

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

FILED

APR 26 2002

DAVID W. DANIEL, CLERK  
U.S. DISTRICT COURT  
E. DIST. NO. CAR.

No. 5:00-CV-703-F(2)

NORTH CAROLINA STATE )  
UNIVERSITY and CREE, INC., )  
Plaintiffs, )

v. )

NICHIA CORPORATION and )  
NICHIA AMERICA CORPORATION, )  
Defendants )

ORDER

----- )  
NICHIA CORPORATION and )  
NICHIA AMERICA CORPORATION, )  
Counterclaimants, )

v. )

NORTH CAROLINA STATE )  
UNIVERSITY, CREE, INC., and )  
SHUJI NAKAMURA, )  
Counterclaim-defendants. )

Introduction

This matter is before the court upon the motion of Dr. Shuji Nakamura (Nakamura) to dismiss [DE# 144-1]<sup>1</sup> Nichia Corporation's (Nichia) counterclaims predicated on alleged violations of the Computer Fraud and Abuse Act (CFAA).<sup>2</sup> This

<sup>1</sup> Docket Entry # 144 contains two motions, the second of which is Cree's and Dr. Nakamura's Motion to Strike Immaterial Allegations of Inevitable Disclosure.

<sup>2</sup> Although the title (and text) of the DE# 144 indicate it is filed on behalf of Cree and Dr. Nakamura, only Dr. Nakamura is alleged by Nichia to have violated the CFAA. Therefore, the court perceives that DE# 144-1 (motion to dismiss) is filed on behalf of

order deals only with Dr. Nakamura's Motion to Dismiss Counterclaims. The matter has been fully briefed and is ripe for disposition.

### **Motion to Dismiss Standard**

A motion pursuant to Rule 12(b)(6) is designed to eliminate fatally flawed claims at the pleading stage. *See Parham v. Pepsico, Inc.*, 927 F. Supp 177 (E.D.N.C. 1977). Such a motion "should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Cortez v. Prince George's County Maryland*, 31 Fed. Appx. 123, 127 (4<sup>th</sup> Cir. 2002) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4<sup>th</sup> Cir. 1999)).

### **Factual Predicate**

Nichia has alleged that while Dr. Nakamura, a Japanese citizen, was working in Japan for Nichia, a Japanese corporation, Nakamura exceeded his authorization by accessing one or more of Nichia's computers and thereby obtaining proprietary information belonging to Nichia. Nichia alleges further that Nakamura later shared this information with Cree/Cree Lighting, located in the United States. Nichia has not alleged that Dr. Nakamura used its Japanese computer in Japan to *transmit* trade secrets to America.<sup>3</sup> Nichia alleges vaguely that Nakamura obtained proprietary

---

Dr. Nakamura only, and that DE# 144-2 (motion to strike) is filed on behalf of both Dr. Nakamura and Cree.

<sup>3</sup> In its effort to bolster its argument that Dr. Nakamura's conduct is controlled by the CFAA, Nichia relies on *Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121 (W.D. Wash. 2000). Remarking that the "parallels between the *Shurgard* case and this one are quite striking," Nichia's Opposition to Cree's and Dr. Nakamura's Motion to Dismiss (hereinafter "Nichia's Opposition") [DE# 175], p. 3, n.1,

information by accessing the Japanese computer in Japan and that “Nichia’s confidential information and trade secrets have been conferred in the United States . . . .” Nichia’s First Amended Answer and Counterclaims ¶¶ 144, 149, 154. Nichia contends Nakamura’s conduct renders Nakamura liable to Nichia under the CFAA – specifically, 18 U.S.C. §§ 1030(a)(2)(C), (a)(4) and (a)(5)(C).

### Analysis

Although it is a criminal statute located in Title 18 of the United States Code, the CFAA provides also that “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.” 18 U. S. C. § 1030(g). Nichia is a “person” under the statute,” *see United States v. Middleton*, 35 F. Supp. 2d 1189, 1192 (N.D. Calif. 1999), and its counterclaims against Nakamura are brought as “civil actions” under § 1030(g).

The 1996 version of the CFAA is applicable to Nichia’s counterclaims.

Amendments made in 1996 substituted the term “protected computer” for the former term “Federal interest computer,” and clarified that the new term includes a computer

---

Nichia represents to this court that the “defendant [in *Shurgard*] accessed the plaintiff’s computers and downloaded sensitive, competitive information and provided it to his new employer, the plaintiff’s competitor.” *Id.* The inference created is that the former *Shurgard* employee made the same use of his employer’s computer as Dr. Nakamura allegedly made of Nichia’s computer. However, what the *Shurgard* case reveals, in fact, is that the former employee “sent e-mails to the defendant containing various trade secrets and proprietary information belonging to the plaintiff.” *Shurgard*, 119 F. Supp. 2d at 1124 (emphasis added). That Nichia has not alleged that Dr. Nakamura made such integral use of a computer in his alleged disclosure of trade secrets, *see* Nichia’s Amended Answer and Counterclaims ¶¶ 15, 18-19, 144, 149 and 154, is a significant point of distinction between the cases not acknowledged by Nichia.

“which is used in interstate or foreign commerce or communication.” 18 U.S.C. § 1030(e)(2)(B). The 2001 amendment, enacted a month *after* Nichia filed its counterclaims against Nakamura, added the phrase, “including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States.” The PATRIOT Act, Pub. L. No. 107-56, § 814(d)(1), 115 Stat. 272, 384 (1996) (amending 18 U.S.C. § 1030(e)(2)(B)). That amendment, of course, has no application in this case. *See Landgraf v. USI Films*, 511 U.S. 244, 270 (1994) (“Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress has made clear its intent.”).

Subsection (a) of § 1030 outlines potential claims against a person accessing a “protected computer.” In its First Amended Answer and Counterclaim filed on September 21, 2001, Nichia alleged counterclaims against Nakamura under three of the subsections of § 1030(a).

The CFAA prohibits a person from intentionally *accessing* a computer without authorization or exceeding authorized access, and thereby *obtaining* “information from any protected computer if the conduct involved an interstate or foreign communication.” 18 U.S.C. §1030(a)(2)(C) (emphasis added). Citing that subsection, Nichia alleged in Counterclaim Twenty-One that Dr. Nakamura intentionally *accessed* at least one of Nichia protected computers without authorization or exceeding authorization, and thereby *obtained* confidential information and trade secrets. Within that same Counterclaim, Nichia alleged that its confidential information and trade secrets were “conferred” in the United States by Nakamura.

The conduct prohibited by the CFAA is “accessing” a protected computer and “obtaining information.” *Id.* According to the evidence now before the court, Nakamura performed those actions in Japan on a Japanese computer owned by a Japanese company. Nichia does not allege that it suffered any injury as a result of such *access*. Rather, Nichia contends it has suffered injury as a result of the subsequent *disclosure* (or “conferral”) in the United States of information that Nakamura allegedly accessed in Japan.

The second subsection prohibits a person from knowingly and with intent to defraud, *accessing* a protected computer without authorization or in excess of authorization, and by so doing, *furthering* the intended fraud *and obtaining* anything of value, “unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$5,000 in any 1-year period.” 18 U. S. C. § 1030(a)(4). In its Twenty-Second Claim for Relief, Nichia contends Nakamura knowingly and with the intent to defraud *accessed* Nichia’s computer under false pretenses and *obtained* confidential information, thus *furthering* his intended fraud. Within that same counterclaim, Nichia alleges, as it did in the previous counterclaim, that it suffered damages by Nakamura’s subsequent disclosure, which occurred in the United States. Although this section penalizes access that *itself* furthers intended fraud resulting in obtaining anything of value, Nichia has not alleged that Nakamura’s alleged unauthorized access in Japan caused injury to Nichia.

Finally, the third subsection prohibits a person from intentionally accessing a protected computer and, as a result of such access, causing damage. 18 U.S.C. § 1030(a)(5)(C). In its Twenty-Third Counterclaim, Nichia contends that Nakamura intentionally accessed one of Nichia’s computers and obtained confidential information

and trade secrets and therefore "has caused Nichia to suffer damages or loss of value as a result of, and by reason of, Nakamura's conduct and by his subsequent disclosure of Nichia's confidential information and trade secrets, which harmed the integrity of said information."

Nichia's rationale is that Nakamura's conduct violates United States law because Nichia was damaged when Nakamura subsequently disclosed the trade secrets he had accessed in Japan to Cree/Cree Lighting in the United States. The court rejects Nichia's argument, first because Nakamura's conduct in Japan is not governed by American law and, second, even if it were, the conduct alleged by Nichia does not violate the CFAA.

1. Extraterritorial Application of the CFAA

Although Congress has the authority to enforce its laws beyond the territorial boundaries of the United States, *see United States v. Corey*, 232 F.3d 1166, 1170 (9<sup>th</sup> Cir. 2000), *cert. denied*, 122 S. Ct. 198 (2001) (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)); *see also Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949), whether it has in fact exercised that authority is a matter of statutory construction. Here, the question is whether Congress intended the reach of the CFAA to encompass actions by a Japanese national using a Japanese computer to access information from that computer in Japan.

It is "a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Arabian American*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285). This "canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained." *Foley Bros.*, 336 U.S. at 285. In applying this rule of construction, a court must determine whether "language in the [relevant Act]

gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *Id.* As Congress legislates against the backdrop of the presumption against extraterritoriality, unless there is "the affirmative intention of the Congress clearly expressed," *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957), the court must presume Congress "is primarily concerned with domestic conditions." *Foley Bros.* 336 U.S. at 285.

The CFAA as it was constituted when Dr. Nakamura allegedly accessed Nichia's proprietary information from Nichia's computer in Japan defined a "protected computer" as one "which is used in interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2)(B). The statute did not expressly include or exclude foreign computers. Nor does any language contained in §§ 1030(a)(2)(C), (a)(4), or (a)(5)(C) give "any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *Foley Bros.*, 336 U.S. at 285.

The Fourth Circuit Court of Appeals recently engaged in an analysis of the alleged extraterritorial application of the Age Discrimination in Employment Act (ADEA) to determine whether that congressional act "covers foreign nationals who apply in foreign countries for jobs in the United States." *Reyes-Ganon v. North Carolina Growers Ass'n, Inc.*, 250 F.3d 861, 863 (4<sup>th</sup> Cir.), *cert. denied*, 122 S. Ct. 463 (2001). Before 1984, the ADEA lacked any language regarding United States citizens employed in foreign workplaces; in fact, it excluded from coverage any individual who worked in a foreign country. *See id.* at 864. Therefore, many courts, including the Fourth Circuit, held that

the ADEA had a “purely domestic focus and did not cover American citizens working for American companies in foreign countries.” *Id.* (citation omitted).

The presumption against the extra-territorial application of American laws required this result because absent a clear statement from Congress, the scope of American law is limited to “the territorial jurisdiction of the United States.” . . . Thus the presumption prevented the ADEA from regulating events taking place in foreign countries even when they involved citizens of the United States. And the Act certainly could not have reached the even more attenuated situation of a foreign national applying in a foreign country for work in the United States.

*Id.* at 864-65 (citation omitted).

In 1984, however Congress amended the ADEA to include in the definition of “employee,” “ ‘any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.’ ” *Id.* at 865 (quoting 29 U.S.C. § 630(f)). The Fourth Circuit Court of Appeals explained that the amending “language was ‘carefully worded to apply only to citizens of the United States’ who worked for a U.S. company or its subsidiary because Congress recognized that the ‘well-established principle of sovereignty’ prohibited the United States from imposing ‘its labor standards on another country.’ ” *Id.* (citations omitted). The appellate court observed that “[t]hese amendments demonstrated that ‘when it desires to do so, Congress knows how to’ expand ‘the jurisdictional reach of a statute.’ ” *Id.* (quoting *Arabian American*, 499 U.S. at 258).

The *Reyes-Ganon* analysis is instructive in this court’s effort to determine whether the language of the CFAA evidences a clear intent by Congress to expand the jurisdictional reach of that statute to the conduct of a Japanese national occurring in Japan. Here, as in that case, “the rule [applies] that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . . [C]ourts, [therefore], can infer from congressional silence that the

legislature meant to regulate only activities within the nation's borders." *Corey*, 232 F.3d at 1171; *see also Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993); *Smith v. United States*, 507 U.S. 197, 203-04 (1993).

The court finds that no evidence has been presented that suggests Congress, in enacting and amending the CFAA, intended to rebut the presumption against extraterritorial application of American law, and the statute itself certainly contains no clear intent to expand the jurisdictional reach of that law to the facts as alleged by Nichia against Dr. Nakamura. Accordingly, the court concludes that the version of the CFAA in effect at all times relevant to this action did not reach Dr. Nakamura's extraterritorial conduct alleged by Nichia as supporting its CFAA counterclaims against Dr. Nakamura.

## 2. Nichia's "Injury" Not Compensable Under the CFAA

Nichia makes absolutely clear the nature of the injury or loss for which it is seeking recompense from Dr. Nakamura under the CFAA in Counterclaims Twenty-One, Twenty-Two and Twenty-Three:

[T]he information [Dr. Nakamura] is accused of taking *dit* end up in the United States and . . . the damage Nichia alleges in its counterclaim [sic] occurred precisely when that information reached Nichia's competitor, Cree, in North Carolina.

Nichia's Opposition [DE# 175] p. 1. Nichia admits implicitly that it suffered no damage by virtue of Nakamura's *use of its computer*; Nichia was injured, if at all, when Nakamura allegedly committed the tort of misappropriating Nichia's proprietary information he had obtained in Japan to Cree in North Carolina. Use of a computer was not integral to the commission of the alleged tort of misappropriating trade secrets; indeed, Nichia would have been just as injured had Nakamura accessed the information from a handwritten journal or from his unaided memory. The CFAA does not attempt to

punish transmission or disclosure or misappropriation of trade secrets; it is directed to misuse of computers.

Nichia's own description of its three CFAA counterclaims demonstrates that no action governed by the CFAA caused damage, loss or injury to Nichia; it was the subsequent and insular tort of allegedly transmitting proprietary information that injured Nichia:

In its twenty-first cause of action Nichia alleges that Nakamura "intentionally accessed without authorization or exceeding authorization" one of Nichia's protected computers and "obtained confidential information and trade secrets." Nichia's Counterclaims at ¶¶ 141-143. Next, in its twenty-second cause of action, Nichia alleges Nakamura "knowingly and with intent to defraud" accessed one of Nichia's protected computers and "obtained" confidential information and trade secrets with a value in excess of \$5,000.00." *Id.* at ¶¶ 147-148. Finally, in its twenty-third cause of action, Nichia alleges Nakamura "intentionally accessed" one of Nichia's protected computers and "obtained" Nichia's "confidential information and trade secrets therefrom causing Nichia damage." *Id.* at ¶¶ 152-153.

Nichia's Opposition [DE# 175] p. 4 (emphasis added). Although Nichia states in the final sentence quoted above that Nakamura's alleged conduct caused it damage, in fact Nichia suffered no damage by virtue of Nakamura's accessing and obtaining Nichia's confidential information. According to Nichia, for twenty years "Nichia gave Nakamura access to its confidential information and trade secrets. . . . Further, as a result of his employment by Nichia, Nakamura had access to additional confidential information and trade secrets of Nichia relating to [products] developed by the other employees of Nichia."<sup>4</sup> First Amended Answer and Counterclaims at ¶ 10 (emphasis added).

Nichia acknowledges that "the harm Nichia has alleged in its counterclaims is not merely the accessing by Dr. Nakamura of certain information. Nor was the harm to

---

<sup>4</sup> Query, then, whether Dr. Nakamura's alleged "access" in fact could have been "unauthorized" or in excess of his authority.

Nichia inflicted by the mere fact that he downloaded or copied the information. [T]he harm to Nichia occurred when Dr. Nakamura disclosed the wrongfully obtained information to Cree in North Carolina. . . . [T]he wrongful acts were consummated, and the harm to Nichia inflicted, by steps taken by Dr. Nakamura here in, or directed toward, North Carolina.” Nichia’s Opposition p. 5.<sup>5</sup>

Thus, Nichia’s own allegations demonstrate the fallacy of its argument that Nakamura is liable under the CFAA. It is the alleged *revelation* of information supposedly accessed from Nichia’s computer in furtherance of Nakamura’s planned misappropriation that caused Nichia’s damage, if any, *not the manner of or vehicle for* its acquisition. The CFAA is not directed to misappropriation of trade secrets where, as here, that misappropriation occurred independent of the use of a “protected computer.”

Nor is the court persuaded by Nichia’s attempt to bootstrap its having suffered a loss into a violation of the CFAA . As Nakamura points out, § 1030(g) provides for a private cause of action for damages only if a plaintiff can prove a substantive violation of the CFAA. *See Thurmond v. Compaq Computer Corp.*, 171 F. Supp. 2d 667, 675 (E.D. Tex. 2001) (plaintiffs’ right to a civil claim is wholly dependent on proof of a substantive violation). Nichia’s injury in Japan resulting from alleged disclosure of its trade secrets in North Carolina does not, *ipso facto*, give rise to a violation of the Computer Fraud and Abuse Act.

---

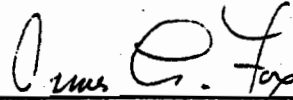
<sup>5</sup> Incidentally, Nichia fails to acknowledge that any injury it suffered by virtue of Dr. Nakamura’s conduct occurred, *not* in the United States, but in Japan. *See, e.g., BP Chemicals Ltd v. Formosa Chemicals & Fibre Corp.*, 229 F.3d 254, 261 (3d Cir. 2000) (in a trade secret case, the injury occurs to the owner of the trade secret wherever the owner resides).

**Conclusion**

For the reasons stated above, even if it could be said that Congress has made the CFAA applicable to the unauthorized access to a Japanese computer by a Japanese national in Japan (which it has not), Nichia has failed to state a claim upon which relief is available under the CFAA. Accordingly, Dr. Nakamura's Motion to Dismiss Nichia's CFAA Counterclaims [DE# 144-1] is ALLOWED, and Nichia's Counterclaims Twenty-One, Twenty-Two, and Twenty-Three hereby are DISMISSED.

SO ORDERED.

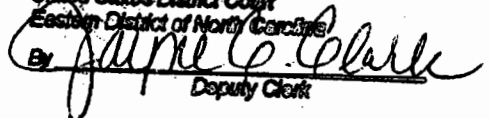
This the 26 day of April, 2002.



---

JAMES C. FOX  
Senior United States District Judge

I certify the foregoing to be a true and correct copy of the original.  
David W. Daniel, Clerk  
United States District Court  
Eastern District of North Carolina

By   
Deputy Clerk