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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ACT III MANAGEMENT, LLC, and RONALD M. SHAICH, Plaintiffs / Defendants-in-Counterclaim, v. PANERA BREAD COMPANY and PANERA HOLDINGS CORP., Defendants / Plaintiffs-in-Counterclaim, and JIM DOBSON, JAMES KYLE PHILLIPS, KRISH GOPALAKRISHNAN AND PANERA, LLC, Interested Parties.	)	C.A. No. 2019-0111-MTZ
PANERA, LLC, Third-Party Plaintiff, v. JIM DOBSON, JAMES KYLE PHILLIPS, KRISH GOPALAKRISHNAN AND ACT III MANAGEMENT, LLC, Third-Party Defendants.	)	

REPLY BRIEF IN FURTHER SUPPORT OF PANERA BREAD COMPANY AND PANERA HOLDINGS CORP.'S PARTIAL MOTION TO DISMISS AND MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AS TO PLAINTIFFS' THIRD AMENDED AND SUPPLEMENTAL VERIFIED COMPLAINT

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DATED: May 7, 2021

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Pursuant to Court of Chancery Rules 12(b)(6) and 12(c), Panera Bread Company and Panera Holdings Corp. ("Panera Holdings" and together with Panera Bread Company, "Panera") submit their Reply Brief in Further Support of Panera Bread Company and Panera Holdings Corp.'s Partial Motion to Dismiss and for Partial Judgment on the Pleadings (the "Motion") as to the Third Amended and Supplemental Verified Complaint (the "Third Amended Complaint," cited herein as "Third Am. Compl.") filed by Act III Management, LLC ("Act III") and Ronald M. Shaich ("Shaich", and together with Act III, "Plaintiffs").

ARGUMENT

I. PANERA'S CURRENT MOTION IS PROCEDURALLY PROPER AND TIMELY.

Panera's current motion does not violate any Court order or procedural rule. Plaintiffs' procedural argument—that Panera's Motion to Dismiss and for Judgment on the Pleadings runs afoul of certain stipulations entered into between the parties regarding Plaintiffs' serially amended pleadings—fails under the facts and the case history.

While Panera's Motion to Dismiss the Amended Complaint was still pending, Plaintiffs filed a Second Amended Complaint that added new claims. Instead of adding those new counts to the end of the Complaint, however, Plaintiffs added them in the middle, changing the numbering of various counts in their previous pleading. (Dkt. 348.) For example, where Panera previously moved to

dismiss Count VII for tortious interference with prospective business relations, Plaintiffs' Second Amended Complaint listed that claim as Count X. (*Id*. at 65-66.) When Plaintiffs filed the Third Amended Complaint, they added still more claims, further affecting the numbering. (Compare Dkt. 348 ¶¶ 253-57 (Count X) *with* Dkt. 358 ¶¶ 273-77 (now Count XII).).[1]

Then, Plaintiffs added new allegations to existing counts that Panera already had moved to dismiss, further confusing the issues. (Dkt. 358 ¶¶ 268-69.) Plaintiffs updated their prior Count VI (now Count XI) with new factual allegations, identifying additional conduct they did not previously allege in the Amended Complaint and that they alleged also violated Chapter 93A of the Massachusetts General Laws. (*Id*.; Ans. Br., 31.) Thus, although Panera moved to dismiss the prior Count VI, it had yet to respond to Plaintiffs' newly alleged Chapter 93A claim.

To address the confusion Plaintiffs created, Panera timely answered the Third Amended Complaint, including the new claims and allegations. (Dkt. 361.) Panera then timely moved for partial judgment on the pleadings with respect to Plaintiffs' new Chapter 93A claim. (Op. Br., 19-34.) In addition, Panera

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[1] As Panera noted at p. 1-2, n. 1 of its Opening Brief (Dkt. 373, hereinafter "Op. Br.") and its earlier September 25, 2020 Reply Brief (Dkt. 349), Panera attempted to work cooperatively with Plaintiffs to avoid overcomplicating the briefing process, but Plaintiffs refused.

resubmitted its Motion to Dismiss with respect to the previously-alleged claims and allegations, without raising new substantive arguments, but simply to clarify that its prior arguments applied to the new count numbers for those claims. (*Id*., 1 n.1)

There is nothing improper about how Panera addressed the Third Amended Complaint. Panera's current motion does not alter anything about the prior Motion to Dismiss other than to reflect the new count and paragraph numbering that Plaintiffs used in their amended pleadings. (*Id*., 13-19, 35-37.) Panera explained that it was resubmitting those arguments so that the Court could reference the current, operative pleading when ruling on the pending motion. (*Id*., 1 n.1.) The only two exceptions are Panera's discussion over the Settlement Agreement's choice of law provision, which Plaintiffs correctly point out was an area that Panera addressed in the prior briefing round, and Panera's brief point to contrast Plaintiffs' Chapter 93A position against the plain fact that noncompete agreements are permissible in Massachusetts. Plaintiffs engage both points at length, so Panera addresses them here accordingly. In any event, there should be no question as to timeliness because Panera included its larger collection of previous arguments simply for the Court's convenience and does not affect the substance of the pending Motion to Dismiss.

Panera also properly moved for judgment on the pleadings regarding Plaintiffs' new Chapter 93A claim. (*Id*., 19-34.) "[A]ny party may move for judgment on the pleadings" "[a]fter the pleadings are closed but within such time as not to delay the trial." Ct. Ch. R. 12(c). Plaintiffs do not argue that Panera's motion will delay trial; indeed, trial is not scheduled until July 11, 2022. Moreover, nothing in the parties' December 4, 2020 stipulation purports to alter Panera's right to file a motion for judgment on the pleadings or the timing for filing such a motion. Nor is it significant that Panera answered the new allegations before moving: that is *always* the case for motions filed under Rule 12(c).

Plaintiffs also are wrong that Panera waived the arguments it raises with respect to the new Chapter 93A claim. Plaintiffs chose to replead their prior Count VI by adding new factual allegations. In fact, they admit that (i) the current Chapter 93A claim (Third Am. Compl., Count XI) is not the same as their prior Chapter 93A claim (Count VI in the Amended Complaint) (*see* Ans. Br., 32), and (ii) Panera had not yet addressed this new claim. Plaintiffs cite no authority in support of their waiver argument and instead rely on the parties' stipulations. (*Id*., 23-24.) But, again, those stipulations do not preclude Panera from seeking judgment on the current pleadings. (Dkt. 345 & 357.) Panera is entitled to seek dismissal of the claim as Plaintiffs currently plead it.

In short, Plaintiffs' procedural argument is entirely without merit and the Court should reject it.

II. PANERA'S POSITIONS REMAINED UNCHANGED FROM ITS PRIOR BRIEFING IN SUPPORT OF THE JUNE 19, 2020 RULE 12(B)(6) MOTION.

Panera's positions remain substantively unchanged from its prior briefing in support of the June 19, 2020 Rule 12(b)(6) Motion with respect to Plaintiffs' implied covenant claims in Count V, and its other ripeness challenges to Counts V, XI, and XII of the Third Amended Complaint. (Op. Br., 1, n. 1, 13, n. 7, 35-36; Ans. Br., 27-28.)[2] Panera reincorporated the substance of those positions into its updated February 11, 2021 brief for the Court's reference.

III. THE COURT SHOULD DISMISS PLAINTIFFS' CHAPTER 93A CLAIMS BECAUSE THE UNDERLYING CONDUCT AND TRANSACTIONS DID NOT TAKE PLACE IN "TRADE" OR "COMMERCE."

Panera's Chapter 93A arguments and their supporting legal principles remain fundamentally unchanged from in its earlier briefing. Those positions are as follows:

(1) Chapter 93A is a question of law that is for the Court to determine. *See, e.g.*, *R.W. Granger & Sons, Inc. v. J & S Insulation, Inc.*, 754 N.E. 2d 668,

[2] Plaintiffs are correct that Panera does not update its ripeness challenge to include Plaintiffs' updated Chapter 93A related to Shaich's Panera stock. Panera outlines in § III, *infra*, why those claims fail for other reasons.

675 (Mass. 2001) ("A ruling that conduct violates G.L. c. 93A is a legal, not a factual, determination.").

(2) A mere breach of contract is insufficient to properly plead a Chapter 93A violation. *See Monotype Imaging Inc. v. Deluxe Corp.*, 883 F. Supp. 2d 317, 323 (D. Mass. 2012) ("A mere breach of contract, without more, does not constitute a violation of Chapter 93A.").

(3) Disputes arising from an employment relationship "are not covered by the c. 93A remedies afforded in commercial transactions." (Dkt. 349 at 19 (citing *Diamond Crystal Brands, Inc. v. Backleaf, LLC*, 803 N.E.2d 744, 749 (Mass. App. Ct. 2004); *Informix, Inc. v. Rennell*, 668 N.E.2d 1351, 1353 (Mass. App. Ct. 1996)).)

Plaintiffs cannot counter this concrete legal authority to avoid dismissal of their Chapter 93A claims (Count IX).

A. Plaintiffs Fail to Plead More than a Breach of Contract.

The gravamen of Plaintiffs' first Chapter 93A claim concerns Panera's treatment of its own employees. (*See* Ans. Br, 32-33.) As an initial matter, Panera has not changed its positions from June and September 2020 briefing with regard to Plaintiffs' 93A claim relating to Panera's internal management of its own employees. Plaintiffs' word choices alone cannot overcome the fact that, as this Court has already ruled in part, Panera may enforce

its non-competes (whatever iteration) against Shaich (and as explicitly contemplated by the Settlement Agreement). As such, Panera accordingly incorporates the same and refers the Court to its earlier briefing.

Panera notes that it included additional language in its February 2021 opening brief, reminding the Court that Massachusetts permits employers to implement, update, and enforce non-competition agreements. (Op. Br., 23.) In response, Plaintiffs demand the Court credit their conclusory narrative that Panera's only purpose for updating its agreements was to "pursue its anti-Shaich vendetta." (Ans. Br., 37-38.) But Plaintiffs stop short of actually challenging the enforceability of Panera's since-withdrawn updated non-compete agreements. (*Id*.) Instead, they provide a strained interpretation of an introductory paragraph of the Third Amended Complaint that they now claim challenges whether Panera's new noncompete is reasonable or enforceable. (*Id*. citing Third Am. Compl., ¶ 9.) This paragraph says no such thing; it merely repeats Plaintiffs' objection that Panera might do anything to manage its own employees or guard against Plaintiffs' obvious competitive threat. (Third Am. Compl., ¶ 9.)

In sum, what Plaintiffs did not plead, do not argue, and do not support with any legal authority is why Panera's entirely legal conduct – with its own employees, is actionable under Chapter 93A.

B. The Court May Properly Dismiss Plaintiffs' Chapter 93A Claims on the Pleadings.

Plaintiffs' suggestion that a court may not dismiss Chapter 93A claims pursuant to a Rule 12 motion is not correct. To the contrary, courts "routinely" rule that defenses to a Chapter 93A claim such as whether those claims concern an employment or "intra-enterprise" dispute, are an appropriate basis for a motion to dismiss. *See*, *e.g.*, *Weiler v. PortfolioScope, Inc.*, 12 N.E.3d 354, 370 (Mass. 2014) ("We continue to view a rule 12 (b)(6) motion as the proper vehicle for a party to raise such a defense."); *Manning v. Zuckerman*, 444 N.E.2d 1262, 1263-66 (Mass. 1983) (affirming Rule 12 dismissal of Chapter 93A claim where contract at issue arose out of the parties' employment relationship).

Moreover, Plaintiffs' lengthy preamble and exception to Panera's description of Section 11's comparatively narrower application[3] do not support their ultimate position that it is categorically inappropriate for the Court to dismiss their 93A claims at this stage. Indeed, Plaintiffs only cite general language in one unreported, 25-year-old Superior Court case, otherwise uncited elsewhere for this purpose, to support their point. (Ans. Br., 30, citing *Canha v. LaRoche*, 1996 WL

[3] Plaintiffs' statement that Panera misunderstands the statute by taking the position that Section 11 reflects a narrower scope of disputes than elsewhere in Chapter 93A also falls short. *See, e.g., Debnam v. FedEx Home Delivery*, 766 F.3d 93, 96 (1st Cir. 2014) (In Chapter 93A cases, "Massachusetts courts have narrowed the scope of the statute by interpreting 'trade or commerce' to exclude various kinds of activities.").

1186959, at *7 (Mass. Super. Ct. Aug. 8, 1996).) Plaintiffs' cite to *Canha* does not directly address this issue, nor does it disturb the robust lineage of cases described above holding that courts may dismiss Chapter 93A claims on the pleadings. The Court should disregard Plaintiffs' suggestions to the contrary.

C. The Court May Evaluate and Dismiss Plaintiffs' Chapter 93A Claims Separately.

Plaintiffs' argument that a court cannot dismiss either of their Chapter 93A claims because Plaintiffs grouped them with other claims that may survive (Ans. Br., 30-31) contravenes Massachusetts and Delaware law.

1. The Court May Dismiss Individual Chapter 93A Claims and Allegations.

Courts can and do dispose of certain alleged Chapter 93A violations while sustaining others. For example, in *Hebert v. Vantage Travel Service, Inc.*, 444 F. Supp. 3d 233, 251, 254-55 (D. Mass. 2020) the court entered summary judgment on two out of three alleged bases for a violation of Chapter 93A.

Plaintiffs try to work around this settled law but offer no persuasive or binding legal authority. Plaintiffs rely on only one unreported trial court decision as the foundation for their otherwise sweeping procedural assertion. (Ans. Br., 30-31 (citing *Kilgallon v. Clear Channel Commc'ns, Inc.*, 2007 WL 2840381, at *3 (Mass. Super. Ct. July 30, 2007) (denying summary judgment where defendants' motion ignored five other allegations arising from the same incident in plaintiff's

Chapter 93A claim.) Here, unlike in *Kilgallon*, Panera addressed each of Plaintiffs' allegations, which arise from entirely separate subject matter.

2. Plaintiffs Allege Two Separate Chapter 93A Claims.

Plaintiffs' Chapter 93A allegations comprise two separate claims. Plaintiffs cite to a Delaware Superior Court decision that discourages parties from using Rule 12 motions to "trim down" constituent theories within certain claims. (*See* Ans. Br., 49-50 (quoting *inVentiv Health Clinical, LLC v. Odonate Therapeutics, Inc.*, 2021 WL 252823, at *6 (Del. Super. Ct. Feb. 18bkaer, 2021) (Wallace, J.)).[4] That decision does not apply here.

First, *inVentiv Health* concerned claims alleging multiple theories for the defendants' breach of contract. *Id*. Plaintiffs ask the Court to take them at their word that "Plaintiffs have not asserted a separate 93A claim relating to Shaich's stock," saying that they only added *allegations* to the existing claim. (Ans. Br., 49.) But Plaintiffs admit that they effectively added a new Chapter 93A claim, drawn from a separate set of facts, to their subsequent Second and Third Amended Complaints. (Ans. Br., 28-29.)

[4] Plaintiffs' counsel recently asserted the opposite position of this exact issue before the same court in another case. *Unbound Partners Ltd. P'Ship v. Invoy Holdings Inc.*, 2021 WL 1016442, at *1, *7 (Del. Super. Ct. Mar. 29, 2021) (Wallace, J.).

Here, the two Chapter 93A claims arise from entirely different facts, agreements, and time periods. They are not constituent theories giving rise to the same claim—they are entirely different claims.

Unlike *inVentiv Health* and *Unbound Partners*, the two Chapter 93A claims here arise from different contracts. The first involves whether Panera violated the Settlement Agreement. (Ans. Br., ¶¶ 84-115, 119-122.) The second involves the Retirement Agreement, Chairman's Letter, and the other Panera employee equity agreements governing Shaich's purported stock rights. (*Id*., *passim*.) Plaintiffs asserted the two claims at different times, with 16 months between them. (*Compare* Dkt. 348 *with* Dkt. 358.) They filed the first Chapter 93A claim when most of the allegations Plaintiffs now include with the second had yet to even develop.

Second, notwithstanding the *inVentiv Health* and *Unbound Partners* decisions, the Court of Chancery can and will dismiss discrete allegations within a single claim. *See, e.g.*, *In re Baker Hughes Inc. Merger Litig.*, 2020 WL 6281427, at *11-14 (Del. Ch. Oct. 27, 2020) (dismissing two out of three allegations within one claim that defendant breached its duties of disclosure); *Overdrive, Inc. v. Baker & Taylor, Inc.*, 2011 WL 2448209, at *7 (Del. Ch. June 17, 2011.) (dismissing two out of three parts of plaintiff's breach of contract claim.)

Plaintiffs' discrete Chapter 93A allegations should rise and fall on their own. While Panera asserts that both claims fail for clear reasons, if the Court decides that one claim merits dismissal, it should dismiss it regardless of whether the other claim fails.

D. The Settlement Agreement's Choice of Law Provisions Foreclose Plaintiffs' Chapter 93A Claims.

Plaintiffs argue that the Settlement Agreement's Delaware choice of law provision does not preclude application of Massachusetts law because certain of their underlying claims sound in tort. This fails because Plaintiffs do not plead any allegations sounding in tort that took place *in Massachusetts*. (Ans. Br., 38-41.)

Plaintiffs overlook a crucial prerequisite to bringing a Chapter 93A claim under Massachusetts law in the face of a conflicting choice of law provision: that the conduct at issue occurred within the Commonwealth. *Knox v. Vanguard Grp., Inc.*, 2018 WL 315157, at *14-15 (D. Mass. Jan 5, 2018), *aff'd*, 738 F. App'x 701 (1st Cir. 2018) (holding that, *inter alia*, Chapter 93A claim failed because tortious conduct did not occur primarily and substantially in Massachusetts); *Huffington v. T.C. Group, LLC*, 2012 WL 1415930, at *11 (Del. Super. Ct. Apr. 18, 2012) (Massachusetts law was appropriate notwithstanding Delaware forum selection clause where Defendants failed to contradict allegation of conduct occurring in Massachusetts.).

This principle is consistent with the elements of a Chapter 93A claim. To sustain a Chapter 93A claim, it is necessary that the *conduct* at issue, and *not just the injury*, took place *substantially and primarily* in Massachusetts. *Hamann v. Carpenter*, 937 F.3d 86, 93-94 (1st Cir. 2019) (emphasis added) (dismissing plaintiff's claims for failing to plead any factual allegation linking defendant's conduct to Massachusetts).[5] "To determine whether [the primarily and substantially] standard has been met, courts apply a 'center of gravity' test in which the focus should be 'solely on the actionable conduct said to give rise to the violation,'" whereas place of injury is not sufficient by itself. *Allscripts Healthcare, LLC v. DR/Decision Res., LLC*, 2021 WL 681976, at *8 (D. Mass. Feb. 22, 2021) (citing *Monahan Prods. LLC v. Sam's East, Inc.*, 463 F. Supp. 3d 128, 151 (D. Mass. 2020).

Plaintiffs claim they meet this standard based on two allegations: [1] "Panera tortiously interfered with Act III's prospective business relationships by harassing and intimidating employees, and [2] Panera purported to convert Shaich's stock to punish and intimidate Act III, with such conduct occurring

[5] "No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth." Mass. Gen. L. c. 93A, § 11.

primarily and substantially in Massachusetts." (Ans. Br., 41, citing Third Am. Compl. ¶¶ 267-269, 272-277.)

Plaintiffs plead neither allegation with the requisite specificity. At the pleadings stage, courts do not "blindly accept conclusory allegations unsupported by *specific* facts…" *Nemec v. Schrader*, 991 A.2d 1120, 1125 (Del. 2010) (emphasis added); *see also Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998) ("[W]e ignore conclusory allegations that lack specific supporting factual allegations.").

Plaintiffs plead no other specific or conceivable facts showing that the events underlying their "interference" allegations took place in Massachusetts. Instead, they offer only one general statement:

> Panera employees based in and working in Massachusetts engaged in coercion, intimidation, and harassment towards other Panera employees working in Massachusetts, and because Panera has attempted to prevent Massachusetts-based Act III and the Massachusetts-based Act III Entities from hiring Massachusetts-based employees.

(Third Am. Compl., ¶ 272.)

This conclusory statement lacks the necessary specifics to sustain the underlying claim. *See*, *Nemec*, 991 A.2d at 1125. The only specific facts Panera can locate in the Third Amended Complaint where Panera allegedly "harassed" or "intimidated" employees concern the five technology executives that resigned in February 2019. (Third Am. Compl., ¶¶ 4-5, 85-89, 103-109, 119-122.) All five of

those employees lived and worked in Missouri, where all meetings at issue occurred.[6] Plaintiffs do not cite or describe any other specific instances of "harassment".[7] Without any viable interference claim, Plaintiffs' claim fails generally and under the Settlement Agreement's choice of law provision.

Second, Plaintiffs plead no facts that Panera's alleged conduct, *i.e.* that it "purported to convert Shaich's stock to punish and intimidate Act III," took place "primarily" and "substantially" in Massachusetts.[8] (Third Am. Compl.) As stated above, it is not Shaich and Act III's injury which governs the inquiry, but rather where the alleged unfair or deceptive conduct took place. Plaintiffs' claims related to Shaich's forfeiture – all contractual in nature – identify no location of the

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[6] While Plaintiffs do not specifically list these facts in their Complaint, there is no dispute that Messrs. Dame, Dobson, Gopalakrishnan, Petersen, and Phillips all lived, worked, and were situated in Missouri during the events at issue, including their meetings at Panera's St. Louis headquarters following that group's mass resignation. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 172 (Del. 2006) ("Where a plaintiff has no good faith basis for challenging the authenticity or legitimacy of an extraneous fact, *that is otherwise subject to judicial notice*, the trial court may properly consider such fact in ruling on a motion to dismiss without affording the plaintiff an opportunity to take discovery.") (emphasis in original).

[7] Plaintiffs provide no specific facts supporting their assertion that "Panera's General Counsel Scott Blair personally confronted at least one employee," and decline to identify the location of the incident, nor are the other vague assertions in the same paragraph sufficient to support any conceivable claim. (Third Am. Compl. ¶ 109.)

[8] Panera assumes "purported to convert" relates to Shaich's stock forfeiture.

conduct at issue beyond the perfunctory language Plaintiffs add to their Chapter 93A claim. Without more, the Delaware choice of law provisions in the relevant agreements apply and Massachusetts law does not.

Finally, Plaintiffs do not connect any particular tort to this allegation – indeed, they plead no claim for conversion elsewhere. Moreover, for the reasons Panera describes in Section III, Plaintiffs' claims based on these allegations fail as a matter of law. This includes Plaintiffs' confusing assertion that Panera sought to indirectly "punish and intimidate Act III" because Shaich triggered forfeiture provisions in his Panera agreements. (Ans. Br., 41.) This reduces Plaintiffs' claims back to a simple contract dispute, without any related tort, whereupon applying Massachusetts law is inappropriate under the Settlement Agreement's choice of law provision. *See Socket Mobile, Inc. v. Cognex Corp.*, 2017 WL 3575582, at *6 (D. Del. Aug. 18, 2017) (holding that a 93A claim that goes to the core of the contract dispute cannot be sustained when the agreement selects Delaware law). Plaintiffs' Chapter 93A claims accordingly fail as a matter of law.

E. Plaintiffs' Claims Relating to Shaich's Stock Are Outside the Scope of Chapter 93A and the Court Should Dismiss Them.

1. Plaintiffs Are Unable to Counter Panera's Clear Challenge that Plaintiffs' Chapter 93A Stock Claims Arise Entirely from Shaich's Panera Employment, and Not in Trade or Commerce.

Section E(2) of Plaintiffs' Answering Brief fails to address Panera's challenge that Chapter 93A does not apply to the intra-enterprise-related subject matter underlying Plaintiffs' stock-related Chapter 93A claim.[9] Again, this is the core inquiry:

> It is well established that disputes between parties in the same venture do not fall within the scope of G.L. c. 93A, § 11. To bring a claim under the statute, there must be a dual inquiry whether there was a commercial transaction between a person engaged in trade or commerce and another person engaged in trade or commerce, such that they were acting in a "business context." Inter-enterprise [sic] disputes, including those stemming from an employment relationship or between or among fellow shareholders, are essentially private in nature, and thus not considered "commercial transactions" within the meaning of c. 93A.

Selmark Assocs., Inc. v. Ehrlich, 5 N.E.3d 923, 942 (Mass. 2014) (internal quotation marks and citations omitted).

Plaintiffs confine their response to Panera's argument that Plaintiffs' stock-related Chapter 93A claim does not apply because it arises from Shaich's

[9] Panera notes that in their Opposition, Plaintiffs once more clarify that their stock-related 93A claims relate only to Act III, but they do not assert the same for Shaich individually. (Ans. Br., 41) (explaining that Panera "purported to convert Shaich's stock to punish and intimidate Act III…").

Panera employment to a two-paragraph afterthought. (Ans. Br., 45-47.) Simply put, Chapter 93A does not apply to "a dispute arising out of the employment relationship" between a former employee and their former employer. *Manning*, 444 N.E.2d. at 1264-66; *Informix, Inc.*, 668 N.E.2d at 1353 ("The parties' subsequent dispute as to whether Rennell had violated those contractual undertakings arose from the very same employment relationship between Rennell and Informix. It is without consequence that Rennell was no longer Informix's employee when he acted in disregard of the contract.")

In *Manning*, the defendant entered an agreement with the plaintiff that effectively terminated the plaintiff's position as the editor of *The Atlantic Monthly* magazine, aside from a promise to pay him certain monthly retirement benefits. *Manning*, 444 N.E. 2d. at 1263. When the company failed to make the first payment, plaintiff sued, claiming, *inter alia*, breach of contract and violation of Chapter 93A. *Id*.

The Massachusetts Supreme Judicial Court (SJC) upheld the lower court's order granting defendant's motion to dismiss the plaintiff's Chapter 93A claims. *Id.* at 1263-1266. The court held that Chapter 93A does not cover employment contract disputes arising out of the employment relationship. *Id*. at

1265. The SJC held that agreements arising from that relationship do *not* constitute "trade" or "commerce" as defined by the statute. *Id*.[10]

Here, the stock grants at issue and the underlying breach claims that Plaintiffs now assert arise entirely from agreements that Shaich entered with Panera related to his Panera employment. (Op. Br., 5-9.) Those agreements are the only bases for Plaintiffs' stock-related Chapter 93A claim. They do not constitute the type of business transaction where Chapter 93A applies. *See, e.g.*, *Informix, Inc.*, 668 N.E.2d at 1353-1354. The Court should dismiss the claim.

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[10] The SJC recently distinguished *Manning* and identified employment-related conduct that is not exempt from Chapter 93A, § 11. *Governo Law Firm LLC v. Bergeron*, 166 N.E.3d 416 (Mass. 2021) (holding that if an employee misappropriates and later uses employer's trade secrets in the marketplace at a new entity, that is a marketplace transaction to which Chapter 93A, § 11 may apply). That decision does not affect Panera's position here. *Governo* draws its distinction from trade secret claims in other cases that fell outside any contractual obligation that the defendant employees owed the plaintiff employer. *Id*. (citing, *e.g.*, *Specialized Tech. Res., Inc. v. JPS Elastomerics Corp.*, 957 N.E.2d 1116, 1121 (Mass. App. Ct. 2011) (defendant's trade secret misappropriation "was actionable independent of his contractual obligations")); *see also Informix Inc.*, 668 N.E.2d at 1354, n. 2 (distinguishing *Peggy Lawton Kitchens, Inc. v. Hogan*, 466 N.E.2d 138, 139-141 (Mass. App. Ct. 1984) (identifying limit to *Peggy Lawton Kitchens*' holding where that defendant's later use of stolen trade secrets did not connect to prior employment because defendant had no contract with former employer from which trade secret claims arose)). Indeed, *Governo* emphasized *Manning's* key point that disputes arising from "the ordinarily cooperative circumstances of the employment relationship" are not marketplace transactions to which Chapter 93A would apply. 2021 WL 1324147, at *5 (quoting *Zuckerman*, 444 N.E.2d at 1265). Here, Plaintiffs' stock-related 93A claims arise from agreements that were a product of the cooperative circumstances just described – contracts relating to Shaich's Panera employment. (Op. Br., 5-9.)

2. Chapter 93A Does Not Apply to Termination and Settlement Agreement Disputes Arising from Prior Employment.

Any distinction regarding the timing of the agreement in the *Manning* case is immaterial here. Courts necessarily apply *Manning's* authority and logic to Chapter 93A claims arising from plaintiffs' termination and settlement agreements with their former employers that they entered or negotiated upon their departure. *See, e.g.*, *Psy-Ed Corp. v. Klein*, 947 N.E.2d 520, 526-28, 539 (Mass. 2011) (dismissing Chapter 93A claim because agreement was employer-employee related where defendant corporation's board, citing plaintiff/company founder's subsequent conduct in separate litigation, voted to stop payments due under parties' settlement and release agreement that parties entered into upon plaintiff's earlier ouster from company); *Lubin & Meyer, P.C. v. Manning*, 2017 WL 7362332, at *1-2 (Mass. Super. Ct. Dec. 22, 2017) (granting former employer's motion to dismiss Chapter 93A claims where employer refused to honor referral fee terms in plaintiff's termination agreement after asserting that plaintiff, by his later-discovered misconduct, forfeited his rights to those terms).

It is undeniable that Shaich entered his Chairman's Letter and Retirement Agreement in connection with his employment and board services at Panera. (*See* Op. Br., 5-9, 26-28.) For the reasons just described, Chapter 93A does not apply. Plaintiffs barely attempt to confront this issue because they cannot

overcome it. Their Chapter 93A claim relating to Shaich's stock fails as a matter of law.

3. Plaintiffs Offer No Persuasive Authority to Counter Panera's Employment-Related Position that Chapter 93A Does Not Apply to Plaintiffs' Stock Claims.

Plaintiffs devote only two paragraphs to the employment context of Shaich's Panera stock grants. Plaintiffs' lone citation selectively quotes one footnote from a single case where the court does not even render a holding on this issue. (Ans. Br., 46 (quoting *Weiler*, 12 N.E.3d at 371 n.39.)

In *Weiler*, the plaintiff was the defendant-company's former president and COO. 12 N.E.3d at 357. In 2009, he sued defendant alleging that it refused to pay him certain entitlements to litigation proceeds to which the parties agreed several months after his employment ended in 2002. *Id*. at 357-360.

The SJC affirmed the trial court's judgment on plaintiffs' Chapter 93A claim and overturned the appellate court's reversal for the sole reason that the defendants failed to appeal the judgment on that claim. *Id*. at 369-71. The SJC noted that if they had occasion to rule on the issue, which they did not, certain details may have been enough to overcome an employment-related or intra-enterprise bar to the Chapter 93A claim. *Id*. at 371 n. 39. In doing so, however, the SJC noted meaningful distinctions that demonstrate why *Weiler* does not affect Panera's position. Among other distinctions, the dispute in *Weiler* concerned an

amendment to a stock option purchase and sale agreement entered into five months *after* plaintiff terminated his employment with defendant. *Id.* at 358. Defendant's alleged related conduct occurred over six years after that. *Id.* at 371 n.39. Noting these glaring temporal distinctions, among others, the SJC observed, "[i]n short, the factual circumstances of this case appear to be significantly different from the direct employer-employee or shareholder-corporation disputes to which we have held G.L. c. 93A inapplicable." *Id*. (contrasting cases). The facts in *Weiler* are materially different from the facts here.

Plaintiffs appear to assert a second point, "that because Shaich no longer owes Panera any fiduciary duties, Panera's Chapter 93A challenge does not apply." (Ans. Br. 46-47.) Aside from trying to turn Panera's language on itself, this argument is unclear and appears directed at countering Panera's separate challenge that Plaintiffs' claims involve a shareholder dispute. (*Id*.) It does nothing to disturb Panera's valid intra-enterprise challenge.

Accordingly, this claim has no conceivable avenue to survive, and Plaintiffs seemingly have no answer to Panera's challenge. The Court should dismiss it.

F. Plaintiffs' Stock-Related Chapter 93A Claim Should Not Survive Simply Because Act III Is A Party.

Chapter 93A does not apply to the dispute over Shaich's stock because it arises from his Panera employment. Plaintiffs cannot overcome this by arguing

Act III is suffering collateral damage because Shaich's personal stock interests were in jeopardy.

1. Act III Cannot Prove Damages.

Plaintiffs fail to plead how Panera's alleged conduct relating to *Shaich's stock* has damaged or will damage *Act III*. "A deceptive act must be a proximate cause of a loss to the plaintiff to sustain a complaint under section 11." *Ray v. Ropes & Gray LLP*, 961 F. Supp. 2d 344, 361 (D. Mass. 2013), *aff'd*, 799 F.3d 99 (1st Cir. 2015).

Act III claims that Panera's conduct as it relates to Shaich's stock is harmful because it will force Shaich into settling the Act III litigation. (Third Am. Compl. ¶ 268.) Two paragraphs later, however, Plaintiffs argue that Panera is harming them because Plaintiffs continue to incur legal fees due to Panera's conduct. (*Id*., ¶ 271.)

Act III seemingly argues that if Shaich settled because of Panera's alleged pressure, it would collaterally harm Act III – Shaich's alter-ego – because Act III would also have to exit the case. (*Id*., ¶¶ 268-269, 271.) By this result, however, there would be no more legal fees. If Shaich and Act III do not settle, Panera has not forced them to relinquish their other rights. These theories conflict, and illustrate how Act III has not pled any cognizable harm. This, in turn,

forecloses Act III's right to remain tied to Plaintiffs' stock-related Chapter 93A claim.

Viewed differently, Act III does not plead in any way that it is paying the legal fees related to Shaich's attempts to enforce his shareholder rights. (*See, e.g.*, *id*., ¶¶ 268-269, 271.) It has no conceivable basis to claim those damages. This case has not settled, so Act III has not lost its purported third-party rights under the Settlement Agreement. Act III fails to plead that it has suffered any damages proximate to Shaich's separate forfeiture of his stock rights by which it may conceivably maintain a viable Chapter 93A claim. The Court should not allow Act III's presence as a corporate fiction to salvage Shaich's stock-related Chapter 93A claim that otherwise fails for the reasons described above.[11]

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[11] In their Opposition, Plaintiffs attempt to add Shaich after the fact to their stock-related Chapter 93A allegation. A plain grammatical reading of the language in Paragraphs 268 and 269 instructs otherwise. (Third Am. Compl.) Those paragraphs focus only on Panera's alleged "unfair and deceptive acts ***toward Act III***" "to extract a financial penalty ***against Act III***." (*Id*.) Although the Court can and should foreclose this claim as it relates to Shaich based on the legal authority described in § III(E), *supra*, Act III's curious collateral damage theory here also fails because it necessarily arises from contracts connected to Shaich's Panera employment. Those claims are not actionable, as just described. It would make no sense for the Court to allow Act III, a non-party to any of those contracts, to be the vehicle that allows Plaintiffs to layer Shaich's related breach claims, where Act III is not a claimant.

(a) Act III Cannot Sustain this Claim Based on Its Purported Prayer for Injunctive Relief.

Act III does not plead any equitable relief as to Shaich's Retirement Agreement and the Share Forfeiture Notice to meet the Chapter 93A damages requirement. (Ans. Br., 51.) Because Act III is not a party or intended beneficiary of Shaich's Retirement Agreement or equity agreements, it cannot sue to enforce their provisions. *See O'Neill v. Middletown*, 2006 WL 205071, at *20 n.174 (Del. Ch. Jan. 18, 2006) ("This claim fails because the Plaintiffs were neither party to the agreement, nor were they intended beneficiaries of the agreement. As a consequence, they may not sue to enforce its provisions").

As a non-party to Shaich's Retirement Agreement and equity agreements, Act III lacks standing to litigate these issues and it fails to plead facts to support the claims in Counts VI-VIII. (Third Am. Compl. ¶¶ 224-243.) Indeed, Shaich is the only listed party in each claim. (*Id*.) Chapter 93A is not a magic key whereby Act III can argue they are seeking this relief after the fact. Act III fails to plead any cognizable damages relating to the stock-related Chapter 93A claim. The Court should dismiss them accordingly.

2. Panera's Alleged Litigation Conduct Is Not Actionable Under Chapter 93A.

Act III's only conceivable nexus to Plaintiffs' stock-related Chapter 93A claims concerns Panera's litigation conduct. (Third Am. Compl., ¶¶ 268-

269.)[12] The Court should dismiss this claim because Act III had no prior business relationship with Panera before it sued Panera.

(a) Act III and Panera Had No Preexisting Commercial Relationship When Act III Initiated this Litigation in February 2019.

Panera and Act III shared no business relationship, nor did they previously engage in any transaction in commerce, before Act III filed its unilateral lawsuit against Panera in February 2019. As Plaintiffs admit, the parties must engage in some kind of commercial or arms-length transaction for Chapter 93A to apply to their conduct during litigation. (Ans. Br., 43 n. 9, 47-48.); *See also Szalla v. Locke*, 657 N.E.2d 1267, 1269 (Mass. 1995); *Aggregate Industries-Northeast Region, Inc. v. Hugo Key & Sons, Inc.*, 57 N.E.3d 1027, 1032 (Mass. App. Ct. 2016) ("Unfair and deceptive conduct must *itself* arise from trade or commerce, and *not tangentially* from litigation concerning that conduct.") (emphasis added).)

Act III and Panera had no prior commercial relationship before litigation began.[13] Act III Management, LLC was not a party to Shaich's January

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[12] Panera separately notes that Plaintiffs' continued allegations that Panera has engaged this dispute in bad faith are false. Plaintiffs have not, and cannot identify any such conduct. Instead, Panera is simply protecting its business interests by enforcing rights to which it is contractually entitled.

[13] Panera notes that whether Act III and Panera had a pre-existing commercial relationship and whether Act III and Panera were competitors prior to February 2019 are entirely different issues. The latter does not affect this analysis, and

2018 purchase of Panera's Tatte holdings. (Third Amended Complaint, ¶¶ 2, 38.) Act III Management, LLC is not a party to the December 6, 2018 Settlement Agreement and it does not appear in that agreement. (*See, e.g.*, Third Am. Compl. ¶ 62, Ex. B, Settlement Agreement.) Plaintiffs plead no facts that Shaich assigned Act III any third-party rights pursuant to the Settlement Agreement before this dispute where Panera had notice, or that Panera ever previously dealt with Act III. (*See generally* Third Am. Compl.)

The first place Act III Management, LLC ever appears was in Shaich's February 8, 2019 notice to Panera's corporate parent. (Third Am. Compl. ¶¶ 94-97, Ex. C, February 8, 2019 Shaich Notice.) It may have been conceivable for the parties at that point to have created a preexisting commercial relationship if Panera was able to engage Act III under the terms of the Settlement Agreement. Act III, however, foreclosed any chance of that when it filed its lawsuit five days later, before Panera could respond and in contravention of the Settlement Agreement's 14-day notice period. (Third Am. Compl. Ex. B, Settlement Agreement, § 6; Dkt. 263, 5/9/2019 Ruling, 20:5-9.) ("Act III ignores that it was the one who told the IT directors to tell Panera they would not negotiate, and that it

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Panera does not waive or otherwise forego its positions that Act III was and remains a Panera competitor.

was Act III who sued to enforce the settlement agreement before the expiration of Panera's two-week notice period.")

Without a preexisting commercial relationship, Act III and Panera's foray into litigation did not occur in trade or commerce. As Plaintiffs correctly cite, "[t]he question of whether litigation-related conduct can violate Chapter 93A turns on whether the parties have a business relationship that *gives rise to the claim*." (Ans. Br., 47 (citing *Turner Bros. Constr., Inc. v. Trs. of Nichols Coll.*, 1995 WL 809508, at *2 (Mass. Super. Ct. May 31, 1995), *aff'd*, 680 N.E.2d 954 (Mass. App. Ct. 1997) (TABLE)).) The only unfair and deceptive conduct Act III alleges as it relates to Plaintiffs' Chapter 93A claim is Panera's litigation conduct. (*See* Op. Br. 30-31, (citing Third Am. Compl. ¶¶ 150-156, 268-269).) Because the conduct Act III alleges only occurred in litigation, and not trade or commerce, Act III and Panera had no preexisting business relationship that gave rise to Act III's claim. The Court should dismiss this claim as to Act III.

(b) Chapter 93A Is Not Applicable to Panera's Alleged Litigation Conduct Underlying Shaich and Act III's Claims Because the Subject Matter of this Litigation Did Not Occur in Trade or Commerce.

Plaintiffs' stock-related Chapter 93A claim, as pled, relates only to Panera's litigation conduct in matters that do not concern the Parties' business relationships. Again, "unfair or deceptive conduct alleged must *itself* arise from

trade or commerce, and *not tangentially* from litigation concerning that conduct." *Aggregate Industries-Northeast Region, Inc.* 57 N.E.3d at 1032 (emphasis added). The parties' commercial relationships are what must *give rise to the claim*. *Turner Bros.*, 1995 WL 809508, at *2 (emphasis added). Here, "the claim" relates to Shaich's purported stock rights, whether Panera violated those rights, and, in a parallel sense, whether Shaich violated certain agreements and forfeited those rights. For the reasons described above, these disputes all arise from Shaich's Panera employment-related agreements, not his commercial relationship with Panera.

(c) The Cases Plaintiffs Rely upon Are Inapposite, But Demonstrate Why Act III Does Not Have A Commercial Relationship with Panera Through Shaich's Agreements.

Plaintiffs lean on the *Commercial Union Insurance Company v. Seven Provinces Insurance Company, Ltd.* case to support their position that Panera's litigation conduct *vis-à-vis* Shaich's stock is actionable under Chapter 93A. (Op. Br., 47-48, (citing 217 F.3d 33, 41-43 (1st Cir. 2000).) *Commercial Union* does not apply.

That case involved two insurance entities where the defendant engaged in a pattern of knowing obstruction and evasion of its reinsurance obligations well before plaintiff filed suit, but which lasted through trial. *Commercial Union Ins. Co.*, 217 F.3d at 41-43. There, defendant's pre- and post-

suit conduct extended directly from the parties' contractual obligations that were the basis of their preexisting business relationship. *Id*. Defendant's conduct before and during litigation was thus a continuum of bad faith. *Id*. at 43. That circumstance does not apply here.

The three other cases Plaintiffs cite in support of this position – indeed the parentheticals listed in their Answering Brief itself – all similarly demonstrate facts where the parties had commercial relationships prior to the litigation conduct at issue. (Ans. Br., 47, n. 10.) Plaintiffs' summaries of each note the direct privity between the parties in each case with respect to that subject matter. *See id*. (citing *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140, 142 (Mass. 1978) as a "…93A claim against financing company for suing debtors in inconveniently located courts"; citing *Greater Boston Legal Serv., Inc. v. Haddad*, 1999 WL 513885, at *2 (Mass. Super. Ct. May 3, 1999) as a "…93A claim arising from conduct in landlord-tenant litigation,"; and citing *Turner Bros.*, 1995 WL 809508, at *2 as a "…93A claim concerning unfair conduct in arbitration of contract claims"). They each evidence direct commercial relationships and transactions among the parties that predated litigation and conduct that was not tangential to those relationships. These cases do not apply and cannot salvage Plaintiffs' claim.

(d) The Panera Forfeiture Notice Is Not Conduct that Occurred in Trade or Commerce.

Chapter 93A applies only to conduct in the context of a party's commercial relationship, the key categories being where either party was selling or buying a service, a product, a business, or part of a business. *See, e.g., Szalla*, 657 N.E.2d at 1269. Furthermore, "[a] person is not engaged in trade or commerce merely by the exercise of contractual or legal remedies." *Begelfer v. Najarian*, 409 N.E.2d 167, 176 (Mass. 1980). The agreements that give rise to Shaich's forfeiture relate entirely to his Panera employment, as do any actions by Panera to exercise its rights under those agreements.

Shaich's grant agreements, which Plaintiffs directly reference and describe in the Third Amended Complaint, contain an automatic forfeiture penalty if Shaich breaches his restrictive covenants. (*See, e.g.*, Third Am. Compl., ¶¶ 189-190, 192); Supplemental Transmittal Declaration of Elisa M.C. Klein (hereinafter "Klein Decl."), Ex. 4, Matching Stock Unit Award Terms and Conditions Under Panera Bread Company Executive Ownership Plan, ("Matching Award"); Klein Decl. Ex. 5, Award Under the Panera Bread Company Long-Term Incentive Plan Restricted Stock Unit Grant Notice ("Annual Award").[14]

[14] Plaintiffs' assertions regarding the enforceability of these terms and agreements, and/or the propriety of the September 12, 2020 Forfeiture Notice, are not at issue in Panera's Motion. While the Parties have yet to conduct discovery on or litigate those assertions, the content of those agreements, as

Those agreements related to Shaich's employment. The issue is whether Shaich violated his confidentiality or noncompetition obligations, which this Court established twice in the last two years was likely. (*See* Opening Br. 11-12, Dkt. 263, Telephonic Ruling on Panera's Motion for a Preliminary Injunction "5/9/2019 Ruling".) This is an issue that exists independently of the commercial relationships that Plaintiffs describe or which arise from the Settlement Agreement. Like the stock grants themselves, the operative forfeiture provisions arise entirely from Shaich's employment relationship with Panera. (Third Am. Compl., ¶ 189; Op. Br., 5-9.)[15] Whether Panera applied them properly is not actionable under

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drafted, are informative here. Both Awards' terms and conditions, alone and pursuant to the EOP and the LTIP, included certain forfeiture provisions. (Klein Decl. Ex. 4, Matching Award, § 9; Klein Decl. Ex. 5, Annual Award, § 9; Ex. 6, Transmittal Declaration, Panera Bread Company Long-Term Incentive Plan ("LTIP"), § 11.1; Klein Decl. Ex. 7, Panera Bread Company Executive Ownership Plan ("EOP"), § 11.1.) Each provides that Shaich will forfeit any vested or unvested RSUs he received under the applicable Award, and any shares received with respect to those RSUs, if he breaches any restrictive covenant to which he was bound. (*Id*.) Both the LTIP and the EOP vest in the Panera Holdings' Board of Directors Compensation Committee all duties, power, discretion, and authority to manage, execute, and administer the plans' provisions. (Klein Decl. Ex. 6, LTIP, §§ 2.12, 3.1-3.3, 6.8; Klein Decl. Ex. 7, EOP, §§ 2.12, 3.1-3.3.)

[15] Plaintiffs may argue that the *Governo* decision, described at n. 10, *supra*., overlaps with Panera's argument here because both involve trade secret misappropriation claims against a former employee. Again, *Governo* and the cases it cited only address misappropriation claims that were independent of those former employees' contractual obligations relating back to their employment with the defendant former employers. (*Id*.) On that basis, *Governo* does not affect this analysis.

Chapter 93A because the underlying facts did not occur in a commercial context. *Begelfer*, 409 N.E.2d at 175-176.

All told, Shaich has no avenue to sustain his stock-related Chapter 93A claims because of his employment history at Panera. Act III's only asserted avenue to bring the same claim fails because Panera's alleged conduct underlying this claim occurred during litigation and outside "trade" or "commerce." This leaves the claim without a plaintiff. The Court should dismiss it as a matter of law.

IV. PLAINTIFFS MISUNDERSTAND PANERA HOLDINGS' POSTURE AS A NON-PARTY TO THE SETTLEMENT AGREEMENT.

The Court should dismiss Panera Holdings as a named Defendant on all claims relating to the Settlement Agreement because Plaintiffs fail to identify any contractual or legal authority to support their claims.

As an initial matter, Plaintiffs fail to explain how or why Panera Holdings is subject to any claims or obligations arising from the Settlement Agreement. This failure is fatal to Plaintiffs' claims in Counts I-III and V. For example, in a similar matter, this Court dismissed breach of contract and implied covenant claims against defendants who were non-parties to a contract, where the plaintiffs failed to identify a provision of the contract binding on those defendants. *See DG BF, LLC v. Ray*, 2021 WL 776742, at *12 (Del. Ch. Mar. 1, 2021).

Here, Plaintiffs do not identify how the Settlement Agreement binds Panera Holdings. Plaintiffs do not, and cannot, allege that Panera Holdings is a party (or successor or permitted assignee of Panera Bread) to the Settlement Agreement. Panera Holdings was not some undisclosed principal unknown to Plaintiffs at the time the Settlement Agreement was executed, given that it is a party to Shaich's Retirement Agreement and Shaich was its Chairman. (Op. Br., Ex. 3, Retirement Agreement, 1.) If Shaich wanted to bind Panera Holdings to the Settlement Agreement, he should have done so.

For the same reason, Count V must also fail against Panera Holdings because non-parties to a contract are not bound by the implied covenant. *DG BF, LLC*, 2021 WL 776742, at *16 n.125 (citing *CMS Inv. Hldgs., LLC v. Castle*, 2015 WL 3894021, at *16 (Del. Ch. June 23, 2015)).

Plaintiffs' singular reliance on footnote 3 of Panera's counterclaims is misplaced. (Ans. Br., 52, quoting Am. Counterclaims at 5 n.3.) As noted in footnote 3 and above, Panera Holdings took control of Panera Bread in 2017, *before* the Settlement Agreement was executed. Plaintiffs' argument is temporally incorrect and contrary to the Settlement Agreement's plain language . Because Plaintiffs do not identify an obligation in the Settlement Agreement that binds Panera Holdings and because they fail to offer any legal authority supporting their position, this Court should dismiss Panera Holdings from Counts I-III and V.

CONCLUSION

For these reasons Panera respectfully requests that the Court dismiss, in whole or in part, Counts V, XI, XII (and Counts I-III as to Panera Holdings) of the Third Amended Complaint.

Respectfully submitted,

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DATED: May 7, 2021

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CERTIFICATE OF SERVICE

I, Jenness E. Parker, hereby certify that on May 7, 2021, a copy of the Reply Brief in Further Support of Panera Bread Company and Panera Holdings Corp.'s Partial Motion to Dismiss and Motion for Partial Judgment on the Pleadings as to Plaintiffs' Third Amended and Supplemental Verified Complaint, Supplemental Transmittal Declaration of Elisa M.C. Klein with Exhibits 4-7 and Compendium of Selected Authorities was served electronically via File & Serve*Xpress* upon the following counsel of record:

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