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

CDI INTERNATIONAL, INC.,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
GARY MARCK, et al.,	:	**No. 04-4837**
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J. **February 8, 2005**

Plaintiff CDI International, Inc. ("CDI") seeks damages and injunctive relief for theft of trade secrets, violation of § 1 of the Sherman Act, defamation, and conspiracy to obtain trade secrets. Presently before the Court is the motion of Defendants Cloud, Feehery and Richter ("CFR") and David Richter to dismiss for failure to state a claim upon which relief can be granted. For the reasons below, Defendants' motion is granted in part and denied in part.

I. BACKGROUND

The following allegations are taken from Plaintiff's complaint and accepted as true for purposes of the instant motion. CDI imports beverageware from China and sells it within the United States to firms that decorate and resell it. (Compl. ¶ 1.) Gary Marck ("Marck"), who does business in Ohio, is the president and sole owner of G.G. Marck and Associates, Inc. ("Marck Associates"), a competitor of CDI. (*Id*. ¶ 2.) Marck Associates hired Defendant Richter, a private investigator who works for Defendant CFR, to gain access to CDI's garbage. (*Id*. ¶¶ 6-7, 13.) With Richter's help, Marck and Marck Associates stole CDI's trade secrets from that garbage, including customer lists and information related to pricing and the development of a water bottle that CDI was creating.

(*Id*. ¶¶ 17, 20, 22.) Through CDI's trash, Marck Associates also learned of CDI's relationship with Shandong Huaguang Ceramics Group ("Shandong"), a supplier of CDI, prompting Marck to induce Shandong to end its relationship with CDI. (*Id.* ¶¶ 12, 18.) Moreover, Defendants falsely communicated to CDI's customers that CDI would no longer be able to furnish customers with products that it had supplied them with previously. (*Id*. ¶¶ 18-19, 29, 31.) Finally, using the trade secrets that it obtained pertaining to the water bottle, Defendants were able to develop the same product without expending the time and money that CDI did. (*Id*. ¶¶ 22-23, 33-34.)

II. STANDARD OF REVIEW

The standard of review for deciding a 12(b)(6) motion is well known; a court must accept as true all of the factual allegations in the complaint and all reasonable inferences that can be drawn from those allegations. *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). Moreover, a court must view all factual allegations in the light most favorable to the plaintiff. *Id*. Therefore, a motion to dismiss can be granted only if it is certain that plaintiff is not entitled to relief under any set of facts which plaintiff could prove. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Klein v. Gen. Nutrition Cos.*, 186 F.3d 338, 342 (3d Cir. 1999). Under this standard, a complaint will be deemed sufficient if it adequately puts the defendant on notice of the essential elements of a cause of action. *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996). The question is not whether the plaintiff will ultimately prevail; instead, it is whether the plaintiff can prove any set of facts consistent with the averments of the complaint which would show the plaintiff is entitled to relief. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994).

III. DISCUSSION

A. Misappropriation of Trade Secrets

On January 21, 2005, the Court denied a motion filed by Defendants Marck and Marck Associates to dismiss Plaintiff's trade secret claims. In this motion, CFR and Richter advance the same argument for dismissal previously made by Marck and Marck Associates and rejected by the Court, namely that CDI's trade secrets are no longer protected once discarded. (*See* Mem. and Order of Jan. 21, 2005.) But CDI's allegations, accepted as true at this stage, coupled with all reasonable inferences drawn from those allegations, meet the standard set forth under Rule 12(b)(6). Accordingly, Defendants' motion on these counts is denied.

CDI claims that Marck Associates induced CDI's trash hauler to deliver its garbage to Marck Associates, in violation of CDI's contract with the trash hauler. (Compl. ¶¶ 12, 15.) CDI also claims that Marck Associates and Richter bribed CDI's trash hauler to deliver its trash to them, rather than dispose of that trash as CDI had instructed. (*Id.* ¶¶ 13, 16.) The record before the Court at this early stage of the litigation is not developed enough to conclude that CDI failed to take reasonable steps to protect its trade secrets and thus forfeited those trade secrets. *See Frank W. Winne & Son, Inc. v. Palmer*, Civ. A. No. 91-2239, 1991 WL 155819, at *4 (E.D. Pa. Aug. 7, 1991) (denying motion to dismiss misappropriation claim where record did not disclose steps plaintiff had taken to protect trade secrets). As noted, the Court denied an earlier motion to dismiss filed by Marck and Marck Associates on the same grounds presented now by CFR and Richter. There is no reason why these two Defendants should fare any better. I therefore deny Defendants' motion to dismiss CDI's trade secret claims.

B. Defamation

Count III is framed as a defamation claim and asserts that Defendants falsely advised CDI's customers that CDI is unable to supply those customers with products. (*Id.* ¶¶ 19, 29, 31.) To state a claim for defamation under Pennsylvania law, CDI must prove: (1) a defamatory communication; (2) published by defendant; (3) applied to plaintiff; (4) understood by the recipient to be defamatory; (5) understood by the recipient to apply to plaintiff; (6) special harm to plaintiff resulting from the publication; and (7) abuse of a conditionally privileged occasion. 42 PA. CONS. STAT. ANN. §8343(a) (2004); *Franklin Prescriptions, Inc. v. New York Times Co.* , Civ. A. No. 01-0145, 2001 WL 936690, at *2 n.2 (E.D. Pa. Aug. 16, 2001).

Plaintiff has failed to allege any statement made by either CFR or Richter, let alone a statement capable of a defamatory meaning. Indeed, as CDI makes clear in its response to this motion, "[t]he speaker of the statement, then, is Gary Marck and/or some representative of G.G. Marck and Associates; the recipients were plaintiff's customers . . . ." (Pl.'s Resp. at 3.) CDI's argument, although difficult to decipher, appears to be that since CFR and Richter supplied Marck with the trade secrets which Marck and Marck Associates subsequently used to defame CDI, CFR and Richter are also responsible for defaming CDI. This "defamation by association" argument, premised on the belief that it was foreseeable that the trade secrets provided by CFR and Richter would be used to defame CDI, is not encompassed within the scope of defamation law.

Even under the liberal pleading requirements of the Federal Rules of Civil Procedure, CDI has failed to state a claim for defamation against CFR and Richter. The Complaint identifies the speaker, the recipient and the nature of the statements, but the problem is that, as CDI concedes, the speaker is Marck "and/or some representative of G.G. Mark and Associates." The Complaint is

devoid of any claims that could be construed as an allegation that CFR or Richter said anything to any of CDI's customers. In fact, the Complaint lacks any allegation that CFR or Richter even know who CDI's customers are, let alone any allegation that either CFR or Richter have conversed with those customers. Without an allegation that Defendants published a statement, the defamation count against both CFR and Richter fails to state a claim.[1] *See Maier v. Maretti*, 671 A.2d 701, 704 (Pa. Super. Ct. 1995).

I decline to adopt CDI's "defamation by association" theory and therefore dismiss the defamation claim against both CFR and Richter.

III. CONCLUSION

For the reasons stated above, I grant in part and deny in part Defendants' motion to dismiss. An appropriate Order follows.

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[1] Defendants offer an alternative reason for dismissing this claim. Relying on the statement made in *Ersek v. Township of Springfield*, 822 F. Supp. 218, 223 (E.D. Pa. 1993), Defendants assert that the complaint must "specifically identify what alleged defamatory statements were made by whom and to whom." (Defs.' Mot. to Dismiss at 7.) But *Ersek* is of doubtful application in a defamation case in federal court. *See Joyce v. Alti America, Inc.*, Civ. A. No. 00-5420, 2001 WL 1251489, at *2 (E.D. Pa. Sept. 27, 2001) (federal pleading requirements do not mandate that plaintiff specify the precise defamatory statements or specifically name the speaker but must merely put the defendant on notice); *see also Roskos v. Sugarloaf Township*, 295 F. Supp. 2d 480, 492 (M.D. Pa. 2003) (noting that Pennsylvania requires fact pleading while the Federal Rules, which must be applied in defamation actions in federal court, require only notice pleading). Nevertheless, there is some support for Defendants' position. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1245 (3d ed. 2004) (noting that "the standard for successfully pleading defamation tends to be more stringent than that applicable to most other substantive claims . . . ."). Regardless of the pleading standard applied, the Complaint still lacks a necessary element of a defamation claim and must therefore be dismissed.

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ORDER

AND NOW, this **8th** day of **February**, **2005**, upon consideration of Defendants Cloud, Feehery and Richter and David Richter's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Document No. 6), Plaintiff's response thereto, and for the foregoing reasons, is hereby **ORDERED** that:

1. Defendants Cloud, Feehery and Richter and David Richter's motion to dismiss Count III is **GRANTED**. Count III of the Complaint is **DISMISSED** as to those Defendants only.

2. In all other respects, the motion to dismiss is **DENIED**.

BY THE COURT:

/s/ Berle M. Schiller
Berle M. Schiller, J.