IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CREATIVE MOVEMENT AND DANCE, INC.,	
Plaintiff,	**CIVIL ACTION FILE**
v.	**NO. 1:16-CV-3285-MHC**
PURE PERFORMANCE, LLC, LACE UP STUDIOS, LLC, and LACEY STERN, an individual,	
Defendants.	

ORDER

This case comes before the Court on Defendants Pure Performance, LLC, Lace Up Studios, LLC, and Lacey Stern's (collectively, "Defendants") Second Motion to Dismiss Counts III, VII, IX, X, and XI for Failure to State a Claim [Doc. 33], as well as Plaintiff Creative Movement and Dance, Inc.'s Motion to File Amended Complaint [Doc. 24], Motion for Sanctions for Spoliation of Evidence During Litigation and Failure to Comply with the Court's Order [Doc. 29], and Motion for Contempt [Doc. 30].

I. BACKGROUND

Plaintiff Creative Movement and Dance, Inc. ("CMD") is a Georgia-based company that provides dance classes in Georgia, Florida, and South Carolina. First Am. Compl. [Doc. 24-1] ¶¶ 1, 60.[1] According to the allegations in the First Amended Complaint, CMD utilizes a "unique system" that brings dance classes to clients at various locations—like child-care facilities, churches, parks, and elementary schools—rather than offering classes at a traditional dance studio. Id. ¶ 61. In operating this model, CMD enters into licensing agreements with dance instructors and entities, pursuant to which licensees may utilize CMD's business model and licensed marks (including certain trade names, trademarks, service marks, logos, and symbols that CMD owns) in exchange for ten percent of their monthly revenues. Id. ¶¶ 62-64.

On or about May 9, 2011, CMD granted Defendant Pure Performance, LLC ("Pure Performance"), a South Carolina limited liability corporation whose sole member is Defendant Lacey Stern ("Stern"), a license to exclusively operate a

[1] On October 31, 2016, pursuant to the Court's Interim Scheduling Order [Doc. 12] ("Interim Scheduling Order") and Federal Rule of Civil Procedure 15(a)(2), CMD requested leave to file an amended complaint. See Pl.'s Mot. to File Amended Complaint [Doc. 24]. Defendants have not opposed CMD's request. See LR 7.1B, NDGa ("Failure to file a response shall indicate that there is no opposition to the motion."). Therefore, for good cause shown, CMD's Motion to File Amended Complaint [Doc. 24] is **GRANTED**.

CMD business in Richland County, South Carolina, for a period of five years. Id. ¶¶ 3-4, 65. A little less than five years later, in March 2016, Stern emailed CMD to request a five-year renewal of this agreement. Id. ¶ 96. Although no written renewal was ever formalized between the parties,[2] causing the agreement by its own terms to expire on May 9, 2016, Stern continued contact with CMD (as well as operations under the agreement) after May 9, 2016, and was permitted to continue operating as though the license agreement remained in effect. Id. ¶¶ 96-101. Based on Stern's expressed interest in renewal and ongoing operations, CMD alleges that it was led to believe that Stern would eventually renew the agreement. Id. ¶ 103.

But Stern did no such thing. Instead, CMD alleges that, on or about June 29, 2016, Stern created a new South Carolina-based limited liability dance company, "Lace Up," of which she is also the sole member. Id. ¶¶ 5-6, 114. According to the First Amended Complaint, Lace Up operates in the same territory, in many of the same venues, and serves many of the same customers as Pure Performance. Id. ¶¶ 115-16. CMD further alleges that, on or about the same day she created Lace Up, Stern accessed CMD's website database using her personal laptop and, without

[2] For reasons that are not clear from the record, it appears CMD simply never responded to Stern's e-mail.

authority, (1) deleted CMD data related to customer accounts, products, and product orders, and (2) altered, disabled, and damaged the website database's settings. Id. ¶¶ 117-34. Around the same time, Stern also sent a letter to her customers explaining that she had "decided to re-brand" her company as "Lace Up Studios LLC," and that her contact information would "remain the same except for e-mail." Id. ¶¶ 136-45; see Re-branding Letter, attached as Ex. 8 to First Am. Compl. [Doc. 24-1] ("Re-branding Letter") at 143. CMD alleges that, although the license agreement between the parties required Stern to return "all trade secrets and confidential materials, equipment and other property" owned by CMD—including its customer lists—Stern has not done so, and has instead retained and continued to use CMD's customer information to provide dance classes identical to those previously offered through Pure Performance. First Am. Compl. ¶¶ 155-56, 171.

CMD originally sued Pure Performance, Stern, and Lace Up in the Superior Court of Gwinnett County, Georgia, and Defendants removed that action to this Court on August 31, 2016. See Notice of Removal [Doc. 1]. In its Amended Complaint, CMD alleges that Defendants are liable for and/or have violated the Georgia Trade Secrets Act, O.C.G.A. 10-1-760 *et seq*. (Count Two); the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (Count Three); the Georgia Computer Systems Protection Act, O.C.G.A. § 16-9-93 (Count Four); breach of contract

(Count Five); conversion (Count Six); fraud (Count Seven); Georgia's Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 *et seq*. (Count Eight); Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq*. (Count Nine); Georgia's Uniform Deceptive or Unfair Practices Act, O.C.G.A. § 10-1-370 *et seq*. (Count Ten); the Lanham Act, 15 U.S.C. § 1125 (Count Eleven), constructive trust (Count Twelve), equitable lien (Count Thirteen), and equitable accounting (Count Fourteen). See First Am. Compl. ¶¶ 207-339.

Concurrent with its initial complaint, CMD also filed a motion for a temporary restraining order requesting that the Court prohibit Defendants from utilizing CMD's trade secrets and confidential information, transfer Stern's preexisting CMD phone number back to CMD, enforce the non-compete and non-solicitation provisions of the license agreement, permit CMD access to Defendants' computers, servers, and phone for forensic analysis and copying, require Defendants to return all trade secrets and confidential information to CMD, and order expedited discovery.[3] See Emergency Mot. for TRO and Interlocutory Inj. [Doc. 4]; First Am. Compl. ¶¶ 191-206. However, before the Court could rule on this request, CMD filed a motion stating that a temporary restraining order is no longer necessary, and instead requesting that the Court enter a permanent

[3] This Court held a hearing on CMD's Motion for a TRO on September 21, 2016.

injunction against Defendants. See First Am. Mot. for TRO/Permanent Injunction [Doc. 25] ("Mot. for Permanent Injunction") at 1 n.1.[4]

II. DISCUSSION

A. Defendants' Second Motion to Dismiss

1. Standard of Review

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Under Federal Rule of Civil Procedure 12(b)(6), a claim will be dismissed for failure to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

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[4] Defendants' Motion to Dismiss Defendants Lace Up and Lacey Stern for Lack of Personal Jurisdiction [Doc. 5] and CMD's Amended Motion for Permanent Injunction [Doc. 25] remain pending. The Court will address these motions by separate order.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citation omitted). Thus, a claim will survive a motion to dismiss only if the factual allegations in the pleading are "enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555.

At the motion to dismiss stage, the court accepts all the well-pleaded facts in the plaintiff's complaint as true, as well as all reasonable inferences drawn from those facts. McGinley v. Houston, 361 F.3d 1328, 1330 (11th Cir. 2004); Lotierzo v. A Woman's World Med. Ctr., Inc., 278 F.3d 1180, 1182 (11th Cir. 2002). Not only must the court accept the well-pleaded allegations as true, they must be construed in the light most favorable to the pleader. Powell v. Thomas, 643 F.3d 1300, 1302 (11th Cir. 2011). But the court need not accept legal conclusions, nor must it accept as true legal conclusions couched as factual allegations. Iqbal, 556 U.S. at 678. Thus, evaluation of a motion to dismiss requires the court to assume the veracity of well-pleaded factual allegations and "determine whether they plausibly give rise to an entitlement to relief." Id. at 679.

Under Federal Rule of Civil Procedure 9(b), a complaint alleging fraud "must state with particularity the circumstances constituting fraud."

> Rule 9(b) is satisfied if the complaint sets forth (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of

> omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

United States ex rel. Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1310 (11th Cir. 2002) (quoting Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001)).

However, Rule 9(b) also provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b). Thus, it "does not require a plaintiff to allege specific facts related to the defendant's state of mind when the allegedly fraudulent statements [or omissions] were made." Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1237 (11th Cir. 2008). Instead, it is sufficient to plead "the who, what, when, where, and how" of the allegedly fraudulent statements or omissions and then allege generally that those statements or omissions were made with the requisite intent. Id.

2. Analysis

Defendants argue that Counts Three, Seven, Nine, Ten, and Eleven of CMD's Proposed First Amended Complaint should be dismissed.[5] The Court will address these arguments *seriatim*.

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[5] Given this Court's ruling granting Plaintiff's unopposed Motion to Amend the Complaint, see n.1, supra, the Amended Complaint is the operative complaint in this case (thus rendering the original complaint moot). See Dresdner Bank, A.G. v.

a. Count Three

Count Three of CMD's First Amended Complaint alleges that Stern violated the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, when she accessed CMD's "protected computers" without authorization (i.e., after the license agreement had expired) and deleted data contained on its servers. First Am. Compl. ¶¶ 134-35, 221-34. The CFAA creates a cause of action where, *inter alia*, a person "intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage" in excess of $5,000. 18 U.S.C. §§ 1030(a)(5)(B), (c)(4)(A)(i)(I), (g). The statute defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information," and defines "loss" as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." Id. §§ 1030(e)(8), (11).

M/V Olympia Village, 463 F.3d 1210, 1215 (11th Cir. 2006) (holding that an amended pleading supersedes the former pleading). Defendants appropriately address their Second Motion to Dismiss to CMD's proposed First Amended Complaint.

Defendants first argue that, because Athens Micro, CMD's website administrator, was able to "restor[e] backups of the database and retriev[e] the data that was originally found to be deleted," Stern's conduct did not cause any "damage" within the meaning of the CFAA. See Defs.' Mot. to Dismiss at 8-10 (citing Letter from Zack Lester, President of Athens Micro, to CMD, attached as Ex. 7 to First Am. Compl. [Doc. 24] at 137-38). But this argument is at odds with the statute's plain language, which defines "damage" as "any impairment to the integrity or availability of data" without mention of how easily that damage may be remedied, or its permanence.[6] 18 U.S.C. §§ 1030(e)(8) (emphasis added); see, e.g., Expert Janitorial, LLC v. Williams, No. 3:09-CV-283, 2010 WL 908740, at *8 (E.D. Tenn. Mar. 12, 2010) (concluding that plaintiff stated a claim under the CFAA by alleging that his computer was "damaged" where the defendant executed a program to delete data from his laptop, which in turn required that the plaintiff

[6] Defendants cite Andritz, Inc. v. S. Maint. Contractor, LLC, 626 F. Supp. 2d 1264, 1264 (M.D. Ga. 2009), for the proposition that, where a plaintiff does not lose access to data, there can be no "damage" under the CFAA. But the court in Andritz dismissed plaintiff's CFAA claim because the plaintiff did not allege that the defendants, who were claimed to have "accessed Plaintiff's computer network and obtained files containing Plaintiff's trade secrets and proprietary information," deleted or altered any data. See id. at 1266-67 ("The alleged CFAA violation is not that Defendants deleted or altered any data but that Defendants used the data inappropriately.").

"institute remedial measures and restore the computer system to the condition it was in prior to the alleged damage.").

Defendants also argue that CMD has not plausibly alleged that it suffered a "loss" in excess of $5,000, emphasizing that the sum total of CMD's response to Stern's alleged "hacking" seems to have involved little more than restoring a server backup. See Def.'s Reply to their Mot. to Dismiss [Doc. 42] at 6-7. However, as the Eleventh Circuit recently explained in Brown Jordan Int'l, Inc. v. Carmicle, 846 F.3d 1167 (11th Cir. 2017), the CFAA's definition of "loss" is a relatively broad one, and includes

> two separate types of loss: (1) reasonable costs incurred in connection with such activities as responding to a violation, assessing the damage done, and restoring the affected data, program system, or information to its condition prior to the violation; and (2) any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.

Id. at 1174.

The Court credits CMD's assertion at this stage of the litigation that it incurred sufficiently "substantial costs" investigating Defendants' alleged impairment of its website database.[7] See Pl.'s Resp. in Opp'n to Defs.' Mot. to

[7] However, it appears that CMD may struggle to prove these costs. Although the First Amended Complaint indicates that CMD's damage calculation includes not only the costs associated with "attempts to recover data" and "forensic computer review and analysis" but also "legal fees," "court costs," and "lost profits," see

Dismiss [Doc. 37] at 12. Accordingly, CMD sufficiently has alleged "loss" under the CFAA.

Defendants' Motion to Dismiss is **DENIED** with respect to Count Three of the First Amended Complaint.

b. Count Seven

Count Seven of the Amended Complaint alleges that Stern falsely represented to CMD that she intended to renew her license agreement. See First Am. Compl. ¶¶ 157-60, 271-80. In support of this claim, CMD relies on three e-mails that it argues "reasonably suggest" Stern's intention to continue her business relationship with the company (i.e., her intention to sign a new five-year license agreement) after her original agreement expired on May 9, 2016: (1) a March 14, 2016, e-mail from Stern to CMD's Richard Burton in which Stern stated that she

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First Am. Compl. ¶ 232, the latter three likely are not recoverable "consequential damages" within the meaning of 18 U.S.C. § 1030(e)(11); see Padmanabhan v. Healey, 159 F. Supp. 3d 220, 224 (D. Mass. 2016), aff'd sub nom. Padmanabhan v. Healey, et. al., (1st Cir. Feb. 16, 2016) (concluding that the "patient consulting costs, legal fees and professional injuries claimed by plaintiff" did not qualify as losses under the CFAA, and explaining that "nothing in the statute suggests that the alleged loss or costs can be for matters unrelated to the computer."); see also Brown Jordan, 846 F.3d at 1174 ("'Loss' includes the direct costs of responding to the violation in the first portion of the definition, and consequential damages resulting from interruption of service in the second.") (emphasis added).

"would like to renew [her] contract with CMD for another 5 years;"[8] (2) a May 25, 2016, e-mail from Stern to Burton requesting a syllabus for the "Mothergoose" dance class; and (3) a June 22, 2016, e-mail from Stern to CMD's Sally Jenkins in which Stern stated that she would not be able to pay a pending invoice for "CMD Cart fees" "during [the] summer months," but that she would "be able to pay [the invoice] come August when funds are better due to registrations." See Stern E-Mails, attached as Exs. 3-5 to First Am. Compl. [Doc. 24-1] at 127-131; see First Am. Compl. ¶ 100. As noted above, Stern created her new company, "Lace Up," on or about June 29, 2016, approximately one week after sending the last of these e-mails. First Am. Compl. ¶¶ 5-6, 114. In its First Amended Complaint, CMD alleges that it "justifiably relied upon Stern's and Pure Performance's false representations that they would renew the License agreement," and consequently: (1) took no action to contract with other dance instructors to provide CMD dance classes within the area and (2) continued to provide Defendants with further assistance, support, CMD trade secrets, and confidential information. First Am. Compl. ¶¶ 101-103, 275, 277.

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[8] As explained above, although no written renewal was ever formalized between the parties, Stern continued contact with CMD (as well as operations under the agreement) after May 9, 2016, and was permitted to continue operating as though the license agreement remained in effect. Id. ¶¶ 96, 101.

Under Georgia law, a plaintiff must prove five elements to sustain a claim for fraud: "(1) a false representation or omission of a material fact; (2) scienter; (3) intention to induce the party claiming fraud to act or refrain from acting; (4) justifiable reliance; and (5) damages." Home Depot of U.S.A., Inc. v. Wabash Nat'l Corp., 314 Ga. App. 360, 367 (2012) (internal quotation marks and citation omitted). A party alleging fraud must "state with particularity the circumstances constituting fraud." FED. R. CIV. P. 9(b) (emphasis added). The Eleventh Circuit has interpreted this Rule as follows:

> Rule 9(b) is satisfied if the complaint sets forth (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

Tello v. Dean Witter Reynolds, Inc., 494 F.3d 956, 972 (11th Cir. 2007) (citations and internal punctuation omitted).

Defendants maintain that Stern's e-mails do not support a claim for fraud, and that they instead consist of "opinions about future events, statements of hope, and a question." Defs.' Mot. to Dismiss at 12. In Georgia, "[a] promise about a future event generally cannot form the basis of a claim for fraud. 'Fraud cannot consist of mere broken promises, expressions of opinion, unfulfilled predictions or

erroneous conjecture as to future events.'" RMS Titanic, Inc. v. Zaller, 978 F. Supp. 2d 1275, 1298 (N.D. Ga. 2013) (quoting Allen v. Columbus Bank & Trust Co., 244 Ga. App. 271, 277 (2000)). However, "[a]n exception to the general rule exists where a promise as to future events is made with a present intent not to perform or where the promisor knows that the future event will not take place." Lumpkin v. Deventer N. Am., Inc., 295 Ga. App. 312, 314 (2008) (quoting Buckley v. Turner Heritage Homes, 248 Ga. App. 793, 795 (2001)).

The Court agrees with Defendants that CMD's allegations fail to state a claim for fraud. Even when construed in the light most favorable to CMD, none of the three e-mails on which CMD relies—all of which were sent before Stern created Lace Up—contains anything approaching an actual promise to renew the license agreement. To the contrary, Stern's e-mails demonstrate at most that she indicated she would "like to renew" her contract with CMD (a communication to which it appears CMD never responded) and implied as much through her conduct.[9] This is insufficient to state a claim for fraud.

Therefore, Defendants' Motion to Dismiss is **GRANTED** with respect to Count Seven of the First Amended Complaint.

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[9] Furthermore, there is no indication in the record—nor does CMD allege—that the "CMD Cart fees" Stern promised to pay "come August" had any relationship to a new license agreement.

c. Count Nine

Count Nine of the Amended Complaint alleges that Defendants violated the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*. See First Am. Compl. ¶¶ 300-07. In relevant part, the Complaint alleges that Defendants Stern, Pure Performance, and Lace Up constitute an "enterprise" that

> jointly and severally, acting in concert, sent emails to Plaintiff on or about March 17, 2016 (Email Re Renewal), May 26, 2016 (Email Re Mother Goose), and June 22, 2016 (Email Re Cart Payment) manifesting an intent to renew the License Agreement, with the intent to deceive Plaintiff and prevent Plaintiff from effectively competing in the Territory. Further, Defendants Stern and Lace Up, jointly and severally, acting in concert, emailed and publicly posted notices on or about June 29, 2016 to customers indicating merely a "re-branding" effort, without informing customers of the change in companies, ownership, and the other circumstances of the transition of business. Additionally, Defendants, jointly and severally, acting in concert, hacked into the CMD Website Database via the internet on or around June 29, 2016 and, without authority, accessed, altered, and deleted property and information belonging to CMD which was stored on the CMD Website Database.

Id. ¶¶ 301-02. The Complaint further alleges that Defendants "committed multiple related acts of mail fraud, theft of trade secrets, [and] theft of data and electronically stored information," which together constituted a pattern of racketeering activity in violation of 18 U.S.C. § 1961(c). Id. ¶¶ 303-05.

Under 18 U.S.C. § 1962(c), it is "unlawful for any person employed by or

associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). To prove a violation of 18 U.S.C. § 1962(c), a plaintiff must establish: (1) the existence of an enterprise which affects interstate or foreign commerce; (2) that the defendant associated with the enterprise; (3) that the defendant participated in or conducted the enterprise's affairs; and (4) that the participation in or conduct of the enterprise's affairs was through a pattern of racketeering activities. United States v. Goldin Indus., Inc., 219 F.3d 1271, 1274 (11th Cir. 2000) (citing United States v. Weinstein, 762 F.2d 1522, 1536 (11th Cir. 1985)).

CMD fails to plead a viable RICO claim. As another court in this district has explained,

> RICO prohibits, broadly speaking, second stage criminal activity. RICO does not punish or provide a remedy for murder, kidnapping, arson, or fraud. It punishes, or provides a remedy for, the operation—acquisition, investment, maintenance, or conduct—of enterprises through racketeering activity or as a result of racketeering activity.

Homes by Michelle, Inc. v. Fed. Sav. Bank, 733 F. Supp. 1495, 1501 (N.D. Ga. 1990) (quoting Friedlander v. Nims, 571 F. Supp. 1188, 1194 (N.D. Ga. 1983), aff'd, 755 F.2d 810 (11th Cir. 1985)). Accordingly, where a plaintiff's complaint

"merely restate[s] and/or extrapolates from [its] breach of contract and fraud claims . . . [it] does not involve the second stage criminal activity . . . prohibited by RICO." Id. But CMD's complaint does just that: its RICO allegations strain to contort "relatively straightforward" allegations of breach of contract and fraud into "second stage criminal activity." Id. at 1497.

Furthermore, it is equally clear that CMD has not satisfied RICO's continuity requirement. The Supreme Court has explained:

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. . . . A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct.

H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 241(1989) (citations omitted); see also Homes by Michelle, 733 F. Supp. at 1502. CMD's allegations, all of which concern conduct occurring over a short period of time, plainly satisfy neither of these definitions.

Defendants' Motion to Dismiss is therefore **GRANTED** with respect to Count Nine of the First Amended Complaint.

d. Count Ten

Count Ten of the Amended Complaint alleges that Defendants violated Georgia's Uniform Deceptive or Unfair Practices Act, O.C.G.A. § 10-1-370 *et seq.* See First Am. Compl. ¶¶ 308-15. Specifically, CMD alleges that Defendants violated the following subsections of O.C.G.A. § 10-1-372(a), pursuant to which a person engages in a "deceptive trade practice" when, in the course of her business, vocation, or occupation, she, *inter alia*,

> (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with or certification by another;
>
> (5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
>
> (8) Disparages the goods, services, or business of another by false or misleading representation of fact.

O.C.G.A. §§ 10-1-372(a)(2), (3), (5), (8); see First Am. Compl. ¶¶ 310, 312-14.

Count Ten is based on the so-called "Re-branding Letter" that Stern sent to her customers on or about June 29, 2016. As discussed above, Stern stated in that letter that she had "decided to re-brand" her company as "Lace Up Studios LLC,"

and that her contact information would "remain the same" save for a new e-mail address. Id. ¶¶ 136-145; see Re-branding Letter. In full, the letter stated:

> Dear Valued Customer,
>
> We would like to express our appreciation for your continued support to our business and are pleased to announce that we are re-branding our company. Please be advised that effective July 1st, 2016, we will be changing our name to Lace Up Studios.
>
> There has been no change in management, and as always, we will continue to serve you with the same devotion and quality, which you have come to expect from us. It will be a pleasure to do business with you in the future.
>
> Our following contact information will be the same:
>
> PO Box 2127
> Columbia, SC 29202
> Phone: (803) 553-8855
>
> Please note that our new website address will be **www.LaceUpStudios.com**. All payments and correspondence should go through this website as of July 1st, 2016. The general contact email will be **LaceUpStudios@gmail.com**.
>
> Thank you again for your continued support and let us know if you have any questions.
>
> Kind Regards,
>
> Lacey Stern

CMD alleges that Stern's e-mail caused confusion in the marketplace by (1) failing to indicate that Lace Up was separate and distinct from Pure Performance or

CMD, (2) listing the CMD phone number as the main contact phone number for Lace Up, and (3) indicating that the change in name from "Pure Performance" to "Lace Up" would not involve any "change in "management." See First Am. Compl. ¶¶ 136-45. In support of this theory, CMD also alleges that customers experienced confusion "on multiple occasions" as to whether Lace Up classes were offered as part of CMD or separately. Id. ¶¶ 145-54.

In their Motion to Dismiss, Defendants appear to argue that it is simply implausible that any of Stern's customers would have inferred that CMD "was somehow still involved" in the operation of Lace Up upon reading the Re-branding Letter, which makes "no mention" of CMD or the previous license arrangement. See Defs.' Mot. to Dismiss at 11. But this claim defies common sense: construing the facts in the light most favorable to CMD, Stern's representation to her customers that she was merely "re-branding," and that there would be "no change in management" was, at a minimum, sufficient to create a "likelihood of confusion or of misunderstanding" as to Stern's ongoing "sponsorship" by or "affiliation" with CMD.[10] See O.C.G.A. §§ 10-1-372(a)(2), (3).

[10] It is unclear from the record whether or in what way Stern/Pure Performance's customers, given the nature of CMD's licensing model, were made aware of the relationship between CMD and Pure Performance.

Therefore, Defendants' Motion to Dismiss is **DENIED** with respect to Count Ten of the First Amended Complaint.

e. Count Eleven

Count Eleven of the Amended Complaint alleges that Defendants violated the Lanham Act, 15 U.S.C. § 1125. See First Am. Compl. ¶¶ 316-25. Although CMD fails to specify precisely which facts support its Lanham Act claim (much less the subsection of the statute under which its claim is brought), it appears that Count Eleven arises under 15 U.S.C. § 1125(a)(1)(A). This section of the Lanham Act mirrors Georgia's Uniform Deceptive or Unfair Practices Act, providing in relevant part:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id.; see, e.g., SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc., 455 F. Supp. 2d 1347, 1372 (N.D. Ga. 2006) ("This provision [15 U.S.C. § 1125(a)(1)(A)] establishes a cause of action for "false association" or "false endorsement." . . . . Georgia's

Deceptive Trade Practices Act similarly prohibits misrepresentations concerning approval or certification of a product.").

For the same reasons set forth in subsection 2(d) above, Stern's representation to her customers that "there has been no change in management" was, at a minimum, sufficient to create a "likelihood of confusion or of misunderstanding" as to Stern's ongoing "sponsorship" by or "affiliation" with CMD with the meaning of 15 U.S.C. § 1125(a)(1)(A).

Therefore, Defendants' Motion to Dismiss is **DENIED** with respect to Count Eleven of the First Amended Complaint.

B. Plaintiff's Motion for Sanctions for Spoliation of Evidence and Failure to Comply with the Court's Order

CMD has filed a Motion for Sanctions (as well as a Motion for Contempt, discussed infra), in which it alleges that Defendants and their counsel have engaged in a "pattern and practice of **Destruction, Deceit, and Disregard** [sic]" resulting in the permanent erasure of CMD-related data once contained on Stern's business laptop and several external drives. See Pl.'s Mot. for Sanctions at 1. CMD frames its allegations in grave terms; among other things, it alleges that Defendants have deleted and disabled crucial electronic information, falsely represented the kind and types of preservation of evidence attempted, falsely represented the reasons evidence has been destroyed, and "contemptuously"

withheld information that the Court ordered tendered to CMD's forensic expert. See id. at 2-3. As a remedy, CMD requests that the Court strike Defendants' answers, enter a default judgment against Defendants on all claims, hold a damages hearing, and sanction Defendants' counsel in the amount of "at least" $250,000.00; alternatively, CMD requests that the Court "enter a negative presumption that all data that is missing, altered, destroyed, or withheld is most helpful to CMD's case[.]" Id. at 4.

Although much of what follows is disputed, the Court will first summarize the events that have led the parties to this point.

1. Background

As previously explained, CMD originally filed this action in the Superior Court of Gwinnett County, Georgia, on or about July 19, 2016. On the same day, CMD filed an emergency motion requesting that the superior court enter a temporary restraining order against Defendants. Although a hearing on CMD's motion was originally scheduled in the superior court for August 19, 2016, CMD voluntarily suspended the hearing a day before it was scheduled to occur, and the parties attempted to negotiate a settlement. See Pl.'s Mot. for Sanctions at 5; Defs.' Resp. to Pl.'s Mot. for Sanctions [Doc. 35] ("Defs.' Resp. to Mot. for Sanctions") at 4.

Defendants represent—and CMD disputes—that during these subsequent settlement negotiations, CMD's counsel, Alex Kaufman, "repeatedly stated that any electronic copies of CMD material on [Stern's] computer constituted a breach of the License Agreement and should be removed immediately." Defs.' Resp. to Pl.'s Mot. for Sanctions at 5; see Decl. of Lacey Stern [Doc. 35-1] ("Stern Decl.") at ¶ 7; Decl. of Andrew M. Beal [Doc. 35-2] ("Beal Decl.") ¶ 4; but see Pl.'s Mot for Sanctions at 11-12 ("CMD's counsel denies such correspondence ever took place.").[11] In a declaration attached to Defendants' response, Defendants' counsel, Andrew Beal, represents that he then "immediately instructed" Stern that she should remove all CMD files from her computers and place them on a thumb drive, and that she should "have this work performed by a reliable IT professional to demonstrate that all such files had been removed from her computer properly, and

[11] In a declaration attached to his reply brief, Kaufman maintains that, on August, 19, 2016, in e-mail correspondence with Defendants' counsel, he "indicated that [he] would agree to use Kroll Ontract or Fordham Forensics for a forensic preservation and analysis of Defendant's electronic devices," but that Defendants' counsel never responded to this recommendation. See Decl. of Alex B. Kaufman [Doc. 40-1] ("Kaufman Decl.") ¶¶ 5, 7. Although Kaufman maintains that he never told Stern that she was obligated to remove CMD's materials from her computer, his declaration—which indicates that, at a minimum, the parties appear to have discussed how Stern could remove CMD-related materials from her computer without compromising its forensic integrity—appears to undermine this claim.

so that a complete record would be maintained of what was removed from her computer and when it was removed for use in this litigation." Beal Decl. ¶ 5.

On August 23, 2016, Stern e-mailed Brian Jefferson, the president of Columbia, South Carolina-based Bristeeri Technologies, a technology support and repair service. Stern Decl. ¶ 8. Stern told Jefferson that she was "in a lawsuit" and "needed him to download all of the CMD files on [her] computer to a separate thumb drive," stressing "the importance of mirroring [her] hard drive and preserving it for evidence in [her] lawsuit." Id. ¶ 8, 10; see Dep. of Brian Jefferson taken Oct. 18, 2016 [Doc. 29-7] ("Jefferson Dep.") at 20-25, 41-43. In response, Jefferson told Stern that, if she wanted to permanently remove the files from her computer—i.e., render them non-recoverable—"the best thing to do" would be to "back up the files [she] want[ed], wipe the drive, [then] reinstall [the computer's operating system] on top of the drive." Jefferson Dep. at 43. Stern relayed this conversation to her counsel, who advised her that

> if she was going to do anything to her computer other than download the CMD files onto a thumb drive and remove them from her computer's hard drive, it would be necessary for her to have her consultant crate a complete copy or replica of the hard drive as it existed before any deletion or erasing was performed and ensure its preservation for use in this litigation.

Beal Decl. ¶ 7; see also Decl. of Amy B. Cheng [Doc. 35-3] ("Cheng Decl.") ¶¶ 4-5. Stern's counsel represent that they believed that Bristeeri would prepare a

mirror image of Stern's computer before removing or deleting any documents. Beal Decl. ¶ 8; Cheng Decl. ¶ 5; see also Stern Decl. ¶ 9.

On August 24, 2016, Stern e-mailed Jefferson again to inform him that she had dropped off her laptop, two blank thumb drives—a PNY 8 gigabyte flash drive (the "PNY flash drive") and a Penguin 8 gigabyte flash drive (the "Penguin flash drive")—and an external hard drive at Bristeeri's office, explaining that she and her counsel had "decided to back up the entire computer on an external hard drive and transfer all CMD files to a thumb drive." See E-mail from Lacey Stern to Brian Jefferson dated August 24, 2016 [Doc. 29-5]; Jefferson Dep. at 15. Stern further instructed Jefferson to ship both these items to her counsel once the work was complete. Id. At her deposition, Stern admitted that she deleted CMD-related QuickBooks[12] data on the PNY flash drive, as well as Lace Up-related information from the Penguin flash drive, "a couple of days" before bringing them to Bristeeri because she believed that was what she "was supposed to do" in order to comply with CMD's request that she not possess its materials. See Dep. of Lacey Stern taken Oct. 19, 2016 [Doc. 29-6] at 108-13.

In response to Stern's request, Thomas Barrett, a technician employed by Bristeeri technologies, (1) transferred the CMD data identified by Stern on her

[12] QuickBooks is an accounting program commonly used by small businesses.

laptop to a new sixteen gigabyte Kingston flash drive (the "Kingston flash drive"); (2) created a backup of Stern's laptop hard drive; and (3) re-installed the Windows operating system on the laptop after "wiping" and "reloading" it. See Jefferson Dep. at 12. At his deposition, Jefferson stated that the latter two parts of this process involved creating a "clone" or an "image" of Stern's laptop, then transferring that clone on to a new external hard drive.[13] Id. at 16. He explained:

> So a backup typically is what's called file and folder backup. File and folder meaning whatever files, individual files and the folders and the subfolders that you have on the machine, those get backed up. A mirror is like a clone. It's a clone image. It's a snapshot of the hard drive. We took a snapshot of the hard drive prior to doing any work and stored that snapshot image on that external hard drive. We then completed the work, copying the file and folders that Lacey had requested on to the particular thumb drives. Wiped and reloaded the computer. Erased the hard drive and reinstalled the Windows to make it like the new computer. Like the day they opened it out of the box.

Id. at 33-34. Bristeeri completed this work on August 29, 2016. Id. at 20-21.

Defendants' counsel subsequently produced Stern's laptop, the external hard drive containing Bristeeri's backups, access credentials to several cloud-based storage websites, and three flash drives—the PNY, Penguin, and Kingston flash

[13] In her declaration, Stern states that, although she originally brought in an "old external hard drive" for Bristeeri to use, Jefferson was unable to use this hard drive; as a result, she purchased a new hard drive from Jefferson and "told him to recycle" the old one. Stern Decl. ¶ 10.

drives—to CMD,[14] which in turn provided them to its forensic expert, Gregory Fordham, for review. In a declaration submitted with CMD's Motion for Sanctions, Fordham states that, contrary to Jefferson's claims, the backups created by Bristeeri were in fact neither "clones" nor "forensic grade image[s]," and that, rather than containing two backups of Stern's laptop—one from before cleaning, and another from after—the external hard drive produced to Fordham contained only one such backup. See Decl. of Gregory L. Fordham [Doc. 29-4] ("Fordham Decl.") ¶¶ 22-29. Based on his analysis, Fordham concludes that only "specific files and folders" were copied on to the hard drive, that other "invisible" files and hidden systems folders were not part of the backup, and that some of this "invisible" data may have been permanently lost when Bristeeri performed its work. Id. ¶¶ 28-32. Fordham explains:

> The external hard drive does not and never did contain any image of the laptop—neither one before cleaning nor one after cleaning. In addition, the external hard drive does not contain a complete backup of the laptop. Rather, it simply has a few user profiles and then only has select files and folders from those profiles. It appears that only the visible files and folders were copied in these user profiles and not

[14] After Defendants removed this matter to federal court, this Court entered an Interim Scheduling Order permitting the parties to obtain limited discovery; in relevant part, the Order required Defendants to submit Stern's laptop, thumb drives, and the imaged copy of her computer for forensic examination, as well as Stern's access credentials to several cloud-based storage websites. See Interim Scheduling Order at 1-2.

> the hidden system files or folders that provide important machine usage artifacts as wells as other protected data sources like e-mail.

Id. ¶ 49.

In addition, Fordham also concludes in his declaration that: (1) although Bristeeri's attempted "wipe" of Stern's laptop succeeded in permanently destroying certain forms of data on the computer, including system files "useful for forensic analysis," other deleted files may be recoverable, see id. ¶¶ 33-42, 50; and (2) although both the PNY and Penguin drives were produced empty—consistent with Stern's admission that she deleted the files on those devices—"some" of the files on those devices are recoverable, see id. ¶¶ 43-46, 51-52. Fordham's report also states that he was unable to access several of Stern's cloud-based storage accounts because he was not provided adequate access credentials,[15] and that, in analyzing Stern's laptop, he was able to identify (1) "four other flash drives that had been attached to the laptop but not produced," including a Kingston flash drive

[15] Fordham explained that, although he had Stern's user credentials for her iCloud and Google Drive accounts, these accounts had so-called "two-step verification" enabled. Id. While it appears that Defendants' counsel were unaware that two-step verification was enabled on Stern's accounts, and that they would have been willing to produce the additional information necessary for Fordham to access them, Defendants' counsel represents that CMD never sought this additional information from Defendants, nor did it notify them that Fordham was unable to access Stern's accounts. See Defs.' Resp. to Mot. for Sanctions at 12; Beal Aff. ¶¶ 10, 13.

that had CMD-related data copied on to it over 2015 and 2016, as well as (2) the existence of Microsoft OneDrive account containing QuickBooks backups for which he was not provided user credentials. Id. ¶¶ 47-48, 51. Stern asserts that she has no knowledge of these additional drives and that, although she previously backed up her QuickBooks data in both her Dropbox account and on the PNY flash drive, she has no recollection of setting up or using a Microsoft OneDrive account. Stern Decl. ¶¶ 13, 15-16.

2. Standard of Review

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." Graff v. Baja Marine Corp., 310 F. App'x 298, 301 (11th Cir. 2009) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)). "Spoliation sanctions are 'intended to prevent unfair prejudice to litigants and to insure the integrity of the discovery process.'" United States v. Lanzon, 639 F.3d 1293, 1302 (11th Cir. 2011) (quoting Flury v. Daimler Chrysler Corp., 427 F.3d 939, 944 (11th Cir. 2005)). The moving party carries the burden of proof on a motion for spoliation sanctions. In re Delta /AirTran Baggage Fee Antitrust Litig., 770 F. Supp. 2d 1299, 1305 (N.D. Ga. 2011) (citing Eli Lilly & Co. v. Air. Express Int'l USA, Inc., 615 F.3d 1305, 1318 (11th Cir. 2010)).

In determining whether sanctions for spoliation are warranted, the court should consider the following factors: (1) whether the movant was prejudiced as a result of the destruction of evidence; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the alleged spoliator acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence provided by the spoliator is not excluded. Flury, 427 F.3d at 945.

> Even if the Court finds spoliation, a sanction of default or an instruction to the jury to draw an adverse inference from the party's failure to preserve evidence is allowed "only when the absence of that evidence is predicated on bad faith." Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997). A showing of bad faith requires the plaintiff to demonstrate that a "party purposely loses or destroys relevant evidence." Id. Mere negligence in destroying evidence is not sufficient to justify striking an answer. See Mann v. Taser Int'l, Inc., 588 F.3d 1291, 1310 (11th Cir. 2009). In determining whether to impose sanctions for spoliation, "[t]he court should weigh the degree of the spoliator's culpability against the prejudice to the opposing party." Flury, 427 F.3d at 946.

Marshall v. Dentfirst, P.C., 313 F.R.D. 691, 694 (N.D. Ga. 2016).

Effective December 1, 2015, Federal Rule of Civil Procedure 37(e) was amended to authorize curative measures for failure to preserve electronically stored information, specify the measures available, and establish the findings necessary to impose such measures. See FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment. "It therefore forecloses reliance on inherent authority or state

law to determine when certain measures should be used." Id. As amended, Rule 37(e) provides as follows:

> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> > (A) presume that the lost information was unfavorable to the party;
> >
> > (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> >
> > (C) dismiss the action or enter a default judgment.

FED. R. CIV. P. 37(e).

This version of Rule 37(e) applies to civil cases commenced after December 1, 2015, and to all proceedings pending on that date unless its application would be unjust or impractical. Marshall, 313 F.R.D. at 695. Unlike the old rule, the new rule "authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures." FED. R. CIV. P. 37(e) advisory committee's note to 2015

amendment. The rule is applicable "only if the information was lost because the party failed to take reasonable steps to preserve the information;" however, "perfection in preserving all relevant information is often impossible." Id.

First, the Court must evaluate the reasonableness of preservation efforts, such as: (1) "the routine, good-faith operation of an electronic information system;" (2) the need to intervene in the routine operation; (3) the party's sophistication with regard to litigation in evaluating preservation efforts; (4) factors beyond the party's control (malign software attack, failure of a "cloud" service, whether information destroyed was not in the party's control, etc.); and (5) proportionality of costs. Id.

Second, if a party failed to take reasonable steps to preserve the information in the anticipation of litigation, and the information cannot be restored or recovered by additional discovery, a court may resort to Rule 37(e)(1) measures only "upon finding prejudice to another party from loss of the information." Id. "An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation." Id. The new rule "does not place a burden of proving or disproving prejudice on one party or the other," but rather leaves it within the Court's "discretion to determine how best to assess prejudice in particular cases." Id. For example, in some cases,

"[d]etermining the content of lost information may be a difficult task," and therefore, "placing the burden of proving prejudice on the party that did not lose the information may be unfair." Id. However, in the situations where "the content of the lost information [is] fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties," the complaining party may be ordered to show prejudice. Id.

Third, if the Court finds prejudice, it "may order measures no greater than necessary to cure the prejudice." FED. R. CIV. P. 37(e)(1). There is a broad spectrum of measures with "no all-purpose hierarchy" that the Court has the discretion to employ, but the Court is not required "to adopt measures to cure every possible prejudicial effect." Id., advisory committee's note to 2015 amendment. "Serious measures," such as "forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument," may be imposed under subdivision (e)(1) to cure the prejudice. Id. The Court, however, must "ensure that curative measures under subdivision (e)(1) do not have the effect

of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation." Id.

Finally, the Court may impose "very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation." FED. R. CIV. P. 37(e)(2) advisory committee's note to 2015 amendment. These measures include the Court's presumption that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial, jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it, or dismissal of the action. Id. However, a party's negligence or even gross negligence does not merit the imposition of those most severe measures. Id.

3. Analysis

As noted above, CMD argues broadly in its Motion for Sanctions that Defendants and their counsel have engaged in "destruction," "deceit," and "disregard." Although CMD's specific allegations are many, they ultimately boil down to three claims: (1) Defendants failed to preserve and/or destroyed evidence by failing to obtain a forensic grade image of Stern's laptop, overwriting the contents of the laptop, and by deleting (as Stern herself has admitted) the contents

of the PNY and Penguin flash drives, see Def.'s Mot. for Sanctions at 6-10; (2) Defendants engaged in a "pattern of deception" by failing to consult CMD before retaining Bristeeri's services, see id. at 10-14; and (3) Defendants and their counsel failed to timely produce four USB drives—drives that Fordham, CMD's forensic expert, claims were attached to Stern's laptop—as well as login credentials to Stern's Microsoft OneDrive account.[16]

However, CMD's Motion for Sanctions suffers from a basic defect: despite the seriousness of its allegations, CMD fails to show that either Defendants or their counsel acted "with the intent to deprive another party of the information's use in the litigation." See FED. R. CIV. P. 37(e)(1). To the contrary, the story CMD tells in its Motion for Sanctions is less one of sinister intent than of confusion and ineptitude: although Defendants and their counsel should have consulted CMD before bringing Stern's laptop and flash drives to Bristeeri—a company whose work seems to have been of poor quality, if not downright negligent—CMD has put forth no evidence that Defendants or their counsel intended to willfully conceal or destroy evidence.[17] See Zeitz v. Innsbruck Golf Resort, Inc., No. 2:15-CV-

[16] As explained infra in the Court's discussion of CMD's Motion for Contempt, these drives and login credentials appear to no longer be at issue.

[17] Although CMD's counsel maintains that he never told Stern, during settlement negotiations, that she needed to remove any remaining CMD files on her laptop,

00218-RWS, 2016 WL 6193475, at *2 (N.D. Ga. Oct. 24, 2016) ("To find bad faith, the court is not required to find malice. It must, however, find more than mere negligence, which is insufficient to support spoliation sanctions under the law of this circuit.") (internal citations and quotation marks omitted). Instead, if there is any wrongdoer here, it appears to be Bristeeri: although Stern indicated to Bristeeri's technicians that she was involved in litigation and needed to preserve a "mirror image" of her computer (consistent with her counsel's advice), Bristeeri did no such thing, or at least failed in trying. Although CMD imputes sinister intent to nearly every action undertaken by Defendants and their counsel, it appears to the Court that, had Bristeeri's work simply been up to task, there would not be any meaningful dispute between the parties as to preservation efforts.

Additionally, to the extent any information was lost permanently as part of the above-described events, CMD fails to demonstrate that it will suffer more than a minimal amount of prejudice, if any. In its Motion for Sanctions, CMD maintains only that it may "never" know (1) precisely "what CMD information

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the fact that he recommended forensic firms to Defendants only days after these settlement negotiations calls this claim into question. See Kaufman Decl. ¶¶ 5, 7. At a minimum, the Court credits Defendants' contention that CMD's counsel "stated repeatedly" that any such remaining documents "constituted a breach of her License Agreement and any such materials must be removed immediately[.]" See Beal Decl. ¶ 4; Stern Decl. ¶ 7.

Defendants actually stored on the [laptop] hard drive, aside from the data that Stern, in her sole discretion, chose to preserve," and (2) "whether Stern had utilized CMD's property, trade secrets, and confidential information in her new business." Pl.'s Mot. for Sanctions at 24. Assuming *arguendo* that both of these claims are true, CMD fails to detail how either would affect its underlying case. In fact, of the twelve remaining claims in CMD's First Amended Complaint, only Count Two—for Defendants' alleged violation of the Georgia Trade Secrets Act, O.C.G.A. 10-1-760 *et seq.*—appears to rest in any way on CMD's allegation that Stern "had and continues to have valuable Trade Secrets and Confidential Information[.]" See First Am. Compl. ¶ 208.[18] If the core of CMD's allegation on this point is that Stern retained CMD's trade secrets after terminating her license agreement with the company, Stern appears to have explicitly admitted as much in both word and deed. See id. ¶¶ 155-56.

For the foregoing reasons, the Court concludes that sanctions are not appropriate for the spoliation of any evidence in this case. Accordingly, CMD's Motion for Sanctions for Spoliation is **DENIED**.

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[18] The rest of CMD's claims—for fraud, breach of contract, conversion, equitable lien, and equitable accounting, as well as for the violation of various state and federal statutes—appear to turn almost exclusively on allegations related to the circumstances under which Stern formed Lace Up and/or Stern's alleged "hacking" of CMD's servers.

C. Plaintiff's Motion for Contempt

In addition to its Motion for Sanctions, CMD has also filed a Motion for Contempt. In that motion, CMD requests that the Court hold Defendants and their counsel in contempt for their alleged "willful failure" to produce various items in violation of the Court's Interim Scheduling Order. See Pl.'s Mot. for Contempt at 1. As in its Motion for Sanctions, CMD seeks severe penalties, including that "Defendants be jailed until such contempt may be purged." See id. at 15.

Courts have the inherent power to enforce compliance with their lawful orders through civil contempt. Shillitani v. United States, 384 U.S. 364, 370 (1966); Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1301 (11th Cir. 1991). A party "in a civil contempt proceeding must establish by clear and convincing evidence that the alleged contemnor violated the court's earlier order." United States v. Roberts, 858 F.2d 698, 700 (11th Cir. 1988) (citation omitted). Once this *prima facie* showing of a violation is made, the burden then shifts to the alleged contemnor "to produce evidence explaining his noncompliance." Citronelle-Mobile Gathering, Inc., 943 F.2d at 1301; see also Mercer v. Mitchell, 908 F.2d 763, 768 (11th Cir. 1990).

As explained above, the Court's Interim Scheduling Order required that Defendants produce a variety of digital devices and/or computer log-in information

to CMD's expert, Fordham Forensics, no later than September 26, 2016. See Interim Scheduling Order at 1-2. On that day, Defendants produced Stern's laptop, the external hard drive used by Bristeeri to back up Stern's laptop, and one flash drive (the Kingston drive); due to an oversight on the part of Defendants' counsel, Defendants subsequently produced two other flash drives (the PNY and Penguin drives), as well as login information for Stern's cloud-based storage accounts, approximately two weeks later, on October 7, 2016. See Cheng Decl. ¶¶ 8-9; Stern Decl. ¶¶ 12-14; see also Fordham Decl. ¶ 11.

However, CMD contends in its motion that Defendants have still failed to produce: (1) a second laptop related to Stern's business; (2) Stern's current phone, on which she has admitted to using Google Docs; (3) additional USB drives, including the four drives discussed above whose existence is disputed; (4) full and complete login credentials for Stern's iCloud and Google Drive accounts (i.e., the information necessary to overcome two-step verification); and (5) Stern's login credentials for a Microsoft OneDrive account. See Pl.'s Mot. for Contempt at 4-8. Defendants respond that they are willing to produce many of the items identified by CMD (several of which either were not specifically requested by CMD's counsel, including Stern's cell phone and new laptop, or have been identified as

issues for the first time in CMD's Motion for Contempt[19]); they also point out that rather than raising these issues in good faith with Defendants' counsel, or seeking to resolve these discovery issues by requesting a telephone conference—as this Court's rules require[20]—CMD simply filed its Motion for Contempt. See Defs.' Resp. to Mot. for Contempt at 4-7.

In apparent acknowledgment of this fact, CMD changes course in its reply: in lieu of sanctions (and potential jail time), it asks the Court to reserve ruling on

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[19] Defendants stress, for instance, that CMD's counsel "never informed Defendants' counsel that Plaintiff's expert encountered a two-step verification process and needed information from Defendants counsel to access the accounts," and that they would have provided CMD with this information had it asked. See Defs.' Resp. to Mot. for Contempt [Doc. 36] at 4.

[20] Section II.D.3 of this Court's Standing Order provides in relevant part:

> Notwithstanding LR 37.1, NDGa, prior to filing any motion related to discovery, including but not limited to a motion to compel discovery and a motion to quash a subpoena (except for unopposed, consent, or joint motions to extend the discovery period), the movant, after conferring with the respondent in a good-faith effort to resolve the dispute by agreement, must contact Ms. Smilley [the courtroom deputy] to notify her that there is a discovery dispute. Ms. Smilley will then schedule a conference call in which the Court will attempt to resolve the matter without the necessity of a formal motion, and a court reporter will be provided by the Court to take down the conference call. Ms. Smilley may request that each side submit a brief statement of the issues in advance of the conference call.

See Standing Order [Doc. 2] at 11-12.

its motion "pending Defendants' promised production" of the items sought above, and further states that it will "request a telephonic hearing on this matter" if these items "are not produced to Plaintiff's counsel within five business days" "per [the Court's] Standing Order." Pl.'s Reply in Supp. of Mot. for Contempt [Doc. 41] at 1-2. Although it has now been more than six months, CMD has yet to request a telephonic hearing. In light of this silence, the Court presumes that Defendants have now sufficiently produced the items sought by CMD.

Accordingly, the Court concludes that, based on the record before it, CMD has failed to establish by clear and convincing evidence that Defendants have violated the Court's Interim Scheduling Order. CMD's Motion for Contempt [Doc. 30] is **DENIED**.

III. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Defendants Pure Performance, LLC, Lace Up Studios, LLC, and Lacey Stern's Second Motion to Dismiss Counts III, VII, IX, X, and XI for Failure to State a Claim [Doc. 33] is **GRANTED IN PART and DENIED IN PART**. Defendants' motion is **GRANTED** as to Counts Seven and Nine of Plaintiff's First Amended Complaint and **DENIED** as to Counts Three, Ten, and Eleven.

It is further **ORDERED** that Plaintiff's Motion to File Amended Complaint [Doc. 24] is **GRANTED.** The Clerk is **DIRECTED** to docket the proposed amended complaint attached to Plaintiff's motion [Doc. 24-1] as Plaintiffs' First Amended Complaint.

It is further **ORDERED** that Plaintiff's Motion for Sanctions for Spoliation of Evidence During Litigation and Failure to Comply with the Court's Order [Doc. 29] and Motion for Contempt [Doc. 30] are **DENIED**.[21]

IT IS SO ORDERED this 24th day of July, 2017.

Mark H. Cohen

MARK H. COHEN
United States District Judge

[21] Additionally, because the Court finds it has sufficient information to decide the pending motions, CMD's Motion for Oral Argument [Doc. 46] is **DENIED**.