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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Civil No. 23-1746-BLS1

ABIGAIL DUBOIS
Plaintiff

vs.

STAPLES, INC., & another[1]
Defendants

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Abigail Dubois alleges that Staples, Inc. ("Staples") and Staples Contract & Commercial LLC ("SCC") failed to pay her commissions and fired her in retaliation for her complaints about not receiving those commissions. She brings her claims predominantly under the Massachusetts Wage Act. Defendants now move for summary judgment, arguing, among other things, that the Wage Act does not apply. Because I conclude the Wage Act does apply and I reject SCC's other challenges, I deny SCC's motion. For other reasons, I must allow Staples' motion.

BACKGROUND

A. Factual Background

SCC, which is headquartered in Massachusetts, sells office and facilities supplies. At all relevant times, plaintiff has lived in Rhode Island.

1. Plaintiff's Employment Relationship

On August 31, 2020, plaintiff began working for SCC as a business to business ("B2B") Sales Associate. In consideration of her employment, plaintiff signed a Proprietary Interest

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[1] Staples Contract & Commercial LLC.

Protection Agreement ("the PIPA"). The PIPA makes clear that plaintiff is an at-will employee and describes plaintiff's various non-competition, non-solicitation, and confidentiality obligations. The PIPA also includes the following choice of law and venue provision:

> This Agreement, and any disputes that may arise out of or relate to this Agreement, shall be governed in all respects by, and this Agreement shall be construed and interpreted in accordance with, the laws of the Commonwealth of Massachusetts, without regard to choice of laws principles or any other doctrine or principle that would result in the application of any law other than the law of the Commonwealth of Massachusetts. *I understand, however, that certain terms and conditions contained in this Agreement may be affected by the laws of the state in which I am employed. . . .*
>
> I agree that any action concerning this Agreement shall be commenced and maintained exclusively in the state or federal courts in Suffolk County, Massachusetts unless Staples, in its sole discretion, chooses to pursue the action in the federal or state courts in the state or county in which I reside. I hereby irrevocably submit to the personal jurisdiction and venue of all courts located in Suffolk County, Massachusetts, and agree that I will not challenge personal jurisdiction or venue of such courts, nor seek to have any action concerning this Agreement dismissed or transferred based on personal jurisdiction, venue, inconvenience, or otherwise. (Italics in original).

SCC first assigned plaintiff to a New York sales territory. Although plaintiff was expected to move to New York, plaintiff was allowed to work remotely from Rhode Island because of the COVID-19 pandemic. Plaintiff continued to work remotely from Rhode Island until her termination in July 2023. While employed with SCC, plaintiff used a phone for business purposes which had a Rhode Island area code and paid taxes in Rhode Island. She included a New York address in her email signature block while she served the New York territory and her various supervisors were based in locations other than Massachusetts.

At some point, plaintiff was promoted to B2B Sales Consultant. As a Sales Consultant, plaintiff was paid a salary plus commissions. Her commission compensation was detailed in a B2B Sales Consultant Variable Compensation Plan ("Compensation Plan" or "Plan"). Under the Plan, for commissionable sales, plaintiff was to be "credited on an account win for a total of 365 days from the start date," i.e., her commission would be based on sales for one year after the first sale to the customer.

2. **Sales to Atalian**

In February 2022, plaintiff secured a new customer, New Jersey-based Atalian Global Services ("Atalian"), which agreed to buy office supplies from SCC. SCC set up a master account to handle sales to Atalian. The first sale of office supplies to Atalian was on March 9, 2022. Under the Compensation Plan, plaintiff was to receive commissions on sales to Atalian from March 9, 2022, to March, 9, 2023.

Sometime thereafter, plaintiff's client contact for Atalian informed plaintiff of an opportunity to sell Atalian facilities supplies (e.g., cleaning products) in addition to office supplies. In response, plaintiff and her supervisor, Abigail Frenkel ("Frenkel"), an Area Sales Manager, worked to close the deal with assistance from SCC's enterprise division, which handles larger national accounts.[2] After SCC won Atalian's facilities business, plaintiff opened a second, national-scale master account at the direction of Stephen Nardiello ("Nardiello"), a New Jersey-based Area Vice President and Frenkel's supervisor. The first master account was merged into the second one. SCC began selling Atalian facilities supplies in October 2022.

[2] It is not entirely clear where Frenkel was based. While she served as Area Sales Manager for the New York City area and the signature block in her emails listed the same New York address as plaintiff's signature block, Frenkel's signature block also included a phone number with an Illinois area code.

3. The Dispute Over Commissions

Plaintiff asserts that Nardiello and Frenkel told her that she would receive commissions on the Atalian account until October 2023, the one-year anniversary of the first sale of facilities supplies to Atalian. In November 2022, however, plaintiff learned that her Atalian commissions would end in March 2023, the anniversary of the first sale of office supplies to Atalian, and would not extend for a year after the first sale of facilities supplies. After plaintiff expressed concern to Frenkel, Frenkel emailed SCC's Senior Manager of Sales Operations, Antonia Bellotti ("Bellotti"), regarding the issue. Part of Bellotti's job was to answer questions about, interpret, and administer the Compensation Plan. Bellotti replied by email. Her email had a signature block listing the address of SCC's Massachusetts headquarters and a phone number with a New Jersey area code. Bellotti explained that plaintiff was not eligible to receive commissions through October 2023 because the facilities supply business won from Atalian did not qualify as "a new win" for purposes of the Compensation Plan. Nardiello replied: "Definitely a bummer but what we expected." Frenkel forwarded the email chain to plaintiff. According to plaintiff, after Bellotti's email, Frenkel suggested that plaintiff either transfer teams to get more help and voice her concerns to someone else, or seek legal help.

In early 2023, plaintiff transferred to a territory in Massachusetts. After the transfer, she was required to travel to an SCC office in Massachusetts once a week or biweekly. Plaintiff reported to Area Sales Manager Aiden Steinmann ("Steinmann"), who was based in New Hampshire. Steinmann, in turn, reported to New Jersey-based Area Vice President Kendel Pelka ("Pelka").

According to plaintiff, in December 2022, just before her transfer, she again raised her concerns about the Atalian commissions with Pelka, who told her she would investigate the

issue. In late January 2023, Pelka reviewed plaintiff's performance and rated her "Exceeds Expectations." Plaintiff also received a sales excellence award for her 2022 performance. The award included a paid trip to Mexico for an event and vacation with other top performers.

At some point, Pelka contacted Elizabeth Froberg ("Froberg"), Director of Sales Operations & Incentives Strategy, about plaintiff's commissions. On March 1, 2023, Froberg emailed Pelka, declining to extend the one-year period for plaintiff to earn commissions on the Atalian sale. Froberg's email signature block did not contain an address, but listed a phone number with a Massachusetts area code.

On March 30, 2023, Pelka emailed plaintiff a document titled General Release of Claims ("General Release"). Plaintiff declined to sign the release.[3]

On April 21, 2023, at Pelka's request, Steinmann emailed Pelka to relay concerns from two employees about statements plaintiff allegedly made to them and other employees. The email stated that plaintiff had discussed a $25,000 offer Staples had made to her regarding the Atalian account, which plaintiff described as "hush money"; and her intention to sue because she believed she had a "clear case" after speaking with her lawyer. Plaintiff allegedly also stated that she "wasn't really trying to work," but was interviewing for positions inside and outside of Staples during work hours. Steinmann also expressed concerns about plaintiff's performance. He stated: "If we look at her performance since P1 Abbie has consistently underperformed to a level that would normally trigger performance management, this is severely impacting our team's

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[3] Defendants move to strike evidence related to a General Release of Claims that SCC presented to plaintiff before her termination and testimony that defendants argue contains inadmissible hearsay. Because the evidence is not necessary for plaintiff to survive summary judgment with regard to the claims against SCC, the motion is denied as moot. In any event, "[d]efendants are not seeking to strike the circumstances surrounding the proposed General Release, such as the fact it was offered or Plaintiff's reaction to it." Reply in Support of Defendants' Motion to Strike at 2 n.1 (Docket #28).

ability to reach our targets and is beginning to take a toll on our overall team culture due to her underperformance and open discussion of sensitive topics." (SCC measures its sales cycle and commissions in four-week increments and refers to those periods as P1, P2, etc.) Steinmann set out metrics to demonstrate plaintiff's performance issues. Pelka responded that she would relay the matter to human resources and the legal team.

Plaintiff was on vacation the first week of May. The day after she returned, plaintiff was put on an Associate Success Plan ("ASP"), i.e., a performance improvement plan, to last from May 5, 2023, to July 5, 2023, even though Steinmann previously suggested plaintiff had another three months before she would be placed on an ASP. The ASP provided that for each of the two periods covered by the plan (P4 and P5), plaintiff was expected to meet five Key Performance Indicators ("KPIs"): she was expected to bring in at least $5,100 in New Business Revenue and achieve at least 75% of four targets (Dials Target, Cadence Target, FTA Target and Wins Target). Plaintiff was required to make "sustained progress toward achieving these **expectations**," reach "[m]inimum attainment . . . by the conclusion of this ASP," and "make immediate and sustained improvement within the first phase [30 days] of this plan in order to proceed to the final phase of this ASP." According to the ASP:

> Failure to meet the expectations of this Associate Success Plan within the required timeframe may result in further disciplinary action up to and including termination of employment. During the timeframe covered by this ASP, you must comply with all Staples policies and practices. In addition, if immediate improvement is not observed, if there is deterioration in any other aspect of performance, or in the event of any other Staples policy violation, Staples reserves the right to move to further disciplinary action, up to and including termination, prior to the end of the Associate Success Plan.

Unless Steinmann or Pelka exercised their discretion to keep her on staff, plaintiff understood that failure to meet the expectations in the ASP would result in her termination.

At the end of May, plaintiff went on the paid trip to Mexico she had received as part of her sales excellence award for her 2022 performance.

Steinmann's report for P4 indicates that although plaintiff satisfied the New Business Revenue KPI by a substantial margin, she failed to meet the other four KPI targets. His report for P5 indicates that plaintiff missed two KPI targets (New Business Revenue and Wins Target).

On July 6, 2023, plaintiff was terminated purportedly due to her failure to successfully complete the ASP. Plaintiff's final pay stub was emailed to her Rhode Island address. Plaintiff subsequently applied for and received unemployment benefits from Rhode Island.

B. Procedural History

Approximately a month after her termination, plaintiff filed this suit, alleging claims under the Wage Act for failure to pay her timely for accrued leave, her last paycheck, and commissions (Counts I-IV) and under the Wage Act for retaliation (Count V). She also asserts a claim for breach of the implied covenant of good faith and fair dealing (Count VI).

In moving for summary judgment, defendants raise several arguments. They contend that Staples is not a proper party to this lawsuit because it was not plaintiff's employer. They also argue that Massachusetts law does not apply to any of plaintiff's claims and, alternatively, that plaintiff has failed to put forward sufficient evidence to support her claims for retaliation, failure to pay commissions, and breach of the implied covenant. As explained below, Staples is entitled to summary judgment; however, I conclude that Massachusetts law applies and plaintiff has put forward sufficient evidence to proceed on her claims against SCC.

DISCUSSION

I. Standard of Review

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Mass. R. Civ. P. 56(c). See Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983). The moving party bears the burden of showing the absence of any triable fact. Flesner v. Technical Comm'n Corp., 410 Mass. 805, 808-809 (1991). If the moving party meets its burden, the burden shifts to the non-moving party to show specific facts that establish a genuine dispute. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991). The court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in her favor. Jupin v. Kask, 447 Mass. 141, 143 (2006).

II. Claims Against Staples

Plaintiff brings her claims against Staples and SCC, alleging that she was employed by both entities. Defendants, however, have put forward evidence by affidavit indicating that plaintiff was solely employed by SCC. In an effort to show a dispute of fact, plaintiff cites generally to the PIPA and claims that it shows that she was employed by both entities. It does not. Nothing in the PIPA suggests that plaintiff was an employee of Staples. To the contrary, the introductory paragraph of the PIPA states that plaintiff is entering into the agreement "[i]n consideration of, and as a condition of, my employment or continued employment by Staples, Inc., Staples Contract & Commercial, Inc., USR Parent Inc., or any affiliated entity with which I am or will be employed." (Emphasis added). Plaintiff has not shown facts suggesting a material dispute about whether plaintiff was employed by Staples. Staples is entitled to summary judgment.

III. Claims Against SCC

A. Applicability of Massachusetts Law

Defendants argue that SCC is entitled to summary judgment because Rhode Island law applies to the dispute. In making this argument, they only cite to case law analyzing claims under the Wage Act. Even assuming an analysis of plaintiff's Wage Act claims would apply equally to her implied covenant claim,[4] I disagree that Rhode Island law applies.

The Wage Act does not only apply to employees located within Massachusetts. It also protects out-of-state employees so long as Massachusetts, "as compared to any other State, . . . has . . . the most significant relationship to . . . [plaintiff's] employment relationship with [the employer]." Dow v. Casale, 83 Mass. App. Ct. 751, 752, 754-758 (2013). See Wilson v. Recorded Future, Inc., 669 F. Supp. 3d 53, 58 (D. Mass. 2023) (Talwani, J.) (Wage Act "applies extraterritorially – and affords protections to out-of-state employees – so long as Massachusetts has the most significant relationship to the plaintiff's employment"), quoting Viscito v. National Planning Corp., 34 F.4th 78, 83 (1st Cir. 2022).

To determine which state has the most significant relationship to plaintiff's employment, courts look to various factors, including "the state where the employer's headquarters is located, the place(s) the worker performed the work, the frequency of interactions between the worker and the employer in Massachusetts, whether another state has a significant connection to the worker and work performance, and whether the contract between the worker and employer has a

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[4] The Wage Act claims are not covered by the choice of law provision in the PIPA. See Viscito v. National Planning Corp., 34 F.4th 78, 84 n.11 (1st Cir. 2022) ("a contract's choice-of-law clause does not govern a Wage Act claim when (as here) the choice-of-law clause doesn't explicitly refer to and include statutory causes of action"), citing Melia v. Zenhire, Inc., 462 Mass. 164, 173-175 (2012). I need not resolve the question of whether the choice of law provision applies to the implied covenant claim.

choice-of-law provision." Viscito, 34 F.4th at 84-85, citing Dow, 83 Mass. App. Ct. at 757–758. It is also relevant in which state "(i) the employer received [the] benefit from plaintiff-employee generated income, (ii) the employer provided all of its services to the plaintiff-employee, and (iii) the employer required the plaintiff-employee to train or work." Wilson, 669 F. Supp. 3d at 58, citing Viscito, 34 F.4th at 86.

Defendants argue that Rhode Island has the most significant relationship to plaintiff's employment and that Massachusetts has only a tenuous connection to it. They note that plaintiff worked remotely from her home in Rhode Island, used a Rhode Island phone number for work, received her wages via direct deposit to her bank account, received her final pay stub at her Rhode Island address, paid Rhode Island taxes, and claimed Rhode Island unemployment benefits after termination. They also note that plaintiff was responsible for a New York territory and used a New York address in her email signature block for most of her time at SCC; reported to managers who were based in New York, New Jersey, or New Hampshire throughout her tenure; and seeks commissions earned while she covered the New York territory.

I am not persuaded. In addition to the above, the record reflects that during the final months of her employment, when SCC purportedly failed to pay the Atalian commissions and retaliated against plaintiff for demanding those commissions, plaintiff's sales territory covered solely Massachusetts, and she traveled to an SCC office in Massachusetts weekly or bi-weekly. Moreover, SCC's headquarters is in Massachusetts, the decisions concerning the Atalian commissions appeared to come from individuals – Bellotti and Froberg – based in Massachusetts,[5] and the PIPA plaintiff entered at the beginning of her employment contains a

[5] Bellotti's email signature block listed the address of SCC's Massachusetts headquarters. Froberg's email signature block contained a phone number with a Massachusetts area code.

Massachusetts choice of law provision. Based on these facts, I conclude that Massachusetts has the most significant relationship to plaintiff's employment.

Although the facts provided by defendants are clearly relevant, they do not suggest that Rhode Island has the more significant relationship. Indeed, several facts asserted by plaintiff cut against the applicability of Rhode Island law: plaintiff was responsible for a New York territory and used a New York address in her email signature block for most of her time at SCC; reported to managers who were based in New York, New Jersey, or New Hampshire throughout her tenure; and seeks commissions earned while she covered the New York territory. In short, as among the various states in play, Massachusetts has the most significant relationship to plaintiff's employment with SCC.

B. Plaintiff's Specific Claims

1. Failure to Pay Commissions (Counts III and IV)

Plaintiff claims that SCC violated the Wage Act by failing to pay her accrued leave at the time of her termination (Count I), failing to pay timely her last pay check (Count II), and failing to pay her commissions she earned on the Atalian account (Counts III and IV). Assuming the Wage Act applies, defendants also seek summary judgment on Counts III and IV because, they argue, no commissions were due for sales during the period from March to October 2023 under the plain terms of the Compensation Plan. See Parker v. EnerNOC, Inc., 484 Mass. 128, 133 (2020) (Wage Act applies to commissions "when two conditions are met: (1) the amount of the commission 'has been definitely determined'; and (2) the commission 'has become due and payable.'"), quoting G.L. c. 149, § 148, para. 1. This argument is unavailing.

For commissionable sales, the Compensation Plan provides that "[a]ssociates are credited on an account win for a total of 365 days from the start date," (emphasis added), i.e. from the

date of the first sale to the customer. Although defendants argue that the acquisition of Atalian's facilities business did not constitute "an account win," this is not at all clear from the Plan. The Atalian facilities supply deal was entirely separate from the earlier office supply deal and it resulted in a new master account. Given these circumstances, the deal can be reasonably viewed as "an account win" under the Plan; the relevant Plan provision is at the least ambiguous. Contrary to defendants' suggestion, the agreed-to definition of "start date" does not negate any ambiguity.

I am unpersuaded by defendants' contention that plaintiff (and the court) may not challenge or second guess their interpretation of the Plan to the extent an ambiguity exists. In support of this position, defendants cite Klauber v. VMware, Inc., 80 F.4th 1, 12-13 (1st Cir. 2023); Vonachen v. Computer Assocs. Int'l, 524 F. Supp. 2d 129, 134 (D. Mass. 2007); and Daly v. T-Mobile USA, Inc., 93 Mass. App. Ct. 1123, 2018 WL 3999439 at * 5 (Aug. 22, 2018) (Rule 1:28 decision). These cases do not support such a sweeping assertion. They involve commission plan provisions that allow the employer discretion in calculating the commissions. They seem to stand for the unremarkable proposition that "nothing in Massachusetts law prevents commission arrangements from incorporating subjective criteria." Klauber, 80 F.4th at 12, citing Vonachen, 524 F. Supp. 2d at 134-135, and Daly, 2018 WL 3999439 at * 5.

Moreover, there is evidence that SCC personnel have interpreted the commission provision as plaintiff does. This includes Frenkel's testimony that there were other instances in which SCC awarded commissions based on the opening of a new master account for a pre-existing customer, and evidence that at the time of the Atalian facilities supply deal, both Frenkel

and Nardiello believed plaintiff was entitled to commissions.[6] Whether plaintiff is owed commissions cannot be resolved on summary judgment.

2. Retaliation (Count V)

In Count V, plaintiff asserts that she engaged in protected conduct by advocating for the payment of the Atalian commissions and was terminated in retaliation for that advocacy in violation of the Wage Act. Such a claim is governed by a three-stage burden-shifting framework. See Biewald v. Seven Ten Storage Software, Inc., 94 Mass. App. Ct. 376, 383 (2018), quoting Mole v. University of Mass., 442 Mass. 582, 591 (2004). At the first stage, plaintiff must satisfy the elements of a prima facie case of retaliation; that is, that she "engaged in protected conduct," she "suffered some adverse action," and there was "a causal connection . . . between the protected conduct and the adverse action." Mole, 442 Mass. at 591-592. At the second stage, the burden shifts to SCC to provide a legitimate, "nonretaliatory reason[ ]" for the adverse employment action. Id. at 591. At the last stage, the burden shifts back to plaintiff to prove "that the articulated nonretaliatory reasons were pretext." Id.

Defendants argue that SCC is entitled to summary judgment because, even assuming plaintiff can prove her prima facie case, SCC had a legitimate, nonretaliatory reason for her

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[6] Plaintiff also testified that during a conversation in which Pelka reviewed the General Release with her, Pelka stated that the reason plaintiff was not receiving the Atalian commissions was because "there were too many hands on the pot." In their motion to strike, defendants contend that Pelka's purported statement is inadmissible because it was made during settlement negotiations. See Mass. G. Evid. § 408(a). Although I need not consider the statement to deny summary judgment, I am skeptical about the applicability of Rule 408(a) because there is no evidence Pelka had any negotiating authority in connection with the General Release or had any role other than explaining its terms. Moreover, the substance of the statement concerns the reasons SCC did not pay plaintiff the disputed commissions. The fact that the statement was made at the time the General Release was explained to plaintiff does not automatically render it inadmissible. See Dahms v. Cognex Corp., 455 Mass. 190, 199 (2009) ("factual statements made during the course of settlement negotiations are admissible").

termination – the plaintiff's poor performance – and plaintiff cannot establish that this reason was pretextual. I disagree.

Plaintiff has presented sufficient evidence to create a genuine dispute about whether SCC's stated reason for her termination was pretextual. The record reflects that plaintiff was an excellent performer prior to her transfer. There is evidence that SCC put plaintiff on an ASP only after Steinmann sent an email to Pelka, at Pelka's request, describing, among other things, plaintiff's complaints about the Atalian commissions; and despite the fact that Steinmann previously told plaintiff that she would have additional months to improve her performance before the imposition of an ASP. Plaintiff also testified that Pelka frustrated two sales opportunities while plaintiff was on the ASP. These events occurred while plaintiff was advocating, or soon after plaintiff advocated, for additional commissions based on the later Atalian sales.[7]

3. Breach of the Implied Covenant (Count VI)

Plaintiff alleges that SCC terminated her employment to avoid paying her the Atalian commissions, thus breaching the implied covenant of good faith and fair dealing. See Parker, 484 Mass. at 137 (firing at-will employee to avoid paying commissions violates implied covenant);

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[7] And there's more. SCC imposed the ASP less than a month after plaintiff rejected the General Release, and plaintiff testified that Steinmann told her that Pelka wanted to fire her at least in part because she had made a "fuss" about her commissions. In their motion to strike, defendants suggest that I may not consider this evidence. Although the claims against SCC survive even without this evidence, I am not entirely persuaded by defendants' arguments that such information is inadmissible. The evidence of the release is potentially probative of whether SCC's termination had a retaliatory purpose. See Dahms, 455 Mass. at 199 ("[E]vidence regarding the settlement may be admissible if it 'is relevant for some other purpose. . . . There may be situations . . . in which evidence of a settlement, or the amount of a settlement, will bear on some issue in the case other than damages, and an automatic rule of exclusion should not be applied.'"), quoting Morea v. Cosco, Inc., 422 Mass. 601, 603 (1996). Steinmann's statement may be admissible as a vicarious admission. See Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 790-791 (1996).

Biewald, 94 Mass. App. Ct. at 383-384. Defendants argue that this claim fails because plaintiff was not entitled to further commissions from the Atalian account; SCC had good cause to fire plaintiff (her poor performance) and did so in good faith; and SCC first determined she was not entitled to commissions in November 2022, several months before her termination. As explained above, there are genuine disputes of material fact as to whether plaintiff was owed additional commissions based on the later Atalian sales, whether the reason for her termination was pretextual, and whether SCC's denial of commissions was in good faith. Summary judgment on this claim would be improper.

ORDER

Staples, Inc. and Staples Contract & Commercial LLC's Motion for Summary Judgment (Docket #19) is **ALLOWED** as to Staples, Inc., but **DENIED** as to Staples Contract & Commercial LLC.

Dated: April 1, 2025

Peter B. Krupp
Justice of the Superior Court