COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
No. 2284CV01603-BLS-1

WESTERN AIR CHARTER, INC.[1]

vs.

DARRYN MACKENZIE & another[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT FLYEXCLUSIVE'S MOTION TO DISMISS

Plaintiff Western Air Charter, Inc., d/b/a Jet Edge ("Jet Edge"), commenced this action against its former employee, Darryn Mackenzie ("Mackenzie"), and his new employer, Exclusive Jets, LLC, d/b/a flyExclusive ("flyExclusive"), alleging that Mackenzie breached certain employment agreements he had with Jet Edge and stole its trade secrets, proprietary, and confidential information prior to leaving his employment. Jet Edge further alleges that flyExclusive "is actively inducing and acting in concert" with Mackenzie in using the allegedly stolen information for flyExclusive's benefit. On July 25, 2022, a preliminary injunction entered against Mackenzie concerning trade secret and confidential information, but relief requested as against flyExclusive was denied. *See* Docket No. 11. The matter is presently before the court on flyExclusive's motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6). After consideration of the written submissions and a hearing on November 9, 2022, the motion is **ALLOWED**.

[1] d/b/a Jet Edge
[2] Exclusive Jets, LLC, d/b/a flyExclusive.

BACKGROUND

The complaint and relevant materials in the case record[3] set forth the following facts. Jet Edge and flyExclusive are both in the private aviation and private jet charter business. Mackenzie is a salesperson who has worked in the private aviation industry for several years. In August 2020, he began working for Jet Edge as a sales executive, and, on August 6, 2022, signed a Confidentiality Agreement with Jet Edge. On February 14, 2022, he signed a Proprietary Information Protection Agreement with Jet Edge.

In April 2022, Mackenzie emailed the owner of flyExclusive, Jim Segrave ("Segrave"), expressing an interest in working there. In May 2022, Mackenzie met Segrave at flyExclusive's location, and toured its operations. Thereafter, Mackenzie emailed Segrave:

> I sincerely appreciate you taking time out of your busy schedule this morning to meet with me and show me around. I am very impressed with your entire operation, first class! I already have plans to follow you around on that tour with my iPhone to use in the sales cycle. . . . Look forward to continuing the conversation with Brad, have no doubt I will kill it at FE. All the ingredients are there. Cheers, Darryn

On June 4, 2022, Mackenzie announced that he was resigning from Jet Edge; his last day of employment there was June 10, 2022. He did not inform Jet Edge that he would be working at flyExclusive. A short time later, Mackenzie began working at flyExclusive.

Meanwhile, prior to leaving Jet Edge, Mackenzie used his Jet Edge-issued laptop to email his private email account several large Jet Edge files containing client, management, flight, and other information. Mackenzie then deleted his company email and performed factory resets on the laptop and his Jet Edge iPhone before returning them to Jet Edge. Mackenzie also requested a new iPhone in May 2022, shortly before leaving Jet Edge, claiming that his old one was

[3] The record includes emails submitted in conjunction with the preliminary injunction filings, which were reasonably relied on in the framing of the complaint. *See Schaer v. Brandeis Univ*., 432 Mass. 474, 477 (2000); *Golchin v. Liberty Mut. Ins. Co*., 460 Mass. 222, 224 (2011).

malfunctioning. Mackenzie never returned the old iPhone to Jet Edge. Jet Edge discovered the suspicious conduct after a client mistakenly emailed Mackenzie at his Jet Edge email account, after Mackenzie had already left, about flyExclusive offers that Mackenzie had communicated to her.

On June 23, 2022, Jet Edge's counsel sent Mackenzie and flyExclusive a demand letter, citing "compelling evidence that Darryn Mackenzie has violated several of his post-employment contractual obligations to JetEdge." The demand letter sought immediate surrender of all Mackenzie's electronic devices for examination. On June 28, 2022, flyExclusive's counsel responded to the demand letter, stating that flyExclusive had not sought or knowingly used any of Jet Edge's proprietary information, it had instructed Mackenzie to cooperate with Jet Edge about the materials in question, and had taken possession of Mackenzie's flyExclusive laptop, which it intended to have a third-party vendor wipe. The response letter also offered to provide, upon his agreement, Mackenzie's personal devices to a third-party forensic examiner.

After further communications, and failure to reach agreement, on July 15, 2022, Jet Edge commenced the present action. The complaint asserts claims against flyExclusive for injunctive relief in aid of arbitration (Count 1); trade secret misappropriation (Count 2); tortious interference with contract (Count 3), tortious interference with advantageous business relations (Count 4), and violation of G.L. c. 93A (Count 5).

STANDARD OF REVIEW

Rule 12(b)(6) allows for dismissal of a complaint when the factual allegations contained within it do not suggest a plausible entitlement to relief. *Iannacchino v. Ford Motor Co*., 451 Mass. 623, 635-636 (2008); *Fraelick v. PerkettPR, Inc*., 83 Mass. App. Ct. 698, 699-700 (2013). In ruling on the motions, the court accepts the factual allegations as true and draws all reasonable inferences in the non-moving party's favor. *Fraelick*, 83 Mass. App. Ct. at 699-700.

DISCUSSION

Central to and implicit in all its claims against flyExclusive, is Jet Edge's allegation that flyExclusive knew about, and was acting in support of and in concert with, Mackenzie to use the allegedly stolen material to flyExclusive's advantage. However, the allegation is unsupported by the record. The email correspondence cited *supra* indicates that Mackenzie solicited Segrave, and sought employment at flyExclusive, not the other way around. Nowhere in the emails exchanged does Segrave ask or hint to Mackenzie that he should bring Jet Edge's confidential material to flyExclusive. Moreover, even an inferred directive to do so would be implausible where the parties' later correspondence makes clear that flyExclusive had a business association with Jet Edge that it did not want to jeopardize.[4] In that correspondence, flyExclusive denies knowledge of Mackenzie's actions, and indicates the actions it is taking to scrub any Jet Edge proprietary material from its systems, citing at length the parties' business association. The complaint, drafted after this correspondence, provides no factual support for Jet Edge's claim that flyExclusive had knowledge of or encouraged Mackenzie's actions, including only the conclusory statement that they were "acting in concert." *See* Complaint ¶ 45. Under these circumstances, Jet Edge's causes of action against flyExclusive necessarily fail.

In particular, no misappropriation of trade secrets could have occurred absent some alleged, affirmative conduct, knowledge, or reason to know of Mackenzie's actions on flyExclusive's part. See G.L. c. 93, § 42(2) (defining "misappropriation" as requiring that a

[4] At the hearing, counsel for Jet Edge cited the iPhone reference in Mackenzie's email as support for its assertion that flyExclusive was implicated in his conduct. The court disagrees that any such inference is plausible, particularly where Mackenzie made the statement, not Segrave. Moreover, Mackenzie's statement that he would "follow [Segrave] around on that tour with my iPhone" to use for sales purposes could have multiple meanings, but the most obvious is use of the phone's video and/or audio features to capture the tour, not the use of stored confidential information from a prior employer.

person know or have reason to know that information acquired was a trade secret).[5,6] Tortious interference claims likewise require that a defendant *knowingly* induce the third party to break the contractual or business relationship at issue. *Psy-Ed Corp*. v. *Klein*, 459 Mass. 697, 715-16 (2011); *Shafir v. Steele*, 431 Mass. 365, 370 n.10 (2000). The c. 93A claim fails where it is derivative of the prior claims. *Park Drive Towing, Inc. v. Revere*, 442 Mass. 80, 85-86 (2004). Finally, the claim for injunctive relief against flyExclusive must be dismissed where it is not a standalone cause of action. *Woods v. Wells Fargo Bank, N.A.*, 733 F.3d 349, 353 n.3 (1st Cir. 2013). On these bases, flyExclusive's motion to dismiss is **ALLOWED**.

ORDER

For the forgoing reasons, flyExclusive's motion to dismiss is **ALLOWED**.

Dated: 3/16/23

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Hélène Kazanjian
Justice of the Superior Court

[5] The cases Jet Edges cites are distinguishable. *SOAProjects, Inc. v. SCM Microsystems, Inc*. contains more circumstantial allegations than the single conclusory allegation here, including that the new employer/competitor solicited the employee. 2010 WL 5069832, at *2-*3, *11. The respondeat superior cases are inapposite where Mackenzie is not alleged to have taken the information while he was flyExclusive's employee, or following targeted recruitment by flyExclusive. *Contrast Newport News Indus. v. Dynamic Testing, Inc.*, 130 F. Supp. 2d 745, 747, 753-54 (E.D. Va. 2001), and others cited. *See GSI Tech., Inc. v. United Memories Inc*., 2015 WL 5655092, at *10 n.119 (N.D. Cal. 2015) ("In California, parties cannot substantiate trade secret misappropriation claims against a competitor solely on the basis that a former employee now works for a competitor").

[6] For this reason, the court need not examine whether the trade secrets were pleaded with sufficient particularity.