

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**BRO-TECH CORPORATION t/a
THE PUROLITE COMPANY, et al.,
Plaintiffs**

v.

**THERMAX, INC. d/b/a THERMAX
USA LTD, et al.,
Defendants**

**CIVIL ACTION
NO. 05-2330**

ORDER

AND NOW, this 28th day of February 2006, upon consideration Defendants' Motions to Dismiss [Docs. #26 and #30], Plaintiffs' Responses thereto [Docs. #32 and #38], Defendants' Reply [Doc. #56], Plaintiffs' Supplemental Response [Doc. #71], and Defendants' Supplemental Response [Doc. #84], it is hereby **ORDERED** that the Motions to Dismiss are **DENIED WITHOUT PREJUDICE**.¹

BY THE COURT:

CYNTHIA M. RUFÉ, J.

1. On May 18, 2005, Plaintiffs filed this lawsuit alleging numerous claims arising from the theft of its trade secrets by Plaintiffs' former employees and their new employer, a rival corporation. Plaintiffs' original Complaint included only one claim under federal law, namely the Computer Fraud Abuse Act ("CFAA"), 18 U.S.C. § 1030 (2000). In a teleconference held the day after the original Complaint was filed, Defendants suggested the CFAA claim was without substance and plead solely to invoke federal jurisdiction, since diversity of citizenship was lacking. The Court directed Defendants to brief the issue formally and allowed Plaintiffs to undertake limited discovery to establish subject matter jurisdiction under the CFAA.

On August 1, 2005, Plaintiffs filed an Amended Complaint adding another federal claim, under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68 (2000). Pursuant to the Court's earlier direction, Defendants filed the instant motions to dismiss the Amended Complaint.

A. CFAA

In Count VII of the Amended Complaint, Plaintiffs plead claims under two provisions of the CFAA. First, Plaintiffs allege that Sachdev, Gleasman, and Gresham violated section 1030(a)(4), punishing “whoever . . . 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.” Second, Plaintiffs allege that Sachdev, Gleasman, and Gresham violated sections 1030(a)(5)(A)(iii) and 1030(a)(5)(B)(i), punishing “whoever . . . intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage” and “loss to 1 or more persons during any 1-year period . . . aggregating at least \$5,000 in value.”

Defendants argue that Count VII should be dismissed for lack of subject matter jurisdiction and/or failure to state a claim under the CFAA. The thrust of Defendants’ argument is that the kind of activity alleged here—employees taking confidential and proprietary information from their former employer’s computers for delivery to their new employers—does not violate the CFAA. While courts are in disagreement on this issue, this Court is persuaded by the view represented in Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc., 119 F. Supp. 2d 1121, 1129, holding that “the CFAA was intended to encompass actions such as those allegedly undertaken” here. See also P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC, 428 F.3d 504, 510 (3d Cir. 2005) (recognizing, in dicta, the increasingly expansive scope of the CFAA); but see Int’l Ass’n of Machinists and Aerospace Workers v. Werner-Masuda, 390 F. Supp. 2d 479, 499 (D. Md. 2005) (holding that the CFAA does not recognize a cause of action in the circumstances alleged here).

Furthermore, to the extent Plaintiffs state a claim under the CFAA, they have also put forward enough evidence to establish that their CFAA claim is not “wholly insubstantial and frivolous” for purposes of subject matter jurisdiction. See Gould Electronics, Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000) (“A claim may be dismissed under Rule 12(b)(1) only if it ‘clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction’ or is ‘wholly insubstantial and frivolous’”). Therefore, the Court will exercise federal jurisdiction over Plaintiffs’ CFAA claims.

B. RICO

In Counts XI and XII of the Amended Complaint, Plaintiffs plead that the former Purolite employees and the Thermax executives violated sections 1962(c) and (d) of RICO by conspiring to steal—as well as actually stealing—Purolite’s trade secrets. Section 1962(c) of RICO criminalizes conduct by a “person employed by or associated with any enterprise” engaged in a pattern of racketeering, and section 1962(d) criminalizes conspiracy to violate subsection (c).

Defendants argue that both RICO counts should be dismissed for lack of subject matter jurisdiction and/or failure to state a claim. Their argument is two-fold: (1) Plaintiffs do not allege wrongdoing by a “person” who owns or operates the RICO “enterprise,” i.e. Thermax; and (2) Plaintiffs do not allege a pattern of racketeering. The first assertion is unpersuasive because “RICO liability is not limited to those with primary responsibility for the enterprise’s affairs, just as the phrase ‘directly or indirectly’ makes clear that RICO liability is not limited to those with a formal position in the enterprise.” Reves v. Ernst & Young, 507 U.S. 170, 179 (1993); see also United States v. Parise, 159 F.3d 790, 796 (3d Cir. 1998) (explaining that Reves “made clear that RICO liability may extend to those who do not hold a managerial position within an enterprise”). The second assertion is also unpersuasive. As a matter of law, “[u]se of the mails and/or wires in connection with the misappropriation of confidential propriety information has been held to constitute mail and/or wire fraud.” Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., Civ. A. No. 95-1698, 1995 WL 455969, at *8 (E.D. Pa. July 27, 1995) (citing Carpenter v. United States, 484 U.S. 19, 27 (1987)). Furthermore, for purposes of the instant motions, Plaintiffs have alleged and demonstrated a scheme sufficient to constitute a “pattern of racketeering” under RICO. Therefore, the Court will exercise federal jurisdiction over Plaintiffs’ RICO claims.

C. Personal Jurisdiction

Another court in this district has outlined the standard of review for a motion to dismiss for lack of personal jurisdiction as follows:

The Court enjoys “considerable procedural leeway” in deciding a motion to dismiss for lack of personal jurisdiction: “[t] may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion.” If the court decides *not* to conduct an evidentiary hearing, the plaintiff “need make only a *prima facie* showing of jurisdiction through its affidavits and supporting materials.” Plaintiff must

eventually establish jurisdiction by a preponderance of the evidence, “either at a pretrial hearing or at trial. But until such a hearing is held, a *prima facie* showing suffices, notwithstanding any controverting presentation by the moving party, to defeat the motion.”

Leonard A. Feinberg, Inc. v. Cent. Asia Capital Corp., 936 F. Supp. 250, 253-54 (E.D. Pa. 1996) (internal citations omitted). In determining whether plaintiff has made a *prima facie* case, “the Court does not act as a fact-finder” but rather “accepts properly supported proffers of evidence by the plaintiff as true.” Id. at 254.

Applying that standard here, the Court finds that Plaintiffs have presented sufficient proffers of evidence to establish a *prima facie* case of personal jurisdiction over all Defendants. With respect to the Thermax India executives, Plaintiffs’ *prima facie* case rests on the executives’ participation in the conspiracy to steal Purolite’s trade secrets. The deposition testimony of Sachdev, the employment agreement between Sachdev and Thermax, and e-mail correspondence between Sachdev and the Thermax India executives—when credited in Plaintiffs’ favor for purposes of the instant motions—suggest that the Thermax India executives were aware or should have been aware of substantial acts in furtherance of that conspiracy. See Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n, 846 F. Supp. 374, 379 (E.D. Pa. 1994); Murray v. Nat’l Football League, No. Civ. A. 94-5971, 1996 WL 363911, at *15 (E.D. Pa. June 28, 1996) (“Plaintiff must show substantial acts in furtherance of the conspiracy within the forum, of which the out-of-state conspirator was or should have been aware.”).

Although Plaintiffs have satisfied their initial burden, they eventually must establish personal jurisdiction by a preponderance of the evidence at a later stage of the proceedings. Therefore, the Court will permit additional time for discovery on this issue and will allow the Defendants to re-raise any objections to personal jurisdiction upon the close of that discovery.