UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

NEW YORK PIZZERIA, INC.,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 3:13-CV-335
	§	
RAVINDER SYAL, *et al*,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

Intellectual property plays a prominent and growing role in our Information Age economy. High-stakes litigation over software patents, for example, is increasingly common in federal dockets. In this case, though, the plaintiff seeks intellectual property protection for something quite traditional: the meal one might order at a neighborhood pizzeria. New York Pizzeria, Inc. contends that the flavor of its Italian food and the way in which it plates its baked ziti and chicken and eggplant parmesan dishes are entitled to protection under the trademark laws. These are some of the key issues to be resolved in the pending Rule 12(b)(6) motion that seeks dismissal of four claims in full and one in part.

I. BACKGROUND

New York Pizzeria, Inc. (NYPI) is a franchisor of restaurants founded and solely owned by Gerardo Anthony Russo. Adrian Hembree, a former vice

president of NYPI and former owner of an NYPI-franchised restaurant, was terminated in March 2011. After a state court lawsuit brought by Hembree alleging that NYPI breached his termination agreement, NYPI brought this suit against Hembree and alleged coconspirators contending they engaged in a scheme to create a knockoff restaurant chain called Gina's Italian Kitchen using NYPI's recipes, suppliers, and internal documents and manuals. According to NYPI, Hembree "began disclosing NYPI's proprietary information to Ravinder Syal," a restaurateur and alleged coconspirator, "sometime in 2010," while Hembree still worked for NYPI. Docket Entry No. 20 ¶ 39. It is further alleged that after Hembree left NYPI, some of the defendants obtained the username and password of an existing NYPI franchisee, and used it to log on to NYPI's FranConnect account, a service that allows franchisors to communicate with franchisees. NYPI alleges that Syal, or someone acting on his behalf or on behalf of one of his businesses, downloaded NYPI's trade secrets, including recipes, from that account. Syal also hired former NYPI employees to work at Gina's locations, who are claimed to have violated their confidentiality obligations by disclosing NYPI's trade secrets.

The extent of the alleged misappropriation and infringement came to light when NYPI's "internal auditor" (who apparently obtained a job at a Gina's

restaurant in order to investigate the violations, *see* Docket Entry No. 1 ¶ 45 (original complaint)) observed Defendants using NYPI's recipes and copying its supply orders, and taped conversations with Gina's employees who admitted to the use of NYPI's recipes and manuals. Docket Entry No. 20 ¶¶ 53–58.

NYPI's amended complaint (Docket Entry No. 20) asserts fifteen counts against various defendants. In a previous order, this court dismissed Adrian Hembree from the suit because of a liability waiver he signed as part of his termination from NYPI (Docket Entry No. 36). Five of the counts are at issue in the remaining Defendants' current motion to dismiss (Docket Entry No. 24):

- **Count 1:** Violation of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030(a)(2)(C), for improperly accessing a computer system to obtain NYPI's proprietary information;
- **Count 2:** Violation of the Stored Communications Act, 18 U.S.C. § 2701, for improperly accessing a computer system to obtain NYPI's proprietary information;
- **Count 3:** Trademark infringement under the Lanham Act for copying NYPI's distinctive flavors;
- **Count 4:** Trade dress infringement under the Lanham Act for copying NYPI's distinctive plating methods; and
- **Count 14:** Aiding and abetting the commission of various torts.

II. ANALYSIS

Rule 12(b)(6) provides for dismissal of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). A claim is considered "plausible" if the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. However, a claim is not considered plausible where it is based on nothing more than "formulaic recitation of the elements of a cause of action" or it merely consists of "naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557). In considering a Rule 12(b)(6) motion to dismiss, a court must accept all well-pleaded facts as true and view those facts in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *In re Katrina*, 495 F.3d at 205.

The Court takes up each contested count in turn.

A. Count 1: Computer Fraud and Abuse Act

To state a civil CFAA claim, a plaintiff must allege that one of the first five factors listed in 18 U.S.C. § 1030(c)(4)(A)(i) is present. *See* 18 U.S.C. § 1030(g). Here, NYPI alleges the first factor, a "loss" during a one-year period of at least $5,000 in value. *See* § 1030(c)(4)(A)(i)(I); Docket Entry No. 20 ¶ 69 ("NYPI spent in excess of $5,000 determining the source of the intrusion and extent of the damage."). "Loss" is defined under the CFAA 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.

18 U.S.C. § 1030(e)(11).

Defendants do not dispute that the cost to NYPI of "determining the source of the intrusion and extent of the damage" meets the $5,000 threshold and constitutes an actionable "loss" under the CFAA; they thus do not seek full dismissal of NYPI's CFAA claim. Instead, they argue that the Court should eliminate NYPI's claim for additional compensatory damages resulting from the misappropriation of its trade secrets as a result of the computer intrusion. Docket Entry No. 24 ¶ 3. They assert that compensation for trade secrets misappropriated

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