which he later disclosed to his new employer without authorization).

As the court in *Lockheed Martin Corp.* noted, to allow CFAA § (a)(4) "to stand for the proposition anyone who accesses information with intent to use the information in an adverse manner to her employer is . . . 'exceeding authorized access' reads the limiting phrases ["without" and "exceeding"] describing the authorization out of the statute." 2006 WL 2683058, at *6. In *Bridal Expo, Inc. v. Van Florestein*, the defendants, like in this case, had access to the plaintiffs' databases as part of their job duties, and the plaintiffs were aware of the defendants' use of the computers on their last day. No. 4:08-cv-03777, 2009 WL 255862, at *9 (S.D. Tex. Feb. 3, 2009). The court held that "[i]t was within the nature of their relationship with [the defendants] that they could use their computers and access the files at issue." *Id*. at 11. Even though the defendants copied the plaintiff's client lists and databases prior to resigning, the court granted defendants' motion to dismiss on the CFAA claim. *Id.* at *12.

Continental alleges that Kravit accessed the information while she was an employee for Continental, and Continental does not allege that Kravit accessed its computers ***after*** her resignation on December 11, 2008. *See* Complaint at ¶¶ 37 and 39. Continental also alleges that Kravit informed Continental of the offer she received from KW some time in late October or November. *See* Complaint at ¶ 36. Thus, Continental was aware that Kravit was using its computers after she received an offer from KW.

Thus, Continental has failed to adequately plead that Kravit exceeded her authorized access, and as such, Continental's claims under the CFAA must be dismissed as a matter of law. Furthermore, because jurisdiction in this court vests solely upon the CFAA claims, Continental's entire Complaint must be dismissed for lack of subject matter jurisdiction.

C. Continental has Failed to State a Claim under CFAA § (a)(4)

CFAA § (a)(4) provides that a party who "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 . . ." violates the CFAA (emphasis added). Continental does not allege that Kravit committed a fraud; it merely alleges that Kravit breached restrictive covenants when she allegedly copied Continental's confidential information and trade secrets. Furthermore, Fed. R. Civ. Pro. 9(b) requires that "[i]n alleging fraud . . ., a party must state with particularity the circumstances constituting fraud." Continental merely alleges that Kravit, knowingly and with intent to defraud, accessed protected computers, and by means of such conduct furthered her intended fraud. *See* Complaint at ¶ 62. Plaintiff does not state with particularity what fraud Kravit committed. *See Motorola, Inc. v. Lemko Corp. et al.*, No. 08 C 5427, 2009 U.S. Dist. LEXIS 10668, at *10 (holding that Fed. R. Civ. Pro. 9(b) "quite plainly applies" to section 1030(a)(4)). Therefore, Continental's claim under CFAA § (a)(4) must be dismissed as a matter of law.

Furthermore, Florida courts have consistently held that the economic loss rule bars fraud claims that are not separate and independent from a breach of contract claim. *Swaebe v. Sears World Trade*, Inc., 639 So.2d 1120, 1121 (Fla. 3d DCA 1994). Both the claim under CFAA (a)(4) and the breach of contract claim are based on the allegations that Kravit accessed and copied confidential information belonging to Continental, in violation of her restrictive

covenants with Continental. Thus, Continental's fraud claim under the CFAA is barred by the economic loss rule.

## IV. Continental Has Not Adequately Pled that KW Committed a Violation of the CFAA

In order to hold KW liable for Kravit's actions while she was ***still*** an employee of Continental, Continental must plead and prove that Kravit was acting as an agent for KW. However, Continental merely makes blanket statements that Kravit was acting as an agent for KW while she was an employee of Continental. *See* Complaint at ¶ 45 and 63. In Florida, in order to establish an agency relationship, the party asserting the agency relationship must plead and prove: (1) acknowledgment by the principal that the agent will act for it; (2) the agent's acceptance of the undertaking; and (3) ***control by the principal over the actions of the agent***. *Chase Manhattan Mortgage Corp. v. Scott, Royce, Harris, Bryan, Barra, & Jorgensen, P.A.*, 694 So.2d 827, 832 (Fla. 4th DCA 1997); *Meterlogic, Inc. v. Copier Solutions, Inc.*, 126 F. Supp.2d 1346, 1354 (S.D. Fla. 2000). ***None*** of the required elements are alleged by Continental. In order to establish an agency relationship in Florida, the amount of control a principal exerts over his agent must be very significant. *Meterlogic, Inc.* 1126 F. Supp.2d at 1356. Continental has not alleged that KW told Kravit to obtain information from Continental, or that KW had any right to control Kravit. *See Dorse v. Armstrong World Indus*., 513 So.2d 1265, 1268 n.4 (Fla. 1987) (holding that in a true agency relationship, the principal must control the means used to achieve the outcome, and not just the outcome itself). There is also no allegation that KW requested or directed Kravit to copy the information from Continental's computers.

The CFAA is a ***criminal*** statute with a civil cause of action. *Lockheed Martin Corp.*, 2006 WL 2683058, at *7. A principal is ***not*** liable for the criminal acts of his agent, unless the principal participates in the crime, or counsels, commands, aids, or abets in the commission of

the crime. *See State v. Glassman*, 414 So.2d 204, 205 (Fla. 4th DCA 1982). Even if, assuming *arguendo*, Continental sufficiently pled that Kravit was acting as an agent for KW, Continental has not alleged that KW participated in the crime, counseled, commanded, aided or abetted Kravit in the commission of a violation of the CFAA. Thus, KW cannot be held liable for Kravit's alleged ***criminal*** acts.

In sum, Continental has not adequately pled that Kravit was acting as an agent for KW, while she was ***still*** an employee of Continental, all claims against KW for violation of the CFAA must be dismissed as a matter of law. However, if the Court finds that Continental sufficiently pled that Kravit was acting as an agent for KW when she allegedly violated the CFAA, all claims against KW for violation of the CFAA must still be dismissed as a matter of law because the CFAA is a criminal statute, and Continental has failed to plead that KW counseled, commanded, aided, or abetted Kravit to violate the CFAA.

## V. Continental has Failed to State a Claim for Tortious Interference with Contractual Relationships

The elements of a tortious interference with a contract under Florida law are: (1) the existence of a contract under which the claimant has legal rights; (2) a third party has knowledge of the contract; (3) the third party intentionally interferes with a party's rights under the contract; (4) the interference is unjustified; and (5) there are damages. *Mariscotti v. Merco Group*, 917 So.2d 890, 892 (Fla. 3d DCA 2005). If the contract that a party alleges has been tortiously interfered with is itself unenforceable, then the party cannot maintain an action for tortious interference of a contract. *Id.* (holding that "[i]f a contract between the initial buyer and seller is unenforceable, then an element of a tortious interference claim is absent."); *see also Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 357 (Minn. 1998) (stating that "[a] third party's interference

with an employer's ***valid*** noncompete employment agreement is a tort for which the employer may recover damage.") (emphasis added).

Continental does not allege that its noncompete agreements, or any other agreements with Kravit or any other former Continental employee, were valid or enforceable[7]. Furthermore, because tortious interference with a contract is an intentional tort, Continental must allege that Continental knew or should have known that the agreements were valid or enforceable, and KW intentionally interfered with the valid or enforceable contracts. *See Stutzke v. D.G.C. Liquidation Co.*, 533 so.2d 897 (Fla. 4th DCA 1988) (holding that a third party's interference with a contract must be both direct and intentional for it to be actionable in tort). Because Continental does not allege that KW knew that the agreements between Continental and KW were valid or enforceable, or that KW intentionally interfered with the contracts with knowledge that they were valid or enforceable, Continental's claim for tortious interference with contractual relationships must be dismissed as a matter of law.

WHEREFORE Defendants, KW PROPERTY MANAGEMENT, LLC, KW HOLDING ONE, LLC, and THE GRAND PRESERVE AT NAPLES LLC, respectfully request that Plaintiff's Verified Complaint for Injunctive Relief and Damages be dismissed for lack of jurisdiction and failure to state a claim, and that Defendants be awarded attorney's fees and costs.

[7] Any restrictive covenant not supported by a legitimate business interest is unlawful and is ***void*** and ***unenforceable***. Fla. Stat. § 542.335(1)(b); *see also Whitby v. Infinity Radio Inc.*, 951 So.2d 890 (Fla. 4th DCA 2007).

**CERTIFICATE OF SERVICE**

I hereby certify that on March 2, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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**THE CONTINENTAL GROUP, INC. V. KW PROPERTY MANAGEMENT, LLC et al.**
**09-CV-60202-COHN-SELTZER**

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