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SESSION WATCH

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F E A T U R E D D E C I S I O N :

Governo v. Law, 2019 Mass. Super. LEXIS 72, 74, 76 & 384

(May 3-15 & June 18, 2019) (Salinger, J.).

Value of Materials is not a Proper Measure of Damages in Misappropriation Case

The court issued a series of decisions in a case in which the Governo Law Firm, LLC ("Governo Firm") sued six of its former partners and their new firm, CMBG3 Law, LLC ("CMBG3"), alleging that the individual defendants took copies of proprietary databases owned by the Governo Firm.

The court denied the Defendants' motion to strike the Governo Firm's jury demand. The court held that the Governo Firm had a constitutional right to a jury trial on its claims for conversion, tortious interference, civil conspiracy, and its claim under the trade secret act. Although there is no constitutional right to a jury trial on the duty of loyalty and Chapter 93A claims, the court exercised its discretion to have the jury decide those claims as well because the factual issues for all claims were largely identical.

Defendants also moved to bar the Governo Firm from offering any evidence of damages on the ground that the materials at issue were not trade secrets. Alternatively, defendants sought to bar expert testimony regarding a reasonable royalty or the value of the materials. The court denied the request to bar evidence of damages because compilations of materials in the public domain may be protectable intellectual property even if they do not constitute a trade secret.

The court did, however, allow the request regarding expert testimony, finding that the proper measure of damages would be disgorgement of defendants' profits or recovery of the Governo Firm's lost profits. The court explained that a reasonable royalty measure of damages is only appropriate where the defendant has made no actual profits, and a measure based on value of the materials "is never appropriate in cases like this." The court pointed out that, once the Governo Firm demonstrated that defendants profited from use of the confidential information, the burden would shift to the defendants to prove what portion of their profits was not attributable to use of the confidential information.

The Governo Firm sought reconsideration of the expert decision on the grounds that the money earned by the individual defendants at CMBG3 was treated as salaries, not allocations of profits. The court denied the Governo Firm's request "because it improperly asks the Court to look at the reported profit or loss of CMBG3 in isolation, without considering whether Defendants as a whole have made money since leaving and starting their own law firm."

The jury returned a verdict in the Governo Firm's favor on some of its claims and found a breach of the duty of loyalty but no misappropriation of trade secrets or violation of Chapter 93A. At the Governo Firm's request, the court entered a narrow injunction prohibiting defendants from accessing or using certain materials taken from the Governo Firm. ■

Hickman v. Riverside Park Enters., 2019 Mass. Super. LEXIS 390

(June 20, 2019) (Salinger, J.).

Partial Summary Judgment Granted Based on Amusement Park Exemption to Overtime Law

Plaintiffs Dakota Hickman and Matthew D'Agostino, employees of Six Flags New England amusement park ("Six Flags"), brought suit claiming that Six Flags' owner, Riverside Park Enterprises, Inc. ("Riverside"), violated Massachusetts law by not paying overtime and for meal breaks. Pursuant to G.L. c. 151, § 1A(20), however, amusement parks that operate their rides for no more than 150 days per year do not have to pay overtime. Therefore, Plaintiffs' overtime claim turned on whether Riverside could claim application of that statutory exemption. Both sides moved for summary judgment on the overtime claims.

The court found that the defendants were entitled to summary judgment in their favor for hours worked during 2013, 2014, and 2016 because Riverside operated its attractions for no more than 150 days during those years. The court found that the fact that some employees worked on days when none of the park's attractions were open did not matter because the application of the exemption "turns on how many days the amusement park attractions are operated each year, not on how many days employees work at the facility each year." The court also held that days when Riverside rented out portions of the park were also irrelevant because the attractions were not operated during those days.

The court also found that Plaintiffs were entitled to summary judgment as to hours worked during 2015, 2017, and 2018, when Riverside operated for more than 150 days. The court stated that Riverside was not entitled to ignore days on which it was open fewer hours than normal, as "[t]he statutory exemption says nothing about counting hours." ■

All Tech Networking, LLC v. Pryor, 2019 Mass. Super. LEXIS 60

(Apr. 24, 2019) (Salinger, J.).

Representation of Close Corporation Did Not Automatically Result in Attorney Owing Fiduciary Duties to its Members

This case involves litigation between Steven Wojcik ("Wojcik") and Richard Pryor ("Pryor"), the sole members and managers of All Tech Networking, LLC ("All Tech"), stemming from Wojcik's decision to terminate Pryor's employment and prohibit him from acting on behalf of All Tech. Pryor asserted counterclaims for breach of contract, breach of fiduciary duty, and tortious interference with a business relationship and then sought leave to add counterclaims for breach of fiduciary duty by self-dealing, embezzlement, and dissolution of All Tech. Pryor also sought to add a third-party claim against plaintiffs' counsel, Attorney Richard Joyce ("Joyce"), for breach of fiduciary duty to Pryor. With respect to Joyce, Pryor alleged that Joyce had performed legal services for All Tech and therefore owed a fiduciary duty to its members that he breached by representing All Tech and Wojcik in litigation against Pryor. All Tech and Wojcik opposed the motion on the grounds of delay and futility.

The court disagreed that the motion should be denied on the grounds of delay, as the plaintiffs had not demonstrated that they would be prejudiced by the amendment. The proposed amendment sought to conform the counterclaims to the evidence gathered during discovery, and plaintiffs did not identify any discovery they would have conducted differently had the new claims been asserted earlier.

The court allowed Pryor to assert a dissolution counterclaim, though the court noted that dissolu-

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tion would be pursuant to G.L. c. 156C, not 156D, as stated in the proposed counterclaim. The court explained that a claim will survive a motion to dismiss so long as it alleges facts suggesting relief under any legal theory, even if it cites the wrong statute.

The proposed fiduciary duty and "embezzlement" claims had to be asserted as derivative claims, however, and the court granted Pryor leave to replead. The court rejected plaintiffs' assertion that Pryor needed to make a written demand, stating that the universal demand requirement "does not apply to derivative actions on behalf of a Massachusetts limited liability company." Pryor had alleged facts sufficient to show that it would be futile to demand that Wojcik authorize All Tech to sue himself.

The court denied Pryor's request to sue Joyce because the allegations did not support the existence of a fiduciary duty owed by Joyce to Pryor. The court first noted that third-party claims under Mass. R. Civ. P. 14 are intended to be claims for indemnification or contribution, and Pryor's counterclaim asserted neither. Moreover, the court rejected Pryor's argument that representation of a closely-held corporation automatically results in an attorney owing fiduciary duties to the members. The court also held that Pryor failed to allege damages from a fiduciary breach because if plaintiffs had not retained Joyce, they would have retained another lawyer, and Pryor would have ended up in the same position. ■

Bullen v. Cohnreznick, 2019 Mass. Super. LEXIS 391

(June 17, 2019) (Salinger, J.).

No Personal Jurisdiction Over Auditor Who Performed All Relevant Work Outside of Massachusetts

Plaintiffs were investors in a defunct hedge fund ("Fund") and claimed they were defrauded of tens of millions of dollars. They brought suit against the Fund's outside auditor and accountant, CohnReznick, LLP ("CohnReznick"), alleging, among other things, that it aided and abetted the Fund's fraud. CohnReznick is a New Jersey limited liability partnership headquartered in New York. CohnReznick had two offices in Massachusetts, but its Massachusetts business activities were a relatively small part of its overall operations. CohnReznick performed its audit work related to the Fund outside of Massachusetts.

The court allowed CohnReznick's motion to dismiss for lack of personal jurisdiction. The court first found that there was no specific personal jurisdiction under G.L. c. 233A, § 3(a) because Plaintiffs' claims did not arise from CohnReznick's transaction of business in Massachusetts. Plaintiffs' claims were based on audit and tax work performed exclusively outside of Massachusetts. The court stated that, even assuming CohnReznick was aware that forms it sent to the Fund in New York would be subsequently sent to Massachusetts, that did not constitute transacting business in Massachusetts. Nor did the fact that CohnReznick responded to several communications initiated by Plaintiffs' Massachusetts investment advisor suffice to establish personal jurisdiction. Even if such emails constituted transaction of business in Massachusetts, Plaintiffs' claims did not arise from such contacts because the loss of their investment was not the result of CohnReznick's emails.

For the same reasons, the court found that it could not constitutionally exercise specific jurisdiction over CohnReznick with respect to Plaintiffs' claim under the Massachusetts Uniform Securities Act: "[d]oing audit and tax work in New York and New Jersey, and sending that work product to the Fund in New York which in turn forwarded it to . . . Massachusetts, does not constitute 'purposeful availment' of the privilege of doing business in Massachusetts."

The court also rejected general personal jurisdiction under G.L. c. 233A, § 3(d). Although CohnReznick regularly did business in Massachusetts and derived substantial revenue from its Massachusetts services, it would be unconstitutional to subject it to general jurisdiction in Massachusetts because its activities were only a small part of its nationwide business and did not make CohnReznick "at home" in the Commonwealth. ■

White Winston Select Asset Funds, LLC v. Prof'l Diversity Network, Inc., 2019 Mass. Super. LEXIS 96 *(May 30, 2019) (Kaplan, J.).*

Claims Based on Failure to Provide Clean Stock Certificates Following Registration with SEC Survived Dismissal

Plaintiff White Winston Select Asset Funds, LLC ("White Winston"), a private equity firm, provided financing to defendant Professional Diversity Network, Inc. ("PDN"), a Delaware corporation, in connection with a commercial transaction. As part of that transaction, White Winston received the right to purchase common shares of PDN, which it exercised in 2016. At that time, the shares were not registered with the Securities and Exchange Commission ("SEC"), and the stock certificates contained a legend so stating. PDN subsequently registered the shares, and White Winston immediately requested new stock certificates. PDN refused to issue the new certificates. White Winston brought suit against PDN, alleging that PDN had an obligation to provide it with new, unlegended stock certificates but failed to do so, which prevented White Winston from selling the shares during a favorable market for the stock. White Winston asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, violation of Delaware statutes, and violation of Chapter 93A. PDN moved to dismiss.

The court denied the motion. The court held that, although there was no specific contractual provision requiring PDN to deliver stock certificates without a legend, "the allegations plausibly suggest that among the fruits of the financing transaction . . . was the grant of warrants for shares of PDN stock that White Winston could sell as soon as PDN was practically able to register them." The court also postponed consideration of PDN's argument that the conduct at issue involved a matter of corporate governance outside the scope of Chapter 93A. Although, generally speaking, a shareholder's claims involving its right to receive certificates involve intra-corporate matters, the rights allegedly impaired by PDN's conduct arose in the context of a commercial transaction. The court chose not to "grapple" with the question of the applicability of Chapter 93A at such an early stage in the litigation. ■

Silva v. Todisco Servs., 2019 Mass. Super. LEXIS 63

(Apr. 1, 2019) (Salinger, J.).

93A Claim Failed Where Consumer Class Did Not Identify Injury Separate from Regulatory Violation

Christopher Silva ("Silva") brought claims against Todisco Services, Inc. ("Todisco") for violation of Chapter 93A, declaratory relief, negligent misrepresentation, intentional fraud, and unjust enrichment, all arising out of Todisco's towing of Silva's vehicle from a private parking lot. Silva alleged that Todisco's invoice failed to include information required by a Department of Public Utilities ("DPU") regulation. The court certified a class as to the Chapter 93A and declaratory judgment claims. Todisco asserted counterclaims for unjust enrichment, quantum meruit, and declaratory relief based on its allegation that it inadvertently charged Silva less than the maximum allowable amount. Both parties moved for summary judgment.

The court first rejected Todisco's argument that Silva lacked standing because his son had paid the tow charges. Silva was the one who instructed his son to retrieve the vehicle, and he repaid him for doing so. The court also noted that Silva's standing was not affected by whether he could ultimately prove his claims: "the threshold question whether a plaintiff has standing

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is different than the ultimate merit of its allegations."

The court found in Todisco's favor on the Chapter 93A claim. The court began its analysis by explaining that not every violation of DPU regulations constitutes an unfair and deceptive act. The court went on to find that there is nothing "unfair" about charging a lawful fee for an involuntary tow, "even if the tow operator fails fully to comply with the disclosure obligations imposed by the DPU regulations." The court also held that plaintiffs could not prove a violation of Chapter 93A because there was no evidence they suffered an injury separate from the regulatory violation. The court stated, "[a] consumer is not entitled to collect even nominal damages under c. 93A without proving that the violation caused some sort of separate and distinct injury."

Todisco was also entitled to summary judgment on Silva's misrepresentation claims because there was no evidence that Todisco made any false statements, and any statements made by Todisco were statements of opinion, not fact.

Todisco's unjust enrichment and quantum meruit claims failed as a matter of law, however, because Todisco collected and was paid the full amount that it charged, and the fact that it could have charged more did not mean Silva was unjustly enriched. ■

N. Corp. v. Grosso, 2019 Mass. Super. LEXIS 69

(May 13, 2019) (Salinger, J.).

Negligence, Breach of Contract, and Chapter 93A Claims Against Attorney Survived Dismissal Despite Absence of Express Attorney-Client Relationship

Plaintiffs brought suit against defendant Attorney James F. Grosso ("Grosso") and his law firm (collectively, "Defendants") for legal malpractice in connection with a claim by the Sheet Metal Workers' Union (the "Union") that Northern Installation Corporation ("Northern"), as well as all other businesses under common control, owed more than $600,000 to the Union's pension fund. Grosso had responded to the Union's demand specifically on Northern's behalf but corresponded with the other plaintiffs – whom Grosso knew or should have known were targets of the Union's demand – regarding the demand. Plaintiffs asserted claims for negligence, breach of contract, and violation of Chapter 93A. Defendants moved to dismiss the negligence and breach of contract claims on behalf of the non-Northern plaintiffs and the Chapter 93A claim on behalf of all plaintiffs.

The court denied the motion to dismiss. The court found that the complaint plausibly suggested that Defendants breached a duty owed to all plaintiffs, not only Northern, because Grosso knew or should have known that all of the plaintiffs were relying upon him to handle the Union's demand and protect them from liability.

The court also found that the contract claims survived because the complaint plausibly suggested that plaintiffs had an implied attorney-client relationship with Grosso. The court explained that "the same reasonable and foreseeable reliance that allegedly created a duty of care from Grosso to all of the Plaintiffs can also be understood to create an implied attorney-client relationship."

The Chapter 93A claim survived because the complaint plausibly suggested that Defendants negligently misrepresented their competence to handle the type of pension dispute at issue in the underlying case. The court held that responding to the demand on Northern's behalf constituted an "implied representation" that Grosso was competent to handle the matter. In addition, even if the non-Northern plaintiffs were unable to prove an implied attorney-client relationship with Grosso, the allegation that Defendants owed them a duty of care "akin to" an attorney client relationship sufficed to bring the claim within trade or commerce under Chapter 93A. ■

Miller Inv. Trust v. Morgan Stanley & Co., 2019 Mass. Super. LEXIS 388

(June 21, 2019) (Salinger, J.).

MUSA Claim May Proceed Despite Six Weeks Between Misstatement and Sale of Securities

Defendant Morgan Stanley & Co. ("Morgan Stanley") sold Plaintiffs millions of dollars' worth of notes issued by ShengdaTech. Plaintiffs purchased those securities through a series of transactions over the course of several months. Plaintiffs alleged that Morgan Stanley sold the securities by means of misleading statements in a private placement memorandum, in violation of the Massachusetts Uniform Securities Act ("MUSA"). Morgan Stanley moved for summary judgment, arguing that plaintiffs could not establish any connection between the allegedly misleading statements and plaintiffs' purchases. Specifically, Morgan Stanley argued that no jury could find that its initial sale of securities to plaintiffs was "by means of" the alleged misleading statements because plaintiffs had entered into a binding contract to purchase the securities before their agent received the private placement memorandum.

The court denied the motion for summary judgment. The court first found that there was an issue of fact regarding exactly when a contract was formed between plaintiffs, through their agent, and Morgan Stanley. Moreover, the court held that, even if the contract was formed before sending out the private placement memorandum, a jury could conclude that the sale was "by means of" the alleged misstatements because the transaction did not close until four days after the agent's receipt of the memorandum. The court noted that plaintiffs need not allege that Morgan Stanley's misstatements "actually caused" plaintiffs to purchase the securities: "the statute requires only some causal connection between the alleged communication and the sale, even if not decisive."

The court also rejected Morgan Stanley's argument that the latter sales of securities to plaintiffs were not "by means of" the private placement memorandum because too much time had passed. The court stated, "A jury must consider all the circumstances to determine whether a particular sale of securities was made by means of an alleged misstatement. Morgan Stanley has not shown that the passage of six weeks from an alleged misstatement to a sale and purchase of securities must always bar a claim under the MUSA as a matter of law." ■

Psychemedics Corp. v. City of Boston, 2019 Mass. Super. LEXIS 98

(May 22, 2019) (Kaplan, J.).

Indemnification Right Unenforceable Absent Notice

Defendant City of Boston ("City") entered into a series of contracts with plaintiff Psychemedics Corporation ("Psychemedics") pursuant to which the City purchased hair follicle testing services from Psychemedics for use by the Boston Police Department ("BPD"). The contracts required Psychemedics to assume the City's defense and hold it harmless from claims arising out of any wrongful or negligent acts of Psychemedics.

Several BPD officers were terminated after hair samples they submitted to Psychemedics tested positive for cocaine. The officers challenged their termination, claiming the follicle test was not based on a scientifically sound methodology and the collection process was flawed. Some of these officers were successful in their appeals, and some joined in a separate civil rights lawsuit against the City based on the impact of the test on people of color. Psychemedics never assumed the defense of any of these cases. The City eventually demanded indemnification from Psychemedics for the damages awarded to the officers and the costs the City incurred in defending against their claims. Psychemedics brought suit seeking a declaration that the City is not entitled to indemnification and subsequently moved for

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summary judgment. Psychemedics argued that the City could not enforce the indemnification clause against Psychemedics because the City neither requested nor allowed Psychemedics to defend the lawsuits. The City contended that Psychemedics had an obligation to affirmatively assert its right to assume the defense once it learned of claims against the City.

The court allowed the motion. It noted the lack of case law concerning the obligations of an indemnitee when enforcing a contractual right to indemnification. The court then explained that, although the requisite notice of indemnification rights need not take the form of an explicit written demand, "the indemnitee must make it clear that it is calling upon the indemnitor to take over the case or be responsible for an adverse outcome." The City failed to provide Psychemedics with an explicit or implicit demand that it provide a defense; to the contrary, the City immediately assumed the defense of all matters itself. The court held that "an opportunity to assume the defense must be clearly articulated in order to charge Psychemedics as indemnitor." ■

Christensen v. Cox, 2019 Mass. Super. LEXIS 53

(Apr. 25, 2019) (Kaplan, J.).

Settlement Reached at Mediation Enforced Despite Failure to Memorialize it in Subsequent Formal Agreement

The parties to this case engaged in a mediation of their dispute. The mediation lasted fourteen hours and resulted in an agreement that was memorialized shortly before midnight in a document titled "Binding Mediation Agreement," signed by the parties and their counsel. The Agreement contained a clause requiring the parties to cooperate to memorialize the terms in a formal settlement agreement. The parties were unable to cooperate and memorialize the settlement in a formal agreement. Plaintiff alleged that a binding settlement was reached at mediation and brought a motion to enforce it.

The court allowed the motion, noting that oral and written settlement agreements are enforced where all material terms have been agreed upon, even where the parties contemplated completion of further documentation. The court noted that the Mediation Agreement stated that the material terms of the settlement were set forth therein and rejected defendant's arguments that the Agreement failed to include all material terms, was conditional on execution of further documents, or is unenforceable because the mediation was confidential. ■

Paypal, Inc. v. NantHealth, Inc., 2019 Mass. Super. LEXIS 58

(Apr. 16, 2019) (Salinger, J.).

Request for Leave to Amend to Hold Parent Liable for Subsidiary's Breach of Sublease Denied as Futile

Plaintiff PayPal, Inc. ("PayPal") brought suit against Defendant NantHealth, Inc. ("NantHealth") for allegedly breaching its sublease. PayPal asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, violation of Chapter 93A, and declaratory judgment. PayPal sought leave to add a claim against NantHealth's parent, NantWorks, LLC ("NantWorks"). NantHealth argued that the motion was untimely and would be futile. The court disagreed that the motion should be denied on the grounds of delay because NantHealth failed to show prejudice. The court agreed, however, that the proposed amendment would be futile and denied the motion.

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The court held that the allegations in the proposed amended complaint did not provide a basis for piercing the corporate veil because there was "no allegation that NantWorks and NantHealth worked together to defraud PayPal, or that NantWorks used its control of NantHealth to injure PayPal in some other way." There were also no allegations that NantWorks disregarded NantHealth's separate nature or that PayPal was confused about which company it was dealing with. The court explained that a corporate parent may not be held liable for its subsidiary's breach of a lease merely because it controlled the subsidiary – there must be evidence that the parent used its relationship with the subsidiary to defraud or unfairly injure the landlord.

The court also rejected PayPal's claim that NantWorks could be liable under an agency theory. There were no allegations plausibly suggesting that NantHealth was acting as NantWorks' agent when it leased the space. The mere fact of common management or shareholders was insufficient to establish an agency relationship. The sublease also stated that PayPal and NantHealth were the only parties to the contract and that NantHealth was signing on its own behalf. Therefore, even assuming NantHealth had authority to act as NantWorks' agent, its decision to execute the sublease solely on its own behalf meant that only NantHealth was bound by that contract. ■

Punzak v. McIvor, 2019 Mass. Super. LEXIS 46

(Apr. 5, 2019) (Kaplan, J.).

Shareholder in 83-Member Professional Corporation Permitted to Proceed to Trial with Direct Fiduciary Claim Against President

Plaintiff, Dr. Stephen Punzak ("Punzak"), was a former member and shareholder of defendant Anesthesia Associates of Massachusetts, P.C. ("AAM"). All AAM shareholders were practicing anesthesiologists, and many of them referred to one another as "partners." The physician shareholders earned the same base pay and shared equally in AAM's profits. Defendant Dr. James English ("English") was the president of AAM and exerted a significant amount of influence over the affairs of AAM, although he was not a "majority shareholder" because he held the same interest in AAM as all of the other shareholders.

Punzak's employment was involuntarily terminated and he was forced to sell back his shares in AAM. At the time of his termination, there were 83 shareholders in AAM, and therefore it was not a closely held corporation. Punzak brought suit against English and others for breach of fiduciary duty, intentional interference, and other claims. The defendants moved for summary judgment.

The court denied the motion with respect to the fiduciary duty claim brought by Punzak against English. The court stated that "the attributes of a closely held corporation" were "strikingly similar to those that pertain to professional corporations like AAM." The court went on to hold that, where AAM and English had attributes "similar in nature to a closely held corporation and a controlling majority shareholder, respectively," it was appropriate to apply an exception to the general rule that officers of a corporation do not owe direct fiduciary duties to shareholders. Accordingly, English "ought to have fiduciary obligations to each of his fellow physicians to treat them fairly, as well as obligations to AAM."

The court also denied the motion with respect to the intentional interference claim, holding that a jury could find that the defendants were motivated by personal animosity in terminating Punzak. The court also held that this claim was not tied to the existence of a written employment contract because "malicious interference with an at-will employment relationship will support a cause of action." ■

Amgen USA, Inc. v. Karyopharm Therapeutics, Inc., 2019 Mass. Super. LEXIS 397 *(June 11, 2019) (Kaplan, J.).*

Massachusetts Uniform Trade Secrets Act Not Applicable to Misappropriation Predating October 1, 2018

Plaintiff Amgen USA, Inc. ("Amgen"), a biotechnology company, brought suit against defendant Karyopharm Therapeutics, Inc. ("Karyopharm"), alleging that it hired a group of Amgen's leading sales managers, who then used trade secret information to hire away fifteen of Amgen's most effective sales representatives. The alleged misappropriation began in February of 2018. Amgen brought claims for misappropriation of trade secrets in violation of G.L. c. 93, § 42, tortious interference with contract, and violation of Chapter 93A. Karyopharm moved to dismiss.

The court denied the motion. The court first rejected Karyopharm's argument that the complaint failed to meet the particularity requirement of the recently-enacted Massachusetts Uniform Trade Secrets Act ("MUTSA") because MUTSA took effect on October 1, 2018 and does not have retroactive effect. The court also declined to apply the heightened pleading standard of Mass. R. Civ. P. 9(b) because Amgen had not alleged fraud, duress, or undue influence.

The court also declined to dismiss the tortious interference claim based on Amgen's allegations that Karyopharm induced sales managers to breach their employment contracts and thus unlawfully obtained and misused Amgen's trade secret information in violation of G.L. c. 93, § 42. The court noted that improper means may consist of violation of a statute or common law precept. With respect to the Chapter 93A claim, the court rejected the argument that the conduct at issue did not occur in trade or commerce. Amgen and Karyopharm were not in an employer/employee relationship. ■

Cabrera v. Auto Max Preowned, Inc., 2019 Mass. Super. LEXIS 395

(June 14, 2019) (Kaplan, J.).

Court Considers Whether a Proposed Class is "Ascertainable" in Context of Request for Class Certification

Plaintiff Carlos Cabrera ("Cabrera"), on his own behalf and on behalf of other similarly situated individuals, brought suit against defendants Auto Max Preowned, Inc., New England Auto Max, Inc., and Auto Max, Inc. (collectively, "Auto Max"). Cabrera alleged that Auto Max sold used vehicles without disclosing structural/frame damage.

The court denied Cabrera's motion for class certification. In order for plaintiffs to prove that Auto Max committed regulatory violations, they would need to prove that Auto Max failed to disclose "material" facts about the vehicles. The court held that materiality could not be established on a class wide basis because whether the failure to disclose structural damage was material in the context of a particular transaction was entirely contingent on the circumstances of that sale. The court noted that there is no statutory or regulatory requirement that used car dealers provide written disclosure of structural damage. In addition, there was little evidence that the experience of putative class members mirrored that of Cabrera, and Cabrera failed to provide evidence that the issue he experienced was "pervasive."

The court also stated that certification was inappropriate because the class was not "ascertainable," meaning that individual fact finding would be necessary to identify class members. Although no Massachusetts appellate decision has addressed the question of whether ascertainability is an appropriate consideration, the court relied on federal case law suggesting ascertainability is an "implicit element" of class certification. ■

Blue Nile, LLC v. Harding, 2019 Mass. Super. LEXIS 101

(May 13, 2019) (Kaplan, J.).

Challenge to Tax Assessment Dismissed for Failure to Exhaust Administrative Remedies

Plaintiffs are engaged in internet retail sales of products. In October of 2017, the defendant, the Commissioner of the Massachusetts Department of Revenue ("Commissioner"), promulgated a regulation which required internet retailers without a physical place of business in Massachusetts to collect Massachusetts sales tax on sales to Massachusetts residents. Plaintiffs, relying on two existing decisions from the United States Supreme Court holding that a state could only require an out-of-state retailer to collect sales tax if it had a physical presence in the state, did not comply with the new regulation. In June of 2018, the Supreme Court overturned its prior standard and held that an internet retailer has the necessary nexus with the state if it avails itself of the substantial privilege of doing business in that state. The Plaintiffs then began collecting sales tax. The Commissioner, however, sought to assess taxes for the period where Plaintiffs were not collecting them. The Plaintiffs filed a declaratory judgment action, arguing that the new Supreme Court standard could not be retroactively applied. The Commissioner moved to dismiss for failure to exhaust administrative remedies.

The court allowed the motion to dismiss. The court explained that there is an administrative process through which taxpayers may seek abatement of a tax, though exceptions to the exhaustion of remedies rule exist when important, novel or recurrent issues are at stake, when the decision has public significance, or when the case reduces to a question of law. The court noted that it was not apparent that a decision in this case would have an impact beyond the Plaintiffs. Therefore, "although a very close question," the court declined to exercise its discretion to resolve the matter by declaratory judgment. ■

Preferred Pharm. Sols., LLC v. Mason, 2019 Mass. Super. LEXIS 59

(Apr. 18, 2019) (Salinger, J.).

Rule 12(b)(9) Did Not Apply Where Claims in Second Action Were Separate and Distinct from Claims in First Action

Norman Mason ("Mason") brought suit in Worcester Superior Court against three of the five members of Preferred Pharmacy Solutions, LLC ("PPS"). Mason joined the remaining member, Richard Kravetz ("Kravetz"), as a necessary party, and two of the defendants asserted counterclaims. PPS subsequently brought a separate action in Suffolk Superior Court against Mason and Kravetz, which raised some of the same factual issues. Mason and Kravetz moved to dismiss this action on the grounds that it was barred by the prior pending case and that venue in Suffolk County was improper.

The court rejected the prior pending action argument because the prior action involved different legal claims on behalf of different parties and the result of that case would not bind PPS. In the Worcester action, the members were asserting individual claims against one another and were not asserting any derivative claims on PPS' behalf. The court stated that the distinction between individual and derivative claims is "significant."

The court agreed, however, that venue was not proper in Suffolk County because none of the parties lives or has its usual place of business there. The court ordered that the case be transferred to Worcester and consolidated with the first action, relying on its "broad authority to consolidate separate civil actions that arise from the same transaction or event, even if the actions were brought in different counties." ■

Bruett v. Walsh, 2019 Mass. Super. LEXIS 99

(May 8, 2019) (Kaplan, J.).

Insurance Company Unlikely to Succeed in Effort to Prevent Former Agent from Servicing Clients Who Contacted him Without Solicitation

Plaintiff David C. Bruett ("Bruett"), an insurance agent, filed a declaratory judgment action against his former employer, defendant John J. Walsh Insurance Agency ("Walsh"), seeking a declaration that certain restrictive covenants in his employment agreement with Walsh were not enforceable against him. Bruett's employment agreement prohibited him from soliciting or transacting business for Walsh's clients for three years following termination. After leaving Walsh, Bruett notified Walsh that certain of his former clients at Walsh had reached out to him and requested that he service them at his new agency. Bruett had not solicited those clients. Bruett informed Walsh that he intended to provide services to them. The defendants moved for a preliminary injunction prohibiting Bruett from violating his employment agreement.

The court found that Walsh was unlikely to succeed on the merits of its claim to enforce that part of Bruett's restrictive covenant that attempted to prohibit him from servicing his former clients who followed him to his new firm without solicitation. The court explained that, where a client goes to the trouble of tracking down Bruett, "the goodwill is likely more the result of Bruett's individual service to that client than the other benefits that may have been derivative of [Walsh's] services." The court also found that the risk of harm to Bruett under the circumstances outweighed the harm to Walsh, as the loss of Bruett's ability to service his former clients might cause his new venture to fail, while Walsh's loss of a few accounts was unlikely to cause irreparable injury. The court did, however, enter a preliminary injunction prohibiting Bruett from contacting clients who were Walsh clients at the time of Bruett's termination, to the extent Bruett had contact with those clients while at Walsh or was familiar with them. ■

Mach. Project, Inc. v. Lucas, 2019 Mass. Super. LEXIS 52

(Apr. 22, 2019) (Kaplan, J.).

Savings Statute Inapplicable Where Complaint Received By Clerk's Office More Than One Year After Dismissal

Plaintiff Kinser Chu and defendant Anthony Lucas ("Lucas") jointly owned plaintiff Machine Project, Inc. ("Machine Project"). Machine Project had contractual rights to manufacture and market products bearing the trademark of Pan Am American World Airways, Inc. ("Pan Am"). Plaintiffs brought a series of four lawsuits against Lucas. In the suit giving rise to the decision at issue, plaintiffs alleged that Lucas was responsible for Pan Am's efforts to terminate the agreement with Machine Project. Plaintiffs filed the instant lawsuit by mail on July 28, 2017, following dismissal of a prior federal action against Lucas on July 28, 2016. The clerk's office received and docketed the new lawsuit on July 31, 2017. Lucas moved for judgment on the pleadings on the grounds that plaintiffs' claims were time barred.

The court granted Lucas' motion. The court held that the statute of limitations had expired more than six years before the present lawsuit was filed. The court rejected plaintiffs' argument that the Massachusetts Savings Statute, G.L. c. 260, § 32, applied. The present lawsuit was not filed within a year after the dismissal of the prior lawsuit because, where first class mail is used, the suit is not commenced until the complaint and filing fee are received, and here, the complaint was not received until July 31. The court stated, "where a party uses regular mail the date of mailing is not the relevant date for determining when an action commenced." ■

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