



FEATURED DECISIONS:

Nortek AS v. Zifteh

No. 26-464-BLS1 (May 26, 2026) (Krupp, J.)

Derivative Plaintiff That Makes a Pre-Suit Demand Must Give the Board a Reasonable Opportunity to Act Before Filing Suit

Nortek AS (“Nortek”) purported to bring a derivative action on behalf of Nefring Inc. (“Nefring”), a Delaware corporation, seeking declaratory judgment and injunctive relief. Nortek was not itself a Nefring shareholder; rather, its wholly owned subsidiary, NortekUSA, was a minority shareholder of Nefring. Nortek also was a creditor of Nefring under a \$500,000 loan that would not mature until the end of 2026, and alleged that Nefring was insolvent. Before filing suit, Nortek sent Nefring a January 27, 2026 demand requesting that Nefring convene its annual stockholder meeting, appoint a neutral third director, and have the Board evaluate Nefring’s financial condition, address its alleged insolvency, and protect its remaining enterprise value. Nefring responded by sending meeting materials on February 6 and scheduling a Board and stockholder meeting for February 19. Nortek nevertheless filed suit on February 13, six days before the scheduled meeting. Defendant Freda L. Zifteh moved to dismiss, arguing, among other things, that Nortek lacked standing and had failed to satisfy the pre-suit demand requirement. The court allowed the motion and dismissed the action without prejudice to Nortek bringing a later action after proper demand, if a basis for doing so remained.

The court first held that Nortek could not sue derivatively as a shareholder because NortekUSA, not

Nortek, owned the Nefring shares. Nortek’s characterization of itself as an “indirect” shareholder was insufficient, and Delaware’s double-derivative doctrine did not apply because Nortek was not a shareholder of the corporation on whose behalf it sought to sue. The court separately assumed, without deciding, that Nortek could pursue a derivative claim as a creditor of an insolvent corporation even though its loan had not yet matured. That theory nevertheless failed because Nortek did not adequately allege either an unsuccessful demand or demand futility. Its own complaint showed that Nefring promptly responded to the January 27 demand by scheduling the requested corporate meeting, but Nortek filed suit before giving the Board an opportunity to act. The court reasoned that it would make little sense to require a shareholder or creditor to demand Board action while permitting that party to sue before learning whether the Board would remedy the complained-of conduct. The subsequent events reinforced that conclusion: when the Board ultimately met in March, it adopted all or most of Nortek’s requested measures, including adding an independent director, implementing governance changes, retaining an independent restructuring professional, and expanding Board access to company records. The court therefore dismissed the action without prejudice and denied the defendant’s request for sanctions. ■

Gem Plumbing & Heating Servs., LLC v. Rusty's, Inc.
No. 2484CV00083-BLS2, 2026 Mass. Super. LEXIS 29 (Apr. 29, 2026) [Sallinger, J.]

Representations and Warranties in Asset Purchase Agreement Did Not Require Seller to Disclose That Employees Operated a Competing Business

Gem Plumbing and Heating Services (“Gem”) purchased Rusty’s, Inc. (“Rusty’s”) from Michael Roderick and Thomas Hansen. Two weeks after the closing, Gem fired Roderick and Hansen after learning that two Rusty’s employees, including Hansen’s son, owned Air Pros, a competing HVAC company. Gem alleged that the sellers fraudulently concealed Air Pros and breached several representations and warranties in the Asset Purchase Agreement (“APA”), including representations that Rusty’s had no undisclosed affiliates, that no conditions interfered with the use or operation of its assets, that there had been no material adverse change, and that the company complied with applicable law. Gem also asserted fiduciary duty, Chapter 93A, and conspiracy claims. Roderick and Hansen counterclaimed for, among other things, breach of employment agreements after Gem terminated them for cause. The court granted summary judgment for the defendants on Gem’s claims for fraud, breach of contract, breach of fiduciary duty, violation of G.L. c. 93A, and civil conspiracy.

The court stated that Air Pros was not an “affiliate” of Rusty’s because neither Rusty’s nor its owners had an ownership interest in or control over Air Pros; the fact that two Rusty’s employees owned Air Pros did not create the corporate-control

relationship ordinarily conveyed by the term “affiliate.” Nor did the APA’s representation that there were no facts or conditions interfering with the use or operation of Rusty’s assets require the sellers to disclose the existence of a competitor or guarantee that particular employees would continue working after the acquisition. The court concluded that no rational business person would understand the APA’s representation concerning interference with Rusty’s assets as guaranteeing that Rusty’s had no competitors or that particular employees would remain after the acquisition.

Although a jury potentially could have found that Roderick and Hansen occupied positions of trust while briefly serving as managers for Gem after the closing, Gem had no evidence that they breached any resulting fiduciary duty. They did not own or work for Air Pros, and Gem failed to establish that the identity of one particular competitor was material information they were obligated to disclose. Because Gem’s Chapter 93A and conspiracy theories were derivative of its failed fraud and fiduciary duty claims, those claims failed as well. The court separately held that Gem lacked contractual cause to terminate Roderick and Hansen for failing to make disclosures they had no obligation to make. ■



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Competitor's Hiring of Employee Did Not Plausibly Establish Tortious Interference Without Facts Showing Improper Motive or Means Beyond Ordinary Competition

USI Insurance Services LLC (“USI”), an insurance brokerage and consulting firm, sued former employee Matthew Hillberg and his new employer, Alera Group, Inc. (“Alera”), after Hillberg left USI to join Alera, a direct competitor. Hillberg had worked for USI since 2012 and, under a 2021 employment agreement, was subject to confidentiality and non-solicitation provisions, a requirement that he provide 60 days’ notice before resigning, and an obligation to give any new employer a copy of certain restrictive provisions before beginning new employment. As a Senior Vice President, Hillberg had access to USI client relationships and confidential information, including client lists, coverage information, placement histories, and leads. On January 30, 2026, Hillberg resigned effective immediately, and he began working for Alera three days later. USI alleged that Hillberg had also forwarded confidential documents to his personal email before resigning and that Alera knew about his contractual obligations and encouraged or assisted his breaches. USI asserted contract claims against Hillberg and tort claims against Alera for intentional interference with the 2021 agreement and aiding and abetting Hillberg’s alleged fiduciary breach. Alera moved to dismiss the two claims against it. The court allowed the motion but granted USI 21 days to amend.

The court held that USI had not plausibly alleged that Alera interfered with Hillberg’s 2021 agreement through improper motive or means. Although USI alleged that Alera induced Hillberg to leave and knew about his contractual restrictions, gaining a competitive advantage or improving a company’s business is not, standing alone, improper interference. Because Alera was a direct competitor and Hillberg brought potentially valuable client relationships and expertise, recruiting him fell within ordinary competitive business activity. USI did not allege facts showing ill will, bad blood, independently wrongful conduct, or any other basis for inferring that Alera acted for an improper purpose rather than a legitimate competitive one. Its allegations that Alera knew about, encouraged, and assisted Hillberg’s breaches were also too conclusory because the complaint did not identify who at Alera knew about Hillberg’s obligations or describe how Alera supposedly encouraged or assisted the breach.

The aiding-and-abetting claim failed for the same reason. Although a plaintiff may plead facts on information and belief, USI alleged only that Alera knew of and substantially assisted Hillberg’s misconduct without providing factual detail about what Alera knew, who possessed that knowledge, or what assistance it provided. Those allegations did not plausibly establish the active participation or substantial assistance required for aiding and abetting a fiduciary breach. ■

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Marketers in Demand, LLC v. Lockwood

No. 25-887-BLS1 (Apr. 30, 2026) (Krupp, J.)

Arbitration Clause in Employment Agreements Applied to Claims Based Exclusively on Post-Termination Misconduct

Charles Lockwood and Joshua Walovitch (together, “the Sellers”) sold their marketing company, Ideometry, LLC (“Ideometry”), to Marketers in Demand, LLC (“MID”). After MID acquired Ideometry, it and Ideometry brought suit alleging that three former Ideometry employees retained and used confidential information after leaving the company to help establish a competing business. Each employee had agreed to arbitrate any dispute or claim relating to or arising out of the employment relationship; however, Plaintiffs

based their claims only on the employees’ post-departure conduct.

Nevertheless, the court compelled arbitration because the employees obtained access to the information at issue through their employment, and nothing in the arbitration provision limited its reach to conduct occurring while they remained employed. The fact that the alleged misuse occurred after termination therefore did not remove the dispute from the clause’s broad scope. ■

The Achievement Network, Ltd. v. Eedi Ltd.,

No. 26-980-BLS1 (June 24, 2026) (Krupp, J.)

Agreement Prohibiting Arbitrator from Awarding Equitable Relief Permitted Claims Seeking Injunctions to Proceed in Court

The Achievement Network, Ltd. (“ANet”) hired Eedi Ltd. (“Eedi”) to develop an AI-based predictive academic tool using ANet’s data. Their agreement included confidentiality, intellectual-property, noncompetition, and non-solicitation provisions, as well as a dispute-resolution clause requiring negotiation, mediation, and ultimately arbitration. The agreement also provided that the arbitrator could not award equitable relief and that a party could seek injunctive or declaratory relief without first using those procedures. After Eedi entered into an agreement with Imagine Learning, an ANet competitor, ANet sued for breach of contract, breach of the implied covenant, trade secret misappropriation, violation of Chapter 93A, unjust enrichment, and declaratory relief. It sought monetary and injunctive relief. Eedi moved to dismiss, arguing that ANet had known about and effectively consented to its work with Imagine Learning, that the Chapter 93A claim lacked a sufficient Massachusetts connection, and that ANet’s claims belonged in arbitration. The court denied the motion.

The court found that the parties’ communications did not establish ANet’s consent or waiver as a matter of law. Although ANet knew Eedi was discussing work with Imagine Learning, later messages could reasonably be read as objecting to any arrangement that conflicted with the existing agreement, which was enough for the claims to survive dismissal. The court also held that Eedi’s challenge to the Chapter 93A claim was premature because whether the alleged conduct occurred “primarily and substantially” in Massachusetts generally requires factual findings, and Eedi bears the burden on that issue. Finally, the arbitration clause did not bar ANet from pursuing equitable relief in court. Because the agreement expressly prohibited the arbitrator from awarding equitable relief and allowed the parties to seek injunctive or declaratory relief outside the contractual dispute-resolution process, ANet could pursue its requests for injunctive relief in court. Its damages claims, however, could still be subject to arbitration. ■

Shareholder Bound by Covenant Not to Challenge Financing and Merger Agreements Could Not Bring Derivative Action Seeking to Invalidate Those Agreements

Capital Artists, LLC, a roughly 27.5% shareholder of Active Protective Technologies, Inc. (“APT”), brought a derivative action challenging financing and acquisition agreements between APT and Asahi Kasei Holdings US, Inc. (“AK Holdings”). In 2021, while APT was in serious financial distress, AK Holdings agreed to provide up to \$17 million in financing in exchange for, among other things, the right to appoint two APT directors and an option to acquire APT through a future merger. Capital and the other shareholders approved the transaction, and Capital signed the Option Agreement, which included a covenant not to bring any derivative or other claim challenging the validity or operation of the financing, option, or merger agreements. Capital later sued, alleging that AK Holdings failed to pay the required option premium, that the financing was usurious, that the contemplated merger agreement was unenforceable, and that AK Holdings aided and abetted fiduciary breaches by its board designees. AK Holdings moved to dismiss, and the court dismissed all claims with prejudice.

The court held that the covenant not to sue barred Capital’s claims seeking to invalidate the agreements. Even apart from that covenant, the claims failed on the merits. The contract documents established that \$1 million of AK Holdings’ initial funding also satisfied the option premium, and the financing commitments provided sufficient consideration for both agreements. The usury claim failed because the stated interest rate would not exceed 20% before maturity, and the provision reducing a future merger price by twice the outstanding principal was a purchase-price adjustment, not additional interest. The challenge to the future merger agreement was also premature because AK Holdings had not yet exercised its option, and the agreement contained a sufficiently definite formula for calculating the purchase price. Finally, the aiding-and-abetting claim failed because the AK directors joined APT’s board only after the challenged agreements were approved, and their later failure to pursue alternative financing did not constitute a fiduciary breach where APT was already contractually restricted from doing so without AK Holdings’ consent. ■

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Thomson v. Holt Road LLC

No. 22-74-BLS1, 2026 Mass. Super. LEXIS 41 (Apr. 13, 2026) (Krupp, J.)

Third Party Employer Did Not Aid and Abet Controlling Owners' Alleged Fiduciary Breach, Absent Evidence They Were Hired to Divert Proceeds from Plaintiff

William Thomson, a 25% owner of several family businesses, claimed that his three brothers, who controlled the remaining interests, breached fiduciary duties in transactions involving North Andover Waste Systems ("NAWS"). The family businesses sold assets to NAWS, licensed it a waste permit for fifteen years, and leased property to it for \$600,000 annually, generating more than \$15 million for the businesses. NAWS also hired each brother at a \$150,000 annual salary. Thomson asserted that NAWS aided and abetted the brothers' fiduciary breaches and participated in a civil conspiracy by effectively diverting value that should have gone to the family businesses directly to the controlling brothers. The court granted NAWS' motion for summary judgment on the claim for aiding and abetting breach of fiduciary duty, as well as the claim for civil conspiracy insofar as it applied to NAWS.

Although Thomson pointed to NAWS' knowledge of his ownership interest and the substantial salaries

paid to his brothers, there was no evidence that the positions were sham jobs, that the brothers did not perform work for NAWS, that their salaries exceeded fair market value, or that NAWS hired them to divert proceeds away from Thomson. Thomson also relied on findings from an earlier contempt proceeding, but those findings concerned separate \$10,000 monthly distributions made by one of the family businesses from NAWS rental payments, not the salaries NAWS paid the brothers for their employment. Without evidence that NAWS knowingly and substantially assisted a fiduciary breach, both the aiding-and-abetting and conspiracy claims failed.

The court also refused to postpone summary judgment under Rule 56(f) because Thomson did not submit the required affidavit identifying the material evidence he could not yet obtain or explaining how additional discovery was likely to affect the motion. The mere existence of an ongoing discovery dispute did not justify delaying adjudication. ■

Murphy v. Newtek Small Bus. Fin., LLC

No. 26-605-BLS1 (May 12, 2026) (Krupp, J.)

Oral Loan Modification May Survive a No-Oral-Modification Clause Where the Alleged Agreement Is Corroborated by the Parties' Conduct and Contemporaneous Communications

Hawthorne Food Company ("Hawthorne") borrowed \$3.5 million from Newtek Small Business Finance, LLC ("Newtek") under a promissory note requiring monthly payments and a provision barring oral modifications. When Hawthorne encountered financial trouble in 2024, it alleged that Newtek offered a six-month payment deferment on the condition that Hawthorne first miss a payment.

Hawthorne accepted the offer and skipped the next payment. Subsequent emails from Newtek referred to the "Deferment" and transmitted documentation for it. Hawthorne then petitioned for Chapter 11 bankruptcy, which was converted to Chapter 7 liquidation. Its bankruptcy trustee sued Newtek on claims of breach of contract, breach of the implied

covenant of good faith and fair dealing, intentional and negligent misrepresentation, promissory estoppel, and violation of Chapter 93A. Each of the counts was based on Newtek's failure to honor the alleged oral agreement to allow Hawthorne to defer loan payments for six months. Newtek filed a motion to dismiss the claims and the court denied it in full.

Although the note unambiguously prohibited oral modification, Massachusetts recognizes narrow circumstances in which the parties' subsequent words and conduct can establish an oral modification despite such a provision. The parol evidence offered by the

party relying on the oral modification must be sufficient enough to demonstrate an ambiguity between the contract and the actual conduct of the parties. Here, the alleged offer, acceptance, missed payment in reliance on the deferment, and contemporaneous emails plausibly supported either a collateral agreement or a modification and created enough tension between the written contract and the parties' actual conduct to permit the claims to proceed. The same allegations also adequately supported the trustee's related misrepresentation, estoppel, and Chapter 93A theories. ■

EnterpriseDB Corp. v. Flora

No. 26-1767-BLS1 (June 23, 2026) (Krupp, J.)

Broad Allegations of Possession of Business Knowledge Insufficient to Establish Irreparable Harm for Alleged Misuse of Confidential Information

EnterpriseDB ("EDB"), an open-source PostgreSQL database company, sought to prevent former senior executive Douglas Flora from working for Couchbase, Inc. ("Couchbase"). EDB initially sued in Florida based on concerns that Flora had taken confidential information. A stipulated TRO required Flora to surrender devices and accounts for forensic examination, and he complied. EDB did not identify anything from that examination showing that Flora retained, forwarded, or used its confidential materials. After the Florida suit encountered a forum-selection problem, EDB filed in Massachusetts and shifted its preliminary-injunction theory toward the information and general know-how Flora had acquired while employed at EDB. The court denied the injunction because EDB failed to show either a likelihood of success on the merits or irreparable harm.

Flora's agreement prohibited work for a "Competitor," but the attached competitor list consisted of companies selling PostgreSQL products; Couchbase sold a NoSQL platform. Although the

agreement permitted EDB to update that list prospectively twice a year, it never did so. More significantly, the noncompetition provision expressly stated that Flora remained free to "work on databases other than PostgreSQL," so long as he did not develop or contribute to features competing with EDB's proprietary software. Flora's role was in marketing, sales enablement, and training, not product development, making the exception directly applicable. Any ambiguity would also be construed against EDB as drafter.

EDB likewise failed to identify a concrete threat of irreparable misuse of confidential information. After the forensic review produced no evidence of retained materials, EDB relied principally on broad assertions that Flora possessed substantial knowledge about its business strategy. Without identifying particular confidential information and explaining how Flora's work at Couchbase would necessarily employ it, those generalized concerns were insufficient to justify barring him from employment. ■