COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
2284CV02321-BLS2

VICARIOUS SURGICAL INC.

v.

BETH TRAGAKIS

DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

Vicarious Surgical Inc. has designed, and is seeking federal regulatory approval for, a small surgical robotic system to be used in human abdominal surgery. Beth Tragakis worked for Vicarious for three-and-a-half years. Vicarious claims that Tragakis violated her non-competition and non-disclosure agreements by going to work for a direct competitor after downloading and taking copies of proprietary, confidential, and highly sensitive technical information. Vicarious sued Tragakis for breach of contract, conversion of property, violating the Massachusetts Uniform Trade Secrets Act (G.L. c. 93, §§ 42–42G) and committing unfair trade practices that violate the business-to-business section of the Massachusetts Consumer Protection Act (G.L. c. 93A, § 11).

Tragakis moved to dismiss all claims for alleged lack of subject matter jurisdiction, improper venue, and failure to state any claim upon which relief may be granted.

The Court will deny the motion to dismiss with respect to the contract, conversion, and trade secrets claims. It will allow the motion to dismiss only with respect to the claim under c. 93A, § 11.

1. **Subject Matter Jurisdiction**. Though Tragakis moved to dismiss this entire action under Mass. R. Civ. P. 12(b)(1) for alleged lack of subject matter jurisdiction, her memorandum of law did not address the issue. At oral argument, Tragakis asserted for the first time that Vicarious's claims for breach of her non-competition agreement must be dismissed for lack of subject matter jurisdiction because that contract is unenforceable under the Massachusetts Non-Competition Act (G.L. c. 149, § 24L).[1] The Court disagrees.

[1] Normally a party's failure to raise and develop an argument in their written memorandum would waive the point. A party that files a motion in the Superior Court must submit a memorandum "stating the reasons, including supporting authorities," why the motion should be allowed. Sup. Ct. Rule

Section 24L provides that a non-competition agreement entered into by an employer and a current employee will be valid and enforceable only if the employee is given notice of the agreement "at least 10 business days before the agreement is to be effective," and the agreement is "in writing and signed by both the employer and employee," is "supported by fair and reasonable consideration independent from the continuation of employment," and "expressly states that the employee has the right to consult with counsel prior to signing." G.L. c. 149, § 24L(b)(ii).

This statute does not apply here, however, because Tragakis signed her non-competition agreement before this new statute took effect. Tragakis executed this contract, and by its terms it became effective, on September 28, 2018. The Legislature limited application of § 24L to agreements entered into after October 1, 2018, three days after Tragakis signed the non-competition agreement. See St. 2018, c. 228, § 21.

In any case, the statute would not raise any question of subject matter jurisdiction even if it applied to this non-competition agreement. The Superior Court would have subject matter jurisdiction to hear a claim for alleged breach of a non-competition agreement between and employer and an employee, even if it then found that the contract is unenforceable under § 24L.

"Subject matter jurisdiction is 'jurisdiction over the nature of the case and the type of relief sought.' " *Town of Middleborough* v. *Housing Appeals Comm.*, 449 Mass. 514, 520 (2007), quoting Black's Law Dictionary 870 (8th ed.2004). To say that a court has subject matter jurisdiction over a claim means that it has "the power … to hear and decide the matter." *Ginther* v. *Commissioner of Ins.*, 427 Mass. 319, 320 n.4 & 322 n.6 (1998). "The question at the heart of subject

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9A(a)(1). Parties therefore waive issues and arguments that they do not raise and develop in their written memoranda. Cf. *Halstrom* v. *Dube*, 481 Mass. 480, 483 n.8 (2019) (argument raised "in a cursory fashion without citation to supporting legal authority" is waived); *Commonwealth* v. *Johnson*, 470 Mass. 300, 319 (2014) (trial court acted "well within" its discretion in declining to consider unsupported and undeveloped argument); *Board of Reg. in Med.* v. *Doe*, 457 Mass. 738, 743 n.12 (2010) (argument raised for first time at oral argument, in violation of rule requiring that parties' contentions must be presented in written brief, is waived).

However, a challenge to a court's subject matter jurisdiction may be raised "at any time." See, e.g., *Short* v. *Marinas USA Ltd. Partnership*, 78 Mass. App. Ct. 848, 854 (2011) ("questions of subject-matter jurisdiction may be raised at any time, and are not waived even when not argued below").

matter jurisdiction is, 'Has the Legislature [or the Constitution] empowered the [agency] to hear cases of a certain genre?' " *Alliance to Protect Nantucket Sound, Inc.* v. *Department of Pub. Utils.*, 457 Mass. 663, 687 (2010), quoting *Doe, Sex Offender Registry Bd. No. 3974* v. *Sex Offender Registry Bd.*, 457 Mass. 53, 56–57 (2010), and *Wachovia Bank, Nat'l Ass'n* v. *Schmidt*, 546 U.S. 303, 316 (2006); accord *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 161 ("subject-matter jurisdiction" refers to "the courts' statutory or constitutional *power* to adjudicate the case" (emphasis in original) (quoting *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 89 (1998)).

A claimant's inability to satisfy statutory requirements for obtaining relief will generally not deprive a court of subject matter jurisdiction, unless the Legislature "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional;" in other words, "when the Legislature does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Reed-Elsevier*, 559 U.S. at 162, quoting *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515-516 (2006); accord *MOAC Mall Holdings LLC* v. *Transform Holdco LLC*, 143 S.Ct. 927, 936 (2023).

For example, the statutory presentment requirement under the Massachusetts Tort Claims Act—which provides that no tort claim may be asserted against a public employer unless the plaintiff first presents their claim in writing to the executive officer within two years after the cause of action arose (see G.L. c. 258, § 4)—"is a condition precedent to bringing suit," but failure to comply "does not deprive a court of jurisdiction over the subject matter of a complaint brought under G.L. c. 258." See *Vasys* v. *Metropolitan Dist. Comm'n*, 387 Mass. 51, 52 (1982).

Similarly, nothing in § 24L suggests that an employer's failure to comply with the requirements of that statute will deprive a court of subject matter jurisdiction to consider a claim that a former employee has breached a non-competition agreement. It follows that the requirements imposed by § 24L are conditions precedent to enforcing non-competition agreements to which this statute applies, but are not jurisdictional.

2. **Venue**. Tragakis contends that this action was improperly filed in Suffolk County and must be dismissed without prejudice for improper venue. Once again, the Court disagrees.

First, the facts that Tragakis resides in Bristol County and that Vicarious has its principal place of business in Middlesex County does not mean that venue is improper in Suffolk County.

The parties agreed that an action to enforce Tragakis's non-competition or non-disclosure obligations "shall be commenced only" in Massachusetts court or a federal court located within Massachusetts.[2] A contract providing that suits to enforce the agreement may or must be brought in a particular statute is a consent to both personal jurisdiction and venue in that state. See *Boland* v. *George S. May Int'l Co.*, 81 Mass. App. Ct. 817, 819–826 (2012) (agreement that "jurisdiction shall vest in the State of Illinois" was a jurisdiction-granting and permissive forum selection clause constituting agreement that personal jurisdiction over the parties existed and venue was appropriate in Illinois).

Tragakis is bound by her agreement that this action may be brought anywhere in Massachusetts. See *Baby Furniture Warehouse Store, Inc.* v. *Meubles D & F Ltée*, 75 Mass. App. Ct. 27, 31–33 (2009). As a result, her insistence that venue is improper in Suffolk County has no merit.

Second, the venue provision of G.L. c. 149, § 24L(f) does not apply here. As discussed above, Tragakis signed her non-competition agreement before § 24L took effect. In any case, even if this statute applied it would permit this action to be brought in Suffolk County by mutual agreement of the parties. See § 24L(f). As discussed above, Tragakis and Vicarious agreed that this action may be brought in any Massachusetts court, and thereby agreed that it may be brought in Suffolk County.

3. **Material Change Doctrine**. Under Massachusetts law, a non-competition agreement is no longer enforceable if the employment relationship changes so fundamentally—for example with respect to pay, territory, or position—that it was effectively terminated and replaced with a new employment relationship. See *F.A. Bartlett Tree Co.* v. *Barrington*, 353 Mass. 585, 586-587 (1968).

Tragakis contends that the non-competition agreement that she signed in 2018 when she was hired as Director of Quality Systems is unenforceable because in

[2] The relevant provisions state that, "Any action, suit, or other legal proceeding which is commenced to resolve any matter arising under or relating to any provision of this Agreement shall be commenced only in a court of the Commonwealth of Massachusetts (or, if appropriate, a federal court located within Massachusetts), and the Company and the Employee each consents to the jurisdiction of such a court."

June 2020 she was promoted to be Vice President of Quality, took on material new duties, and did not execute a new non-compete agreement. These points seem to be undisputed.[3]

This defense fails because Tragakis waived this argument by contract. Tragakis expressly agreed, in ¶ 2(j) of her non-competition agreement, "that any change or changes in [her] duties, salary or compensation after the signing of this Agreement shall not affect the validity or scope of this Agreement." This provision means what it says. And Tragakis is bound by it.

4. **Non-Disclosure, Trade Secret, and Conversion Claims**. Tragakis argues that Vicarious may not sue her for breaching her non-disclosure agreement, violating the Trade Secrets Act, or converting property that belongs to Vicarious, because the complaint does not allege that Tragakis used or disclosed any of the proprietary information or materials that she allegedly took with her from Vicarious. Though the complaint alleges in some detail that Tragakis copied and has retained trade secrets and other proprietary information that belongs to Vicarious, it does not allege that Tragakis disclosed or used those materials in any way since she left Vicarious and started her new job. Tragakis contends that these allegations do not plausibly suggest that Vicarious is entitled to relief under counts I, III, V, or VI of the complaint.[4]

The Court is not persuaded.

The facts alleged by Vicarious plausibly suggest that it will be entitled at least to obtain injunctive relief for Tragakis's alleged copying and retention of trade secrets and other proprietary information. The non-disclosure agreement provides that Tragakis shall not copy or remove any of Vicarious's proprietary information from its premises except in pursuing the company's business, upon termination of her employment Tragakis had to return and could not

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[3] Vicarious alleges that after her promotion Tragakis became "primarily responsible for the creation, implementation[,] and management of Vicarious' electronic quality management system ('eQMS')," "for ensuring high new product quality before product launch, through application of advanced product quality planning," and "for leading Vicarious' eQMS efforts to ensure compliance with industry regulatory requirements."

[4] To survive a motion to dismiss under Rule 12(b)(6), a complaint 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).

retain any such materials, and Vicarious "shall have the right" to obtain injunctive relief to remedy a breach or threatened breach of this contract. Similarly, the Trade Secrets Act provides that Vicarious may obtain an injunction to bar any actual or threatened misappropriation of its trade secrets. See G.L. c. 93, § 42A(a). And it defines misappropriation to include not only the disclosure or use of another's trade secret, but also the acquisition of a trade secret by improper means. See G.L. c. 93A, § 42(2).

Vicarious has also stated a viable claim for conversion of its property. "Conversion is the 'wrongful exercise of dominion or control over the personal property of another.' " *Waxman* v. *Waxman*, 84 Mass. App. Ct. 314, 321 (2013), quoting *Cahaly* v. *Benistar Property Exch. Trust Co*., 68 Mass. App. Ct. 668, 679 (2007). Conversion can be proved either by showing wrongful acquisition of property or by showing a wrongful refusal to return the property upon demand. *Id.* If Vicarious can prove its allegations that Tragakis copied and still retains its property, even after Vicarious has demanded that it be returned, then Vicarious may be entitled to recover reasonable royalty damages even if it cannot prove that it has suffered any direct loss or that Tragakis has profited from using what she allegedly stole.[5]

5. **Unfair Trade Practices Claim under G.L. c. 93A, § 11**. The Court is persuaded, however, that Vicarious's failure and apparent inability to allege that Tragakis has made any use of its proprietary information means that Vicarious has failed to state a viable claim under G.L. c. 93A, § 11.

The Court disagrees with Tragakis's argument that this claim is automatically barred because it arises from her employment relationship with Vicarious, and therefore does not concern conduct that took place in "trade or commerce" within the meaning of c. 93A.

A former employee may be sued under c. 93A if they take a trade secret or other proprietary information from their former employer and use if after they are

[5] The Supreme Judicial Court "has recognized three acceptable methods of measuring damages in cases involving business torts such as the misappropriation of trade secrets" or other proprietary information or databases: "the defendant's profits realized from his tortious conduct, the plaintiff's lost profits, or a reasonable royalty." *Curtiss-Wright Corp*. v. *Edel-Brown Tool & Die Co*., 381 Mass. 1, 11 (1980). "[T]he 'reasonable royalty' measure of damages is only appropriate where the defendant has made no actual profits and the plaintiff is unable to prove a specific loss." *Id*. at 11 n.9, quoting *Jet Spray Cooler, Inc*. v. *Crampton*, 377 Mass. 159, 171 n.10 (1979).

no longer working for the former employer. See *Governo Law Firm LLC* v. *Bergeron*, 487 Mass. 188, 195–196 (2021); *Peggy Lawton Kitchens, Inc.* v. *Hogan*, 18 Mass. App. Ct. 937, 939 (1984). "Where an employee misappropriates his or her employer's proprietary materials during the course of employment **and then uses the purloined materials in the marketplace**, that conduct is not purely an internal matter; rather, it comprises a marketplace transaction" that may trigger liability under c. 93A. *Governo Law Firm*, *supra* (emphasis added).

But Vicarious does not allege that Tragakis used any materials taken from Vicarious after her employment with Vicarious ended.

As noted above, Vicarious has sued Tragakis under G.L. c. 93A, § 11. To state a viable claim under this statute, Vicarious must allege facts plausibly suggesting that (i) Tragakis did something while acting in trade or commerce that was "unfair or deceptive," and (ii) as a result Vicarious suffered some "loss of money or property." See *Lumbermens Mut. Cas. Co.* v. *Offices Unlimited, Inc.*, 419 Mass. 462, 468 (1995); *Frullo* v. *Landenberger*, 61 Mass. 814, 822–823 (2004); G.L. c. 93A, § 11; see also *Smith* v. *Caggiano*, 12 Mass. App. Ct. 41, 43 (1981) (when loss of money or property was element of claim under G.L. c. 93A, § 9, "it was necessary to plead loss or money or property").

Proof of legally cognizable harm or injury is a necessary element of any claim under G.L. c. 93A. See *Bellermann* v. *Fitchburg Gas & Elec. Light Co.*, 475 Mass. 67, 73 (2016); *Tyler* v. *Michaels Stores, Inc.*, 464 Mass. 492, 501–503 (2013); *Hershenow* v. *Enter. Rent-A-Car Co. of Boston, Inc.*, 445 Mass. 790, 800–802 (2006).

"[T]o meet the injury requirement under G.L. c. 93A, § 9(1) or 11, a plaintiff must have suffered a 'separate, identifiable harm arising from the [regulatory] violation' that is distinct 'from the claimed unfair or deceptive conduct itself.' " *Bellermann*, *supra*, quoting *Tyler*, *supra*. A business or 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. *Tyler*, *supra*; *Karaa* v. *Kuk Yim*, 86 Mass. App. Ct. 714, 725 (2014). In enacting c. 93A, "the Legislature … did not intend to confer on plaintiffs who have suffered no harm the right to receive a nominal damage award which will in turn entitle them to a sometimes significant attorney's fee recovery." *Aspinall* v. *Philip Morris Cos. Inc.*, 442 Mass. 381, 401 (2004), quoting *Lord* v. *Commercial Union Ins. Co.*, 60 Mass. App. Ct. 309, 321–322 (2004). A c. 93A plaintiff must therefore "prove that the defendant's unfair or deceptive act caused an adverse consequence or loss." *Rhodes* v. *AIG Domestic Claims, Inc.*, 461 Mass. 486, 496 (2012).

In this case, a claim that Tragakis caused Vicarious to suffer an adverse consequence could come through allegations that Vicarious suffered some loss, even if unquantifiable, and Tragakis made some profit because Tragakis took and improperly used materials that belonged to Vicarious. Where an employee misappropriates confidential information or proprietary material, uses it unfairly to compete with their prior employer, and thereby violates c. 93A, § 11, disgorgement of profits unfairly earned by the prior employee is a permissible remedy for the employee's "improper use" of the prior employer's property where the employer can show that it suffered "*some* monetary loss" that "is difficult to quantify" (emphasis in original). *Specialized Technology Resources, Inc.* v. *JPS Elastomerics Corp.*, 80 Mass. App. Ct. 841, 850 (2011). Proof of unquantifiable monetary loss satisfies the § 11 requirement that the plaintiff suffered a loss of money or property. *Id*.[6]

But Vicarious has alleged no facts plausibly suggesting that it suffered any kind of loss as a result of Tragakis' misconduct, or that Tragakis has made any profit by using Vicarious's proprietary information. It has therefore failed to state a viable claim under G.L. c. 93A, § 11.

ORDER

Defendant's motion to dismiss plaintiff's complaint is **allowed in part** with respect to the claim in count VII under G.L. c. 93A, § 11, and is **denied in part** with respect to plaintiff's other claims.

Kenneth W. Salinger
Justice of the Superior Court

27 April 2023

[6] If Vicarious were to make such a showing, and also establish that Tragakis made some profit as a result of "improper use" of materials that belonged to Vicarious, then the burden would shift to Tragakis to "demonstrate those costs properly to be offset against its profit and the portion of its profit attributable to factors other than the trade secret" or proprietary information. *USM Corp.* v. *Marson Fastener Corp.*, 392 Mass. 334, 338 (1984). "The guiding principle" of this measure of damages "is to order the wrongdoing defendant to give up all gain attributable to the misuse of the [misappropriated property] and to measure that gain as accurately as possible." *Id*. at 339–340.