NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
2184CV01795-BLS2

KELYN HARRELL, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED

v.

BACKSTAGE SALON & DAY SPA, INC. AND MARYANN RICHARDSON

v.

KELYN HARRELL AND ADORE SALON, LLC

NOTICE SENT (2) 02.24.22 (sc)

MEMORANDUM AND ORDER ALLOWING MOTION TO DISMISS COUNTERCLAIMS AND THIRD-PARTY CLAIMS

Kelyn Harrell used to work as a hair stylist for Backstage Salon & Day Spa, Inc. She claims that Backstage failed to pay her and other employees all the money they are owed, in violation of the Massachusetts Wage Act. In turn, Backstage claims that Harrell violated a non-competition, non-solicitation, and non-disclosure agreement and tortiously interfered with Backstage's customer relationships, and that Harrell's new business Adore Salon, LLC, tortiously interfered with Harrell's contract and violated G.L. c. 93A by competing unfairly against Backstage.

The Court will **allow** the motion by Harrell and Adore to dismiss Backstage's counterclaims and third-party claims because the facts admitted by Backstage in its answer establish that the non-competition and non-solicitation period expired before Harrell allegedly began to compete, and the facts alleged by Backstage do not plausibly suggest that that Harrell and Adore have taken and used any of Backstage's confidential information or that the non-competition and non-solicitation covenants would have been enforceable in any case. It follows that the non-contract claims all fail as a matter of law as well.

1. **Treat as Motion for Judgment on the Pleadings.** Though Harrell and Adore have styled their motion as seeking dismissal under Mass. R. Civ. P. 12(b)(6), they base their motion not only on the facts that Backstage alleges in its counterclaims and third-party claims, but also on facts that Backstage admits in its answer to Harrell's complaint. The Court will therefore treat the motion as seeking judgment on the pleadings under Rule 12(c).

In deciding such a motion, the Court may consider the factual allegations by Backstage in its counterclaims and third-party claims as well as the facts

admitted by Backstage in its answer. See *Ridgeley Mgmt. Corp.* v. *Planning Bd. of Gosnold*, 82 Mass. App. Ct. 793, 797 (2012) (under Rule 12(c), court considers "the well pleaded allegations of the complaint and the admissions or failures of denial presented by the answer").

Backstage is bound by things it alleges or admits in its pleadings. See G.L. c. 231, § 87 (allegations "[i]n any civil action pleadings ... shall bind the party marking them."). This statute provides that "facts admitted in pleadings" are "conclusive upon" the party making them. *Adiletto* v. *Brockton Cut Sole Corp.*, 322 Mass. 110, 112 (1947). This rule applies with full force to allegations in a complaint that are admitted in an answer, which conclusively bind both parties. See *Markus* v. *Boston Edison Co.*, 317 Mass. 1, 7 (1944); *Bancroft* v. *Cook*, 264 Mass. 343, 348 (1928); *McCray* v. *Weinberg*, 4 Mass. App. Ct. 13, 16 (1976).

1.1. **Legal Standards.** A motion for judgment on the pleadings is governed by the same standards as a motion to dismiss a counterclaim for failure to state a claim upon which relief can be granted. See *Boston Med. Ctr. Corp.* v. *Secretary of the Exec. Office of Health and Human Svcs.*, 463 Mass. 447, 450 (2012). To survive a motion to dismiss under Rule 12(b)(6), or an analogous motion for judgment on the pleadings under Rule 12(c), a counterclaim must allege facts that, if true, would "plausibly suggest[] ... an entitlement to relief." *Lopez* v. *Commonwealth*, 463 Mass. 696, 701 (2012), quoting *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), and *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007).

The Court must assume that the factual allegations in the counterclaims and third-party complaint, and any reasonable inferences that may be drawn from the facts alleged, are true. See *Golchin* v. *Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011). In so doing, however, it must "look beyond the conclusory allegations in the complaint and focus on whether the factual allegations plausibly suggest an entitlement to relief." *Maling* v. *Finnegan, Henderson, Farabow, Garrett & Dunner, LLP*, 473 Mass. 336, 339 (2015), quoting *Curtis* v. *Herb Chambers I–95, Inc.*, 458 Mass. 674, 676 (2011).

1.2. **Facts Admitted by Backstage.** The following facts are either alleged by Backstage in its counterclaims and third-party claims or admitted by Backstage in its answer to Harrell's complaint.

- Backstage hired Harrell in late 2008 as a hair stylist and promoted her in 2011 to the position of Senior Stylist.

- Backstage and Harrell entered into an "Employee Confidentiality, Non-Compete and Non-Solicitation Agreement" in July 2017.
- This contract provides in part that Harrell shall not compete against Backstage in certain towns or solicit any of Backstage's clients or employees "for a period of one (2) [sic] years after his/her employment terminates for any reason."
- This contract also provides that Harrell shall not disclose or use any of Backstage's confidential information.
- Backstage had to close its salon in the Spring of 2020 to comply with orders by Governor Baker regarding the COVID-19 pandemic.
- When it closed its business, Backstage furloughed and stopped paying all of its employees on or about March 18, 2020. While the salon was closed, none of its employees did any work for Backstage.
- Backstage reopened, and Harrell returned to work at Backstage, in mid-June 2020.
- Backstage terminated Harrell's employment once again on May 17, 2021.
- Soon thereafter, Harrell went to work for a salon in Amesbury that competes with Backstage. In early June 2021, Backstage sent Harrell a letter, with a copy to the Amesbury salon, asserting that Harrell was violating her non-competition agreement. Soon thereafter, Harrell's employment with the Amesbury salon was terminated.
- Harrell then formed Adore, and opened a salon and hair styling business under that name in Newburyport in August 2021.

2. **Contract Claims.**

2.1. **Confidentiality Agreement.** The contract claim by Backstage asserts in part that Harrell violated the confidentiality provision of her 2017 contract. This aspect of the claim fails because the facts alleged by Backstage do not plausibly suggest that Harrell took and is using any confidential information that belongs to Backstage.

Backstage says that it maintains a confidential database containing its clients' preferences, including information about which services and which specific color formulas different clients like and use. And it makes a completely

conclusory assertion that Harrell and Adore have used unspecified confidential information that belongs to Backstage. But it does not allege any facts that, if true, would plausibly suggest that Harrell took any confidential information from Backstage.

Without any supporting factual allegations, Backstage's conclusory and unexplained assertion that Harrell took and that she and Adore have unlawfully used Backstage's confidential information does not state a viable claim. See *Polay* v. *McMahon*, 468 Mass. 379, 388 (2014) (affirming dismissal of claim based on conclusory recitation of element of claim, unsupported by any factual allegation); see also *Gillette Co.* v. *Provost*, 91 Mass. App. Ct. 133, 139 (2017) (complaint asserting conclusory allegations that defendants misappropriate confidential information "lacked a reasonable factual basis" and thus was properly dismissed under anti-SLAPP statute, G.L. c. 231, § 59H); *All Business Solutions, Inc.* v. *NationsLine, Inc.*, 629 F.Supp.2d 553, 558–559 (W.D. Va. 2009) (dismissing trade secret claim under Fed. R. Civ. P. 12(b)(6)); *Washburn* v. *Yadkin Valley Bank and Trust Co.*, 660 S.E.2d 577, 585–586 (N.C. Ct. App. 2008) (affirming dismissal of trade secret claim).

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Doe* v. *American Guar. & Liab. Co.*, 91 Mass. App. Ct. 99, 105 (2017), quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). "While 'detailed factual allegations' are not required at the pleading stage, mere 'labels and conclusions' will not survive a motion to dismiss." *Burbank Apartments Tenant Ass'n* v. *Kargman*, 474 Mass. 107, 116 (2016), quoting *Iannacchino*, 451 Mass. at 636.

2.2. **Expiration of Non-Compete and Non-Solicit Agreements**. The contract claim also asserts that Harrell violated her non-competition and non-solicitation covenants. This aspect of the contract claim fails because those covenants expired months before Harrell started to compete with Backstage. Harrell was subject to a one-year non-competition and non-solicitation obligation that started to run on March 18, 2020, and expired on March 18, 2021. Backstage does not allege that Harrell did anything to violate her contractual obligations during that period. As a result, Backstage has not stated a viable claim for breach of those covenants.

The contract language imposing non-competition and non-solicitation obligations for "a period of one (2) [sic] years after his/her employment terminates" must be read to mean a one-year period, not a two-year period. At

common law, the general rule is that "[i]n case of an inconsistency between words and figures in a contract the words govern." *Schorzman* v. *Kelly*, 71 Wash.2d 457, 460–461 (1967), quoting 17A C.J.S. Contracts § 431 (formerly § 311). The Uniform Commercial Code codifies this principle with respect to negotiable instruments. See G.L. c. 106, § 3-114 ("If an instrument contains contradictory terms, ... words prevail over numbers.").

Any potential ambiguity in this provision must be resolved in favor of Harrell because Backstage because it drafted the contract; that rule makes the contract unambiguous.[1] It is apparent that Backstage drafted the non-compete agreement, since it was prepared as a form with Backstage's name typed into it at the beginning and end, with blanks for the employee's name to entered by hand. A written contract must be construed "strongly against the party who drew it." See *Leblanc* v. *Friedman*, 438 Mass. 592, 599 n.6 (2003), quoting *Bowser* v. *Chalifour*, 334 Mass. 348, 352 (1956). This canon of construction "resolves ambiguity against the drafter" and turns what otherwise would be an uncertain instrument into an unambiguous contract. *Boland* v. *George S. May Int'l Co.*, 81 Mass. App. Ct. 817, 827 (2012).

This rule of contract interpretation applies with particular strength to post-employment non-competition or non-solicitation covenants that are "imposed by the employer's standard form contract;" such contracts must be "scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through the loss of his livelihood." *Sentry Ins.* v. *Firnstein*, 14 Mass. App. Ct. 706, 707 (1982), quoting Restatement (Second) of Contracts § 188, comment g (1981); accord *Automile Holdings*, 483 Mass. at 809.

The one-year non-compete period began to run when Backstage furloughed and stopped paying Harrell in March 2020. The contract provides that the non-compete period would begin to run as soon as Harrell's "employment

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[1] "If a contract ... is unambiguous, its interpretation is a question of law that is appropriate for a judge to decide[.]" *Seaco Ins. Co.* v. *Barbosa*, 435 Mass. 772, 779 (2002). "Whether a contract is ambiguous is also a question of law." *Eigerman* v. *Putnam Investments, Inc.*, 450 Mass. 281, 287 (2007).

The fact that the parties disagree about how to read this provision does not make it ambiguous. See *Indus Partners, LLC* v. *Intelligroup, Inc.*, 77 Mass. App. Ct. 793, 795 (2010) ("ambiguity is not created simply because a controversy exists between parties, each favoring an interpretation contrary to the other's") (quoting *Jefferson Ins. Co.* v. *Holyoke*, 23 Mass. App. Ct. 472, 475 (1987)).

terminates for any reason." Being placed on an indefinite furlough without pay, and with no guaranty of being rehired, constitutes a termination of employment. Although Backstage rehired Harrell three months later, her non-compete period was triggered as soon as Backstage terminated her employment in March 2020. See *Russomano* v. *Novo Nordisk, Inc.*, 960 F.3d 48, 54 (1st Cir. 2020) (one-year non-compete period running from termination of employment was triggered upon effective date of firing, even though employee was rehired for new position three days later).

Since the one-year non-compete period was triggered when Backstage furloughed Harrell and thereby terminated her employment, the non-compete agreement did not spring back to life when Backstage rehired Harrell three months later. See *Russomano*, Civil Action No. 20-CV-10077-ADB, 2020 WL 3414756, at *4 (D.Mass. Feb. 5, 2020) (Burroughs, J.), aff'd, 960 F.3d 48 (1st Cir. 2020).[2]

2.3. **Enforceability of Non-Competition and Non-Solicitation Covenants.** There is a second, independent reason why the counterclaim for breaching the non-competition and non-solicitation covenants must be dismissed; the facts alleged by Backstage do not plausibly suggest that these provisions protect any legitimate business interests, and thus do not suggest that they were ever enforceable against Harrell.[3]

2.3.1. **Legal Background.** Under Massachusetts law, contractual covenants barring employees from competing with their employer or soliciting the employer's customers are enforceable only to the extent they are consistent with the public interest and consonant with public policy. *Automile Holdings, LLC* v. *McGovern*, 483 Mass. 797, 808–809 (2020); *New England Canteen Service,*

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[2] It appears that Backstage could not have entered into a new non-competition agreement with Harrell when it rehired her in 2021, because Harrell was a non-exempt employee eligible for overtime under the federal Fair Labor Standards Act. See G.L. c. 146, § 24L(c)(i). This statute applies to agreements entered into after October 1, 2018. See St. 2018, c. 228, § 21. Harrell represents that she was a non-exempt employee; Backstage does not disagree.

[3] To state a claim for breach of contract, Backstage must allege facts plausibly suggesting that: (i) it entered into a valid and enforceable contract with the Harrell; (ii) Backstage substantially performed its obligations under the contract or was ready, willing, and able to do so; (iii) Harrell breached the contract; and (iv) Backstage was damaged as a result. See, e.g., *477 Harrison Ave., LLC* v. *JACE Boston, LLC*, 483 Mass. 514, 523 (2019).

Inc. v. *Ashley*, 372 Mass. 671, 673 (1977); *All Stainless, Inc.* v. *Colby*, 364 Mass. 773, 778 (1974); see also *Oxford Global Resources, LLC* v. *Hernandez*, 480 Mass. 462, 470–471 (2018) (same principles apply to both non-competition and non-solicitation provisions of employment agreements).

The employer has the burden of proving that the agreement protects legitimate business interests and thus is enforceable. *New England Canteen Services*, 372 Mass. at 675; *Folsum Funeral Service, Inc.* v. *Rodgers*, 6 Mass. App. Ct. 843 (1978) (rescript). It follows that to state a viable claim for breach of these covenants Backstage must allege facts plausibly suggesting that they are enforceable.

An employer may enforce a non-competition or non-solicitation agreement against a former employee only to the extent necessary to prevent harm to the employer's goodwill or to guard against the release or use of trade secrets or other confidential information. See *New England Canteen Service*, 372 Mass. at 673–676; *All Stainless*, 364 Mass. at 778–780. Goodwill is a "positive reputation in the eyes of [one's] customers or potential customers." *North Am. Expositions Co. Ltd. P'ship* v. *Corcoran*, 452 Mass. 852, 869 (2009).

"Protection of the employer from ordinary competition ... is not a legitimate business interest, and a covenant not to compete designed solely for that purpose will not be enforced." *Marine Contractors, Inc.* v. *Hurley*, 365 Mass. 280, 287-288 (1974); accord, e.g., *Automile Holdings*, 483 Mass. at 812; *Boulanger* v. *Dunkin' Donuts, Inc.*, 442 Mass. 635, 641 (2004).

That is because the right of employees to use their knowledge, experience, and skill to compete against their prior employer "promotes the public interest in labor mobility and the employee's freedom to practice his profession and in mitigating monopoly." *Dynamics Research Corp.* v. *Analytic Sciences Corp.*, 9 Mass. App. Ct. 254, 267 (1980); accord *Automile Holdings*, 483 Mass. at 808 ("We have long recognized a public interest in the ability of individuals to be able to carry on their trade freely.").

2.3.2. Analysis. The facts alleged in the counterclaims do not plausibly suggest that enforcing the non-competition and non-solicitation agreement would protect Backstage against the loss of its goodwill or confidential information, which means it does not suggest that those covenants were ever enforceable.

A non-competition agreement is enforceable only "to protect the employer's good will, not to appropriate the good will of the employee." *Sentry Ins.* v. *Firnstein*, 14 Mass. App. Ct. 706, 708 (1982); accord *RE/MAX of New England, Inc.*

v. *Prestige Real Estate, Inc..*, Civil Action No. 14-12121-GAO, 2014 WL 3058295, *3 (D.Mass. 2014) (O'Toole, J.) (real estate brokerage franchisor could not enforce non-compete agreement with franchisees in absence of proof that "any good will generated by the various offices is due to RE/MAX branding and methods" rather than created by "the work and personal relationships of the agents"). "It has long been recognized that good will may sometimes attach to an employee who maintains distinctly personal or professional relationships with customers, so that the business entity possesses little of it." *P.A. Bldg. Co.* v. *Elwyn D. Lieberman, Inc.*, 642 N.Y.S.2d 300, 301 (N.Y. Sup. Ct. App. Div. 1996).

The relationship between a hair stylist and their client is a very personal one. As a result, the goodwill built up in that relationship typically belongs only to the stylist—and ***not*** to the salon where they happen to work. See *Joymark, Inc.* v. *Lockward*, Suffolk Sup. Ct. no. 1284CV00291-C, 2015 Mass. Super. Lexis 153, at *3 (Mass. Super. May 15, 2015 (Gordon, J.); *Lunt* v. *Campbell*, Suffolk Sup. Ct. no. 0784V03845-BLS2, 23 Mass. L. Rptr. 145, 2007 WL 2935864, at *3 (Mass. Super. Sept. 24, 2007) (Fabricant, J.).

To the extent that Backstage seeks to enforce non-competition and non-solicitation obligations to bar Harrell from serving clients she used to work with at Backstage, that would be an improper attempt to usurp Harrell's goodwill rather than a lawful attempt to protect any goodwill that belongs to Backstage. And to the extent that Backstage seeks to bar Harrel from serving former Backstage clients that Harrell did not serve, it is trying to stifle ordinary competition. Either way, Backstage has not alleged facts plausibly suggesting that the contract is enforceable to protect goodwill.

Nor has Backstage alleged any facts plausibly suggesting that the non-competition and non-solicitation provisions are needed to keep Harrell from misusing Backstage's confidential information.

In some cases, given the nature of the confidential information that an employer shares with its employees, it would be inevitable that the employee would use that information if they went into competition with the former employer; in such a case, a non-competition covenant serves the legitimate purpose of protecting the confidentiality of that information. See, e.g., *SimpliVity Corp.* v. *Moran*, Suffolk County Sup. Ct. No. 1484CV2133, 33 Mass. L. Rptr. 587, 2016 WL 5122671, at *11 (Mass. Super. Aug. 14, 2016) (Hogan, J.); *C.R. Bard, Inc.* v. *Intoccia*, Civil Action No. 94-11568-Z, 1994 WL 601944, at *3 (D.Mass. Oct. 13, 1994) (Zobel, J.).

But Backstage does not contend and has not alleged facts plausibly suggesting that disclosure of confidential information regarding client preferences is inevitable here. "The mere fact that a person assume[s] a similar position at a competitor does not, without more, make it inevitable that he will use or disclose trade secret information[.]" *CSC Consulting, Inc.* v. *Arnold*, No. 001800, 2001 WL 1174183, at *3 (Mass. Super. July 12, 2001) (Houston, J.), quoting *Pepsico, Inc.* v. *Redmond*, 54 F.3d 1262, 1269 (7th Cir.1995).

If a Backstage customer came to Harrell's new salon, described the haircut and color they wanted, and Harrell were to use her hair styling expertise to give the customer what they were looking for, that would not constitute the misuse of any confidential information belonging to Backstage. Employees are free to quit their job, start working for a competitor, and use their "general knowledge, experience, memory and skill" to compete against their former employer. *Dynamics Research Corp.* v. *Analytic Sciences Corp.*, 9 Mass. App. Ct. 254, 267 (1980) (concepts that would be obvious to an inertial guidance engineer were not protectable as trade secrets), quoting *J. T. Healy & Son* v. *James A. Murphy & Son*, 357 Mass. 728, 740 (1970). That is true even if the employee gained that knowledge and developed their skill while working for their former employer. See *Abramson* v. *Blackman*, 340 Mass. 714, 715–716 (1960).

2.4. **Implied Covenant Claim.** The counterclaim for breach of the implied covenant of good faith and fair dealing adds nothing of substance to the failed counterclaims for breach of the express terms of Harrell's contract.

This implied covenant "does not create rights or duties beyond those the parties agreed to when they entered into the contract." *Boston Med. Ctr. Corp.* v. *Secretary of Executive Office of Health & Human Servs.*, 463 Mass. 447, 460 (2012) (affirming dismissal of claim), quoting *Curtis* v. *Herb Chambers I-95, Inc.*, 458 Mass. 674, 680 (2011). "The implied covenant 'concerns the manner of performance' and 'exists so that the objectives of the contract may be realized.' " *Beauchesne* v. *New England Neurological Assocs., P.C.*, 98 Mass. App. Ct. 716, 722 (2020), rev. denied, 486 Mass. 1111 (2021), quoting *Ayash* v. *Dana-Farber Cancer Inst.*, 443 Mass. 367, 385, cert. denied sub nom. *Globe Newspaper Co.* v. *Ayash*, 546 U.S. 927 (2005). In other words, it only governs "the manner in which existing contractual duties are performed." *Eigerman* v. *Putnam Investments, Inc.*, 450 Mass. 281, 289 (2007).

The facts alleged in the counterclaims do not plausibly suggest that Harrell violated the implied covenant.

3. **Tortious Interference Claims.** Backstage's claims for tortious interference also fail as a matter of law.

In Count III, Backstage claims that Harrell has unlawfully interfered with advantageous business relations between Backstage and its clients. But in the absence of any factual allegation plausibly suggesting that Harrell stole confidential information and is using it to compete, Backstage has not stated a viable claim against Harrell for intentional interference.

It is perfectly lawful to try to lure customers away from a competitor out of "a desire for financial or competitive gain" at the competitor's expense, so long as one does not do so "through improper motive or means." *Brewster Wallcovering Co.* v. *Blue Mountain Wallcoverings, Inc.*, 68 Mass. App. Ct. 582, 608 & 609 (2007). "[A]dvancing one's own economic interest, by itself, is not an improper motive" for the purpose of a tortious interference claim. See *Skyhook Wireless, Inc.* v. *Google Inc.*, 86 Mass. App. Ct. 611, 621 (2014); accord, e.g., *Pembroke Country Club, Inc.* v. *Regency Sav. Bank, F.S.B.*, 62 Mass. App. Ct. 34, 39 (2004). And "[t]o demonstrate improper means," Backstage would have to allege facts plausibly suggesting "improper conduct beyond the fact of the interference itself." *Bartle* v. *Berry*, 80 Mass. App. Ct. 372, 380 (2011); accord *United Truck Leasing Corp.* v. *Geltman*, 406 Mass. 811, 815–816 (1990). It has not done so.

In Count IV, Backstage claims that Adore Salon tortiously interfered with Harrell's non-competition, non-solicitation, and non-disclosure agreement. This claim fails because, as discussed above, Backstage has not alleged facts plausibly suggesting that Harrell breached that contract.

One of the elements of intentional interference with contractual relations is that the defendant "knowingly induced" a third party to violate their contract. See *Weiler* v. *PortfolioScope, Inc.*, 469 Mass. 75, 84 (2014). Under Massachusetts law, if the third party did not breach their contract, then a defendant cannot be held liable for tortiously interfering with a contract. See *JNM Hospitality, Inc.* v. *McDaid*, 90 Mass. App. Ct. 352, 354–55 & 357 (2016) (where landlord did not breach lease by failing to make nonexclusive parking spaces available to customers of restaurant lessee, third party could not be liable for intentionally interfering with lease to detriment of tenant); *Cavicchi* v. *Koski*, 67 Mass. App. Ct. 654, 661 (2006) (where clients did not breach contingent fee agreements when they discharged attorney, new lawyer who convinced them to do so could not be liable for intentional interference with contract).

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4. **Civil Conspiracy Claim.** The claim by Backstage for civil conspiracy is entirely derivative of the claims for tortious interference. Since the interference claims fail as a matter of law, it follows that Harrell and Adore Salon cannot be liable for conspiring with each other to commit tortious interference. There can be no civil conspiracy without "an underlying tortious act." *Bartle* v. *Berry*, 80 Mass. App. Ct. 372, 383-384 (2011).

5. **Claim against Adore under G.L. c. 93A.** Finally, since Backstage's claim against Adore Salon under G.L. c. 93A is wholly derivative of its claims that Harrell provided Adore with confidential information taken from Backstage and that Adore conspired with Harrell to breach her contract, and those underlying claims fail as a matter of law, the c. 93A claim cannot survive the motion to dismiss either. See *Park Drive Towing, Inc.* v. *City of Revere*, 442 Mass. 80, 85–86 (2004) (where c. 93A claim is based on and derivative of some underlying claim that fails as a matter of law, that 93A claim "must also fail"); *Macoviak* v. *Chase Home Mortgage Corp.*, 40 Mass. App. Ct. 755, 760, rev. denied, 423 Mass. 1109 (1996) (c. 93A claim "necessarily fail[s]" where it "is solely based upon ... underlying claim for common law" tort and that tort claim fails as a matter of law); *Frohberg* v. *Merrimack Mut. Fire Ins. Co.*, 34 Mass. App. Ct 462, 465 (1993) (c. 93A claim properly dismissed where it is based solely on "legally unsupportable" claim for breach of contract).

ORDER

The motion by Kelyn Harrell to dismiss the counterclaims against her and by Adore Salon LLC to dismiss the third-party claims against it is **allowed**.

Kenneth W. Salinger
Justice of the Superior Court

22 February 2022