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July 2024 MEE Questions

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MEE Question 1

Four years ago, Connie, a professional homebuilder, purchased a five-acre, rectangular tract of land. On its western side, the tract was bordered by land owned by Diane. One month after Connie purchased the tract, Diane sued Connie in state court to establish her adverse possession claim to a 12-foot-wide strip immediately inside the western border of Connie's tract, where Diane had maintained a vegetable garden. The court issued a judgment in Diane's favor, which was filed at the county recorder's office.

Three years ago, Connie built a house on the eastern half of the tract. One month after Connie completed the house, she contracted to sell the entire five-acre tract to Bert and convey it by warranty deed. The purchase agreement contained no express warranties regarding the quality of the house's construction. At the closing, Connie delivered to Bert the warranty deed, which excepted from warranties "all titles, covenants, and restrictions on record with the county recorder."

One year ago, Bert conveyed the five-acre tract to Adam by a quitclaim deed that contained no warranties. Adam had never inspected the tract.

Three months ago, a major crack appeared in the foundation of the house due to faulty construction. This resulted in frequent water intrusion and substantial water damage to the house.

Two months ago, when Adam started to construct a fence around the entire five-acre tract, Diane correctly told him that he could not lawfully build a fence that would block her access to the portion that she owned by adverse possession.

A gravel road runs from north to south through the middle of the five-acre tract. The gravel road connects the adjoining northern lot to the highway that abuts the tract to the south. One month ago, during Adam's fence construction on the north side of the tract, Adam's northern neighbor correctly told him that she had an implied easement of necessity over the gravel road, preventing her land from being landlocked.

1. Does Adam have a cause of action against Connie based on the crack in the house's foundation? Explain.

2. Does Adam have a cause of action against Connie based on Diane's ownership of a portion of the tract by adverse possession? Explain.

3. Does Adam have a cause of action against Bert based on Diane's ownership of a portion of the tract by adverse possession? Explain.

4. Does Adam have a cause of action against Connie based on the neighbor's easement over the tract? Explain.

In answering these questions, assume that none of Adam's claims are barred by any statute of limitations.

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MEE Question 2

XYZ Corp owns all the common stock of CruiseCo, which operates a fleet of 24 oceangoing passenger cruise ships. In addition, XYZ owns 90% of the common stock of ResortCo, which operates several large hotels and marinas on ocean coastlines. As a result of its share ownership, XYZ has the power to choose all members of the boards of directors for both ResortCo and CruiseCo, and it has voted its shares so as to elect XYZ employees for all seats on each board. All three corporations are incorporated in State A, which has adopted a corporate statute identical in substance to the Model Business Corporation Act.

During the past two years, CruiseCo's profits have steadily declined because fewer people have booked cruises. Moreover, many of the marinas where CruiseCo's ships stop to refuel have increased their docking fees. CruiseCo's ships frequently dock at ResortCo-owned marinas as part of their ordinary operations. ResortCo charges CruiseCo the same docking fees as it charges other cruise lines.

Last year, XYZ demanded that ResortCo stop charging CruiseCo's ships docking fees. At a board meeting to consider this demand, ResortCo's directors voted unanimously to acquiesce to XYZ's demand, even though ResortCo was contractually entitled to those fees. Eliminating the fees would help CruiseCo by reducing its operating costs and hurt ResortCo by lowering ResortCo's revenues.

Six months ago, at a board meeting, ResortCo's directors voted unanimously not to declare or pay the usual yearly dividend. The directors' rationale for this decision was to retain funds to construct new hotels and increase ResortCo's market share. The board reached its dividend decision after considering for several hours a report on the financial implications of the potential dividend from the company's chief financial officer and its independent accountant, as well as an advisory opinion prepared by an outside law firm.

At ResortCo's properly called board meeting last week, the board considered an offer that had been presented to ResortCo's president half an hour before the meeting. The offer was from Ava, the owner of 1,000 acres of coastal land well suited for commercial property development, to sell her land to ResortCo for $50 million. Ava, who had no previous connection to ResortCo, had told the president that she would hold the offer open for only 48 hours. Citing the time-sensitive nature of the offer and the attractiveness of the property, ResortCo's directors discussed Ava's offer for only 15 minutes before unanimously voting to accept it. ResortCo's directors did not obtain any guidance about the transaction's fairness or potential impact on the company's financial condition from outside experts or from ResortCo's chief financial officer before voting. In fact, the price was above the property's fair market value.

1. Did XYZ, as a controlling shareholder of ResortCo, breach a fiduciary duty of loyalty to ResortCo or ResortCo's minority shareholders by causing ResortCo to stop charging CruiseCo docking fees? Explain.

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2. If ResortCo's minority shareholders challenge the board's decision not to declare a dividend this year, are they likely to prevail? Explain.

3. Is the ResortCo board of directors' decision to purchase Ava's land protected by the business judgment rule? Explain.

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MEE Question 3

Three years ago, CarCo, an automobile manufacturer located in State A, entered into contracts with several State A automobile dealers. Under these contracts, the dealers had the right to sell cars made by CarCo. The term of each contract was 10 years, but the contract gave CarCo the absolute right to terminate the dealer's rights upon 60 days' written notice. CarCo insisted upon this termination provision because badly performing dealerships impact CarCo's profitability. CarCo has never entered into a dealership agreement without this provision and, during contract negotiations with other potential dealers, has consistently refused to omit the provision from dealership agreements.

Two years ago, CarCo announced that it planned to terminate agreements with rural dealers in many states and to encourage potential car buyers in rural areas to use CarCo's website to purchase cars. CarCo estimated that this new business model would result in significant cost savings. CarCo relied on the ability to terminate dealers' rights when it invested in expanding its online business.

After learning that CarCo intended to terminate agreements with rural dealers, the State A legislature passed a statute regulating agreements between automobile dealers and automobile manufacturers. The statute provides:

> Notwithstanding the terms of any contract, an automobile manufacturer shall not, without good cause, terminate any contractual rights of a dealer located in a county with a population of less than 1,000. This provision applies to contracts entered into both before and after the effective date of this statute.

The legislature had not previously regulated agreements between automobile manufacturers and dealers, and State A's highest court had held that the state common law did not generally limit the enforceability of contract-termination provisions.

Prior to enactment of the statute, some members of the state legislature privately expressed anger that automobile manufacturers were terminating agreements with rural dealers and thought that the statute was a good way to "get back at them." The statute includes the following legislative finding and statement of legislative purpose:

> This Act addresses the imbalance of bargaining power between automobile manufacturers and dealers. We find that if the parties were able to freely bargain on an equal footing, their agreements would contain a provision allowing termination only for good cause.

Last month, CarCo gave a State A rural dealer timely written notice of termination as provided in the dealership agreement. The dealer sued CarCo, citing the statute and asserting that CarCo could not terminate its rights as a dealer because CarCo lacked good cause to do so.

CarCo asserts that the statute is unconstitutional for three reasons. First, applying the statute to the dealership agreement, which the parties entered into before the statute

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was enacted, violates the Contracts Clause of the Constitution. Second, the statute violates the Equal Protection Clause of the Constitution because it impermissibly discriminates between automobile-dealership agreements and contracts involving other products with similar provisions that allow termination without cause. For this second claim, CarCo has offered evidence of the legislators' private statements to prove that the state's actual purpose for the law was to effectuate the state's animus against automobile manufacturers. Third, the statute's good-cause requirement for terminating automobile-dealership agreements violates CarCo's substantive due process rights.

1. Does application of the State A statute to CarCo's rights under the dealership agreement with the dealer violate the Contracts Clause? Explain.

2. Does the State A statute violate the Equal Protection Clause? Explain.

3. Does the State A statute violate CarCo's substantive due process rights? Explain.

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MEE Question 4

A store owner wanted a new sign for her store. On May 1, she met with a representative of SignCo, a sign company, which she had selected on the basis of its low advertised prices, and detailed her proposed specifications for the sign. The store owner and the representative, who was authorized to enter into contracts on behalf of SignCo, orally agreed that SignCo would deliver to the store owner a 10-foot-long sign, for which the store owner would pay $5,000. They agreed that the sign would bear the unique name of the store, would be constructed of bent red glass, and would meet quality and design specifications stated by the store owner. They also orally agreed that the sign would be delivered to the store owner no later than May 31.

On May 6, SignCo had made substantial progress in shaping the glass into the store's name. By May 8, however, SignCo determined that it would not be able to finish the sign on time. Without the store owner's knowledge, on May 9 SignCo entered into an agreement with another company (the "substitute manufacturer"). The agreement required the substitute manufacturer to complete work on the sign and supply it to the store owner in accordance with the agreement between SignCo and the store owner. In addition, the agreement assigned to the substitute manufacturer SignCo's right to be paid under the agreement with the store owner.

On May 12, SignCo and the substitute manufacturer jointly called the store owner to tell her that the substitute manufacturer would be furnishing the sign to her and that the sign would be ready for delivery by the May 31 deadline. The store owner was angry. She told SignCo and the substitute manufacturer that she had contracted to buy a sign made by SignCo, not by the substitute manufacturer, and that she had no intention of accepting a sign made by anyone other than SignCo.

On May 31, the substitute manufacturer delivered to the store owner a sign that conformed to all the specifications of the store owner's agreement with SignCo. The store owner rejected the sign and refused to pay for it, arguing that the May 1 agreement could not be enforced against her because she had never signed a document reflecting that agreement. She also argued that even if she was bound by the May 1 agreement, its terms required that she receive a sign made by SignCo, not by the substitute manufacturer.

1. Did the store owner and SignCo enter into a contract on May 1? Explain.

2. Assuming that the store owner and SignCo entered into a contract on May 1, is it enforceable against the store owner even though the store owner did not sign a document reflecting the agreement? Explain.

3. Assuming that the May 1 agreement constitutes a contract that is enforceable against the store owner, is the store owner bound to accept the sign from the substitute manufacturer? Explain.

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MEE Question 5

Wanda, who had been married to Harvey for 15 years, filed a complaint for divorce from Harvey shortly after she learned that he was having an affair with their married neighbor, Patrice. In the divorce proceeding, both Wanda and Harvey sought sole custody of their 13-year-old daughter.

Because Harvey and Wanda bitterly argued about and were highly critical of each other's parenting, the trial court appointed a neutral child-custody evaluator to investigate the family dynamics and provide an informed custody recommendation to the court. Both Wanda and Harvey told the evaluator that they were unwilling to share custody. The daughter told the evaluator that she was very upset because her parents were divorcing. She blamed her mother for the divorce and wanted to live with her father. The evaluator found that both parents were devoted to their daughter and recommended that the trial court grant Harvey sole physical and legal custody of the daughter, with Wanda to have liberal visitation with the daughter. The trial court granted the divorce and entered a custody order consistent with the evaluator's recommendation. Neither parent appealed this order.

Two months after the trial court entered the divorce decree and custody order, Patrice moved into Harvey's home. Wanda immediately petitioned the trial court to modify the custody order. She sought sole physical and legal custody of the daughter because of Harvey's nonmarital cohabitation with Patrice. Harvey opposed Wanda's petition, arguing that there was no justification for modifying the custody order. Neither Wanda nor Harvey requested joint custody, and the relationship between Wanda and Harvey remained bitter and acrimonious.

The trial court held a hearing on Wanda's petition to modify custody. The daughter testified, "I am still angry that my parents got divorced, but I do miss my mom and wouldn't mind seeing her more. Patrice is fine." Harvey testified that there had been no change in the daughter's behavior since Patrice moved into his home and that she and the daughter "get along well."

Wanda testified that the daughter should not be exposed to the nonmarital cohabitation of Harvey and Patrice. There was no other testimony.

1. Are the facts legally sufficient to authorize the trial court to consider whether to modify the existing custody order? Explain.

2. Assuming that the facts are legally sufficient to authorize the trial court to consider whether to modify custody, should the trial court modify the existing custody order to grant Harvey and Wanda joint physical and legal custody of their daughter? Explain.

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MEE Question 6

A woman was driving in State A when her sport-utility vehicle (SUV) collided with a car driven by a man. As a result of the accident, the woman, who is a citizen of State A, had significant injuries requiring treatment by a physician. The man is a citizen of State B and was in State A visiting his brother at the time of the accident.

Three passengers were in the man's car: the man's brother was in the front passenger seat, and two of the man's friends were in the backseat.

The man had a car insurance policy that provided coverage of up to $1,000,000 for personal injuries and property damage.

The man hired an attorney, who began investigating the accident. The attorney spoke to four people: a bystander who had witnessed the accident, the man's brother, and the man's two friends who had been in the car. The bystander recounted that the man had been looking at his phone at the time of the accident. The man's two friends also stated that the man had been trying to read directions on his phone at the time. The man's brother stated that the man had not been looking at his phone when the accident occurred.

Shortly after the man's attorney completed his investigation, the woman sued the man in the US District Court for the District of State A. Her complaint asserted a claim of negligence against the man and sought $250,000 in damages for personal injury and property damage. Pursuant to Federal Rule of Civil Procedure 26, the woman and the man exchanged initial mandatory disclosures. The man's initial disclosures included his brother's name and contact information, along with a summary of the information that the brother could provide concerning the accident. The man's initial disclosures did not identify or refer to the other passengers or the bystander, although the man later identified them in answers to interrogatories. The man's initial disclosures also did not include any information about his car insurance policy.

During discovery, the woman's attorney took the man's deposition. When the woman's attorney asked the man about his eyesight, the man's attorney objected and instructed the man not to answer, asserting that the line of questioning was not relevant. When the woman's attorney persisted in asking the man about his eyesight, the man's attorney abruptly ended the deposition, and the man and his attorney immediately departed.

Subsequently, the woman's attorney filed a proper motion to compel the man to answer deposition questions, but the court denied the motion, finding that "questions about the man's health and physical condition are irrelevant to this tort suit, and inquiry about them is improper."

Later, the woman's lawsuit was tried to a jury. At trial, the woman called the man's two friends and the bystander to testify. Each witness testified that the man had been looking at his cell phone at the time of the accident. The woman also called her treating physician to testify. The physician described the nature and extent of the woman's

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injuries. The only witness the man called was his brother, who testified that the man had not been looking at his phone when the accident occurred. Immediately after the man rested his case, the woman moved for judgment as a matter of law on the issue of the man's liability for negligence.

1. Was the man required to include in his initial disclosures information about the insurance policy and the identity of the three other witnesses to the accident? Explain.

2. Did the trial court rule correctly on the woman's attorney's motion to compel the man to answer deposition questions about his eyesight? Explain.

3. How should the court rule on the woman's motion for judgment as a matter of law? Explain.

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July 2024
MPT-1
Item

In re Girard

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In re Girard

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

MEMORANDUM

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

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

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

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

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

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Collins & Timaku LLP
Attorneys at Law

MEMORANDUM TO FILE

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

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

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

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

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RESIDENTIAL LEASE AGREEMENT

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

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

1. **PREMISES:** 7700 Riverside Drive, Franklin City, Franklin 33725, Apartment 12, a one-bedroom, one-bathroom apartment on the first floor (the Premises).
2. **RENTAL AMOUNT:** Beginning January 1, 2023, Tenant agrees to pay Landlord the sum of $1,500 per month by no later than the 3rd day of each calendar month. Said rental payment shall be delivered by Tenant to Landlord at [address omitted]. Rent must be actually received by Landlord in order to be considered in compliance with the terms of this Lease.
3. **RENT INCREASES:** Tenant agrees that Landlord may raise the rent no sooner than 12 months after the commencement of this lease.
4. **SECURITY DEPOSIT:** Tenant shall deposit with Landlord the sum of $1,500 as a security deposit to secure Tenant's performance of the terms of this Lease. After Tenant has vacated the Premises, Landlord may use the security deposit for cleaning the Premises, any damage or unusual wear and tear to the Premises, or any other rent or amounts owed pursuant to this Lease.
5. **INITIAL PAYMENT:** Tenant shall pay the first month's rent of $1,500 and the security deposit in the amount of $1,500 for a total of $3,000. Said payment shall be made by cashier's check or money order and is due prior to occupancy.
6. **TERM:** The Premises are leased on the following two-year lease term: <u>from January 1, 2023, until December 31, 2024.</u> This Lease will automatically renew on a month-to-month basis following the initial lease term, unless Landlord or Tenant provides 30 days' advance written notice of termination to the other party.

*   *   *

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

* * *

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

* * *

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

* * *

LANDLORD:

Jim Fortnum Dated: January 1, 2023

For Hamilton Place LLC

TENANT:

Laurel Girard Dated: January 1, 2023

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

June 1, 2024

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

Re: Rent Increase for Lease dated January 1, 2023

Dear Ms. Girard:

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

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

Sincerely,

Jim Fortnum

Leasing agent
Hamilton Place LLC

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THREE-DAY NOTICE TO CURE OR QUIT

TO: Laurel Girard (Tenant)

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

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

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

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

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

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

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

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

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

Dated: July 29, 2024

Jim Fortnum

Leasing agent
Hamilton Place LLC

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SARAH COHEN, M.Ed., LPC
Wellington Counseling Associates Inc.

FRANKLIN #72386
Phone: 664-555-1970

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

Date: July 26, 2024

To: Hamilton Place LLC

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

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

Please let me know if any other information is needed.

Sincerely,

Sarah Cohen

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

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

§ 500 Applicability

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

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

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

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

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

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

§ 501 Termination for Cause

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

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

(2) Maintaining or committing a nuisance.

. . .

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

. . .

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

§ 505 Limitation on Rent Increase

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

. . .

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

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

. . .

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

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

ii. "Physical disability" [definition omitted]

. . .

(m) "Service animals" [definition omitted]

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

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

§ 756 Assistance Animals

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

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

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

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

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

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

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

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

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

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

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

BACKGROUND

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

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

DISCUSSION

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

Materiality

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

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

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

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

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

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

Public Policy Considerations

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

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

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

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

Reversed.

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July 2024
MPT-2
Item

CDI Inc. v. Sidecar Design

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CDI Inc. v. Sidecar Design LLC

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

MEMORANDUM

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

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

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

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

Your memorandum should analyze the following two questions:

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

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

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

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Breen & Lennon LLP
Attorneys at Law

FILE MEMORANDUM

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

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

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

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

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

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

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

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

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

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

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

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

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Breen & Lennon LLP
Attorneys at Law

FILE MEMORANDUM

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

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

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

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

July 19, 2024

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

RE: Claim for Damages from CDI Inc.

Dear Ms. Davis:

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

We seek damages in the following amounts:

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

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

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

Sincerely,

Henry Brooks

Henry Brooks, Esq.
Counsel for CDI Inc.

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COMPUTER FRAUD AND ABUSE ACT

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

(a) Whoever—

> . . .
>
> (2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer; [or]
>
> . . .
>
> (4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value . . .,

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

(e) As used in this section—

> . . .
>
> (6) the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter;
>
> . . .
>
> (11) the term "loss" means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So ordered.

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

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

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

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

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

<u>Costs of Investigation and Remedy</u>

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

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

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

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

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

<u>Lost Business</u>

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

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

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

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

<u>Punitive Damages</u>

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

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

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

So ordered.

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July 2024

New York State
Bar Examination

Sample Essay Answers

JULY 2024 NEW YORK STATE BAR EXAMINATION

SAMPLE ESSAY ANSWERS

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

ANSWER TO MEE 1

1. *Adam does not have a cause of action against Connie for the crack in the house's foundation.*

The issue here is whether a subsequent purchaser has a claim against a professional homebuilder for faulty construction when there was an intervening owner. In most jurisdictions, the original purchaser of new construction has a claim against a professional builder who constructed the home and sold it to them. This is because there is an implied warranty in cases of new construction, providing that if the constructed home is faulty, the professional builder is liable for those faults. In the majority of jurisdictions, a purchaser who does not buy the home directly from the professional builder is not able to bring a claim against that person if the construction turns out to have faults. In a minority of jurisdictions, however, this subsequent purchaser would have a viable claim.

Here, Adam bought the five-acre tract from Bert by quitclaim deed. Adam did so one year ago, which was two years after the construction of the house. Following the house's construction, Bert bought the tract, including the house from Connie. The warranty deed did not contain any express warranties regarding the quality of the house's construction, but a majority of courts recognize an implied warranty in contracts between professional homebuilders and purchasers of the homes that the construction was sound. Therefore, had the foundation cracked shortly after Bert purchased the home from Connie, he would have, in a majority of jurisdictions, had a claim against her despite the lack of express warranties about the house's construction.

The foundation issue did not arise, until three months ago, which was nearly three years after the house was constructed and ownership had passed to Adam from Bert. In most jurisdictions, because Adam did not purchase the home from Connie directly, he would not have a claim against her based on this implied warranty, which only applies to the immediate purchaser from a professional builder. In a minority of jurisdictions, Adam might have a claim because he might be able to assert that an implied warranty that the house was professionally and carefully constructed was breached.

It is unlikely that the court would find that Adam has a cause of action on this implied warranty because he is not the immediate purchaser and because nearly three years passed between construction and the fault coming to light.

2. *Adam does not have a cause of action against Connie based on Diane's ownership of a portion of the tract by adverse possession.*

The issue here is whether Adam, who as explained above, did not purchase the land from Connie directly, rather purchased it from Bert, has a claim against Connie based on Diane's ownership of a portion of the tract by adverse possession.

If land is acquired through adverse possession and an action to quiet title is brought, title to the property from which the land was possessed becomes marketable title. Record notice arises when parties record a deed in the chain of title and subsequent purchasers are able to conduct a title search on the property before purchase and find relevant records pertaining to the property.

Adam does not have a claim because an action to quiet title was brought by Diane against Connie to establish her claim, and her right to the 12-foot wide strip was established in the action. This right was recorded in the county recorder's office. Though the deed to Bert purported to convey the entire five-acre tract, it also included an exemption from warranties "all titles, covenants, and restrictions on record with the county record holder." Marketable title was therefore provided to Bert, for less than the five-acres given the adversely possessed portion. Though it is not clear whether the deed from Connie to Bert was recorded, and thus Adam's deed may be a wild deed, not connected to the chain of title, the judgment in favor if Diane was and Adam could have found it.

Because the judgment in favor of Diane was recorded, Adam was on notice of the adversely possessed portion of the land because had he conducted a record search, as purchasers are reasonably expected to do before purchase, he would have learned of the 12 foot strip that had been adversely possessed. Since Adam had notice, he is not a bona fide purchaser, which requires being a purchaser for value (which he was) with no notice of the adversely possessed portion of the land. Adam had notice because the result of the quiet title action was recorded. Record notice is sufficient, even if Adam did not have actual notice and he does not have a claim against Connie as a result.

3. *Adam does not have a cause of action against Bert based on Diane's ownership of the tract by adverse possession.*

The issue here is whether Adam has a cause of action against Bert based on Diane's ownership of the tract by adverse possession, of which he learned after purchasing the land. Adam does not have a cause of action against Bert because he had inquiry notice of Diane's ownership by adverse possession and because he received a quitclaim deed from Bert.

A quitclaim deed conveys only the interest that the person conveying the deed actually has. It has no warranties as to ownership. This means that Bert conveyed only the interest he had in the land: the five-acre tract excepting the 12-foot wide strip that Diane had adversely possessed. A quitclaim deed does not come with the warranty of quiet enjoyment, wherein the seller warranties that a buyer's right to possession will not be interfered with by someone else's claim of right. Therefore, because it was a quitclaim deed, Adam has no right to complain of Diane's section.

Though if title had not been quieted Adam might have had a claim, he is also precluded because he was on inquiry notice. Inquiry notice arises when a reasonable inspection, which it is assumed a buyer will conduct before purchase would have revealed the issue. Had Adam inspected, he would have seen the 12-foot garden. In addition to the quitclaim deed, this would likely preclude his action against Bert.

4. *Adam does not have a cause of action against Connie based on the neighbor's easement over the tract.*

The issue here is whether a purchaser who learns of an easement after taking possession has a cause of action over someone earlier in the chain of title. An easement appurtenant is an easement that benefits one property, the dominant tenement, and burdens another, the servient tenement. The burden of such an easement runs with the land, and therefore binds subsequent purchasers, if it touches and concerns the land and the purchaser has notice of the easement.

To touch and concern the land, the easement must impact the parties' use of the land. Here, the easement does touch and concern the land because it is necessary for the northern neighbor's use of her tract: it is an easement by necessity.

Notice can be actual, record, or inquiry notice. Here, Adam has inquiry notice of the easement. If Adam had done a reasonable inspection before purchasing the parcel, he would have seen the gravel road and been aware of the easement before purchase. Because he could have done a reasonable inspection and found the road, he is said to have inquiry notice of the easement.

Because the easement runs with the land and Adam had inquiry notice of the easement, the burden on the servient tenement (Adam's land) runs with the land and he does not have a claim against Connie as a result of the easement.

ANSWER TO MEE 1

1. Adam's Cause of Action Against Connie for Crack in the House

The issue presented is whether Connie (as the professional home builder) is liable for any warranties to a subsequent grantee (Adam) and whether the crack in the foundation of the house makes the house uninhabitable. A professional home builder owes a duty to the original purchaser of home, and subsequent owners, to ensure that the home is fit for a person to live in. Some states may place a limitation on how long this warranty will last (e.g. 5 years from the original purchase date). This warranty (the implied warranty of habitability) is an implied warranty in every deed and can only be disclaimed through language such as "as is, in the current state, etc." A house will be considered uninhabitable, and in breach of the implied warranty of habitability if a defect in the home is so severe that it is not fit for a human to live in.

Here, Connie is a professional home builder who built the house on the eastern tract. Although purchase agreement between Connie and Bert did not expressly contain any warranties regarding the quality of the house's construction, there was an implied warranty that the house would be habitable. This warranty, by Connie, then passed on to Adam when he purchased the tract and home from Bert. It did not matter that the deed from Bert was a quitclaim, because the warranty was from Connie to the subsequent purchaser. There is no indication that the jurisdiction that the tract is in has a limitation on the implied warranty of habitability. Even if it did, Adam purchased the home only three years after Connie built it, so it is likely that any limitation would not apply.

Further, the crack in the foundation of the house has proved to make the home uninhabitable. Many courts have considered consistent flooding to be unfit for human habitation. Here, the crack has resulted in "frequent water intrusion and substantial water damage to the house."

Because Connie still owes an implied warranty of habitability to Adam, and the defect in the house has likely made the home uninhabitable, Adam will have a cause of action against Connie for the crack in the foundation.

2. Adam's Cause of Action Against Connie for Diane's Ownership

Adam does not have an action against Connie for Diane's ownership. The issue presented is whether the warranty of quiet enjoyment 1) runs with the land and is applicable to subsequent grantees and 2) is violated by Diane's ownership of the portion of the tract.

The warranty of quiet enjoyment is a future warranty given by a grantor to a grantee that no third-party will come and claim title to the land, thus interrupting the grantee's quiet enjoyment of the land. This warranty is said to run with the land, and thus privity of estate

exists between the original grantor and a subsequent grantee. As a general rule, the warranty will not be violated if a claim against the land is known to the grantee/purchaser. A purchaser is said to have notice of any third party rights if they have 1) actual notice 2) inquiry notice --they could discern from an inspection of the land that someone had a claim to it, or 3) record notice -- the claim is filed on record.

Here, Diane had a claim to a portion of the tract through adverse possession (meaning she exclusively and continuously used the land for a statutorily permitted amount of time without the permission of the owner of the land). When Connie first purchased the land, Diane brought a judicial action to quit the title and was successful. Upon the judgment in Diane's favor, Diane officially became the owner of that portion of the land and she recorded such ownership, putting all future purchasers on notice.

When Connie sold the land to Bert, the warranty deed excepted "all titles, covenant, and restrictions on record with the county recorder." This meant that Connie would not be liable for Diane's ownership of the portion of the tract because Bert, and subsequent owners had record notice of the ownership. It did not matter that Adam did not inspect the tract, possibly creating inquiry notice, because he had record notice.

Therefore, Adam does not have a cause of action against Connie based on Diane's ownership of the portion of the tract because he had record notice of the possession when he purchased the land.

It should be noted that Connie's conveyance of the "entire five-acre tract" to Bert when she knew that Diane had a right to a portion of the tract through adverse possession was a violation of the warranty of the right to convey. Adam would not have a claim for this breach because he is not in privity of contract with Connie and the warranty of the right to convey is a present warranty that arises when the deed was delivered. Bert would have had to bring the claim against Connie.

3. Adam's Cause of Action Against Bert for Diane's Ownership

Adam does not have a claim against Bert for Diane's ownership. The issue presented is whether Adam is owed any warranties under a quitclaim deed. When a grantor/buyer delivers a quitclaim deed to a grantee/purchaser there are no warranties in the deed. The grantor is essentially deeding over whatever they own, as it is. This means that Adam cannot bring a cause of action against Bert for breach any warranties related to the quality of the land or the usage of the land.

Had Bert given Adam a warranty deed, he likely would have been in breach of the warranties against encumbrances and quiet enjoyment because Bert had record notice of Diane's ownership.

4. Adam's Cause of Action Against Connie for the Neighbor's Easement

As explained in question 2 above, Connie may be liable to Adam for future warranties that run with the land, such as the warranty of quiet enjoyment. Connie is not however, liable to Adam for breaches of present warranties that she owed to Bert at the time of conveyance. Once such warranty is the warranty against encumbrances that there are no encumbrances, such as an easement on the land. The issue presented is whether the implied easement of necessity is in violation of any of the future warranties owed to Adam.

An implied easement of necessity is created when a tract of land has no outlet and requires the usage of another's land to reach said outlet. Typically, this arises when an original tract of land, owned by one person, is divided and the newly divided portion is landlocked. It does not appear that Connie originally owned the northern lot and later divided, thus creating an implied easement in the gravel road for the neighbor. The easement could also be created by express grant from Connie to the neighbor to use the easement. In the case, future owners of Connie's servient land would be burdened by the easement if they had notice of its existence. The gravel road running through the middle of the tract, connecting the northern lot to the highway would likely place any purchaser on inquiry notice of the easement.

Here, Adam did not inspect the tract of land, but he would still be placed on inquiry notice of the easement, despite his failure to inspect. Because Adam was on notice of the easement, he is burdened by the implied easement of necessity which runs with the land (and thus to subsequent purchasers of the land). Even though the easement is certainly a violation of Adam's quiet enjoyment, he likely cannot bring a case against Connie because the warranty against encumbrances is a present warranty and thus does not apply to future purchasers.

ANSWER TO MEE 2

1. At issue is whether XYZ, as a controlling shareholder of ResortCo, breached a fiduciary duty of loyalty to ResortCo or ResortCo's Minority Shareholders by Causing ResortCo to Stop Charging CruiseCo's Docking Fees.

Generally, shareholders of a corporation do not owe each other fiduciary duties. An exception applies, however to controlling shareholders-those that own 50% or more of a company's stock, or those that have outsized influence over the company's fundamental decisions. One of these fiduciary duties if the duty of loyalty. Generally, the duty of loyalty requires controlling shareholders to not put their own self-interest ahead of the best interest of the company. Examples of violations of the duty of loyalty include usurping corporate opportunities, and, relevant here, self-dealing. Self-dealing occurs when a controlling shareholder, or director, stands on both sides of a transaction. However, to be improper self-dealing, the controlling shareholder must extract a benefit different that is not shared by all other minority shareholders for the transaction to be improper. Notably, even controlling shareholder transactions that facially breach the duty of loyalty, may be cleansed by certain safe harbors, including a majority vote by fully informed, disinterested directors. Another safe harbor is a fully informed vote of the minority shareholders. A final safe harbor is a showing that the transaction is both procedurally and substantively fair, such that the effect of the transaction is similar to the effect of an arm's length transaction.

Here, as a controlling shareholder of ResortCo, XYZ owes the minority shareholders a duty of loyalty. Here, the decision to stop charging CruiseCo fees likely constituted a breach of the duty of loyalty, because it was an improper self-dealing transaction, and none of the safe harbors likely apply. First, XYZ stood on both sides of the decision, as the owner of both ResortCo and CruiseCo. It extracted a different benefit from this transaction than other shareholders, because this decision would help cut overhead for CruiseCo, while for all other shareholders, it would just result in losses. It is immaterial that XVZ stood to suffer losses from the ResortCo side, this does not make the transaction any less improper.

Next, XVZ likely cannot avail itself of any of the safe harbors to cleanse this transaction. First, the facts do not indicate that there was an informed minority shareholder vote on the matter. Next, XVZ likely cannot avail itself of the interested director safe harbor, because, as the facts indicate, XYZ has the power to choose all members of the board for ResortCo. As such, these directors were likely "interested" in that they could not be fairly considered impartial. Finally, XVZ is unlikely to be able to allege that this transaction is "fair," either procedurally or substantively. It is procedurally deficient for the aforementioned interested director issue. It is substantively unfair because the facts indicate that ResortCo was contractually entitled to these docking fees -an armed length

transaction would likely not do away with them altogether. Accordingly, XYZ has breached the duty of loyalty, and none of the safe harbors apply.

2. At issue is whether ResortCo's Minority Shareholders Are Likely to Prevail is they Challenge the Board's Decision Not to Declare a Dividend This Year.

Most Board decisions are protected by the business judgment rule. The business judgment rule is a rebuttable presumption that when the directors make a decision, they are acting in the best interest of the corporation. When the court applies the business judgment rule, the corporation virtually always wins the suit. The business judgment rule can be rebutted by a showing of bad faith, or gross negligence (e.g., procedural unfairness or a deviation from the reasonably prudent businessperson). Dividend decisions are an archetypal example of a decision that is typically protected by the business judgment rule. As such, shareholders are generally not entitled to receive dividends.

Here, the decision to declare dividends is presumptively protected by the business judgment rule, as this is a typical decision protected by this rule. As such, if the court decides to apply it in this situation, the shareholders will lose, as they have no right to claim dividends. The minority shareholders will further have a hard time making a showing of gross negligence or bad faith with regard to this decision. As the facts indicate, the directors spent "several hours" considering a report on the financial implications of issuing this dividend, and received input from independent accountants and outside law firms. The rationale behind the dividend, retaining funds to construct new hotels and increase ResortCo's market share, is a valid one.

Further, the facts do not indicate bad faith, e.g., that the Directors are declining to issue dividends in order to keep a surplus for itself. While the shareholders might be able to raise a bad faith inference about whether this decision stems from the improper decision to cut costs from the XVZ/CruiseCo transaction, this argument is not a slam dunk.

As such, the minority shareholders are not likely to prevail if they challenge the Board's decision to not issue dividends.

3. At issue is whether the ResortCo Board of Director's decision to purchase Ava's land is protected by the business judgment rule.

As discussed above, Board decisions are protected by the business judgment rule. The business judgment rule is a rebuttable presumption that when the directors make a decision, they are acting in the best interest of the corporation. When the court applies the business judgment rule, the corporation virtually always wins the suit. The business judgment rule can be rebutted by a showing of bad faith, or gross negligence (e.g., procedural unfairness or a deviation from the reasonably prudent businessperson).

Here, there is strong argument that the Board of Director's decision is *not* protected by the business judgment rule. However, the Board has some availing arguments to the contrary. On the one hand, it can be argued that the decision to only discuss such a large transaction (%50 million) for 15 minutes, and not even obtain any information on the transaction's fairness was grossly negligent. This argument is bolstered by the fact that they did not even consult internally, with ResortCo's CFO before voting. This contention is further bolstered by the fact that the price was above the property's fair market value.

On the other hand, the directors could argue that given the dire financial situation of ResortCo, and the time-sensitive nature of the offering, this was a reasonable process. This argument would be bolstered if they can show that these kind of limited time offers, even for such a large amount, are customary in the industry, they might have a valid rebuttal.

In sum, this decision likely is *not* protected by the business judgment rule, but the directors can try to make the argument that the process they followed was reasonable.

ANSWER TO MEE 2

1. The issue is whether XYZ, as a controlling shareholder of ResortCo, breached its fiduciary duty of loyalty by causing ResortCo to stop charging CruiseCo docking fees.

A shareholder who owns over 50% of stock in a corporation is a controlling shareholder. Although shareholders typically do not owe fiduciary duties to other shareholders and are not personally liable to other shareholders, there is an exception for controlling shareholders due to their ability to influence decisions of the corporation. The duty of loyalty can be breached due to self-dealing and conflicts of interest. The two exceptions are the safe harbor exception and the fairness exception. Under the safe harbor rule, a majority of disinterested shareholders or a majority of disinterested directors can vote to approve the action, if all the material information has been disclosed. A decision is also valid if it is fair.

XVZ owns 90% of ResortCo shares so it is a controlling shareholder and can be held liable for breaches of fiduciary duty. The decision to stop charging CruiseCo's ships docking fees is self-dealing and a conflict of interest since CruiseCo is fully owned by XVZ. CruiseCo's ships frequently dock at ResortCo-owned marinas and had a contract for docking fees, which was the same as for other cruise lines. The decision by the board to eliminate the fees only for CruiseCo ships, despite the contract, benefits CruiseCo and

hurts ResortCo. This decision is not validated by the safe harbor rule. There was no vote of the disinterested shareholders and although there was a vote of the directors, none of them were disinterested since they are all XVZ employees. Therefore, the safe harbor rule does not make the decision valid. The decision also cannot be validated as fair to ResortCo since it hurt ResortCo by lowering its revenues. In addition, other marinas where CruiseCo ships stop to refuel have increased their docking fees, not eliminated them, so the decision is clearly unfair to ResortCo.

XYZ breached its fiduciary duty of loyalty by causing ResortCo to stop charging CruiseCo docking fees and is liable for the breach to the minority shareholders.

2. The issue is whether a challenge to the board's decision not to declare a dividend is likely to prevail.

The board of directors of a corporation owes a duty of care to the corporation. The directors must act as reasonably prudent persons under the circumstances and use any special skills to make their decisions. They may rely on information provided by board committees and outside experts to make decisions. Under the business judgment rule, decisions of the board made in good faith do not violate the duty of care, unless there is fraud or self-dealing.

Here, the decision not to declare a yearly dividend was made after several hours of consideration, based on a report by the CFO and by an independent accountant, as well as an advisory opinion prepared by an outside law firm. The rationale for the decision was to benefit ResortCo in the long term by using the funds to construct new hotels and increase ResortCo's market share. The decision seems to be a considered one, relying on adequate information, and made with a good faith rationale. Therefore, it is subject to the business judgment rule and will likely satisfy the duty of care. Therefore, the shareholders are unlikely to prevail if they challenge the decision.

3. The issue is whether the directors' decision to purchase Ava's land is protected by the business judgment rule.

As previously stated, decisions of the board made in good faith do not violate the duty of care, unless there is fraud or self-dealing. However, failure to be adequately informed when making a decision violates the duty of care and is not protected by the business judgment rule.

Unlike the previous decision not to declare a dividend, here the board did not consider any information about the transaction's fairness or potential impact on the company's financial condition from either a committee of the board, the company's CFO, or outside experts. They only leaned of the offer half an hour before the meeting and only discussed it for 15 minutes before voting to accept it. In fact, the price was above the property's fair

market value. Despite the short amount of time they had to consider the offer (48 hours), the board still had a duty to base their decision on sufficient information. They could have taken an additional day to gather information from the CFO or outside experts to make an informed decision. Their failure to adequately inform themselves before making a decision is a violation of the duty of care and is not protected by the business judgment rule.

ANSWER TO MEE 3

1) Contracts Clause

The State A statute may violate the Contracts Clause. At issue is whether the State A statute has an important government interest in enacting the statute, and whether the statute substantially advances that government interest. The Contract Clause within the Constitute expressly prohibits states from retroactively and substantially impairing the contract rights of its citizens, unless the state can show that they have an important government interest and the statute is aimed at addressing that interest. Furthermore, statutes within the Contracts Clause receive differing levels of judicial scrutiny depending on whether the statute impairs private or public contracts. Public contracts generally receive stricter scrutiny, but private contracts are assessed under an intermediate scrutiny-like test.

Here, the statute in State A is aimed at regulated contracts between automobile manufacturers and automobile dealers, which are private parties. Therefore, the statute retroactively impacts the rights of private parties by prohibiting the "good cause termination" provision in all contracts, entered into both before and after the effective date. Because the Statute seeks to impair contracts that were previously entered into, it must satisfy the intermediate-like scrutiny test, and State A has the burden of proving that the statute is tailored to addressing an important government interest. Here, the legislature seeks to address the bargaining power imbalance between automobile manufacturers and dealers, and seeks to put them both on equal footing in contracting. While this is an important state interest, as it would assist in the contracting between parties, and also maintain more dealers with locations in lower populated areas, the statute may not be narrowly tailored to advance that interest. First, the state's highest court did not limit the enforceability of contract-termination provisions, suggesting that there may be other legal bases for the legislature to accomplish this goal. Additionally, it is unclear whether this prohibiting these types of provisions in contracts will directly advance the goal of maintaining the power balance between manufacturers and dealers. While it may assist in

this goal, it may not be the best way for the legislature to accomplish the goal. Finally, retroactively invalidating contracts with these provisions likely impairs the freedom to contract, and there may be other ways to accomplish the legislature's goal moving forward, without retroactively invalidating the contracts. For these reasons, the State A Statute likely violates the Contracts Clause.

2) Equal Protection Clause

The State A Statute likely does not violate the Equal Protection Clause because it does not discriminate on the basis of a suspect or quasi-suspect class and the law will likely survive rational basis review. The Fourteenth Amendment, as applied to the states through the Due Process Clause, prohibits states from treating similarly situated individuals differently. If a state law discriminates on the basis of a suspect or quasi-suspect class, the law will receive heightened judicial scrutiny. Here, however, the law appears to be treating contracts differently between automobile-dealerships and other contract provisions. This is not a suspect class, and will not receive heightened scrutiny. Instead, the law will receive rational basis review.

Under rational basis review, a law will be upheld if it rationally related to a legitimate government purpose. Essentially, the law will be upheld so long as it is not arbitrary. Here, the State enacted this law to achieve a more equal bargaining power between automobile manufacturers and dealers, and to ensure that rural areas have more access to dealerships. However, CarCo will also argue that the law was impermissibly discriminatory because the legislators expressed anger towards manufacturers and stated that part of the purpose of the legislation was to "get back at them." This sentiment suggests animus towards automobile manufacturers such that there was a discriminatory motive for the law. Nevertheless, under rational basis review, courts have held that just because one of the motivations behind the law is discriminatory, the law may still be upheld if there is another non-discriminatory purpose behind the law. Here, some legislators have clear animus towards automobile manufacturers, and this is a clear motivation to enact the law. Still, the law does serve a legitimate state interest in addressing the bargaining power, and providing automobile manufacturers and dealers with equal footing. Also, the law is rationally related to this purpose because the termination provisions have allowed CarCo to terminate contracts with dealers whenever they wish, and all contracts have this provision, suggesting that dealers do not have ability to bargain equally. Thus, because the law is rationally related to a legitimate purpose, a court may nevertheless uphold it.

3) Substantive Due Process

The State A Statute likely does not violate the Substantive Due Process Clause because it does not impermissibly burden a fundamental right. The Substantive Due Process Clause as applied to the states prohibits states from burdening fundamental rights of citizens. If a

state does burden a fundamental right, the law will be upheld only if it can satisfy strict scrutiny. Thus, the law will be upheld only if the State can prove that it is necessary to achieve a compelling government interest. This is a high burden to meet, and it is very difficult for a state to show that if they are burdening a fundamental right. Here, the law at issue will not receive strict scrutiny because it does not burden a fundamental right. Though freedom of contracting was once considered a fundamental right by the court, it generally only receives rational basis review. A law will be considered to be a fundamental right if it is consistent with the nation's history and tradition and necessary to an ordered concept of liberty. Here, the freedom of contracting is not a fundamental right because it was not considered to be fundamental at the time of the Founding Father, and is thus not consistent with the nation's history and tradition. Therefore, the law will be subject to a rational basis review, and the law will be upheld as outlined above. Thus, under the standard as stated above for the EPC analysis, the law will be upheld because it is rationally related to a legitimate government interest.

ANSWER TO MEE 3

1. Contracts Clause

The application of State A's law to CarCo likely violates the Contract's Clause. The issue is whether State A has an important, legitimate interest in preventing manufacturers from terminating contracts without good cause. The Contracts Clause provides that the state government cannot substantially interfere with already existing contract rights. In order for a state restriction that substantially interferes with an existing contract right to be upheld, it must be serve an important, legitimate government interest and reasonably further that interest. Here, the legislation substantially interferes with CarCo's rights under their contracts. CarCo bargained for the absolute right to terminate their agreements upon proper notice. CarCo has relied on this provision in order to effectuate a new business model that would result in significant cost savings and in expanding its online business. Invalidating a termination provision (even one has one sided as this) is a substantial interference. While the state may have a legitimate interest in protecting dealers in rural counties from sudden contract termination in order to protect their business, and alternatively, to make sure that people in rural communities have access to cars that are for sale, this law is not reasonably tailored to further that interest. The law does not specify what good cause would be. Moreover, CarCo is still selling cars in the rural areas. They are just doing so online. So, this law does not ensure that they get cars because alternative avenues are available. Moreover, contracts need not be "equal". They must only be bargained-for. There is nothing to suggest that the CarCo products are the only ones available in those communities such that the contract should be invalidated on other grounds.

2. Violation of the Equal Protection Clause

The law does not violate the Equal Protection Clause. The Equal Protection clause prevents similarly situated individuals from being treated differently under the law. A law can be discriminatory against a particular group of people in three ways. It can be (1) facially discriminatory, (2) discriminatorily applied, or (3) enacted with a motive to discriminate against a particular group. The level of scrutiny that the law receives to determine that is unconstitutional depends on the classification of individuals effected by the law. Here, the law facially discriminates against automobile manufactures by requiring that they have good cause to terminate any contractual rights for dealers in counties with less than 1,000 people. It was also enacted with a discriminatory motive--i.e., to keep manufacturers from backing out of deals without cause, while not affecting the rights of other dealers. But automobile dealers are not a protected classification. Suspect classifications get strict scrutiny. Quasi-suspect classifications get intermediate scrutiny, and non-suspect classifications get rational basis review. Automobile dealers are not a suspect or quasi-suspect class and there is no fundamental right involved so the statute will be upheld if it is rationally related to a legitimate government purpose. It need not be the actual purpose for enacting the law. Any legitimate purpose will suffice. The burden of showing no legitimate purpose is on the plaintiff. The state likely has a legitimate interest in protecting its citizens from arbitrary termination of contracts, especially since automobile manufacturing contracts are probably sale of goods contracts and thus should be conducted under the duty of good faith and fair dealing. The state also has an interest in ensuring that rural communities have ready access to automobiles. Thus, the statute will likely be upheld under the Equal Protection Clause.

3. The statute also does not violate CarCo's substantive due process rights. The due process clause of the 14th amendment provides that a state will not deprive a citizen of life, liberty, or property without due process of law. Statutes that impede on fundamental rights receive strict scrutiny. Statutes that do not impede fundamental rights receive only rational basis review. Burdens on economic rights receive rational basis review unless it implicates the Contract's Clause (which is discussed above). As discussed above, rational basis review is a very lenient standard. The government need only show the law is rationally related to some legitimate interest. The government would likely meet this burden by any of the above listed interests. In addition, ensuring fair contractual bargaining for its citizens is a legitimate interest. And because this is a civil penalty and not a criminal one, ex post facto punishment is not an issue.

ANSWER TO MEE 4

1. The issue is whether there was a bargained-for detriment, consideration, and mutual assent.

In order for there to be a contract, the parties must have a bargained for detriment, there must be consideration, and the parties must agree to the contract. Additionally, the contract must contain essential terms.

In this case, the parties met and discussed or bargained with each other for the creation of the sign. The store owner agreed to give SignCo $5,000 dollars. In return, SignCo agreed to create a specially manufactured sign for the store owner that would bear the unique name of the store and would meet the quality and design specifications of the owner. Under the UCC, which applies to the sales of a goods the essential term is quantity, here the parties agreed to one sign. Because there was mutual asset, consideration, and a bargained-for detriment, there is a contract.

However, the Statute of Fraud requires that for sale of goods over $500 dollars requires a writing to be an enforceable contract. More details are discussed further below.

2. The issue is whether the contact is enforceable against the store owner and whether an exception to the Statute of Frauds applies.

The Statute of Frauds requires that for sale of goods over $500 dollars requires a writing to be an enforceable contract. In addition, the paper must be signed by the party against who enforcement is sought. However, there are exceptions to the Statute of Frauds where a writing is required. One exception is when a manufacturer is required to make a specially manufactured good, the manufacturer takes a substantial step towards the completion of the good, and the good cannot be otherwise sold in the ordinary course of the manufacturer's business. Additionally, when there is full performance is rendered and all that is left is to pay, a writing is not required.

In this case, SignCo was required to make a sign that would bear the unique name of the store owner's store. It also had to meet the specific quality and design specifications stated by the store owner. Additionally, by May 6th, SignCo had made substantial progress is shaping the glass for the sign. Because of the unique nature of the sign, it could not be sold in the ordinary course of SignCo's business. Therefore, the specially manufactured good exception to statute of frauds applies.

Additionally, SignCo was able to delegate the completion of the project to a substitute and deliver the goods per specifications and on time. All that was left was for the store owner to pay them. Therefore, no writing is required.

Because SignCo meets all the requirements of exceptions, the Statute of Frauds does not apply and a writing is not required for the contract to be enforceable.

3. The issue is whether the contract is enforceable because it was delegated.

Generally speaking a party has the right to delegate performance under a contract, as long as the contract does not state the contrary. However, if the contract was made with the particular purpose, that the good be created by a specific person (such as a famous painter creating a painting) then the performance cannot be delegated. Additionally, unless the buyer states otherwise, whether the goods are acceptable is an objective test. Under the UCC when a good meets the specifications required under the contract and is delivered before the required date. The buyer must pay for the good, otherwise it constitutes improper rejection and a breach of the contract.

In this case, the store owner met with SignCo specifically because of its low advertised prices. She made no mention to SignCo that the purpose of the agreement was to have a sign made by SignCo nor did she explain did not want SignCo to delegate the creation of the sign. After SignCo discovered it would not complete the sign on time, it delegated the work to substitute manufacturer. It also assigned the rights, to them and required they complete the sign according specifications and deliver the sign no later than May 31. The substitute delivered on time and according to the specification in the agreement between the parties. It was only after SignCo spent significant time on the sign and then delegated, that the store owner stated only SignCo should create the sign. Because there was no subjective condition to acceptance, delegation was not expressly prohibited, and the substitute delivered according to specifications and proper timing, the store owner is required to accept the sign or she faces a claim of improper rejection.

ANSWER TO MEE 4

Validity of contract on May 1

The issue here is whether the parties had a valid contract on May 1.

Generally, whenever a contract deals with goods, that for the sale of any movable object, it is governed by article 2 of the UCC. As all other contracts, it requires there be an offer, an acceptance, be supported by consideration, and be free from any defenses to formation. The UCC does not require a pinpoint accurate moment of when the offer and acceptance took place, merely that it happened. Further, consideration is anything that has legal value, it could be a promise, money, or goods. Other times it is described as something that has a detriment/benefit to each party. Contracts can be oral or written, this will not affect their formation, merely their enforcement in some cases.

Here, it is clear that there was offer and acceptance regardless of when they happened. They agreed at some point that the owner would pay and SignCo would deliver a sign. Importantly, the store owner selected SignCo because of its low advertised price, so he likely started communications, however, an advertisement is generally not an offer, merely an invitation to negotiate. The agreement is also supported by consideration, in this case money ($5,000) in exchange for sign (custom made). Lastly, there does not seem to be any defenses to formation such as lack of capacity, duress, etc.

Therefore, the parties entered into an oral contract on May 1.

Enforceability against the owner even though he did not sign a document reflecting the agreement

The issue here is whether the oral agreement is enforceable against the store owner who did not sign anything.

Generally, the statute of frauds prevents enforcement of a variety of contracts unless they are in writing and signed by the party against whom enforcement is sought. Applicable here is that a contract for the sale of goods for more than $500 needs to be in writing to be enforceable. A potential exception to that is for especially manufactured goods that the seller can no longer sell in the ordinary course of business after they have begun substantial progress in manufacturing it or at times preparation for manufacture.

Here, the contract was entirely oral and the store owner did not sign any agreement. The sale is for goods (in this case the sign) for $5,000, which would place it in the statute of frauds. However, the specially manufactured goods exception likely applies. The sign would bear the unique name of the store and would satisfy the owner's quality and design specifications. By May 6, SignCo had already made substantial progress in shaping the

glass something that would remove the contract from the statute of frauds and allow enforcement. Importantly, it is likely a unique/specifically manufactured good since it cannot be sold to another client by SignCo as they would not have the same name. Further, the sign was later finished and delivered.

Therefore, while it appears that the contract's enforcement is prevented by the statute of frauds, the special manufacture of the good would make it enforceable against the store owner after May 6.

Owner bound to accept the sign from the substitute manufacturer

The issue here is whether the store owner would be bound to accept the sign from the substitute manufacturer.

Generally, all contractual duties and rights are assignable and delegable to third parties. This could be curtailed if the parties include specific anti-assignment provisions. For certain contracts where the type of performance is particular to one specific party, a party will not be forced to accept performance by a third party. This is limited to artwork or certain goods and services which require a particular skill whenever the skill is the reason for choosing that counterparty. Further, under the UCC, the perfect tender rule would allow a party to reject a non-conforming goods (that is one that deviates from what was ordered in any way), however, it also means they cannot refuse perfectly conforming goods. Tangentially, after a party receives a concrete statement by the opposing party that they will not perform (anticipatory repudiation) they have an option to sue for breach on the spot (or wait until breach happens) as well as a duty to mitigate their damages.

Here, the agreement between the parties did not contain any anti-assignment provision, it only became a point of contention when the owner was notified of the assignment/substitute performance. Importantly, the reason for choosing SignCo was their low advertised price, not their unique skill in making signs. The substitute manufacturer perfectly performed what SignCo would have originally had to tender, a sign conforming to the owner's design and quality specifications. Therefore, the store owner cannot claim this is breaches the perfect tender rule and would be required to pay for it. After the May 12 conversation it could be argued that the owner anticipatorily repudiated their agreement, however, finalizing the sign was likely the correct decision to mitigate damages in this situation.

Therefore, because perfect tendered was delivered in time, and there was no anti-assignment clause, it is likely that the store owner would be bound to accept the sign.

ANSWER TO MEE 5

(1) The issue is whether the trial court can consider modifying the custody order on these facts.

Once a trial court of appropriate jurisdiction enters a child custody order, the custody order is in effect. If a party seeks modification of the custody order, it ordinarily must be on the basis of a significant change in circumstances that goes to the heart of the custody decision; for instance, a dramatic change in the custodial parent's ability to care for the child, or a substantial detriment to the child resulting from the existing custody arrangement. A court might consider a drastic change in the custodial parent's financial ability to care for the child, a sudden unanticipated change in the child's needs that the custodial parent cannot handle, or an improper and unjustifiable decision of the custodial parent to move out of state with the child and thereby interfere with the noncustodial parent's rights to visitation, among other reasons. The overriding consideration in determining child custody matters is the best interests and welfare of the child. Courts generally will not consider factors that do not have a clear detriment upon the child, such as the custodial parent's sexual relationships or other relationships or cohabitation, if there is no material impact on the child's best interests.

Here, the facts are likely not legally sufficient to authorize a reconsideration of the existing custody order. Only two months have passed since the trial court entered the initial divorce decree and custody order, which is likely not enough time for the court to note a severe change in its initial determination unless something dramatic occurred. Here, the only substantial thing that has changed is that Patrice moved into Harvey's home and Wanda then moved to modify the custody order. The decision of a custodial parent to continue with a relationship with a person other than their ex-spouse is not a significant change in circumstances that will likely result in a modified custody determination, unless that relationship has a material detrimental impact on the child's welfare. Here, the daughter has testified that while she misses her mother, Patrice is "fine," and Harvey has testified that Patrice and the daughter have been getting along well and there have been no changes in the daughter's behavior since Patrice moved in. Therefore, given the lack of a detrimental impact on the daughter, there does not seem to be a basis to modify the custody order on the basis of Patrice's new role in Harvey's home.

Additionally, a court will sometimes consider the wishes of a child of sufficient age and maturity in making a custody determination, but the court will inquire into the reasoning behind the child's wishes. Here, the daughter is 13 years old, which is likely an age of sufficient maturity such that a child could have an informed opinion about their own care and custody. Here, however, there is no evidence that the daughter even wants to disturb the current arrangement. Only two months have passed since the custody order was initially made, a process during which the daughter said she wanted to live with her father. There is no evidence that the daughter's position on this matter has changed;

although she misses her mother, the court will likely not take from this that they should switch to joint custody, especially since the parents' relationship is still so acrimonious.

Moreover, a court will inquire into the reasoning behind a child's expressed interests. Here, only two months have passed since the divorce. The fact that the daughter misses her mother and would like to see her more is not unexpected; the court will likely rationalize that the daughter misses the mother because the change in custody is so recent. Additionally, the daughter missing the mother is not a request to change custody but merely an expression of emotion. Therefore, the daughter's wishes are not a significant factor here, and if anything, her wishes from the decision two months ago will prevail.

In sum, because Harvey's nonmarital cohabitation with Patrice is of little consequence for the daughter's welfare or best interests, and because the daughter's interests are likely not a factor here, there is no substantial change in circumstances justifying modification of the custody order.

(2) The issue is whether the trial court should grant joint physical and legal custody of their daughter if the facts here were legally sufficient to consider modification.

There are various types of custody, including physical and legal custody, and joint custody is when parents cooperate to share both physical and legal custody over a child. Physical custody is the right to oversee a child's day-to-day activities and care, whereas legal custody pertains to important decisions about the child's upbringing and future. However, a court will only grant joint custody to both parents when it is apparent that the parents are able to cooperate in the best interests of their child and could seamlessly handle matters such as deciding major decisions, handling the drop-off and pickup of the child between stays with either parent, and so on. Since the ultimate standard in custody is the best interests of the child, if it is not in the child's best interests to be with parents who cannot cooperate, a court will not order joint custody.

Here, the parties are a divorced couple who suffered a divorce under acrimonious circumstances, an affair with a married neighbor. The parents bitterly argued about parenting issues, were highly critical of each other's parenting, and could not see eye to eye, so much so that the court had to appoint a neutral child-custody evaluator. The parents have said that they are unwilling to share custody. Although the evaluator found that both parents were devoted to the daughter, only two months have passed since the determination that joint custody would be inappropriate because the parties could not share custody in light of their bitter disagreements and lack of cooperation. Additionally, the relationship between the parents has remained bitter and acrimonious since the initial custody determination, with the noncustodial parent now contesting the custody order and asking for a modification. Neither parent is requesting joint custody at this time, either. Since the parties clearly have not shown an ability to cooperate regarding custody, the

court does not have evidence that joint physical and legal custody would be in the best interests of the daughter and joint custody should not be awarded.

ANSWER TO MEE 5

1. The issue is whether there are facts legally sufficient to authorize the trial court to consider whether to modify the existing custody order that grants Harvey sole physical and legal custody and Wanda liberal visitation rights

Generally, the court that issues the custody order has continuing and exclusive jurisdiction to modify a custody order (Uniform Child Custody Jurisdiction and Enforcement Act, UCCJEA). To modify a child custody order, there must be a showing of a substantial, material and continuing change of circumstances, affecting the best interests and needs of the child, or the parent's ability to care for the child. Courts usually prefer not to disturb custody orders until one year has passed, since it would otherwise encourage of flock of litigation in the courts with parents and others immediately seeking to modify the custody orders. Therefore, often, the length of time since when the custody order has been is also considered, although not dispositive. Further, courts generally do not view "non-marital cohabitation" by the custodial parent as a substantial change affecting the best interests of the child, unless such a change threatens harm to the child.

Wanda and Harvey were married for 15 years, until Harvey cheated on Wanda, and Wanda sought a divorce. In the divorce proceedings, both sought sole custody, both are very bitter towards the other. The custody order eventually granted Harvey sole physical and legal custody and Wanda liberal visitation rights. When another woman, Patrice, moved into Harvey's home, Wanda immediately petitioned for a modification of the custody order.

Since the trial court was the court that issued the custody order, it has continuing and exclusive jurisdiction to modify the order. However, the facts are likely not legally sufficient to show that there is a substantial, material and continuing change of circumstances, affecting the best interests and needs of the child, or the parent's ability to care for the child, that would justify a modification.

First, as stated, only two months have passed since the custody order was granted. This is an extremely short period of time and would almost immediately go against the ability to show that there has been a "continuing" change in the circumstances. Had even 5-6 months passed, Wanda might have been in a better position to argue, but the mere passage of two months bears against modifying the order, specifically in light of the fact that most

courts prefer to wait for about 1 year before making modifications. Second, Wanda argues that she seeks sole physical and legal custody of the daughter because of Harvey's non-marital cohabitation. As stated above, such arguments are usually unlikely to sway courts if they are the sole basis for seeking a modification of the order. Wanda has made no showing that the custody arrangement is not in the best interest of the daughter, or that there has been such a substantial and material change in the circumstances that the daughter's best interest is no longer served by Harvey having custody of the child. Lastly, she has also failed to show that any current living arrangement at Harvey's including the fact of the non-marital cohabitation, poses a risk or threat of harm to daughter. On the contrary, there has been no change in the daughter's behavior since Patrice moved in, and as testified by Harvey, the daughter and Patrice get along well.

Therefore, absent any showing of substantial, material, continuing change of circumstances, the court should not modify the custody order especially since it has just been 2 months after it was issued.

2. The issue is whether the trial court should modify the existing order and grant Harvey and Wanda joint physical and legal custody of their daughter.

When considering whether to grant custody, the trial court has a great deal of discretion, and may consider several factors including (1) wishes of the parents (2) preferences of the child (if the child is under 8 years, not much weight is given but if the child is above 12 years, a great deal of weight is given) (3) relationships of the child with siblings, parents, others in parents lives etc. (4) adjustment to home, school, community etc. and so on. However, when considering *joint* custody, the court must consider other additional factors such as (1) whether the parents agree to share custody (2) whether the parents are friendly and amicable (3) geographic proximity of their homes (3) whether they are capable of acting and making decisions together and so on. Usually, when the parents are bitter and acrimonious, joint custody is not granted. Overall, the trial judge is guided by the best interest of the child standard in determining custody matters.

Here, all factors lean towards not granting joint custody- Harvey and Wanda bitterly argued and were highly critical of each other's parenting and they remained bitter and acrimonious. Further, these factors may have a negative implication on the daughter's developmental and emotional growth and she will constantly be placed in the middle of her two fighting parents. This may have a strong negative impact on the daughter's well-being and it would not be in her best interests. Moreover, the neutral child custody evaluator found that both parents refused to share custody. Given their animosity, acrimony and criticisms, they would likely not be able to come up with a conducive co-parenting style that would be in the daughter's best interest.

Therefore, the trial court likely should not modify the order to grant both Harvey and Wanda joint custody given their bitterness and acrimony.

ANSWER TO MEE 6

1. Was the man required to include in his initial disclosures information about the insurance policy and the identity of the three other witnesses to the accident?

The issue is whether the insurance policy and witnesses are required under initial disclosures. Under Federal Rules of Civil Procedure 26(f) a party must make initial disclosures which are mandatory. This must include the names and addresses of any person who has any information relating to a claim or defense that a party knows about, the names and address of any experts that a party might call for a claim or defense, the fact that a party has insurance and the information surrounding the insurance coverage. A party does not have to disclose damaging evidence that it knows if it is not using that evidence for its claims or defenses. It must, however, disclose that information if it is later asked in a more specific discovery request, like an interrogatory. Work product is not discoverable, work product is product that was created in anticipation of litigation, the actual product is not discoverable, but the information inside the product is discoverable.

Here, the facts state that the man's attorney investigated the accident and spoke with the bystander, the two friends in the car and the man's brother. The bystander and the two friends gave statements that would hurt the man, that he was looking at his phone at the time of the accident or that he was trying to read direction on a map. The man's brother on the other hand stated that the man had not been looking at his phone. The only evidence that a reasonable attorney would use out of these interviews is the man's brother's testimony, because this goes to the defense of the man, that he was not negligently looking at his phone when the accident occurred. The other three statements are bad for the man, and the attorney would not use them for a claim or defense. Since initial disclosures only require evidence that a party will use in claims or defenses, the man's attorney was correct in not disclosing the bystander and the two friends.

However, the man's attorney was incorrect for not including the insurance policy in the initial disclosure. The reason insurance policies are disclosed initially is so that parties understand where possible money remedies are coming from. This case is about a car accident, the man hit the woman's car. An insurance policy that covered $1,000,000 for personal injuries and property damages is relevant as cars were destroyed and the woman was hurt. This is the type of insurance policy that is required by initial disclosures to it is understood by the plaintiff what insurance company might be involved in the litigation. Therefore, the man was required to disclosure information about the insurance policy in the initial disclosure.

2. Did the trial court rule correctly on the woman's attorney's motion to compel the man to answer deposition questions about his eyesight?

The issue is whether the man's eyesight was relevant to the lawsuit between the woman and the man over a car accident. Information is discoverable if it is relevant, proportional to the case, and not protected by a privilege or work product. Relevance is defined as having any tenancy to make a fact at consequence any more or less probable. When in a deposition, a party's attorney can object to deposition testimony if it is not relevant or if it is protected by privilege. If it is not protected by a privilege, a party must answer the question, and then later in court an attorney can move to strike that information from the deposition as not relevant. A motion to compel is a motion that requires a party to answer a discovery request. Again, all evidence that is relevant, proportional to the case, and not protected is discoverable.

This lawsuit is by a woman who was in her SUV when it was hit by a car driven by a man. Driving requires you to have eyesight, and in every state, it requires you to have a certain type of eyesight as people with significant impairments are not allowed to drive. Additionally, some states require that individuals with poor eyesight are required to wear glasses or contact lenses while driving. During the deposition of the man, the woman's attorney asked about the man's eyesight. While the attorney claimed that it is not relevant, this is not true. The man's eyesight has a tenancy to make a fact at consequence, whether he could properly see while driving, more or less probable. Therefore, it is relevant. The court erred by ruling that "questions about the man's health and physical condition are irrelevant to this tort suit" for the same reason. The woman's attorney was not broadly asking about the man's health, instead his eyesight goes towards his ability to drive, and this is a lawsuit about the man hitting the woman's car with his car while he was driving. It is relevant if the man had poor eyesight or was required to drive with glasses as it would go towards the negligence action against him, as it would have been negligent for him to be driving with poor eyesight or no glasses. Therefore, the trial court ruled incorrectly on the woman's attorney's motion to compel the man to answer deposition questions about his eyesight.

3. How should a court rule on the woman's motion for judgement as a matter of law?

The issue is whether the court should rule in favor or against the woman's motion for judgement as a matter of law when there is conflicting eye-witness testimony. A motion for judgement as a matter of law can occur after the opposing party has had the opportunity to present their case. The motion requires that the judge determines whether no reasonable jury could find for the non-moving party as a matter of law. The judge takes the evidence in light in favor of the non-moving party.

Here, the facts state that at trial the woman called the man's two best friends and the bystander to state that the man was looking at his cellphone at the time of the accident. The bystander was outside the car and the two friends were in the backseat. The man called his brother, who was in the front seat, to testify that the man had not been looking at his cell phone when the accident occurred. The woman properly moved for judgement as a matter of law, as she moved after the man rested his case. If the court looks at the evidence in light of the non-moving party, the man, it should deny the motion. That is because the testimony of the woman's three witnesses were from individuals who were not in close proximity to the driver. The bystander was outside the car, and a jury could find that at that distance it is impossible to see what was going on in the car. The two friends were also in the backseat, and they also were some distance from the man. The man's brother, was the only one in the front seat, and therefore the closest to seeing what the man was doing. A jury could find that the two witnesses by the woman did not have good enough views and instead believe the brother, who was in the front seat. Since the standard is that no reasonable jury could find for the non-moving party, it must be denied, because a reasonable jury could draw these inferences and find that the brother's testimony is more credible. If they find the brother's testimony more credible, they will likely not rule that the man was negligent. The fact that the man did not offer any evidence against the woman's injuries does not matter, as he would not be liable if he was not negligent. Therefore, the court should rule against the woman's motion for judgement as a matter of law.

ANSWER TO MEE 6

Initial Disclosures: Information about Insurance Policy and Identity of Witnesses

The issue is whether the man's failure to disclose the identity of 3 witnesses and information about his insurance policy was proper.

Under the Federal Rules of Civil Procedure 26, a party is required to make certain initial disclosures at the beginning of a lawsuit. These initial disclosures are mandatory and must be provided even if the other party has not requested them. Such disclosures include information about a party's insurance policy as well as the identity of all witnesses who may contain information that the witness will use in support of the witness's claims, assertions, or defenses.

Here, the man did not produce information about his insurance policy. Because this is a required disclosure, he violated FRCP Rule 26 by failing to do so. As to the identity of the

3 other witnesses (aside from the man's brother), the man did not violate FRCP Rule 26 by failing to include them in his disclosure. The three other witnesses, besides the man's brother, all stated that the man had been looking at his phone at the time of the accident. Such testimony is likely to negate the man's defenses to the accident--in other words, these witnesses will not be helpful to the man's claims, assertions, or defenses. Therefore, the man was not required to disclose the identity of these individuals. Instead, such information could be requested by a party during discovery, typically through interrogatories, where a party is required to disclose information even if it will not support the party's claims. Here, the woman later did request this information through an interrogatory, and she received the identity of the other three witnesses.

Motion to Compel: Deposition Questions

The issue is whether the questioning and objection at the deposition was proper, as well as whether inquiry into the man's eyesight was relevant. The trial court did not rule properly on the motion to compel the man to answer deposition questions about his eyesight. During a deposition, an attorney can object on several grounds, such as privilege or improper form of questioning. However, an attorney is not permitted to instruct a deponent not to answer unless the instruction is made on the grounds of privilege. Moreover, an attorney typically cannot abruptly end a deposition and must preserve any objections for the court to later rule on. Even if the attorney believes that the questioning is improper and inadmissible at trial, the attorney must wait and bring a motion in court to have those portions of the deposition struck.

As to relevance, what is relevant for discovery is much broader than what is relevant for admission at trial. Unlike the rules of evidence, discovery rules permit the discovery of any information that may support, negate, or relate in any manner to the case. Whether the information is relevant for trial and later admissible at trial must be litigated in advance of or at trial.

Here, the man was instructed not to answer the questions as to his eyesight because his attorney instructed him that the line of questioning was not relevant. When the woman continued to ask the man about his eyesight, the man's attorney abruptly ended the deposition. The instructions not to answer the question was improper for several reasons. First, it was not made on the grounds of privilege, it was only made on the grounds of relevance. Second, the information is relevant because it could speak to whether the man perceived the events correctly (i.e., it could be used for impeachment purposes on the grounds of capacity), was able to see the road and the woman's car, and whether he was capable of driving without glasses/contact lenses. This could also speak to the care that the man took in a tort action because if the man's eyesight was poor and he knew that his eyesight was poor, then he should not have been driving without glasses because a reasonable person would not drive if they cannot see properly.

Thus, the judge did not rule properly in denying the motion to compel the man to answer the deposition questions. As explained, questions about the man's health and physical condition may be relevant to the tort suit as they could speak to capacity, is information he could be impeached with, and it may be relevant for purposes of negligence as he may not have been exercising due care if he was driving without glasses when he couldn't see properly. Moreover, the inquiry was not improper because the grounds of what is allowed at discovery is broad.

It is worth noting, however, that the judge's decision may have been proper had the attorney been unduly harassing the deponent. Here, although the woman persisted in asking her question, there is no indication that the attorney's conduct arises to the level of harassment.

Motion for Judgment as a Matter of Law

The issue is whether a reasonable jury could find for the nonmoving party. A party can move for a motion for judgment as a matter of law after the opposing party has had an opportunity to present their evidence. The moving party will be granted a motion for judgment as a matter of law if they can demonstrate that no reasonable jury would find for the nonmoving party. The court must view the evidence in a light most favorable to the nonmoving party.

Here, the court should reject the woman's motion for judgment as a matter of law. It is true that the woman presented more evidence than the man. First, she called three witnesses each of whom testified that the man had been looking at his cell phone at the time of the accident. Second, she called her treating physician who described the nature and extent of her injuries. On the other hand, the man only called his brother, who testified that the man had not been looking at his phone when the accident occurred. Even though the woman has more evidence, it is improper for the court to grant judgment as a matter of law because a reasonable jury may find that the man's brother’s testimony is more compelling and credible than the woman's testimony, and it would be reasonable for the jury to make such a finding. This is especially true since the man's brother was seated in the front seat, where he likely had a better view of what the man was doing. On the other hand, the woman's witnesses were seated in the back or were outside the car. Nor does the physician's testimony support judgment as a matter of law because the physician only speaks to damages, not causation or negligence, all of which must be shown for judgment as a matter of law to be proper. Where there are disputing stories and the verdict comes down to the credibility of each witness, it is improper to grant judgment as a matter of law. Had the man presented no evidence at all, there may have been grounds for judgment as a matter of law. However, because the man has presented evidence from which a reasonable jury could have found that he was not looking at his phone and therefore was not negligent, the court should deny the motion for judgment as a matter of law.

ANSWER TO MPT 1

MEMORANDUM

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

This is a memorandum of law that addresses Ms. Girard's notice to vacate or cure her apartment at 7700 Riverside Drive, Franklin City, Franklin 33725, Apartment 12. The key issue is whether either her failure to pay rent or violating the no-pets clause of her lease constitutes a material breach and therefore just cause under the Franklin Tenant Protection Act §§500-01 (FTPA). Although both are likely material breaches, she likely has a right to keep her pet cat Zoey as an assistance animal under Franklin Fair Housing Act §§ 755-56. Ms. Girard should provide documentation to Hamilton Place and as long as Hamilton Place cannot provide an indication of immediate health or safety risks, she will be able to keep Zoey. If they allow her to keep Zoey, she should immediately tender her outstanding rent and late fee of $200.

I. Hamilton Place has sufficient grounds to evict Ms. Girard based on her failure to pay rent but cannot evict her solely on the basis of her use of an assistance animal.

The issue here is whether 1) withholding 10% of her rent or 2) violating the no-pets clause constitutes just cause for eviction.

Under FTPA 500, once a tenant has continuously and lawfully occupied a residential real property for 12 months, the owner cannot terminate the lease without 1) just cause; 2) providing the tenant notice and opportunity to cure. Here, Ms. Girard has occupied her apartment since January 2023, satisfying the 12 month residency requirement. Further, her apartment is clearly "residential real property" as it is intended for human habitation. Finally, she is a tenant as she has lawfully occupied her residential real property for 30 days or more pursuant to her lease.

Therefore, the question will be whether the landlord has "just cause" to terminate her tenancy. Under FTPA 501(a), just cause includes 1) material breach of the lease; 2) maintaining or committing a nuisance. Here, Hamilton Place has brought an action for breaching two lease provisions: 1[2, which requires rent to be paid in full by the 3rd day; and 1[15, which prohibits pets from being kept without the landlord's consent. Note that the landlord has satisfied FTPA 501(b)'s requirement for notice and opportunity to cure by sending Ms. Girard the Three-Day Notice to Cure or Quit on July 29, 2024.

Before addressing the materiality of Ms. Girard's actions, note that although her lease has a "DEFAULT" clause, that conditions her occupancy on full compliance with the terms of her lease, such "forfeiture" clauses are unenforceable under FTPA 501(g). *Westfield v. Delgado, Kilburn.*

A. Failure to pay rent likely constitutes material breach.

A lease may be terminated only for material breach, not for a mere technical or trivial violation. *Kilburn.* Not every breach is material. */d.* To be material, the breach must go to "the root or essence of the agreement between the parties" such that "defeats essential purpose of the contract or makes it impossible for the other party to perform under the contract." */d.* This requirement applies regardless of the terms of the lease, and cannot be waived. /d., FTPA 501(g), *Westfield.* A *de minimis* failure to pay rent is not material breach. *Vista Homes v. Darwish.* Further, increases in rent above 10% during any 12-month period are impermissible under FTPA 505(a).

Here, Hamilton Place has increased Ms. Girard's rent by exactly 10%, from $1500 a month to $1650 per month. This is the first rent increase since Ms. Girard began living at her current apartment in January 2023, more than 12 months ago. Ms. Girard has tendered the original rent, $1500. Therefore, Hamilton Place is in compliance with FTPA 505(a) and the rent increase will be valid.

The issue will be whether a failure to pay 10% of the rent constitutes a material breach or is a *de minimis* failure under *Vista Homes.* In *Vista Homes,* the court found that the tenant's failure to pay $10 of $1000 rent (only 1%) was not a material breach and did not constitute grounds for eviction. Here, however, Ms. Girard has failed to pay 10%, or $150, significantly more than the $10 at stake in *Vista Homes.* Therefore, her failure is not *de minimis* and likely constitutes a material breach, since rent is an essential purpose of the lease and gets to the "root" or "essence" of the agreement between Ms. Girard and Hamilton Place.

In *Westfield,* the Court of Appeals considered further factors in determining materiality of breach. There, a tenant faced eviction for failing to purchase insurance in violation of their lease. The court stated that nonmonetary covenants for the Tenant's benefit are less likely to be material breaches. Further, the court looked to the landlord's opportunity to detect the breach and failure to do so as an additional factor weighing against materiality, akin to the equitable doctrine of laches. Applying these factors to the present context, Ms. Girard is likely in material breach. The requirement to pay rent is a monetary covenant for the landlord's benefit, and Hamilton Place has waited less than a month to notify Ms. Girard of her failure to pay unlike the two years that the landlord failed to notify the tenant in *Westfield.*

Further, *Westfield* considers public policy factors in determining materiality; specifically, the FTPA's purpose to protect tenants from excessive rent increases, remedying the unequal bargaining power in landlord-tenant negotiations *(Stark),* provide stable affordable housing to residents, and preventing pretextual evictions. The other factors are the traditional concepts of free markets and freedom to contract. *Westfield.* Here, these factors will not be sufficient to protect Ms. Girard. The FTPA explicitly allows rent increases of up to 10% in any 12 month period. Further, there is no evidence that the eviction is pretextual or that any excessive imbalance in bargaining power is at play, at least as far as failure to pay rent. Therefore, public policy will favor finding a material breach for the traditional reasons of freedom to contract and free markets.

B. Violation of the no-pets clause is a material breach, but Ms. Girard will be protected by the Franklin Fair Housing Act.

Violation of a no-pets clause is a material breach of a lease. *Sunset Apts. v. Byron.* However, under FFHA 756, tenants have a right to have "assistance animals" in all dwellings, subject to limited restrictions. An assistance animal is a service or support animal that provides emotional, cognitive, physical, or similar support that alleviates an identified symptom or effect of a disability. FFHA 755(o). A support animal is an animal that provides such support, and does not need to be trained or certified. 755(n). Finally, "disability" is a broad term that includes "any mental or psychological disorder or condition that limits a major life activity" such as anxiety, PTSD, or clinical depression.

Here, Ms. Girard's lease includes an explicit no-pets clause that requires landlord consent. Hamilton Place found out about Zoey about two weeks ago, when the on-site property manager ran into Ms. Girard with Zoey in the cat travel carrier. There is no indication that Hamilton Place has consented, since Hamilton Place has notified Ms. Girard that they consider her in breach, and Ms. Girard is in material breach. *Sunset Apts.*

The question will be whether 1) Ms. Girard has a disability under FFHA 755; 2) whether Zoey is a support/assistance animal; 3) whether any of the restrictions in FFHA 756(c) apply. Note again that although Ms. Girard's lease prohibits pets, such a clause will not be enforced unless it complies with FFHA 755-56 for public policy reasons. Just like the forfeiture clause in *Westfield,* which the court refused to enforce for public policy reasons, the no-pets clause cannot be enforced in violation of FFHA 755-56 due to the extensive power imbalance between a landlord and tenant, especially a tenant suffering from a disability. This requires the court to disregard traditional notions of freedom to contract and to disregard any clauses that violate FFHA ?55-56's provision of accommodations for tenants with disabilities.

Here, Ms. Girard has a disability under FHA 755(c) --specifically, a mental disability of anxiety. Ms. Cohen has provided a letter certifying that Ms. Girard has a disability of anxiety that meets the requirements of FFHA. Such a letter is sufficient information under

FFHA 756(b), which allows reliable third-parties such as medical professionals or health-care providers to certify the presence of a disability or the need for an accommodation. Here, although Ms. Cohen is not a doctor or a nurse, she is a therapist, and is not an online provider that cannot provide individualized assessment. Further, Ms. Girard is taking anxiety medication and experiences panic attacks. Therefore, Ms. Girard has a mental disability and is entitled to a support animal who alleviates identified symptoms of her anxiety.

The kitten Zoey has done exactly that. Ms. Girard has experienced a dramatic improvement of her overall mental well-being after adopting Zoey, and has fewer panic attacks and feels less overwhelmed. Petting Zoey makes Ms. Girard feel like she can handle anything. Ms. Cohen's letter indicates the same: Zoey helps alleviate Ms. Girard's symptoms of anxiety.

Therefore, Zoey is an assistance animal under FFHA 755(o) and the only limitations the landlord can impose are listed by FFHA 756(c): specifically, that only reasonable conditions may be imposed on the use of an assistance animal, and that an assistance animal can be excluded if there is a risk of direct threat to the health or safety of others. Here, there is no indication that Zoey poses any direct threat to the health or safety of others. She is a small kitten, and Ms. Girard appears to be ensuring that she is safe and well.

As such, Hamilton Place cannot enforce it's no-pets clause against Ms. Girard for owning Zoey at her apartment. The only limitations that Hamilton Place can enforce as "reasonable conditions" under 756(c). However, if Hamilton Place can show that someone's health or safety in the apartment complex is at direct risk (i.e. has a very strong cat allergy), they will be able to enforce the clause against Ms. Girard and evict her for having Zoey in her apartment.

II. Ms. Girard's next steps to avoid an eviction action.

Here, Ms. Girard should take several actions to remedy her material breach and prevent an eviction action. She does not need to vacate the premises, however, and does not need to look for another apartment at this time.

The notice from her landlord grants her three days to cure her breach. Since the notice was provided on July 29, she has until August 1, and should move as quickly as possible.

1. Ms. Girard should notify Hamilton Place about her letter from Ms. Cohen, ideally by providing a copy of the letter to the property manager or to an agent of Hamilton Place.

2. Ms. Girard should get in touch with the doctor who prescribes her anxiety medication and attempt to get another note certifying that Zoey is a support animal under FFHA and that Ms. Girard has a mental disability of anxiety under the same.

3. Ms. Girard should then inquire from Hamilton Place whether there is any risk of health or safety posed by Zoey to others in 7700 Riverside Drive.

4. If there is no risk of health or safety, Ms. Girard should tender the additional rent she owes ($150) and the late fee ($50) by cashier's check or money order ($200 total). The 10% increase is allowed under law, and there is no indication that Hamilton Place cannot increase her rent by $150.

5. Ms. Girard should NOT tender any additional pet deposit or additional monthly charge for having her pet, because such charges are in violation of FFHA 756(c)(i).

If Hamilton Place does indicate there is a valid health or safety risk from Zoey, Ms. Girard should get in touch with our office. Unfortunately, if they can present a valid health or safety risk, she may need to move out of her apartment in order to keep Zoey.

ANSWER TO MPT 1

MEMORANDUM

To: Hannah Timaku
From: Examinee
Date: July 30, 2024
Re: Laurel Girard matter

You have asked me to prepare a memorandum assessing a landlord-tenant dispute between our client Laurel Girard (G) and her landlord Hamilton Place LLC (H). G's failure to pay a portion of the rent owed constitutes a material breach of her lease and is a valid basis for termination of the tenancy. Thus, she should promptly pay the $150 owed, along with the $50 late fee, prior to expiration of the three-day notice period. However, her ownership of a cat, Zoey, constitutes valid ownership of an assistance animal that is protected under the Franklin Fair Housing Act (FFHA). Thus, she is entitled to keep the cat, subject to reasonable conditions, but not subject to any additional deposit or rent payment. A full explanation of these recommendations follows below.

1. Are the alleged violations in the Notice valid bases for termination of Girard's (G's) tenancy?

1. a) Standard to terminate a /ease

According to s. 500 of the Franklin Tenant Protection Act (FTPA), where a tenant has been living in a rental unit for more than 12 months, the landlord can only terminate the lease for "just cause". "Just cause" includes "material breach of a term of the lease" (FTPA s. 501(a)). A mere technical or trivial violation is insufficient to terminate a lease (Kilburn v Mackenzie, Fr Sup Ct 2003; as cited in Westfield Apartments LLC v Delgado, Franklin Court of Appeal, 2021). A material breach must "go to the root" or the "essence" of the agreement between the parties, such that it defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract (Kilburn).

Even if a lease agreement contains a clause purporting to dispense with the materiality limitation, the limitation still applies (Westfield). The tenant protections of the FTPA cannot be waived (FTPA s. 501(g)).

Thus, the alleged violations by G will only be valid bases for termination of the lease by H if they were material breaches of the lease terms.

1. b) Failure to pay a portion of the rent

Payment of the rent is one of the tenant's essential obligations (Vista Homes v Darwish, Fr Ct App 2005, as cited in Westfield). Failure to pay is a legal cause for dissolving the lease (Vista Homes). However, in *Vista* Homes, failure to pay a portion of the rent was found to be *de minimis* and thus not a material breach because only 1% of the amount owed was not paid.

However, in the present case, G failed to pay $150, which amounts to 10% of the total amount owed. While 1% was found *de minimis* in Vista Homes, it is less likely that 10% will be found to be *de minimis.* The payment of rent "goes to the root" of a lease agreement. If the renter fails to pay, this affects the essential purpose of the contract for the landlord (to earn income in exchange for providing housing).

Moreover, the increase in rent was valid under the lease. According to clause 3 of the Residential Lease Agreement, the landlord has the ability to raise the rent no sooner than 12 months after the lease commenced. G moved into the apartment in January 2023. She had been living there for a year and a half. The rent was increased beginning July 2024.

Lastly, according to FTPA s. 505(a), a landlord shall not increase rent more than 10 percent within any 12-month period. This provision can be interpreted as stating that an

increase up to 10 percent is presumptively valid. G's rent was increased by exactly 10% once during her 18-month tenancy. For all the above reasons, a court will find the increase to be valid.

G may pursue a public policy argument to justify her non-payment of the rent increase. The FTPA seeks to safeguard tenants from excessive rent increases (Fr Civil Codes. 505(a)). While freedom to contract is important in Franklin (Westfield), free-market principles do not apply to residential leases due to the unequal bargaining power between landlord and tenant resulting from the scarcity of housing (Stark v Atlas Leasing, Ft Ct App 2003, as cited in Westfield). The FTPA has as a public policy goal the provision of stable, affordable housing.

It is unlikely that this public policy argument would succeed in G's case. Firstly, the rent increase was likely not "excessive" - a 10% increase after 18 months of the lease had passed will probably be seen to be in-line with standard market increases due to inflation and market forces. Furthermore, G was provided with 1 months' notice, and the potential for rent increases was identified and agreed to in the lease. Moreover, there is no evidence that G suffers from a substantial lack of bargaining or economic power in this situation. She said that she failed to pay because she "felt it was unfair". She also stated that she will move out if she has to. These factors make G less likely to succeed on a public policy argument.

Thus, it is very likely that the court will find that the failure to pay the $150 was a material breach of the lease, and that public policy reasons do not prevent a finding that termination of the lease is justified in this instance. G is legally required to pay the full rent, including the increase as of July 2024.

1. c) Violation of the no-pet clause

According to s. 756 of the Franklin Fair Housing Act (FFHA), tenants are permitted to have assistance animals in all dwellings. An assistance animal provides emotional, cognitive, physical, or similar support that alleviates one or more symptoms of a disability (FFHA s. 755(o)). A disability includes a mental disability, which includes having any mental or psychological disorder or condition that limits a major life activity (FFHA s. 755 (C)(i)). An example of such a mental disability is anxiety. Information confirming that the individual has a disability may be provided by any reliable third party who is in a position to know about the disability, or the disability-related need for the requested accommodation or modification, including a health-care provider (FFHA s. 756(b)). Lastly, as stated above, the tenant protections of the FTPA cannot be waived (FTPA s. 501(g)).

Here, G's violation of the no-pet clause is not a valid basis for termination of the lease. Firstly, because the protections of the FTPA cannot be waived in a lease agreement, G is

entitled to have an assistance animal in her rental unit as long as she has a disability. This is regardless of the "no-pet" clause in clause 15 of the Residential Lease Agreement.

Next, G has a disability. She suffers from anxiety, which is explicitly listed as a mental disability under the FFHA, and suffers from panic attacks and feeling overwhelmed. These symptoms constitute a condition that limits her major life activities. G's cat qualifies as an assistance animal because the cat provides G with emotional support that improves her symptoms: since getting Zoey, G has seen a dramatic improvement in her mental well- being, has had fewer panic attacks, and feels a lot less overwhelmed and more relaxed. H may argue that Zoey is not an assistance animal because she is not essential to G's healthcare- G takes medication, and initially did not get a cat because she was working long unpredictable hours, thus having a cat is not essential. However, this argument would fail. There is nothing in the FFHA requiring that the assistance animal be essential to the individual with the disability. Moreover, there is no requirement that an animal only be allowed if the disability-sufferer does not take medication or receive other health treatments. Lastly, even if there was a requirement that an assistance animal be "necessary", Sarah Cohen has stated that Zoey is in fact necessary for G's health.

Information confirming G's disability has been provided in a letter by Sarah Cohen. Cohen is a reliable third party because she is a licensed professional counselor. She knows about G's disability because G is a patient under her care, and Cohen has been providing therapy to G for four years. Cohen has attested that G's emotional difficulties constitute a disability under the FFHA and that Zoey helps relieve G's disability.

Thus, because all of the statutory requirements are met regarding G's disability and her possession of an assistance animal, and because of the invalidity of the "no-pet clause" as a violation of the FFHA, G's possession of Zoey is not a valid ground for termination of the lease.

In *Sunset Apartments v Byron* (Ft Ct App 2010), it was found that harboring a pet when a lease contained a "no-pet clause" constituted a material breach of the lease. However, the present case can be distinguished because Zoey is not merely a pet; she is an assistance animal, and thus protected by the FFHA.

According to clause 20 of the Residential Lease Agreement, the tenant's failure to comply with any term of the lease is a ground for termination. But because the "no-pet clause" violates the FFHA, non-compliance with this provision will not be a valid ground for termination.

2. What steps should we advise G to take?

2. a) Failure to pay a portion of the rent

Because the failure to pay the rent is a material breach, we should advise G to pay the $150 in rent owed, along with the $50 late fee outlined in the Three-Day Notice to Cure or Quit. The late fee is valid as it was agreed to in clause 10 of the Residential Lease Agreement. She should pay by cashier's check or money order as outlined in the Residential Lease Agreement and the Three-Day Notice.

2. b) Violation of the no-pet clause

Because keeping Zoey is not a valid grounds for termination, we should advise G that she may keep her cat.

Clause 15 of the Residential Lease Agreement is invalid to the extent that it requires the payment of a pet deposit and additional monthly rent. This is because these provisions violate FFHA s. 756(c)(i), which states that individuals with assistance animals are not required to pay any additional rent or security deposit in connection with an assistance animal.

However, individuals with assistance animals may be required to cover the costs of repairs for damage the animal causes to the premises, excluding ordinary wear and tear (FFHA s. 756(c)(ii)). We should advise G of this so that she is aware. We should also inform her that under ss. 756(c)(iv) and (v) of the FFHA, reasonable conditions may be imposed on her ownership of Zoey, and that H has a right to prohibit pet ownership if an animal constitutes a direct threat to the health or safety of others, or of substantial property damage. There is no evidence that Zoey poses any direct threat (I assume she is an ordinary house-cat), thus this should not pose any issues for our client.

ANSWER TO MPT 2

MEMORANDUM

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

The following memorandum addresses (1) Sidecar Design's liability under the Computer Fraud and Abuse Act (CFAA) and (2) assuming Sidecar Design is liable under the CFAA, what damages, if any, CDI can recover under the CFAA.

I. Sidecar Design's Liability under the CFAA

The CFAA "cover[s] information from any computer 'used in or affecting interstate or foreign commerce or communication,'" which is now understood to uniformly apply to any computer connected to the internet. HomeFresh LLC v. Amity (citing 18 U.S.C. Section 1030(e)(2)(B); Van Burden v US, 141 S.Ct. 1648, 1652 (2021)). The act imposes criminal and civil penalties against violators. 18 USC section 1030(g). In order to maintain a civil action under the CFAA, a plaintiff must show that the "defendant accessed a computer either 'without authorization' or in a way that 'exceeds authorized access.'" 18 USC Section 1030(a)(2), 1030 (a)(4).

According to the Supreme Court in *Van Buren,* an individual only "exceeds authorized access" when a person accesses data that the person does not have the technical rights to access. The court in *Van Buren* expressed that "an individual 'exceeds authorized access' when he accesses a computer with authorization but then obtains information located in particular areas of a computer- such as files, folders, or databases- that are off limits to him."

In *Van Buren,* a police officer was charged under the CFAA when he used his work credentials and login credentials to search the police database for a woman's licenses plate in exchange for payment by a third party. Through his work credentials, the police officer could reach the department database and his login credentials gave him access to the plate information, thus no technical barrier existed to accessing the information. The only barrier in place was a departmental policy barring him from using such data for any non-law enforcement purpose. Therefore, even though *Van Buren* violated department policies by accessing the license plate for an impermissible purpose, he did not violate the CFAA because he had a computer and login credentials that gave him access to the plate data. Similarly, in *HomeFresh,* the company permitted Flynn to use the computer and gave him login credentials with access to all of the customer data in question, meaning that there was not CFAA violation through his actions.

However, despite a circuit split, the court in *HomeFresh* held that "once an employee leaves a job, the employee no longer has the legal right to use the employer's computers or to use the passwords or login credentials that allow the employee access to those computers" and "an employee who does so may be held liable under the CFAA." The court then reasoned that any access after Flynn left HomeFresh did violate the CFAA because his right to use HomeFresh's computers ended when his employment with HomeFresh ended. HomeFresh LLC v Amity.

Moreover, based on the aforementioned law and as analyzed below, Sidecar is likely liable under the CFAA for Smith's actions on July 5, 2024, but not for Smith's actions on June 28, 2024.

A. Smith's June 28, 2024 charge for $25,000

Here, although Smith, a Sidecar employee, certainly violated an internal policy because CDI repeatedly insisted that Sidecar employees not use any of CDI's customer data once it was entered, it is unlikely going to be considered a violation of the CFAA. Like the officer in Van Buren whose login credentials allowed him to access the license plate data, Smith's sidecar login credentials gave him access to reach and even alter customer data and allowed anyone with a password to charge a customer's account without the customers knowledge. Even more similarly, the credentials Smith had given him access to CDI customer data, much like Flynn in HomeFresh had access to and used information about a contract within HomeFresh's data.

Despite Smith's breach being against company policy, as expressed in *Van Buren,* an individual only "exceeds authorized access" when a person accesses data that the person does not have the technical rights to access. Here, Smith had access to charge customer accounts and no technical barriers inhibited his ability to do so.

Therefore, the July 28, 2024 charge of $25,000 is likely not a violation of the CFAA, despite it being against public policy.

B. July 5, 2024 charge of $50,000

On the other hand, the July 5, 2024 charge of the $50,000 was likely a violation of the CFAA. As mentioned *HomeFresh* "once an employee leaves a job, the employee no longer has the legal right to use the employer's computers or to use the passwords or login credentials that allow the employee access to those computers" and "an employee who does so may be held liable under the CFAA." Here, on July 2, 2024 SideCar completed the contractual relationship with CDI and CDI instructed Sidecar to change the passwords. Sidecar is likely liable to CDI because similar to Flynn in HomeFresh, Smith's right to use CDI passwords ended when CDI's contract with Sidecar ended. Despite CDI not changing the password themselves, the end of the contract signifies the end of the

relationship in which Smith was no longer permitted to use the CDI credentials. Therefore, Sidecar is likely liable for Smith's use of the passcodes after the July 2 contract termination.

II. Assuming Sidecar Design is liable under the CFAA, what damages, if any, CDI can recover under the CFAA.

Assuming liability, CDI will likely be able to recover $5,500 for the cost of investigating and correcting the data breach.

A. Damages for Cost of Investigation and Remedy

The CFAA permits recovery of "losses" only if the claimant's losses exceed a threshold amount of $5,000 during any one-period. 18 USC 1030(g). Losses under the CFAA include "the cost of responding to an offense, conducting a damage assessment, and restoring data, program, system, or information to its condition prior to the offense." Slalom Supply v Bonilla (15th Cir. 2023) (quoting 18 USC 1030(e)(11)).

Money spent upgrading a security system does not met the statutory requirement that costs relate to "restoring the ... system ... to its condition prior to the offense." *See Bonilla* (holding that the $1,500 spent to upgrade the security system does not meet this statutory requirement, reasoning the statute's plain language "suggests that a victim of hacking cannot use the violation as a means of improving its own security or system capability.") However, a victim can recover the amount paid to a cyber security firm and the amount paid to its own employees to assist the cyber security firm during the investigation because nothing in the statutory language requires that a hacking victim rely only on external help to remedy a breach. See Bonilla (holding that the statutory minimum of $5,000 was met because the $4,000 spend on a cyber security firm and the $1,500 spent to compensate employees for their help with the firm were permissible damages.)

Here, CDI spent $4,000 to hire a cybersecurity firm, spent $1,500 in overtime for its own employees to help with the security firm's investigation, and $500 to upgrade their security system. Like in Bonilla, CDI will not be able to recover the $500 to improve their security system, but they will be able to recover the $4,000 to hire the cyber security firm for investigation and the $1,500 spent on employee overtime.

B. Lost Business

The definition of compensable "loss" under the CFAA includes "any revenue lost, cost incurred, or other consequential damages incurred because of *interruption of* service." 18 USC 1030(e)(11). Case law supports a narrow reading of this provision and provides that "lost revenues and consequential damages qualify as losses only when the plaintiff experiences an interruption of service." Bonilla (quoting Selvage Pharm George); see

also, Next Corp v Adams (holding that $10 million revenue loss resulting from misappropriation of trade secrets was not a qualifying CFAA loss because it is not result from an interruption in service). Most cases based on lost revenue and consequential damages involve thins such as the deletion of critical files which cost the plaintiff a lucrative business opportunity (Ridley MFG v Chan) or an alteration of system-wide passwords (Marx Florals v. Teft).

Courts have awarded damages even where the interruption of services is only temporary, provided that the damages alleged can be tied to the temporary interruption in services. See Cyranos Inc v Lollard (affirming an award of damages related to the deactivation of a website for two days during a time of peak sales); but see Bonilla (holding that because the redirecting of two payments did not otherwise impair or damage the functionality of Slalom's computer system and because despite alleging there was a four-hour shut down, Slalom failed to tie the interruption of service to any losses, there could not be any damages for lost business.)

Here, CDI will likely not be able to recover the $125,000 for the loss of their contract because such contract was not terminated due to an interruption in services. Further, although the cyber security firm had them shut down their website for 5 days, similar to Bonilla, there was no evidence that such a temporary interruption in services was connected to any losses. Further, CDI will likely not be able to recover the $75,000 in restitution paid to the improperly billed customer because even though they had to refund the customer, this was not a loss that occurred because of the interruption of services.

C. Punitive Damages

The CFAA limits the recovery of damages in civil cases to "economic damages," and courts have consistently refused to include punitive damages within the definition of "economic damages" because "the plain language of the CFAA statute precludes an award of punitive damages." Bonilla (quoting Demidoff v. Park).

Thus, CDI will not be able to recover their requested $400,000 in punitive damages for a violation of the CFAA.

CONCLUSION

Because CDI had terminated the contract with Sidecar on July 2, 2024, Sidecar is likely liable for Smith's use of the passcodes on July 5, 2024, but not on June 28, 2024. Additionally, based on the CFAA's standards for civil damages, Sidecar will likely only be liable for $5,500 worth of damages to CDI based on the money they spent to hire the cybersecurity firm to handle the breach and on the overtime paid to employees.

<u>ANSWER TO MPT 2</u>

To: Damien Breen
From: Examinee
Date: July 30, 2024
Re: Sidecar Design Matter

I. Introduction

We have been hired by the manager of Sidecar Design LLC (Sidecar) Yolanda Davis (Davis) to provide legal advice relating to an alleged breach of the Computer Fraud and Abuse Act (CFAA) stemming from the actions of one of her employees (John Smith). Using credentials provided to him as part of his work building a payment system for CDI, John Smith (Smith) accessed client accounts and charged them fees that were diverted to his own personal bank account. Davis asks us to investigate (1) the extent of sidecar's liability to CDI as a result of Smith's actions and (2) if Sidecar were to be found liable, the extent of damages that it could be required to pay under the CFAA.

II. [Statement of Facts omitted]

Ill. Analysis

A. Sidecar Design's liability to CDI under CFAA

The CFAA applies to any computer that connects to the internet and provides a civil cause of action against those who violate its provisions (as well as potential criminal penalties) *(HomeFresh).* The CFAA can be breached in two ways relevant to the current dispute. Section 1030(a)(2) is breached whenever someone "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains ... information from any protected computer. Section 1030(a)(4) is breached whenever someone "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." In order to give rise to civil liability, therefore, both provisions require that the access to the computer exceed what was authorized *(HomeFresh)*

Exceeding authorized access is defined in the CFAA as accessing "a computer without authorization" and using "such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter" (1030(e)(6)). In *Van Buren,* the Supreme Court held that an individual does not exceed authorized access when they access data that the person has a technical right to access. An employee in possession of login credentials that give the employee the right to enter that area of the electronic system (or to access records contained in the system) has the technical right to access that system

and, therefore, cannot be civilly liable for violating the CFAA (see *Van Buren*- overturning the conviction under the CFAA of an employee who used his password to access a license plate database because use of the password meant that he had a right to access that system). Although *Van Buren* was a criminal case, courts have uniformly held that the CFAA should be interpreted consistently in both civil and criminal cases.

<u>1. Sidecar is not liable to CDI for Smith's actions prior to Sidecar's relationship with CDI ending because he had a technical right to access the system</u>

Sidecar is not liable to CDI for Smith's actions prior to the termination of its relationship with CDI because Smith had a technical right to access the system. In *HomeFresh* and *Van Buren,* the court held that parties who have valid password access cannot be liable under the CFAA. Although both of these cases evaluate technical access in the scope of an employment agreement, they can likely be expanded to encompass other contract related situations where an employee is given password access to work on a system. That is because the policy underpinning the two is the same. The CFAA is concerned with preventing hacking and unauthorized access, being given a password to access a system as part of one's work is not akin to hacking whether that password be provided by an employer or a third party for whom the person is performing work (HomeFresh).

Here, Smith was given a password to access CDI's customer accounts as part of his work building the payment system. This password specifically gave him access to the customer accounts, so it can't be argued that he exceeded the technical right to access the accounts when using the password. Although CDI insisted that Sidecar not use any of CDI's customer data, and Smith did so anyway, this is more akin to the kind of department policy violation found to not violate the CFAA in *HomeFresh* than the hacking the CFAA is concerned with. Because Sidecar was in a contractual relationship with CDI and Smith accessed the accounts using a password provided him under the contractual agreement, he cannot be held to have exceeded his authorized access. Therefore, his actions prior to the contractual relationship ending are clearly not a violation of the CFAA.

<u>2. Whether Sidecar is liable to CDI for Smith's actions after the business relationship ended will turn on which approach the court takes</u>

Sidecar will be liable to CDI for Smith's actions after the business relationship ended if the court applies the approach of *HomeFresh.* After *Van Buren,* it is an open question whether use of a password to access a system after the contractual relationship ended constitutes a violation of the CFAA *(HomeFresh).* This question depends on whether the CFAA turns only on technological limitations (such as password protection) or if it also looks to contractual limitations *(/d.).* If it turns on technological limitations only, access to a system using a password, even after the contractual relationship has terminated, will not violate the CFAA. If it looks to contractual limitations, using a password to access a system after the contractual relationship has ended will violate the CFAA. Although there

is a circuit split on this issue, the only Franklin decision to address it has held that an employee who leaves his job no longer has the right to use the passwords giving the former employee access to the former employee's system *(/d.).* This seems to evidence that Franklin courts look not just to technical limitations on access, but also look to contractual limitations in evaluating whether there has been a CFAA violation.

Here, Smith made an additional fraudulent billing after the relationship with CDI had terminated. Despite Sidecar's urging, however, CDI had not yet changed its password and, therefore, Smith was able to use his password access to make this fraudulent billing. Because the password was unchanged when he accessed the system, a court employing the technical limitations only approach would find that this did not breach the CFAA. If a court takes the contract approach, however, it would likely find that Smith's actions do violate the CFAA because the contractual relationship had terminated when he accessed the system. Because the only Franklin court to address the issue endorsed the contract approach, Smith's second act of fraudulent billing likely violates the CFAA because he accessed the system after the contractual relationship had terminated.

B. Damages that can be recovered if Sidecar is liable

1. The losses meet the threshold for bringing a civil CFAA claim

The losses reach the threshold for bringing a civil CFAA claim because, at the very least, they total $5,500. Although the CFAA allows for a civil remedy, such a remedy can only be pursued if the loss associated with the CFAA breach is at least $5,000 (1030(g)). These losses include 'the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense' *(Bonilla).* Although these costs don't include the amount spent upgrading a security system, they do apply to the cost of an investigation relating to a breach and the cost of compensating employees for their work in the investigation.

Here, CDI paid $1,500 in overtime to its employees to help with a security firm's investigation of the breach and was charged $4,000 by the security company. Although the $500 spent improving the system cannot be recovered the $5,500 related to the other investigation charges is more than the threshold amount. Therefore, a claim can be brought.

2. CDI cannot recover for the lost business or the restitution

CDI cannot recover for the restitution of the diverted payments or for lost payment because they did not result specifically from an interruption in service. The CFAA limits compensable losses to only those that result specifically from an interruption in service (Bonilla). These are things like the deletion of critical files or the alteration of system-

wide passwords (ld.). Merely experiencing an interruption in service is insufficient, the consequential damages must be a direct result of the interruption in service *(/d.)*.

Here, although there was an interruption in service the loss of business and restitution did not stem from the interruption. The loss of business was a direct result of the fraudulent charges, not of the subsequent interruption in service. And the restitution was a business decision similar to the one the court held not to give rise to consequential damages in Bonilla. Because the interruption in service occurred after the charges were incurred, they are not recoverable.

3. CDI cannot recover punitive damages

CDI cannot recover punitive damages because punitive damages are specifically prohibited under the CFAA. The CFAA allows only for economic damages, and courts have consistently held that punitive damages are not economic damages *(/d.)*. Because the CFAA prohibits awards of punitive damages, CDI cannot recover the $400,000 in punitive damages it requests.

4. Damages conclusion

Given the foregoing, CDI is entitled to recover $5,500 resulting from the security firm's investigation ($4,000) and the payment of employee overtime in connection with that investigation ($1,500).

IV. Conclusion

Sidecar is not liable to CDI for Smith's actions prior to the termination of its relationship with Col because Smith had a technical right to access the system. Sidecar will be liable to CDI for Smith's actions after the business relationship ended if the court applies the approach of *HomeFresh*. However, this will only entitle CDI to the $5500 rather than the full amount demanded.