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IN THE DISTRICT COURT OF APPEAL
FOR THE SIXTH DISTRICT OF FLORIDA

Case №: 6D2023-3806
Lower Court Case №: 2022-CA-006526-O

PHLster LLC, *et al.*,
Plaintiffs–Appellants,

v.

The Bernstein Firm LLC, *et al.*,
Defendants–Appellees.

ON APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

APPELLANTS' REPLY BRIEF

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ARGUMENT IN RESPONSE AND REBUTTAL

I. APPELLANTS NEED NOT BRING A SEPARATE RACKETEERING COUNT AGAINST EACH APPELLEE.

Appellees have cited no cases to support their position that to state civil RICO case against members of a criminal enterprise, that a plaintiff must allege a separate count against each member of that enterprise. They failed to do so because no such cases exist.

Instead, Appellees conflate and confuse a claimants' need to plead two predicate acts to demonstrate a pattern of criminal conduct attributable to a criminal enterprise with their demanded repetitive counts to aid and abet them in their digital burglary. RB 12 – 13. Indeed, Appellees complain that the SAC "lumps together all Defendants" and asks this Court to apply the Eleventh Circuit federal anti-shotgun pleading standards. RB at 12 – 13.

Even if the heightened anti-shotgun pleading standards present in the federal Eleventh Circuit were to apply, which they do not, this argument is meritless because the SAC clearly alleges the acts were taken jointly. In *Germain v. Mario's Air Conditioning & Heating, Inc.*, 2024 U.S. Dist. LEXIS 106777, *6, the US District Court for the Middle District of Florida rejected a similar "lumping" argument. The

defendants argued that “by lumping Defendants together, [the defendants] are unable to frame responses.” *Id.*

The District Judge in *Germain* noted that “[a] shotgun pleading is one where "it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief" and the defendant therefore cannot be "expected to frame a responsive pleading.” *Id*, *Anderson v. Dist. Bd. Of Trustees of Cent. Fla. Cmty. College*, 77 F.3d 364, 366 (11th Cir. 1996). In rejecting the defendants’ argument, the *Germain* court wrote that “[u]pon review, the Court finds that the amended complaint does not constitute a shotgun pleading. It appears that Plaintiff alleges that Mario's, SEHS, and WWM jointly sent the text messages at issue. The amended complaint gives SEHS and WWM sufficient notice of the claims against them.” *Germain*, 2024 U.S. Dist. LEXIS 106777 at 7.

In this case Appellants plainly alleged enough facts to demonstrate that Appellees acted jointly as an enterprise when they stole tens of thousands of dollars of Appellants’ goods through a coordinated hacking effort. For this reason, Appellees’ contention that a claimant must state separate independent causes of action individually to plead a singular RICO cause of action—a claim that

requires allegations that defendants acted as an enterprise—is meritless.

Moreover, even if this Court were to require Appellants to plead specific facts against each individual Appellee, Appellants have done so by pleading with reference to an attached spreadsheet demonstrating multiple temporally severable instances of wire and mail fraud.

II. THERE ARE MORE THAN TWO PREDICATE ACTS ALLEGED.

Appellees claim that the the clear reservoir of factual allegations of multiple temporally severable instances of wire and mail fraud—which is specifically delineated to each Appellee by way of a spreadsheet in the Second Amended Complaint ("SAC")—does not constitute an attempt to attribute to each Appellee the specific actions they took "to deprive [Appellants] of their property," and that the SAC "fails to allege the time, place, and manner in which any specific predicate act occurred and fails to allege two or more racketeering actions." RB 14 – 15. As explained in the amended initial brief, that is not the case. AIB 14 – 15; R. 112 -117; 125. The SAC alleges the who, what, when, and where of wire and mail fraud. AIB 14 – 15; R. 112 -117; 125.

Appellees go further and completely ignore the allegations regarding the transportation of stolen goods in interstate commerce, and illegal fencing of those goods (for far below their manufacturing cost). Appellants included photographs of an agent of the enterprise fencing the goods for below the manufacturing costs along with the receipt obtained from Appellants' private investigator. RB 14 – 15.

20. Evidence of THE BERNSTEIN ENTERPRISE'S sale of the Goods at a wildly discounted price,[1] which reflects the stolen nature of the Goods, is below.

R. at 109 – 126.

Even setting aside the factual allegations demonstrating who made the fraudulent order, when they were made, where they were sent to, and the IP addresses of the persons who made the orders—these photographs independently *constitute probable cause* for an arrest warrant to issue against Appellees their RICO violations. The

SAC is written in a manner that exceeds the pleading standards for a criminal indictment in either federal or state court. Because the pleading exceeds the standards of a criminal indictment Florida's pleading standards *in civil litigation* are certainly met.

Appellees attempt to justify their thefts by attempting to distinguish these facts from *State v. Lucas*, 600 So. 2d 1093 (Fla. 1992). But their analysis is flawed. They attempt to make hay out of the phrase "[t]hus, it has been held that **unlike cases brought under the federal act**, **crimes committed at the same time cannot qualify as separate incidents** for purposes of proving racketeering conduct **under the Florida act**." RB 18. But (i) Appellants *have proceeded under the federal act, not the Florida act*, and such crimes can qualify as separate instances; (ii) in any event, Appellants have alleged multiple temporally severable violations of wire and mail fraud, (iii) Appellees caused the stolen goods to cross state lines; and (iv) Appellants alleged that Appellees sold, are selling, disposed of, and/or are retaining the profits of their crime—*i.e.,* they did not give the goods or money back—which is causing them ongoing and continuing harm.

III. AS TO CFAA, THE WEBSITE WAS USED IN INTERSTATE COMMERCE AND REPETITIVE COUNTS ARE UNNEEDED.

The Computer Fraud and Abuse Act, 18 U.S.C. 1030, *et seq.* ("CFAA"), was enacted to "target hackers who accessed computers to steal information or to disrupt or destroy computer functionality, as well as criminals who possessed the capacity to access and control high technology processes vital to our everyday lives." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1130 (9th Cir. 2009) (internal quotation marks omitted).

To bring a § 1030(a) claim, a plaintiff must allege that a defendant: "(1) accessed a 'protected computer,' (2) without authorization or exceeding such authorization that was granted, (3) knowingly and with intent to defraud, and thereby (4) furthered the intended fraud and obtained anything of value, causing (5) a loss to one or more persons during any one-year period aggregating at least $5,000 in value. *Facebook, Inc. v. Grunin*, 77 F. Supp. 3d 965, 971; *quoting Brekka*, 581 F.3d at 1132.

The lower court acknowledged that Appellees' argument that Appellants website is not a "protected computer" was meritless. Instead of conceding error, Appellees have thoroughly dug in,

declaring that "Appellant does not allege or explain how access to a website constitutes access to a 'protected computer" and stick their heads into the proverbial sand. RB 21. As pled, Appellees accessed Appellants' protected computer when it hacked their website—which Appellants use to sell firearms holsters across the United States—and Appellees used that unauthorized access to fraudulently change the price of those holsters to $0.00 before causing them to be shipped resulting in a loss in excess of $5,000 within a year. A finding that the website is on a protected computer is supported by *U.S. v. Nosal*, which states that "[t]he law broadly defines 'computer' to include any electronic device 'performing logical, arithmetic, or storage functions,' excluding only typewriters, handheld calculators, and similarly simple devices. In other words, a 'computer' includes not just a desktop or laptop computer, but also a 'smart-phone, iPad, Kindle, Nook, X-box, Blu Ray player or any other [i]nternet-enabled device.' *U.S. v. Nosal*, 676 F.3d 854, 858 (9th Cir. 2012) (citing 18 U.S.C. §1030(e)(2)(B)). Their argument that Appellees "website, databases, and computers, to sell their Goods across the United States of America, and across state lines" are not computers for purposes of the CFAA is frivolous and has been rejected by courts across the

country. R.119–120; *Craigslist Inc. v. 3Taps Inc.*, 964 F. Supp. 2d 1178, 1180 (Letter from CraigsList demanding 3Taps cease from using its website formed a violated of the CFAA.); *Skin Medicinals LLC v. Optio Rx, LLC* (In re Optio Rx, LLC), 2024 Bankr. LEXIS 1887 (Holding that a computer hosting the website is one used in connection with the operation of plaintiffs' business. That business is engaged in interstate commerce.”).

Underpinning their second argument as to this count is their unsupported proposition that “[c]ount II is still impermissibly directed at *all Defendants*.” RB 22. In fact, this CFAA count is directed against all of the Appellees because they have all acted jointly to hack Appellees’ website and steal their firearms holsters. Like with the RICO count, they are attempting to impose a stricter pleading standard than exists in even the Eleventh Circuit. Because Appellants have proceeded under the theory that Appellees acted jointly, like the amended complaint in *Germain*, the second amended complaint gives Appellees “sufficient notice of the claims against them.” *Germain*, 2024 U.S. Dist. LEXIS 106777 at 7. And the lower court’s order of dismissal should be reversed.

IV. APPELLANTS FOLLOWED THE CONVERSION COMPLAINT FORM IN THE RULES AND THEREFORE STATED A CLAIM.

Appellees complain that Appellants copied and pasted their conversion complaint from Florida Rule of Civil Procedure Form 1.939. They further express exasperation that "Appellants did not revise the claims at all" and cited the lower court's order noting that "Counts III and IV for conversion are identical to those claims previously dismissed in the Complaint and Amended Complaint. After twice being dismissed, Plaintiffs have not made any changes . . . ." RB 24.

Appellants readily concede that they did not amend their conversion claims throughout the course of this litigation. And that is because black letter law demonstrates that they did not have to. Our Supreme Court has promulgated the Florida Rules of Civil Procedure and Rule 1.900(b) to permit a party to state a claim for conversion with Form 1.939. The allegations generally track the form's language, with even more detail than is required. *See Good to Go Food Store, Inc. v. LRM Realty, LLP*, 93 So. 3d 362, 363 (Fla. 2d DCA 2012) (A claimant is not required to copy the form's language exactly to state a claim).

To the extent that Appellees now complain that the SAC is contradictory—it is not. They have not cited case law to support their position that a defendant cannot wrongfully assert dominion over another person's property that they obtained through racketeering conduct or illicit hacking of a protected computer merely because they were tricked into mailing it to them (as a result of their wrongful trickery no less). Or even if it was initially given to them to hold. As our Supreme Court explained:

> The gist of a conversion has been declared to be not the acquisition of the property of the wrongdoer, but the wrongful deprivation of a person of property to the possession of which he is entitled. A conversion consists of an act in derogation of the plaintiff's possessory rights, and any wrongful exercise or assumption of authority over another's goods, depriving him of the possession, permanently or for an indefinite time, is a conversion.

Star Fruit Co. v. Eagle Lake Growers, Inc., 160 Fla. 130, 132, 33 So. 2d 858, 860 (1948) (Grower stated a claim for conversion against a shipper that the grower delivered 721 boxes of tangerines to after the shipper disposed of the fruit it was unable to deliver.). Simply put, for purposes of the conversion claims, it does not matter *how* Appellees got Appellants' firearm holsters. The salient issue is that they *still have them, sold them, or otherwise have retained the benefits*

from selling them. They acted in derogation of the Appellants' possessory rights in the firearms holsters and have wrongfully exercised or assumed of authority over them. Moreover, even if they are correct—which they are not—pleading in the alternative is expressly allowed by the civil rules. Fla. R. Civ. P. 1.110(b)(3).

V. THE LOWER CORT'S ARBITRARY THREE STRIKE POLICY IS AN ABUSE OF DISCRETION.

Appellants did not abuse their privilege to amend, and Appellees failed state specifically how they would face prejudice by leave to amend. *See generally* RB; *Home Performance All., Inc. v. Better Bus. Bureau of W. Florida, Inc.*, 354 So. 3d 1165, 1167 (Fla. 2d DCA 2023) (reversing a trial court's dismissal of an entire case with prejudice so the plaintiff could proceed under a different theory where the court failed to find an abuse of the privilege to amend or prejudice). Such a failure to make a specific argument constitutes a waiver. *See Richardson v. State*, 325 So. 3d 1012, 1016 (Fla. 1st DCA 2021) (A barebones declaration is insufficient to preserve legal arguments); (citing *Knight v. State*, 286 So. 3d 147, 151 (Fla. 2019)).

Indeed, the extraordinary procedural posture of this case being before *three different trial judges* for each hearing on a motion to

dismiss—the first two who declined to write a substantive written order—and the last of which who threw the case out after opining that "Plaintiffs are entitled to three strikes. The Second Amended Complaint is their third" demonstrates that relief from this Court is warranted. R.183

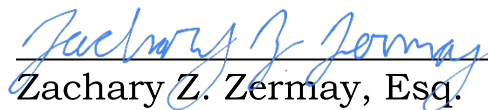
The lower court failed conduct a proper analysis regarding Appellants' request for leave to amend. It failed to identify exceptional circumstances for denying Appellants leave to amend, explain why an amendment would be futile, recite any prejudice that Appellees would suffer if Appellant were to replead, adopted an arbitrary three strike standard, and equated the Supreme Court's own judicial forms to the disorganized pleadings of a *pro se* plaintiff. The lower court erred by dismissing Appellants' SAC, which makes it clear that they allege that Appellees stole tens of thousands of dollars from them, with prejudice.

CONCLUSION

Wherefore, Appellants respectfully request this Court reverse the lower court's final judgment of dismissal, remand this case with instructions to the lower court to deny Appellees' motions to dismiss, and for such relief that the Court deems just and proper.

Dated: December 18, 2024

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Fla. R. 9.210. because this brief contains 2,322 words, excluding the parts of the brief exempted by Fla. R. 9.210.
2. This brief complies with the typeface requirements of Fla. R. 9.210. and the type style requirements of Fla. R. 9.210 because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Bookman Old Style in 14 point font.

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CERTIFICATE OF SERVICE

This is to certify that I am counsel for Appellants and that on this day I have served opposing counsel with a copy of this initial brief because I filed it through the Florida Courts e-filing Portal, and the Portal served it by e-mail or provided a link by e-mail to the document on a website maintained by a clerk.

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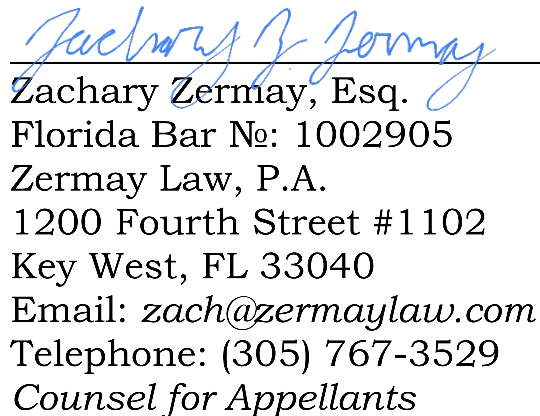

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