COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION No. 1984-CV-03333-BLS1

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

EXXON MOBIL CORPORATION,

Defendant.

OPPOSITION OF THE COMMONWEALTH TO EXXONMOBIL'S MOTION TO DISMISS THE COMMONWEALTH'S AMENDED COMPLAINT

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INTRODUCTION

Exxon Mobil Corporation's (ExxonMobil or Company) Rule 12(b)(2) and 12(b)(6) motion to dismiss should be denied because the facts alleged in the Commonwealth's Amended Complaint—which must be accepted as true—unequivocally demonstrate this Court's jurisdiction over ExxonMobil and state plausible claims that ExxonMobil has engaged in deceptive acts and practices, directed to Massachusetts investors and consumers, in violation of G.L. c. 93A, § 2. The First Amendment also poses no bar to the Commonwealth's action, since it simply does not protect fraudulent and deceptive speech.

The Commonwealth alleges that ExxonMobil has known for decades that fossil fuels—its chief products—are the primary cause of climate change and that, if unabated, climate change could result in "catastrophic" impacts, including droughts, flooding, and sea level rise that will radically alter life in Massachusetts and pose an existential risk to the global economy and the Company's business model, imperiling ExxonMobil's Massachusetts investors and the Massachusetts consumers who purchase its products. But like the tobacco industry before it, ExxonMobil has engaged in a cover-up: it hid what it knew and deceptively represented to Massachusetts investors that it is managing the climate risks that threaten to topple the Company while engaging in deceptive marketing schemes that tell Massachusetts consumers that using ExxonMobil fossil-fuel products benefits the environment and reduces emissions.

PROCEDURAL HISTORY

The Attorney General issued a civil investigative demand (CID) to ExxonMobil in April 2016, following revelations that ExxonMobil had, in the 1970s and 1980s, extensively researched the primary role its fossil fuel products play in causing dangerous climate change, and knew of the risks posed by climate change, including to the global economy and the Company's

business model. Rather than responding to the CID, ExxonMobil sued the Attorney General in federal district court in Texas and in this Court seeking to quash the CID and claiming that Massachusetts lacked personal jurisdiction over it. The Attorney General prevailed in each of those challenges, *see* Opposition to Special Motion to Dismiss under G.L. c. 231, § 59H (59H Opp.) 1-3, and continued her investigation. Based on that investigation, the Commonwealth filed a Complaint in October 2019, and despite the fact that the Complaint alleged only violations of c. 93A, ExxonMobil removed the case to federal court, where it was promptly remanded to this Court. *Mass. v. Exxon Mobil Corp.*, 2020 WL 2769681, at *10 (D. Mass. May 28, 2020) ("Contrary to ExxonMobil's caricature of the complaint, the Commonwealth[ ] ... alleges only corporate fraud."). In June 2020, the Commonwealth filed its Amended Complaint. ExxonMobil then filed its special motion to dismiss under G.L. c. 231, § 59H and the subject motion to dismiss with a supporting memorandum (MTD).

STATEMENT OF FACTS

I. ExxonMobil Has Long Known the Dangers of Climate Change and the Risk Posed by Climate Change to the Company and Global Economy and Engaged in Denial that Continues to This Day.

Since at least the late 1970s, ExxonMobil has known, as revealed in internal ExxonMobil documents, that its fossil fuel products cause climate change. Am. Compl. ¶¶ 69-114. ExxonMobil understood then that use of its products *as intended* would result in carbon dioxide emissions that would cause dangerous global warming; indeed, as early as 1982, ExxonMobil concluded that there was a "clear scientific consensus," with which its own research agreed, that a doubling of atmospheric carbon from pre-industrial levels "would result in an average global temperature rise" of 2.7 to 8.1 degrees Fahrenheit. *Id.* ¶ 99.

ExxonMobil knew the dangerous effects of such warming, resulting from increasing use

of fossil fuels, on the global ecosystem, *id.* ¶¶ 81, 82, 85, 105, 106, 111, and described the impacts variously as "dramatic," *id*. ¶ 85; akin to other existential threats to human survival such as "nuclear holocaust or world famine," *id*. ¶ 86; "globally catastrophic," *id*. ¶ 90; and possibly "catastrophic" for a "substantial fraction of the earth's population," *id*. ¶ 96. ExxonMobil knew that, once measurable, these effects "might not be reversible," *id*. ¶ 107, and if action to address climate change were delayed until effects were measurable, it likely would "occur too late to be effective," *id*. ¶ 92.

Most crucially, ExxonMobil knew decades ago that "major reductions" in fossil fuel use would be required to mitigate those climate change effects. *Id.* ¶¶ 77, 95, 107, 108, 112, 113. ExxonMobil also understood the risks climate change poses to its business. *Id*. ¶¶ 72, 75, 83, 90, 101. Yet, despite knowing precisely how dangerous its products are, as well as the risk posed to its business and the broader economy, ExxonMobil, like the tobacco industry, decided to hide the truth from Massachusetts investors and consumers, instead emphasizing uncertainty in climate science, *id*. ¶ 122, and initiating a decades-long, multi-million-dollar campaign to sow doubt and confusion about climate change and undermining efforts to address it, *id*. ¶¶ 115-72; 189-98.

II. ExxonMobil's Deceptive Misrepresentations and Omissions to Massachusetts Investors.

ExxonMobil has made and is making deceptive misrepresentations and omissions regarding the risks posed by climate change to the Company's business, in its marketing of its securities to Massachusetts investors. Am. Compl. Pt.V. ExxonMobil's scientific research documented "physical risks" from climate change, such as sea level rise, extreme weather, drought, and excessive heat, which pose severe harm to the world economy and ultimately fossil fuel demand, and "transition risks" from decreased demand for fossil fuels due to efforts to reduce greenhouse gas emissions and market shifts to cleaner energy. *Id.* ¶¶ 80-82, 85-86, 90-92,

96-99, 105-06, 111 (describing physical risks, including the possibility that the changes would "bring world economic growth to a halt" (*id.* ¶ 90)); *id.* ¶¶ 77-78, 83, 87, 90, 93-95, 103, 107-08, 112-13 (transition risks). These climate risks are, taken together and across industries, "systemic" risks to the stability of the world's financial markets, and with them, threaten ExxonMobil's business prospects and the value of its securities held by Massachusetts investors, as ExxonMobil has long been aware. *Id.* ¶¶ 23-29, 218-21, 224, 293, 295-96, 310, 474-82.

Instead of disclosing what it knows, ExxonMobil deceives Massachusetts investors about these risks. To create a positive perception of the Company's continued financial health, ExxonMobil has reassured investors that fossil fuel demand is stable or increasing in its *Outlooks for Energy* and other public statements and reports, which it sent to and were the subject of Company meetings with Massachusetts investors. *See id.* ¶¶ 265, 488-501, 503-11, 513-16, 522. None of those so-called disclosures actually discloses ExxonMobil's knowledge of the physical and transition risks to its business from climate change—facts that the Company continues to downplay to Massachusetts investors. *Id.*; *see also id.* ¶¶ 263, 476, 483, 486.

To Massachusetts investors, ExxonMobil paints itself as proactive and responsive to the climate-driven risks to its business by asserting that it discloses and properly accounts for transition risks, *see id.* ¶¶ 258-61. For example, for years, the Company told investors it was, to manage climate-related risk, applying an escalating "proxy cost" of carbon to account for the financial impact on its investment returns of expected greenhouse gas regulations. *Id.* ¶ 260, 366, 373-76. That message was highly misleading: ExxonMobil's public explanations about its use of this proxy cost were at odds with its actual, riskier practices, *see id.* ¶¶ 358, 364-402, 487, had no impact on its financials, *see id.* ¶¶ 260, 388, 487, and did nothing to address the undisclosed graver, systemic risks ExxonMobil has long understood, *see id.* ¶¶ 258-61, 364-83, 487, 522.

Based on its misrepresentations that it was "managing the risks," ExxonMobil has told Massachusetts investors it faces few if any financial risks from climate change, and little risk that its fossil fuel assets will be stranded (i.e., rendered without value after legal or market changes that disfavor fossil fuels). *Id ¶¶* 374, 377, 487, 491, 510-11.

Those misrepresentations and omissions are material to investors' decisions to buy, sell, hold, and price ExxonMobil securities because climate risks are material to ExxonMobil's business, particularly given its representations to Massachusetts investors that it provides safe, long-term value, *see id.* ¶¶ 427-29, 432-39. Indeed, Massachusetts investors are demanding greater disclosure of climate risks, *id.* ¶¶ 266, 403-15, 430-69, and have questioned ExxonMobil regarding its climate risk management, *id.* ¶¶ 380-83, 456, 461-62, 464, 466, 468. ExxonMobil's failure to fully and accurately disclose climate risks, including systemic risks, to Massachusetts investors threatens dramatic asset repricing and other market disruptions as climate risks materialize and corresponding losses for Massachusetts investors in ExxonMobil securities. *Id.* ¶¶ 527-31.

III. ExxonMobil's Deceptive Misrepresentations and Omissions to Massachusetts Consumers.

ExxonMobil has long known that its fossil fuel products, like gasoline and motor oil, cause climate change, *id.* ¶¶ 69-114, and that climate change could be "avoid[ed] ... by sharply curtailing" fossil fuel use, *id*. ¶ 113. But from 1988 to 2015, ExxonMobil was the largest emitter of greenhouse gases (including emissions from use of ExxonMobil products) *among all U.S. companies* and among global investor-owned fossil fuel producers majority owned by non-governmental investors. *Id*. ¶ 66.

Synergy™ Gasoline

Despite its longstanding knowledge of the catastrophic effects of climate change caused

by normal use of its products, ExxonMobil deceptively markets its Synergy™ "fuel technology" (gasoline) as a product that improves, rather than harms, the environment. ExxonMobil thus deceptively claims that Synergy™ will "reduce CO2 emissions," *id*. ¶¶ 587, 588 (screenshot); boost "environmental performance," *id*. ¶ 587; let consumers "drive cleaner," *id*. ¶ 591, and help consumers "reduce their emissions," *id*. ¶ 592. ExxonMobil also deceptively claims that its Synergy Diesel Efficient fuel "reduces emissions and burn[s] cleaner" to "let you drive cleaner," *id*. ¶ 593, and that its Synergy Supreme+ is "2x Cleaner for Better Gas Mileage," *id*. ¶ 594, and is engineered to lower emissions, *id*. ¶ 595 (screenshot).

"Green" Mobil 1™ Motor Oil

Similarly, ExxonMobil deceptively claims that its "green" Mobil 1™ motor oil—literally colored green by ExxonMobil—can "contribute" to consumers' "carbon dioxide emission-reduction efforts." *Id*. ¶ 611. ExxonMobil's "green" Mobil 1™ advertising uses language and imagery to associate in Massachusetts consumers' minds "green" Mobil 1™ motor oil with "greenness" and the Earth, *id*. ¶¶ 612-614, and eco-friendliness and Earth Day, *id*. ¶ 616.

ExxonMobil Brand Greenwashing to Induce Sales of Its Fossil Fuel Products

To induce and promote sales, ExxonMobil has deceptively advertised itself to Massachusetts consumers as a company that supports environmental and climate protection, spending, since 2015, $56 million annually in climate-focused branding activities. *Id*. ¶ 663. In its marketing, the Company, for example, deceptively heralds its commitment to environmental protection and protecting future generations with its "Protect Tomorrow. Today." campaign, *id*. ¶¶ 640-44, when it knows continued reliance on fossil fuels will condemn future generations to inhabit a dangerously warmed and much less stable world. ExxonMobil also misrepresents itself as a leader in developing clean energy, such as algae biofuels, *id.* ¶¶ 645, 651-54, 660-62, that

"are better for the environment for your generation," *id*. ¶ 653, even though ExxonMobil spends a tiny fraction of its revenues on alternative energy research, including algae, *id*. ¶ 655, and billions annually on fossil fuel development, *id*.

In its marketing, ExxonMobil also repeatedly posts misleading statements describing its clean energy and climate change leadership and work to "address[] the risks of climate change," at times using a green planet emoticon, *id*. ¶ 660, and touts its efforts to improve consumer fuel economy, including misleading claims that its Synergy Supreme+ is its "Best Fuel Ever" and twice as "clean" for better gas mileage, *id*. ¶ 665, all while pursuing record fossil fuel production, *id*. ¶ 650. ExxonMobil's greenwashing includes regular publication of "Corporate Citizenship" and "Sustainability" reports that highlight ExxonMobil's purported commitment to safety, risk management, and addressing climate change, while misleadingly failing to disclose its history of climate deception, the massive emissions impacts of its business, and its knowledge of the anticipated global economic and other impacts of climate change, *id*. ¶¶ 673-93.

ARGUMENT

I. ExxonMobil Is Subject to Personal Jurisdiction in Massachusetts.

This Court has personal jurisdiction over ExxonMobil because, as the Supreme Judicial Court (SJC) recently held, ExxonMobil's activities in Massachusetts are encompassed by the long-arm statute, G.L. c. 223A, § 3, and jurisdiction comports with due process, *Exxon Mobil Corp. v. Att'y Gen.*, 479 Mass. 312, 314 (2018), *cert. denied*, 139 S. Ct. 794 (2019). The SJC's opinion controls the jurisdictional question here, *e.g.*, *Kitras v. Town of Aquinnah*, 474 Mass. 132, 146 (2016) (law of the case), since the Commonwealth affirmatively alleges the same facts that supported jurisdiction over ExxonMobil in the earlier case *plus* numerous new, specific facts about ExxonMobil's years-long, purposeful efforts to target Massachusetts investors and

consumers with deceptive marketing to promote the sale and retention of its securities and the sale and use of its fossil fuel products, and the Commonwealth's claims arise directly from that deceptive conduct.

At this stage, the Commonwealth must only "make a prima facie showing of evidence that, if credited, would be sufficient to support findings of all facts essential to personal jurisdiction." *von Schönau-Riedweg v. Rothschild Bank AG*, 95 Mass. App. Ct. 471, 483 (2019). This Court must accept the "specific facts affirmatively alleged ... as true (whether or not disputed) and construe them in the light most congenial to the [Commonwealth's] jurisdictional claim." *Id.* (citation omitted). The Court can consider affidavits, but "[a] determination of jurisdiction ... may [also] rest on the facts alleged in the complaint," *Kleinerman v. Morse*, 26 Mass. App. Ct. 819, 821 n.4 (1989). Here, the Commonwealth affirmatively alleges more than sufficient facts to support jurisdiction over ExxonMobil in this forum on each claim. And to further illuminate those jurisdictional facts, the Commonwealth submits the Affidavit of I. Andrew Goldberg (Goldberg Aff.).[1]

A. ExxonMobil's Contacts with Massachusetts Satisfy the Long-Arm Statute.

Jurisdiction over ExxonMobil is authorized by the long-arm statute—a finding this Court must make before considering due process. *SCVNGR, Inc. v. Punchh, Inc.*, 478 Mass. 324, 329-30 (2017). That statute lists "instances in which a Massachusetts court may acquire personal jurisdiction over a nonresident defendant." *Exxon*, 479 Mass. at 793 (quoting *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 767 (1994)). Three apply here: (i) "transacting any business," G.L. c. 223A, § 3(a); (ii) "causing tortious injury" by acts or omissions in the Commonwealth, *id.* § 3(c);

[1] If, contrary to the prima facie method described in *von Schönau-Riedweg*, the Court finds it necessary to resolve factual disputes at this stage, the Commonwealth requests the opportunity to conduct jurisdictional discovery and a full evidentiary hearing.

and (iii) "causing tortious injury" by acts or omissions outside of the Commonwealth, *id.* § 3(d). ExxonMobil does not contest that it transacts business in Massachusetts, and its objections to the two tortious injury categories lack merit. *See* MTD 21.

First, as the SJC held in 2018, ExxonMobil's contacts with Massachusetts satisfy § 3(a)'s "'transacting any business' prong," *Exxon*, 479 Mass. at 318—a requirement that is construed "broadly," *id.* at 317 (citation omitted). Pursuant to a Brand Fee Agreement, ExxonMobil "directs and controls the creation, marketing, and sale of ExxonMobil-branded fossil fuel products sold at" hundreds of Massachusetts retail gas stations. Am. Compl. ¶ 549; *see id.* ¶¶ 545, 550-54; Goldberg Aff. Exs. 1 & 2. And that network "represents Exxon's 'purposeful and successful solicitation of business from residents of the Commonwealth.'" *Exxon*, 479 Mass. at 318. Similarly, "ExxonMobil offers its securities, including its common stock and debt instruments, directly to Massachusetts investors," Am. Compl. ¶ 270; *see id.* ¶¶ 271, 281-83, 289, which "hold ... billions of dollars" of ExxonMobil stock, *id*. ¶ 273; *see id.* ¶¶ 274-79 (Massachusetts institutional investors). ExxonMobil targeted Massachusetts investors through in-person meetings in Massachusetts (and by other communications) where company representatives sought to influence investor decisions about buying, holding, and selling those securities. *Id.* ¶¶ 441, 450, 456-57, 460-67, 469; *see id.* ¶¶ 394, 403, 405, 427, 430-38, 523-31 (materiality of Massachusetts meetings' topics to investor decisions); *Tatro*, 416 Mass. at 768 ("defendant's communications with the plaintiff in Massachusetts amounted to the transaction of business [in Massachusetts], regardless of whether the contract between the parties had actually been concluded in the Commonwealth").[2] Indeed, the Company's former and current CEOs both

[2] *E.g.*, *von Schönau-Riedweg*, 95 Mass. App. Ct. at 489 (defendant's trips to Massachusetts regarding investment opportunities satisfied § 3(a)'s transacting business requirement); *see also*

travelled to Boston to meet with Massachusetts institutional investors, Am. Compl. ¶¶ 451-53, 455, 462. Those facts are sufficient to satisfy § 3(a)'s "transacting *any* business" requirement. c. 223A, § 3(a) (emphasis added); *Exxon*, 479 Mass. at 317-21.[3]

Second, ExxonMobil's activities also satisfy the "tortious injury" prongs of both § 3(c) and § 3(d) of G.L. c. 223A. The Commonwealth alleges that both Massachusetts investors—who hold billions of dollars in ExxonMobil shares, Am. Compl. ¶ 273—and Massachusetts consumers—who purchase thousands of gallons of ExxonMobil fuel every day from the hundreds of Massachusetts-based ExxonMobil branded stations, *see id*. ¶ 545—have been and continue to be injured by ExxonMobil's deceptive marketing in violation of c. 93A. *E.g.*, *id*. ¶¶ 41-42, 48, 534-36, 623, 632-33, 736-44, 750-57, 762-68. The Commonwealth also alleges that those deceptive statements have distorted the investment and consumer markets such that the "catastrophic" effects of climate change on Massachusetts may not now be avoided. *E.g.*, *id.* ¶¶ 268, 533-36, 714-15, 717-20. At this stage, those allegations must be accepted as true, *von Schönau-Riedweg*, 95 Mass. App. Ct. at 483, and a violation of c. 93A constitutes a *per se* injury, *see Commonwealth v. Mass. CRINC*, 392 Mass. 79, 88-90 (1984).

Contrary to ExxonMobil's conclusory assertion, MTD 21, courts treat c. 93A violations, like those alleged here, as "tortious" injuries. *E.g.*, *Commonwealth v. Purdue Pharma, L.P.*, 2019 WL 5617817, at *5 (Super. Ct. Oct. 8, 2019) (§ 3(c) satisfied where Commonwealth alleged

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Milford Power Ltd. P'ship v. New England Power Co., 918 F. Supp. 471, 479-80 (D. Mass. 1996) (jurisdiction under long-arm statute based on single meeting in Massachusetts); *cf. Aub v. Technicolor Ent't Servs.*, 224 F. Supp. 2d 371, 374 (D. Mass. 2002) (jurisdiction under long-arm statute improper where none of defendant's "executives ever travelled to Massachusetts, and all ... face-to-face meetings" occurred out-of-state).

[3] *See Diamond Grp., Inc. v. Selective Dist. Int'l, Inc.*, 84 Mass. App. Ct. 545, 549 (2013) ("We interpret th[e] term [any] to ... mean that the volume of business need not be substantial but merely definite and perceptible.").

defendants "sent or caused to be sent into Massachusetts fraudulent misrepresentations which caused injury to Massachusetts residents").[4] ExxonMobil's reliance on *Roberts v. Legendary Marine Sales*, 447 Mass. 860 (2006), is inapposite, because *Roberts* "concerned monetary damages that were grounded in breach of contract and thus did not constitute 'tortious injury' ... under § 3(c)." *Purdue*, 2019 WL 5617817, at *5 n.6. And, finally, regarding § 3(d) only, the Commonwealth also alleges facts showing that ExxonMobil "regularly does or solicits business" in Massachusetts, Am. Compl. ¶¶ 48, 270-71, 280-82, 290, 542-54, 557-58, 560, 564, 567, 570-74, 735, 748-49; "engages in ... other persistent course of conduct" in Massachusetts, *id.* ¶¶ 441-42, 450, 469, 546, 735, 748-49; and "derives substantial revenue from goods ... consumed or services rendered" in Massachusetts, *id.* ¶¶ 271, 273, 280-83, 289, 542-54, 557-58, 560, 567, 735, 748-49.

Third, the Commonwealth's claims all "arise[] from" ExxonMobil's transacting business in Massachusetts and/or tortious injuries caused by its deceptive marketing to Massachusetts consumers and investors—the second requirement for each of § 3's jurisdictional categories. The "arising from" requirement is also construed "broadly." *Exxon*, 479 Mass. at 317 (quoting *Tatro*, 416 Mass. at 771). The SJC's opinion in *Exxon* demonstrates that the Commonwealth's consumer claims arise from ExxonMobil's marketing efforts in Massachusetts: "Exxon[Mobil] communicates directly with Massachusetts consumers about its fossil fuel products" through its "control" of point-of-sale advertising at the hundreds of ExxonMobil service stations in Massachusetts. *Id.* at 320. The Amended Complaint carries that binding finding forward, Am.

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[4] *See also JMTR Enters., LLC v. Duchin*, 42 F. Supp. 2d 87, 97 (D. Mass. 1999) ("fraud and chapter 93A claims arise out of tortious injury" for § 3(c) purposes); *Abbott v. Interactive Computing Devices, Inc.*, 1998 WL 1182003, at *2 (Super. Ct. Feb. 27, 1998) (nonresident caused tortious injury under § 3(c) where complaint alleged defendant sent fraudulent message into Massachusetts in violation of c. 93A).

Compl. ¶¶ 545, 549-54, and then directly links those in-state advertising efforts to the Commonwealth's consumer claims, *id.* ¶¶ 34-37, 538, 567-73, 577, 581-84, 589-90, 594-97, 608-09, 616-32, 651.

The Commonwealth's claim that ExxonMobil deceived investors likewise arises from its contacts with Massachusetts to market and sell securities to Massachusetts investors and to persuade them to retain existing investments. Indeed, at its initiative, ExxonMobil dispatched senior management to attend multiple in-person meetings with institutional investors in Massachusetts to convince them that ExxonMobil is properly managing the risk climate change poses to the Company's value and the value of its securities, *id.* ¶¶ 441, 450-53, 456, 459, 460-67, 469. The Amended Complaint alleges that those communications, among others, were deceptive, *id.* ¶¶ 290, 358, 364, 383, 470, 472, 483, 486, 490, 525-28, 530-31, and the investor claim thus arises directly from those deceptive communications, *e.g.*, *id*. ¶¶ 403, 532-35, 736-46. The Commonwealth's allegations thus present even more compelling facts than those on which the SJC already found jurisdiction proper under the long-arm statute in *Exxon*, 479 Mass. at 317-21, and those held proper in *Tatro*, 416 Mass. at 767-72 (plaintiff's injuries in California hotel arose from solicitation of business in Massachusetts through third-party).

B. Jurisdiction Over ExxonMobil Also Comports with Due Process.

Jurisdiction over ExxonMobil also is proper under the due process clause. *See Bulldog Inv. Gen. P'ship v. Sec'y of the Commonwealth*, 457 Mass. 210, 217 (2010). In 2018, the SJC upheld the assertion of jurisdiction over ExxonMobil to enforce the Attorney General's c. 93A CID because the Company "has purposefully availed itself of the privilege of conducting business activities in Massachusetts, with both consumers and other businesses," *Exxon*, 479 Mass. at 321, the investigation arose from those Massachusetts contacts, *id.* at 323, and "[t]he

exercise of personal jurisdiction over Exxon[Mobil]" was fair, *id.* (citation omitted). Here, ExxonMobil offers no cogent reason why this Court should deviate from the SJC's prior opinion; indeed, the factual record here—based on a years-long investigation—presents an even stronger case for jurisdiction.

1. ExxonMobil purposefully targeted the Massachusetts market.

For each of the Commonwealth's claims, "[t]he 'touchstone' of [the due process] inquiry remains 'whether the defendant purposefully established minimum contacts in the forum state.'" *Exxon*, 479 Mass. at 321 (citation omitted). ExxonMobil, through myriad contacts with Massachusetts, "purposefully avail[ed] itself of the privilege of conducting activities within [Massachusetts]" and thus it is reasonable for ExxonMobil to be "held responsible" here for those unlawful acts. *Bulldog*, 457 Mass. at 217.

a. Investor claim

The purposeful availment test is satisfied because ExxonMobil purposefully made its deceptive statements to Massachusetts investors about the risk climate change poses for the value of its securities and business. An entity's decision to "establish[] channels for providing regular advice to customers in the forum State" reflects "an intent or purpose to serve the" forum state's market. *Asahi Metals Indus. Co. v. Super. Ct.*, 480 U.S. 102, 112 (1987). ExxonMobil has developed, and exploited for its financial gain, channels to communicate to Massachusetts investors about the value of its securities and to promote their sale and retention, Am. Compl. ¶¶ 20, 258, 280, 290, 358, 364, and regularly communicated with Boston-based institutional investors, including at in-person meetings in Boston, *id.* ¶¶ 452, 455-56, 459-67, that hold millions of shares of ExxonMobil securities worth billions of dollars, *e.g.*, *id.* ¶¶ 273, 275-77. ExxonMobil's reassuring communications reflect its keen awareness that such investors wield

tremendous power to affect the value of ExxonMobil's securities by, for example, generating public reports that influence their own and other investors' decisions about whether to purchase and retain ExxonMobil securities. *Id.* ¶ 431.

"ExxonMobil [thus] has substantial, continuing contacts with Massachusetts institutional investors and other Massachusetts shareholders with respect to climate change risks, in addition to other topics relating to the operations of the Company, its future business projects, and the overall value of the Company," *id*. ¶ 290, and those purposeful communications satisfy the purposeful availment test. Given that the purposeful availment prong was satisfied in *Bulldog* based on a *website* accessible in Massachusetts and a *single* e-mail to a Massachusetts resident soliciting purchases of certain securities, 457 Mass. at 300, then surely it is here, too, where ExxonMobil's actionable conduct is pervasive.[5] ExxonMobil's focus on the purchase and sale of its stock and bonds in the secondary market[6] is largely irrelevant to the jurisdictional inquiry here. MTD 13. Regardless of how trades were executed, the Commonwealth's claim relates to how ExxonMobil *solicited* the sale and purchases of its securities and sought to persuade Massachusetts investors to retain them by, e.g., deceptively "assur[ing] its Massachusetts and other investors that it had accounted for ... [climate-change-induced] risk." Am. Compl. ¶ 20, *see id*. ¶¶ 31, 358, 364, 477, 525-31; Goldberg Aff. Exs. 7-11. Here, those contacts with Massachusetts investors are unquestionably ones that ExxonMobil itself created with Massachusetts. *See Walden v. Fiore*, 571 U.S. 277, 284-85 (2014).

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[5] *Cf. Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 697-98 (S.D.N.Y. 2018) (New York jurisdiction proper over Attorney General after one New York meeting), *appeal pending on other grounds sub nom.*, *Exxon Mobil Corp. v. Healey*, No. 18-1170 (2d Cir. 2018).

[6] The Commonwealth does, in fact, allege that ExxonMobil sold "short-term, fixed-rate notes," "long and short-term corporate bonds," and "long-term debt instruments," Am. Compl. ¶¶ 281-83, "directly to Massachusetts investors," *id*. ¶¶ 281-82; *see id.* ¶¶ 286-89; *see also infra* p.28 n.20.

b. Consumer claims

The purposeful availment test is also satisfied with respect to the Commonwealth's consumer claims. The SJC has already held that ExxonMobil directly "controls the marketing of its [fossil-fuel] products to Massachusetts consumers" at "over 300 Exxon- and Mobil-branded service stations ... [in] Massachusetts." *Exxon*, 479 Mass. at 321-22; *see* Am. Compl. ¶¶ 545, 549-54, 564, 569-70, 608. In 2016, for example, ExxonMobil began a major marketing campaign for its Synergy™ fuel at hundreds of "ExxonMobil branded stations in Massachusetts." *Id.* ¶ 584. For that campaign, ExxonMobil supplied each retail station with marketing materials and required station owners to display them in both the "forecourt"—the area in front of the stations—and inside the stations. Goldberg Aff. Ex. 2, at 21, 23, 30-36 (pictures); Am. Compl. ¶ 554. More recently, ExxonMobil advanced a similar campaign in Massachusetts to promote the sale of its Synergy Supreme+ fuel, *id.* ¶ 594—a product ExxonMobil states offers "'[b]etter gas mileage' and '[l]ower emissions,'" *id.* ¶ 595, and markets at Massachusetts retail stations under the "2X Cleaner" banner, *id.*; *see* Goldberg Aff. Ex. 3-A to 3-I (examples).

ExxonMobil also targets Massachusetts consumers with misleading marketing through the Rewards+ application (app) (formerly, Speedpass+), which allows "Massachusetts consumers [to] set up personal accounts and use the app as a payment platform for buying" fuel and other products from ExxonMobil at "gas stations located in Massachusetts." Am. Compl. ¶ 555. ExxonMobil markets both the Rewards+ smartphone app and its Smart Card credit card (which provides fuel discounts to consumers) at retail stations in Massachusetts. *See id.* ¶ 574; Goldberg Aff. Exs. 4-A to 4-O. ExxonMobil uses the app as the means to target Massachusetts consumers with the Company's fossil fuel marketing, Am. Compl. ¶¶ 561-62. Through that direct conduit, "ExxonMobil promotes its products to Massachusetts consumers by falsely

portraying its environmental performance," *id.* ¶ 561, by, for example, telling them that ExxonMobil's products "enable customers to reduce ... CO2 emissions," *id.*; *see also* ¶¶ 562, 595 ("[l]ower emissions"). The cases ExxonMobil cites where websites are the only potential jurisdictional hook are thus inapt, MTD 16-17; *see Exxon*, 479 Mass. at 322 (station-locator relevant jurisdictional contact), because ExxonMobil also targets Massachusetts consumers directly through, *inter alia*, its Rewards+ app, which it advertises in Massachusetts.

ExxonMobil is also the "Official Motor Fuel Partner of the Boston Celtics," Am. Compl. ¶ 572; *see uBID*, *Inc. v. GoDaddy Grp.*, 623 F.3d 421, 427-28 (7th Cir. 2010) (advertising in forum's sports venues evidences purposeful availment), and "misleadingly promotes 'green' Mobil 1™ motor oil in Massachusetts as an environmentally friendly product with low environmental impact," Am. Compl. ¶¶ 608, 611. To further promote that product, ExxonMobil featured the Massachusetts-based winner of an ExxonMobil "'Earth Day Drive Away' sweepstakes event promoting ... ExxonMobil 'green' Mobil 1™ products." *Id.* ¶ 616. ExxonMobil sells and markets its 'green' Mobil 1™ products, too, at its Massachusetts stations, among other Massachusetts locations where consumers can purchase the oil. *Id.* ¶¶ 545, 567, 616; Goldberg Aff. Exs. 5 & 6. None of the above described contacts with Massachusetts can, of course, be "characterized as random, isolated, or fortuitous." *Keeton v. Hustler Magazine Inc.*, 465 U.S. 770, 774 (1984). They all constitute ExxonMobil's purposeful efforts to exploit the Massachusetts market to increase its profits. *See uBID*, 623 F.3d at 429.

2. The Commonwealth's claims arise from the deceptive conduct ExxonMobil directed at Massachusetts.

The Commonwealth also satisfies the second due process requirement because its claims all "arise out of or relate to [ExxonMobil's] contacts with" Massachusetts. *Bulldog*, 457 Mass. at 300; *see Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017)

(relatedness prong satisfied where "connection" exists between forum and "specific claims at issue"). Here, ExxonMobil's contacts involve, *inter alia*, its deceptive marketing of securities and fossil fuel products to Massachusetts investors and consumers, and each of the Commonwealth's claims arise from the Company's contacts with Massachusetts. *Cf. Exxon*, 479 Mass. at 323 (c. 93A investigation arose out of or related to Company's Massachusetts contacts).

a. Investor claim

The Commonwealth's claim of investor deception arises directly from the Company's contacts with Massachusetts. Am. Compl. ¶¶ 20, 258, 265, 268, 358, 364, 441, 450, 470, 734-46. While ExxonMobil attempts to downplay its in-person meetings with investors in Massachusetts as just a "handful of meetings" and argues, wrongly, that they "are not a 'but-for' cause of the" claims, MTD 14,[7] the Commonwealth alleges that those meetings (and a variety of other communications directed at Massachusetts) served as ExxonMobil's primary vehicles to provide deceptive assurances about the extent of, and its approach to managing, climate risks to its business. *Supra* pp.9-10, 12-14 (describing meetings and collecting Am. Compl. citations); Goldberg Aff. Exs. 7-11. Contrary to Exxon's assertions, the Commonwealth's claim arises directly from those communications.

b. Consumer claims

Likewise, the Commonwealth's consumer deception claims arise from ExxonMobil's contacts with Massachusetts. "[T]he conduct giving rise to the" Commonwealth's "claim[s]" thus did not "occur[] elsewhere." MTD 16. Instead, ExxonMobil has deceptively marketed its fossil fuel products *in* Massachusetts, *supra* pp.9-12, 15-16, and the Commonwealth's consumer

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[7] The SJC does not employ, in any event, a "but-for" test for the due process clause's relatedness inquiry, as ExxonMobil knows first-hand. *Exxon*, 479 Mass. at 321, 323.

claims arise directly from those contacts, *E.g.*, Am. Compl. ¶¶ 538, 542-78, 584, 589, 616, 651. While some of ExxonMobil's deceptive marketing appears on its websites, the Company disseminates that deceptive marketing directly to Massachusetts consumers through its Rewards+ smartphone app, *supra* pp.15-16, among other means, and the Commonwealth's claims arise directly from those deceptive ploys, *e.g*., Am. Compl. ¶ 618. The consumer claims also arise from ExxonMobil's greenwashing campaigns, including advertisements in print and post editions of the New York Times, which ExxonMobil placed with the purpose of reaching Massachusetts consumers, *id*. ¶¶ 162, 573, 651, lauding its algae biofuel program, *id.* ¶¶ 645, 650-52. ExxonMobil has "intentionally creat[ed] a misimpression that ExxonMobil is helping to protect consumers and the environment from climate change" while "expanding [its] fossil fuel production[] and ... increasing emissions." Am. Compl. ¶ 597; *see id.* ¶¶ 599, 607, 752-53, 762-66. That it employed those deceptive tactics nationwide is no defense, as ExxonMobil wrongly suggests, MTD 16, since the Commonwealth's claims are "related to ... the alleged misrepresentations and deceptive conduct" ExxonMobil "directed to Massachusetts," *Purdue*, 2019 WL 5617817, at *8.

3. Jurisdiction over ExxonMobil in Massachusetts is fair.

Finally, jurisdiction over ExxonMobil is "fair[]," *see Diamond*, 84 Mass. App. Ct. at 552, as the SJC has already held, *Exxon*, 479 Mass. at 323-24. For that reason, ExxonMobil does not dispute this factor. MTD 11-21. Even so, Massachusetts courts have an indisputable interest in adjudicating this case since "the Attorney General has a manifest interest in enforcing G.L. c. 93A" on behalf of the Commonwealth. *Exxon*, 479 Mass. at 323-24; *see Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985). ExxonMobil, in turn, has had a pervasive presence in

Massachusetts for years, *e.g.*, Am. Compl. ¶¶ 450-53, 455-57, 545-46, 551-53, 556, 560, 570-72, and will suffer no unreasonable burden by litigating here.

II. The Amended Complaint States Plausible Claims for Relief.

The Amended Complaint withstands ExxonMobil's Rule 12(b)(6) attack because it includes "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 626 (2008) (citation omitted). Under Rule 12(b)(6), the Court must "accept as true the allegations in the complaint and draw every reasonable inference in favor of the" Commonwealth. *Curtis v. Herb Chambers I–95, Inc.*, 458 Mass. 674, 676 (2011). Accordingly, ExxonMobil may not "dispute the factual basis for the Commonwealth's allegations." *Commonwealth v. Purdue Pharma L.P.*, 2019 WL 4669561, at *3 (Super. Ct. Sept. 16, 2019).

The Commonwealth may prevail if it ultimately shows that ExxonMobil engaged in "deceptive acts or practices in the conduct of any trade or commerce." G.L. c. 93A, § 2(a). The Commonwealth thus need only show that ExxonMobil's marketing and sales constitute trade or commerce, *id.*, and that its alleged representations to investors or consumers are "deceptive" in that they "could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted," *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 394 (2004) (citations & internal quotation omitted); *see Leardi v. Brown*, 394 Mass. 151, 156 (1985) (conduct deceptive if possessing "tendency to deceive"). This determination of "materiality" is "ordinarily decided by the trier of fact." *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 58 (2004). Here, the Commonwealth alleges facts that plausibly suggest that it is entitled to relief on each of its claims. The Court should deny ExxonMobil's Rule 12(b)(6) motion.

A. The Commonwealth Plausibly Alleges that ExxonMobil Violated Chapter 93A by Misrepresenting to Massachusetts Investors the Grave Risks Posed by Climate Change to the Value of the Company's Securities.

The Commonwealth's first cause of action states a plausible claim that ExxonMobil has violated c. 93A by misrepresenting and failing to disclose to Massachusetts investors the financial risks posed by climate change to the Company, the oil and gas sector, and global financial markets. *See Exxon*, 479 Mass. at 315-17, 323, 324 n.9; *Marram*, 442 Mass. at 61-62 (denying motion to dismiss c. 93A investor claim). This Court should deny ExxonMobil's motion to dismiss the investor claim because the Company misstates the law, focuses on fact-issues that cannot be resolved at this stage, mischaracterizes the Amended Complaint's allegations, and claims erroneously that its deception of Massachusetts investors does not occur in "trade or commerce." As the federal court remanding this case found, "[t]he complaint, fairly read, alleges that ExxonMobil hid or obscured the scientific evidence of climate change and thus duped its investors about the long-term health of its" Company. *Mass.*, 2020 WL 2769681, at *8.

1. ExxonMobil's climate risk misrepresentations to investors are actionably deceptive.

ExxonMobil first argues, in essence, that c. 93A authorizes lies if they can be described as "opinions" or predictions—a position that would immunize any deceptive statement about risks of any kind. MTD 24-25. This is not the law. *See Marram*, 442 Mass. at 57 n.24 & 58, 61-62 (rejecting argument that c. 93A claims for misrepresentation of, *inter alia*, "risk profile" of investment could be dismissed as attacking statements of opinion). Even so, the Commonwealth alleges that ExxonMobil—today—*knows* about existential climate-driven risks to its business—and thus the value of its securities—and yet it is deceptively denying, downplaying, and failing to disclose those risks to investors. This case is not, as ExxonMobil contends, about any disagreement with ExxonMobil's "honestly held" opinions about the future. MTD 23. To the

contrary, the Commonwealth's central allegation is that it is being *dishonest* with investors about what it now knows, and has known for decades, about threats that imperil the Company's future.[8]

Disclosures that fail to present the Company's actual assessment of material risks—as they reflect misleading statements of "fact" about what the Company actually thinks and the nature of its business planning now—are not "opinions" and are actionably deceptive. *See Briggs v. Carol Cars*, 407 Mass. 391, 396 (1990) ("[S]tatement that, in form, is one of opinion, in some circumstances may reasonably be interpreted by the recipient to imply that the maker of the statement knows facts that justify the opinion."); *McEneaney v. Chestnut Hill Realty Corp.*, 38 Mass. App. Ct. 573, 575 (1995) (opinions actionable "where the maker is understood to have special knowledge of facts unknown to the recipient"); *cf. Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 185 (2015) (opinion actionable if it "contain[s] embedded statements of [false and material] fact"). As ExxonMobil's lead, non-binding authority acknowledges, MTD 23-25, deceit liability *does* reach the precise misrepresentations types the Commonwealth alleges, including those regarding "the remoteness or immediacy of risk, or the stringency of a business practice" and that have "specificity and ... tie[s] to factual falsehoods," as they are not "generalizations" of opinion that constitute puffery. *NPS, LLC v. Ambac Assur. Corp.*, 706 F. Supp. 2d 162, 171-74, 179-80 (D. Mass. 2010).[9]

[8] The SJC has acknowledged in *this very matter* that "misrepresentations or omissions about the threat that climate change poses to Exxon's business model are highly relevant to" its franchisees, with which, much like its investors, ExxonMobil has long-term business relationships. *Exxon*, 479 Mass. at 323.

[9] None of ExxonMobil's authority addresses liability for opinions or forward-looking statements in cases solely pleaded under c. 93A, and ExxonMobil ignores that the common law principles animating those cases are not dispositive of liability under c. 93A. *Exxon*, 479 Mass. at 316 (liability "neither dependent on traditional concepts nor limited by preexisting rights or remedies"); *see Commonwealth v. DeCotis*, 366 Mass. 234, 244 n.8 (1974) (liability "not limited by traditional tort and contract law requirements"). *Aspinall* is c. 93A's lodestar and itself

Moreover, while this is a c. 93A claim, federal securities law recognizes that "optimistic statements" are actionable where, as here, "the defendants did not genuinely or reasonably believe the positive opinions they touted (i.e., the opinion was without a basis in fact or *the speakers were aware of facts undermining the positive statements*)." *Lapin v. Goldman Sachs Grp.*, 506 F. Supp. 2d 221, 239 (S.D.N.Y. 2006) (emphasis added); *see Omnicare*, 575 U.S. at 184-85. In any event, ExxonMobil's factual mischaracterization of its own misrepresentations as "opinions" or "puffery" cannot be decided at this stage. *See Marram*, 442 Mass. at 62 (whether statements "are unactionable 'mere puffery'" could not be resolved on pleadings); *see Commonwealth v. Equifax, Inc.*, 2018 WL 3013918, at *5 (Super. Ct. Apr. 3, 2018) (declining to decide on pleadings whether statements "were mere 'puffery' that no reasonable person would take seriously").[10]

Although forward-looking, ExxonMobil's fossil fuel demand projections—like its other misrepresentations and omissions about climate risks—also raise a plausible deception claim because they do not disclose what the Company actually knows about how climate-driven

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concerned deceptive advertising downplaying the "substantial and inherent health risks" of "light" cigarettes—risks just as "forward-looking" as climate risks to ExxonMobil's business that are the subject of the disclosures (and non-disclosures) at issue here. 442 Mass. at 397.

[10] ExxonMobil's other authorities are post-pleadings-stage rulings, without meaningful analysis of c. 93A liability, and distinguishable. *See, e.g.*, *von Schönau-Riedweg*, 95 Mass. App. Ct. at 496-97 (*summary judgment* against investor who had not established common law misrepresentation as to statements court found were at best true, and, at worst, puffery); *Bachini v. Edwards*, 2008 WL 2359727, at *13 (Super. Ct. June 5, 2008) (investor advisor not liable *at trial* for making risky, negligent recommendations consistent with being "caught up in the Internet boom like many others" and believing "market would turn around"); *Houston v. Greenwald*, 2000 WL 1273373, at *4 (Super. Ct. June 1, 2000) (rejecting *at summary judgment* common law deceit liability for lender lawyer's implication that real estate title would be certified absent evidence of reliance, and allegation of c. 93A liability solely concerned failure to certify); *Stigman v. Nickerson Enters.*, 2000 Mass. App. Div. 223, 224 (Dist. Ct. 2000) ("characterization of the condition of the ten year old Corvette, with its numerous, visible defects, as 'mint'" not found to be common law misrepresentation *at trial*).

systemic and related risks threaten that demand and thus its business plans and profitability. *See Marram*, 442 Mass. at 62-63; *Tutor Perini Corp. v. Banc of Am. Secs.*, 842 F.3d 71, 91 (1st Cir. 2016) (action for securities fraud where issuer of securities sees "'disaster looming on the horizon' but opts to whitewash reality"). Actionable, too, is ExxonMobil's dishonesty about its climate risk management, as illustrated by its proxy cost misrepresentations and its assurance that, due to its sound planning, virtually none of its assets are at risk of being "stranded" by climate-driven impacts. *E.g.*, Am. Compl. ¶¶ 374-76, 487.[11] But those are not "forward-looking" statements or opinions at all: ExxonMobil is actively downplaying the present extent of its climate risk and misrepresenting that it is fully managing that risk, when it knows—today—those risks are much greater and more consequential than it is telling investors. *Supra* Fact Stmt. Pt.II.

2. ExxonMobil directly knows the systemic climate risks it has failed to disclose to investors, and its deceptive statements about those risks are subject to c. 93A liability.

ExxonMobil argues that the Commonwealth's first cause of action is implausible because climate change risks are "already public." MTD 25. What ExxonMobil misrepresents—the extent of climate risk and impact on ExxonMobil's financial condition—is not "already public," as investors' fight for additional, more detailed climate disclosures shows. Am. Compl. ¶¶ 404-40, 519-21.[12] ExxonMobil's actual risk management practices and accounting are not public

[11] *See also* Am. Compl. ¶¶ 491 ("none of our hydrocarbon reserves are now or will become 'stranded'"), 510 ("reserves face little risk"), 511 ("less than 5 percent of ExxonMobil's total net book value" at risk in lower-carbon scenario).

[12] Indeed, the September 2020 report of the advisory committee to the U.S. Commodity Futures Trading Commission that was anticipated in the Amended Complaint, further confirms that investors lack vital disclosures about climate change risks. Am. Compl. ¶ 297; MANAGING CLIMATE RISK IN THE FINANCIAL SYSTEM at iv-v (Sept. 2020), https://tinyurl.com/y6lx6lsu ("Demand for disclosure of information on material, climate-relevant financial risks continues to grow," and "significant variations remain in the information disclosed by each company, making it difficult for investors and others to understand exposure and manage climate risks.").

information and likewise only known, in small part, through evidence and testimony made public in litigation in New York. *Id.* ¶¶ 21, 384, 390, 398.

ExxonMobil is also wrong to argue that it may engage in deception if investors have access to countervailing public information. In *Aspinall*, for example, the dangers of smoking and the specific risks of "light" cigarettes were publicly documented, but the plaintiffs could maintain a c. 93A deception claim against tobacco companies that were falsely advertising their purportedly "light" cigarettes as relatively less risky. *See* 442 Mass. at 387 n.11, 388 n.16 (noting public reports and studies on such cigarettes prior to complaint). Importantly, ExxonMobil does not cite any case where a company knowingly made misleading assurances about publicly available information. Instead, ExxonMobil cites *Tomasella v. Nestlé USA, Inc.*, 962 F.3d 60, 81-82 (1st Cir. 2020), which is inapt since it does not hold that "generally" or "publicly available" information about a risk to a purchaser defeats a deception claim.[13] Nor is ExxonMobil's other authority—an unreported California federal court decision—any more relevant.[14]

ExxonMobil's next contention—that it cannot be liable for misrepresenting or failing to disclose what it does not know about systemic climate risks—is not only bewilderingly inconsistent with its assertion that it cannot be liable because the public already understands climate change risks, it is beside the point. MTD 26. The Commonwealth alleges that ExxonMobil actually knows the facts that it misrepresented and failed to disclose, unlike in

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Massachusetts investors continue to press for such disclosures as they would for any other material risks. Am. Compl. ¶¶ 430, 432.

[13] *Tomasella* did not address the relevance of public information in analyzing the deception claim; instead, it did so only with respect to the unfairness claim, which the Commonwealth has not pleaded. 962 F.3d at 81-82.

[14] *Hauck v. Advanced Micro Devices, Inc.*, 2019 WL 1493356, at *13 (N.D. Cal. Apr. 4, 2019), involved a bare omission about a known product defect, whereas here, ExxonMobil knowingly made misleading assurances and omissions to investors.

Greenery Rehab. Grp. v. Antaramian, 36 Mass. App. Ct. 73 (1994). There, the issue was whether the defendant could be liable for not disclosing the financial distress of a third party—a fact the defendant was unaware of at the time of the transaction. *Id.* at 77. *Greenery* thus says nothing about the liability of sellers who market their own securities with claims about the projected health *of their own business* that are contradicted by their own internal knowledge, as ExxonMobil has here. *Underwood v. Risman*, 414 Mass. 96, 100 (1993), is inapt for similar reasons—the plaintiff did not allege the landlord actually knew about the problem the plaintiff claimed was not disclosed. This case does not, therefore, implicate *Underwood* either.[15]

3. ExxonMobil's misrepresentations about its use of a proxy cost of carbon also support the Commonwealth's investor deception claim.

Over more than a decade, ExxonMobil reassured Massachusetts and other investors that it employed a single management tool—a proxy cost of carbon—to protect the Company from climate risks. *Supra* Fact Stmt., Pt.II. ExxonMobil's proxy cost statements were misleading: they were specific and wholly inconsistent with the Company's internal practices. *See* Am. Compl. ¶¶ 260, 358, 384-402.[16] Unlike "open-ended, indefinite, or subjective" information, the Commonwealth alleges concrete facts that plausibly suggest deception. *Cf. In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2014 WL 2815571, at *4-5 (S.D.N.Y. June 23, 2014) ("representations about [defendant's] purported controls for avoiding conflicts were directly at odds with its alleged conduct") (distinguishing *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014)).

[15] Chapter 93A also makes clear that willfulness need not be present to determine that there has been a violation of the statute, only to award multiple damages. *See* G.L c. 93A, § 4.

[16] *Cf., e.g.*, *In re Moody's Corp. Sec. Litig.*, 599 F. Supp. 2d 493, 510 (S.D.N.Y. 2009), *opinion corrected on denial of reconsideration*, 612 F. Supp. 2d 397 (S.D.N.Y. 2009) (information that ratings methodologies did not faithfully incorporate risk factors was material for purposes of federal securities law claim against ratings agency).

Now distancing itself from its proxy cost disclosures and claiming them too "conceptual" and "lack[ing] sufficient precision" to mean anything to investors at all, MTD 28, ExxonMobil asserts—astonishingly—that they are not material to investors because the proxy costs were "immaterial to its bottom line" and, *by design*, could not impact the Company's financials, *id*. at 40.[17] Yet its argument ignores proxy costs' prominence in its investor disclosures, their clear importance to investors, and their potential, if actually applied, to significantly impact the economics of the Company's projects. Am. Compl. ¶¶ 361, 363-64, 366, 368-70, 373-79, 380-83, 393-94; *see Ramirez v. Exxon Mobil Corp.*, 334 F. Supp. 3d 832, 846 (N.D. Tex. 2018) (ExxonMobil's proxy cost misrepresentations plausibly material because "[a] reasonable investor would likely find it significant that ExxonMobil allegedly applied a lower proxy cost of carbon than it publicly disclosed"). Like its other disclosures, its proxy cost misrepresentations overstated to investors its accounting of climate change risks and understated the impacts of those risks on the Company's financial health. Am. Compl. ¶¶ 260, 358, 364, 384, 393, 487, 533-34. And how ExxonMobil handled proxy costs *is* relevant to the Commonwealth's knowledge allegation, as it shows how ExxonMobil had a practice of hiding and distorting information relating to climate risk. In any case, the materiality of the proxy cost misrepresentations is an issue of fact that cannot be resolved on the pleadings. *Marram*, 442 Mass. at 58.[18]

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[17] In stark contrast to ExxonMobil's extensive proxy cost statements detailed in the Amended Complaint, its climate-focused disclosures following the commencement of this litigation and similar suits have abandoned all proxy cost references. Am. Compl. ¶¶ 21, 260, 402.

[18] The New York trial court decision, which ExxonMobil cites extensively, reflected findings peculiar to that action on falsity and materiality under New York law, including credibility determinations. In New York, ExxonMobil never even challenged the proxy cost allegations as facially implausible under Rule 12(b)(6) or on any other threshold ground, as they do here.

4. ExxonMobil's deceptive conduct in the sale and marketing of securities in Massachusetts occurs in "trade or commerce."

"Trade" and "commerce" includes the "conduct" of any "advertising, the offering for sale, ... the sale, ... or distribution of any services and any property," including "any security," c. 93A, §§ 1(b), (2), and a defendant acts in "trade or commerce" when it "operat[es] in a 'business context'" at the time of its allegedly deceptive conduct. *UBS Fin. Servs. v. Aliberti*, 483 Mass. 396, 411 (2019). Here, ExxonMobil, in conducting its regular business, has made deceptive statements to investors in meetings, reports, and presentations with the clear, commercial purpose to attract and keep investors. *E.g.*, Am. Compl. ¶¶ 20, 257, 268, 365-79, 450-68, 533, 735-37, 739-40. ExxonMobil does not dispute that those statements advertised its securities as part of the ordinary course of its for-profit business. MTD 35-36; *see* c. 93A, §§ 1(b), 2; *UBS*, 483 Mass. at 411-12. Thus, the Commonwealth plausibly alleges that ExxonMobil's sales and marketing of securities to Massachusetts investors occurred in "trade or commerce."

Notwithstanding ExxonMobil's implication to the contrary, MTD 35, c. 93A does not require privity between parties, and "indirect purchasers can bring a cause of action under G.L. c. 93A." *Ciardi v. F. Hoffman-La Roche, Ltd.*, 436 Mass. 53, 65 (2002); *see UBS*, 483 Mass. at 410 (no privity requirement); *Rafferty v. Merck & Co.*, 479 Mass. 141, 161 (2018) (indirect purchasers can assert failure-to-warn claims). And under § 4, the Attorney General enforces c. 93A on behalf of the public, including indirect purchasers. *Ciardi*, 436 Mass. at 67 n.21; *Greenfield Country Est. Tenants Ass'n v. Deep*, 423 Mass. 81, 84 (1996). With respect to securities claims, Massachusetts courts do not specially limit "trade or commerce" to direct purchases. *See Barron v. Fidelity Magellan Fund*, 57 Mass. App. Ct. 507, 513-14 (2003) (securities claim by third-party beneficiary of mutual fund account); *Fed. Home Loan Bank v. Ally Fin., Inc.*, 2019 WL 4739263, at *1-2, *11 (Super. Ct. Aug. 29, 2019) (claims arising from

securities indirectly purchased through third party).[19] By no means does c. 93A protect investors but then deny them protection if they purchase securities indirectly through public markets.

Ignoring *Ciardi*, ExxonMobil cites two 20-year old federal decisions—*Salkind v. Wang*, 1995 WL 170122 (D. Mass. Mar. 30, 1995) and *Reisman v. KPMG Peat Marwick LLP*, 965 F. Supp. 165 (D. Mass. 1997)—to argue that "trade or commerce" excludes "open market" purchases and public statements and requires a direct security sale, an act ExxonMobil denies.[20] MTD 35-36. These cases are neither relevant nor persuasive. *Salkind* seemingly concerned liability for individual defendants and their statements, not the issuer's liability for statements advertising its securities. 1995 WL 170122, at *1, *9. The instant case is against the issuer, ExxonMobil, and the Company does not dispute that its statements to investors are made in a business context to attract and keep investors. *See UBS*, 483 Mass. at 411-12. And even in its individual-defendant context, *Salkind* did not restrict liability to statements made as part of a direct sale from defendant to plaintiff.[21] 1995 WL 170122, at *9 (allowing claim against

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[19] ExxonMobil erroneously attempts to create a privity requirement by misconstruing the long-standing rule, not at issue here, that c. 93A applies in the context of "a commercial transaction, not a deal between private citizens." *Frishman v. Maginn*¸ 2006 WL 1075600, at *2-5, *13 (Super. Ct. Apr. 12, 2006) (alleged offer of restricted securities between two LLC members); *see* MTD 35.

[20] The Commonwealth alleges that ExxonMobil offers to sell and did sell securities directly to Massachusetts investors. Am. Compl. ¶¶ 270, 271, 281, 282, 283, 735. And ExxonMobil fails to explain how underwriter bond sales are not "sale[s]" or "offering for sale" when its Plan of Distribution states: "*ExxonMobil may sell* the securities ... *through* underwriters" and that "[*w*]*e* and the underwriters *are offering to sell* the Notes." *E.g.*, Prospectus Supp. of Exxon Mobil (Mar. 17, 2014), https://tinyurl.com/y2ednw6e (emphasis added).

[21] Notably, *Salkind*'s implication that "trade or commerce" excludes public statements about indirectly-acquired stock was based on the *federal* racketeering statute, 1995 WL 170122, at *9 (citing *In re Par Pharm. Inc. Sec. Litig.*, 733 F. Supp. 668, 683-84 (S.D.N.Y. 1990), interpreting the phrase "fraud in the sale of securities"), not c. 93A's broad remedial language, which encompasses "conduct" related to a sale or "offer[]" or "advertising," c. 93A, §§ 1(b), (2). And the sole case to reference *Salkind* for this so-called rule, *Reisman*, referenced it, if at all, in dicta. 965 F. Supp. at 174-75 (deciding plaintiff's claim as non-securities claim).

defendant CEO with no indication CEO directly sold stock to plaintiff).

More broadly, ExxonMobil's *Salkind*-based argument conflicts with the Attorney General's § 4 authority—not at issue in either *Salkind* or *Reisman*—to enforce c. 93A on behalf of indirect purchasers, *Ciardi*, 436 Mass. at 67 n.21, and to vindicate public, widespread harms. *Commonwealth v. Purdue*, 2019 WL 5495716, at *3 (Super Ct. Oct. 8, 2019) (quoting *DeCotis*, 366 Mass. at 245). It also conflicts with c. 93A's purpose, which is to regulate behavior in the public marketplace. *See Puritan Med. Cent. v. Cashman*, 413 Mass. 167, 179 (1992) (distinguishing actionable conduct "in a public market setting" from intra-entity disputes). To the extent at odds with c. 93A, *Salkind* and *Reisman* are not controlling here. *Harrison v. Town of Mattapoisett*, 78 Mass. App. Ct. 367, 372 n.5 (2010).

B. The Commonwealth Plausibly Alleges that ExxonMobil Violated c. 93A By Misrepresenting the Environmental Benefits of Its Synergy™ and "Green" Mobil 1™ Products, Failing to Disclose the Climate Change Harms Caused by Using Those Products, and Misleadingly Greenwashing Its Brand to Induce Consumer Purchases of ExxonMobil Fossil Fuel Products.

The Commonwealth plausibly alleges claims that ExxonMobil's misleading representations and failures to disclose material facts in connection with its marketing of Synergy™ gasoline and "green" Mobil 1™ motor oil and its misleading brand greenwashing are "deceptive acts and practices in ... trade or commerce" that violate c. 93A, § 2.

1. ExxonMobil's Synergy™ "fuel technology" and "green" Mobil 1™ motor oil representations are misleading and deceptive.

The Commonwealth alleges that ExxonMobil developed advertising campaigns, rolled out to its stations in Massachusetts and through other media, *see supra* Pt.I.B.1.b., B.2.b, to promote sales of its Synergy™ "fuel technology," and "green" Mobil 1™ motor oil that targeted Massachusetts consumers with misleading and deceptive messages about the purported

environmental and climate benefits of its products.[22] ExxonMobil advertised, for example, that the products would help consumers reduce carbon dioxide emissions, enhance "environmental performance," and allow consumers to "drive cleaner." *Supra* pp.6, 15-16; Am. Compl. ¶¶ 584-95. Claiming to be "obsessed" with energy efficiency, *id.* ¶ 591, ExxonMobil deploys scientific and technical terminology to conjure an image of itself in consumers' consciousness as a trusted scientific leader "continually innovating to develop products that enable customers to reduce their energy use and CO2 emissions," *id*. ¶ 587, that has "[e]ngineered Fuel Technology Synergy™ fuels to help improve fuel economy and reduce CO2 emissions," *id.,* and whose "scientists" developed a "Green Motor Oil" that can contribute to "carbon dioxide emission-reduction efforts," *id*. ¶ 611. ExxonMobil meticulously crafts its advertising and marketing to create a false and misleading impression in the minds of consumers that using ExxonMobil's fossil fuel products helps combat climate change and is environmentally beneficial, and that its products are cleaner and greener than other fuel products.

Nowhere in any of its advertisements and promotional material does ExxonMobil disclose what the Company has known for decades—that fossil fuels are the leading cause of climate change, that burning fossil fuels is not clean, and that using fossil fuels, including ExxonMobil Synergy™ gasoline and "green" Mobil 1™ motor oil, *increases* carbon dioxide emissions, exacerbating climate change harms to Massachusetts and its residents. The SJC, in affirming the Attorney General's authority to investigate ExxonMobil for the very violations the Commonwealth now alleges, found that ExxonMobil's past knowledge of climate change is

[22] ExxonMobil claims that the on-the-pump statements cannot violate c. 93A. MTD 18 n.10. But here, again, the Court must assume that those statements, which the Commonwealth alleges, create a perception that the fuel will lead to "potentially ... decreased pollutant emissions and increased fuel economy," Am. Compl. ¶ 590, violate c. 93A, *Purdue*, 2019 WL 5617817, at *5.

relevant to the determination whether ExxonMobil is currently violating c. 93A by not disclosing that knowledge. *See Exxon*, 479 Mass. at 326; 59H Opp. 14-15. That is so because, as *Aspinall* teaches, knowing a product is unsafe and harmful to human life and not disclosing that fact, while at the same time promoting the product as clean, safe, green, and environmentally beneficial—is deceptive, in violation of c. 93A. Relying on (1) an extensive review of ExxonMobil's *own internal documents* confirming its sophisticated, detailed scientific knowledge of the potentially "catastrophic" harms of climate change resulting from continued reliance on fossil fuels; and (2) ExxonMobil's current fossil fuel product marketing that fails to disclose ExxonMobil's knowledge of those harms, while simultaneously promoting the use of fossil fuel products as "clean" and climate protective, the Commonwealth alleges ExxonMobil has engaged in deceptive marketing of Synergy™ gasoline and "green" Mobil 1™ motor oil.

ExxonMobil also fails to disclose the fact that, even as it proclaims to be "obsessed" with energy efficiency (i.e., conserving energy), it is actually one of the most profligate polluters on the planet because of its penchant for flaring fossil fuel (burning without using for any purpose, i.e., wasting energy), Am. Compl. ¶¶ 599-603, and that, far from working to reduce carbon dioxide emissions, ExxonMobil has been *increasing* fossil fuel production in the Permian Basin and aiming to achieve one million barrels per day by 2024, *id*. ¶ 598—a corporate strategy *The Economist* observed to be "at odds with efforts to hold back climate change," *id*. ¶ 604. And that is precisely the point. ExxonMobil is entitled to pursue a corporate strategy focused on expanding production of fossil fuels. What ExxonMobil cannot do is deceive Massachusetts consumers by failing to disclose in its advertising material facts—its knowledge of the dire climate change consequences of using ExxonMobil fossil fuel products, and the fact that

ExxonMobil is a leading global source of the very carbon dioxide emissions it purports to be mitigating with its Synergy™ "fuel technology" and "green" Mobil 1™ motor oil.

In the absence of such disclosures, ExxonMobil's marketing for Synergy™ gasoline and "green" Mobil 1™ motor oil is misleading and deceptive, and creates an overall misleading picture that hides from Massachusetts consumers the extremely harmful climate change impacts caused by the normal use of the Company's products—including harms to human health. *See Commonwealth v. AmCan Enters., Inc.*, 47 Mass. App. Ct. 330, 336 (1999) ("[T]he question is whether ... the solicitation as a whole was misleading."). Even if, in some degree, ExxonMobil's fossil fuel products improve engine performance and/or efficiency relative to prior or other products, the Company's claims nonetheless convey a false impression that using the products confers an environmental benefit, including greenhouse gas emissions reductions, when, in fact, development, production, refining, and consumer use of its products increases—massively—greenhouse gas emissions. Am. Compl. ¶¶ 581-82; *Aspinall*, 442 Mass. at 395.[23]

ExxonMobil's marketing of those products as "safe," "green," emissions-reducing, and climate protective are like the tobacco industry's efforts to promote "light" cigarettes as an alternative to quitting smoking, after smoking's public health dangers came to light. Am. Compl. ¶¶ 622-32. The SJC has held that such allegations, if proven, violate c. 93A:

> If, as alleged, [defendant tobacco companies] intentionally labeled their cigarettes "Lights" with "lowered tar and nicotine" in order to establish in the individual and collective consumer consciousness the concept that Marlboro Lights are more

[23] ExxonMobil mischaracterizes the Commonwealth's allegations, arguing that the Commonwealth does not allege its advertisements are false or deny that it "accurately" describes its products. MTD 30-31. That is wrong. Even so, ExxonMobil's marketing is deceptive because it fails to disclose the Company's knowledge of its products' role in causing climate change and makes misleading claims about their environmental attributes. *See Aspinall*, 442 Mass. at 395; *Amcan*, 47 Mass. App. Ct. at 336. *Ortiz v. Examworks, Inc*., 470 Mass. 784 (2015), a private suit under § 9, concerned an accurate disclosure of professional credentials and a question of law about whether a physician was required to provide treatment; it offers no support to ExxonMobil.

> healthful (or, at least, less unhealthful) to smoke than regular cigarettes, and thereby increase the defendants' market share of cigarette sales, with full knowledge that most Marlboro Lights smokers would not in fact receive the promised benefits of "lowered tar and nicotine," then there can be no question that the sales of Marlboro Lights occurred in circumstances that make the sales deceptive under G.L. c. 93A.

Aspinall, 442 Mass. at 396-97. ExxonMobil's deceptive representations are carefully tailored to induce consumers to purchase its gasoline and motor oil over its competitors—particularly those consumers who may be concerned about pollution emissions. By invoking concepts of "eco-friendliness," Am. Compl. ¶¶ 616-17; greenness and the color green, *id*. ¶¶ 611, 614; cleanness and "environmental performance," *id*. ¶¶ 587, 591; CO_2 emissions reduction, *id*. ¶ 587; images of the Earth, *id*. ¶ 613, and mountains and trees, *id*. ¶ 587, in association with its Synergy™ gasoline and "green" Mobil 1™ motor oil, ExxonMobil seeks to assure Massachusetts consumers that use of its products is not harmful and is indeed beneficial to the environment, when it knows the opposite is true, based on its own well-documented scientific research.

In this regard, as the Commonwealth alleges, ExxonMobil knows that information about the purported environmental attributes of its products—its deceptive green marketing spin—is material to consumer's purchasing decisions. That is why ExxonMobil has commissioned surveys and gathered and analyzed data to evaluate consumer perceptions to inform its fossil fuel marketing, *id*. ¶ 706, and invested over $100 million since 2013 developing campaigns to promote gasoline sales, including Synergy™ products. *Id*. ¶ 586.[24] And ExxonMobil has admitted that climate change is a material issue to its business and stakeholders, including the

[24] *Cf. In re Chrysler-Dodge-Jeep Ecodiesel Marketing, Sales Practices, and Prods. Liability Lit.*, 295 F. Supp. 3d 927, 1006 (N.D. Cal. 2018) ("[I]t is plausible that a reasonable consumer would understand 'EcoDiesel' to mean environmentally friendly or reduced emissions.").

Company's customers, *id.* ¶ 707, and the oil industry itself recognizes information about climate change as material, *id*. ¶ 705.

ExxonMobil's strategy of failing to disclose critical facts it knows about the climate harms caused by its products while painting an overall misleading picture of the environmental attributes of its products deprives consumers of vital information about the consequences of their purchasing decisions—information that ExxonMobil knows would influence public perception of its products and consumer purchasing behavior. Am. Compl. ¶¶ 697-698; *see Aspinall*, 442 Mass. at 395 ("[A]dvertising may consist of a half-truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information."). ExxonMobil's deception is also material, because, as with the case of tobacco and chlorofluorocarbons, once consumers were made aware of the health and/or environmental harms caused by those products, many opted to discontinue using them. Am. Compl. ¶¶ 699-701; *e.g.*, *Lee v. Conagra Brands*, 958 F.3d 70, 76 (1st Cir. 2020) (reversing dismissal because plaintiff plausibly alleged c. 93A deception where cooking oil with "100% Natural" label did not disclose oil contained genetically modified organisms).

ExxonMobil's reliance on *Tomasella* is misplaced. In that case, the First Circuit considered a question not presented here—whether omission of information concerning a product (a chocolate manufacturer's use of cocoa produced with child labor) at the point of sale is deceptive for c. 93A purposes where the omitted fact is tangential to the product's central characteristics and use (physical characteristics, price, fitness for consumption). 962 F.3d at 68, 72. Here, ExxonMobil has *itself* made the "environmental" attributes of its fossil fuel products a central characteristic by extensively describing those characteristics, albeit deceptively, in its marketing materials. Both ExxonMobil's misrepresentations and omissions involve *the* central

characteristic of its Synergy™ gasoline and "green" Mobil 1™ motor oil products: they are fossil fuels and using them results necessarily—as a function of chemistry—in carbon dioxide emissions that cause climate change. Am. Compl. ¶¶ 71, 108, 113, 596. And that, in turn, harms Massachusetts consumers and threatens to destabilize the ecosystems on which human life depends. *Id.* ¶¶ 752-53. Unlike in *Tomasella*, ExxonMobil's deception concerns the product itself, and ExxonMobil's omissions ignore the direct harms that follow its use by consumers.

2. ExxonMobil's greenwashed brand advertising deceptively induces Massachusetts consumers to purchase its products.

"Greenwashing" is disinformation disseminated by a company to present an environmentally responsible image that contradicts its true environmental record and impact, *id.* ¶ 634, and is used as marketing strategy to induce consumers to purchase products and build brand loyalty. *See* 59H Opp. 20; *Jordan v. Jewel Food Stores*, 743 F.3d 509, 518 (7th Cir. 2014) (advertisement "no less 'commercial' because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service"). Here, ExxonMobil's greenwashing representations allegedly deceived Massachusetts consumers, and this Court should deny ExxonMobil's motion to dismiss on this ground.[25]

ExxonMobil's greenwashing appears in its marketing in multiple outlets that saturate the commercial space with images and text falsely portraying ExxonMobil as a clean, green energy leader working tirelessly to develop solutions to the climate crisis and protect future generations. For example, using a logo that is strikingly similar to the U.S. Environmental Protection Agency's logo and features a bright sun shining over mountains and water, Am. Compl. ¶ 643,

[25] ExxonMobil wrongly claims that its specific misleading and deceptive greenwashing representations are mere "puffery." MTD 33-34. This factual argument cannot be resolved at the motion to dismiss phase. *Supra* p.22 & n.10 (citing *Marram*, 442 Mass. at 62).

ExxonMobil's "Protect Tomorrow. Today." campaign falsely proclaims the Company's commitment to "protect the environment for future generations," *id*. ¶ 643, while failing to disclose the facts that production and use of ExxonMobil fossil fuel products is a leading cause of climate change that, if unabated, will condemn future generations to catastrophe, as ExxonMobil's own scientists and experts have said. *Id*. ¶¶ 90, 96, 105. And ExxonMobil has also spent millions of dollars to ensure that such misleading marketing is heard and seen by Massachusetts consumers, including touting itself as focused on alternative energy development, such as algae and plant-waste-based biofuels. *Id*. ¶¶ 645, 651-54, 660-62. These ads appear often in the New York Times, *id.* ¶¶ 645, 651-52, which ExxonMobil placed with the purpose of targeting the Massachusetts market, *supra* p.18, and other social media, *id*. ¶¶ 660-62.

ExxonMobil's greenwashed marketing repeatedly represents to consumers that it prioritizes efforts to help consumers improve fuel economy and reduce emissions, *id*. ¶¶ 587-95, 611, 614, while at the very same time, ExxonMobil is increasing fossil fuel production, *id*. ¶ 598, and projecting $21 trillion in oil and gas investment globally through 2040, *id*. ¶ 605, contrary to the fossil-fuel-reduction goals it falsely proclaims it is pursuing for its customers.

ExxonMobil's "Corporate Citizenship" and "Sustainability" reports serve to further the illusion of ExxonMobil as an advocate of "sustainable development," working to ensure "future generations are not compromised by actions taken today," *id.* ¶ 675, when in fact the opposite is true. ExxonMobil's assertion, in its 2017 Corporate Sustainability Report, that it has led climate research for 35 years, *id*. ¶ 685, is particularly misleading, since it fails to disclose ExxonMobil's own internal research in the 1970s and 1980s that identified the very real risk of potentially "catastrophic" climate change impacts, the need to "sharply curtail[] the use of fossil fuels," *id*. ¶¶ 113, 107-08, and the implications for ExxonMobil's business, *id*. ¶¶ 75, 83, 101.

ExxonMobil's greenwashing representations are deceptive because ExxonMobil disseminates them to Massachusetts consumers, among others, to induce sales and brand loyalty by indoctrinating consumers with the false and misleading impression that ExxonMobil is working to address climate change by *reducing* reliance on fossil fuels and *reducing* greenhouse gas emissions, when ExxonMobil is actually *increasing* fossil fuel production, which *increases* greenhouse gas emissions. *Id.* ¶ 650; *Jordan*, 743 F.3d at 519 (congratulatory advertisement associating retail grocery chain with prominent sports figure had "unmistakable commercial function: enhancing [chain's] brand in the minds of consumers.").

3. ExxonMobil's deceptive conduct in its brand advertising in Massachusetts constitutes c. 93A "trade or commerce."

Finally, ExxonMobil's argument that its brand advertising promoting its algae biofuels and carbon capture sequestration research have no connection to the sale of its products and thus do not constitute "trade or commerce" under c. 93A, MTD 36-37, is absurd. Increasing sales through customer goodwill is the purpose of such marketing campaigns, regardless whether the advertising mentions a company's specific products. *Cf. Jordan,* 743 F.3d at 519. ExxonMobil's brand greenwashing is designed to advertise *all* of its fossil fuel products to consumers. *See, e.g.*, Am. Compl. ¶¶ 643, 652, 660. ExxonMobil's deceptive greenwashing representations are precisely the type of conduct proscribed by c. 93A. To the extent that ExxonMobil claims its brand advertising is not advertising its products or otherwise published in a business context, it raises a factual claim that cannot be decided on a motion to dismiss. *See UBS*, 483 Mass. at 411-12; *Purdue*, 2019 WL 4669561, at *3.[26]

[26] ExxonMobil cites no legal support to suggest brand advertising is exempt from c. 93A, opting instead to cite an inapposite case concerning the non-commercial nature of a nonprofit advocacy group's pregnancy counseling services. MTD 36; *see Planned Parenthood Fed'n of Am., Inc. v. Problem Pregnancy of Worcester, Inc.*, 398 Mass. 480, 492-94 (1986).

III. ExxonMobil's First Amendment Defense Is Meritless and Otherwise Premature.

ExxonMobil's purported First Amendment defense is meritless.[27] First, the First Amendment simply does not protect false and misleading statements. Second, the First Amendment will not bar this Court from requiring ExxonMobil to publish corrective statements to remedy its unlawful conduct. At this stage, however, evaluating whether any particular corrective statements will comply with the First Amendment is premature because the Court does not have before it any proposed corrective statements—proposals that are necessarily submitted only after this Court finds ExxonMobil liable under c. 93A.

A. The First Amendment Does Not Protect ExxonMobil's Deceptive Speech.

"[T]he First Amendment does not shield fraud," *Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003), and, the government has the "firmly established" power "to protect people against" false and deceptive speech, *id.* (citation omitted); *see Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring) (government "can regulate or punish ... fraud"). Indeed, the government can "prohibit[] enitrely" "[m]isleading advertising." *In re R.M.J.*, 455 U.S. 191, 203 (1982); *POM Wonderful, LLC v. F.T.C.*, 777 F.3d 478, 484 (D.C. Cir. 2015) ("The [Federal Trade Commission Act] proscribes—and the First Amendment does not protect—deceptive and misleading advertisements.").[28]

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[27] ExxonMobil does not assert this defense as to the Commonwealth's investor claim. *See* MTD 39 (citing single investor-related paragraph—Am. Compl. ¶ 503). ExxonMobil has thus waived its First Amendment defense to that claim by failing adequately to develop it; a defect it cannot cure in reply. *See Pasquale v. Casale*, 72 Mass. App. Ct. 729, 737-38 (2008).

[28] Like this case, POM based its marketing on the purported health benefits of its juice, but it failed to disclose the limitations in the studies on which it relied and the contrary findings of other studies. *POM*, 777 F.3d at 500 ("insofar as the FTC imposed liability on petitioners for … ads found to be deceptive" those ads were "unprotected by the First Amendment").

This is such a case, since the Commonwealth alleges ExxonMobil has violated c. 93A by making false and misleading statements about its securities and products to Massachusetts investors and consumers, *e.g.*, Am. Compl. ¶¶ 1-2, and that it did so "to increase its short-term profits, stock prices, and access to capital," *id.* ¶ 1.[29] The First Amendment cases ExxonMobil cites in its memorandum are inapposite because none of them arise in the context of liability for a company's deceptive statements in the marketplace.[30]

This Court should reject ExxonMobil's attempt to lure the Court into examining the First Amendment limits on government regulation of speech outside of the fraud context, s*ee* MTD 38-40, since the First Amendment is simply not a defense in this context. *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123-24 (D.C. Cir. 2009) (rejecting First Amendment defense by companies because statements were fraudulent where, like here, they were aware intended product-use would cause harm yet "publicly ... distorted the truth" of that harm "for several

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[29] Because the First Amendment does not protect fraudulent speech, this Court need not wade into any commercial speech-based inquiry. MTD 38. Even so, the ExxonMobil communications at issue qualify as commercial speech. Indeed, ExxonMobil emphasizes that: (i) it is "a publicly traded energy company" that "manufactures" and sells its products "worldwide" and offers for sale its securities to the public, *id.* at 4-5; (ii) "promotes its consumer products [to consumers] ... through a variety of media," *id.* at 9; and (iii) communicates with investors about its securities, *id.* at 7. ExxonMobil's deceptive communications thus fall squarely within the heartland of the commercial speech doctrine if it were necessary to so categorize the speech.

[30] *E.g.*, *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (state requirement that non-union members subsidize union speech with which they disagreed violated First Amendment); *Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018) (state requirement that certain family planning clinics publish information about state services contrary to clinics' viewpoint violated First Amendment); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986) (state requirement that privately owned utility publish third party's message on utility bills violated First Amendment).

decades").[31] Instead, if ExxonMobil's marketing to Massachusetts investors and consumers violates c. 93A, then that marketing is not protected by the First Amendment. *Id.* at 1123.

B. A Determination on the Constitutionality of Any Potential Future Corrective Statements Is Premature.

The First Amendment also does not categorically prohibit this Court from requiring ExxonMobil to make corrective statements to remedy c. 93A violations, and such orders are routinely upheld.[32] As *Philip Morris* confirms, "the government may require [a company's] commercial speech to 'appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.'" 566 F.3d at 1142 (citation omitted). But resolving the legality of any future potential corrective statements is a fact-bound exercise that requires, first, a liability finding. *Philip Morris* rejected the tobacco companies' First Amendment challenge to the district court's required corrective statements, *following* the district court's liability determination. *Id.* at 1142-45. Even then, however, the Court could not rule on the legality of any such disclosures because "[t]he exact content of the statements [w]as yet to be determined." *Id.* at 1138-39.[33] ExxonMobil's attempt to secure a ruling in advance of a liability finding and court-ordered corrective statements is thus premature.

CONCLUSION

For the foregoing reasons, this Court should deny ExxonMobil's Motion to Dismiss.

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[31] The same is true as to the un-identified "petitioning" ExxonMobil references in passing. MTD 38; 59H Opp. 20; *Philip Morris*, 566 F.3d at 1123-24 (rejecting tobacco companies' *Noerr-Pennington* doctrine defense because doctrine does not protect fraudulent petitioning).

[32] *E.g.*, *Novartis Corp. v. F.T.C.*, 223 F.3d 783, 786, 788-89 (D.C. Cir. 2000) (rejecting First Amendment challenge to required disclosure that "there is no evidence" that corporation's pain reliever "is more effective than other pain relievers"); *Daniel Chapter One v. F.T.C.*, 405 F. App'x 505, 506 (D.C. Cir. 2010).

[33] *Cf. Ass'n of Private Sector Colls. & Univs. v. Duncan*, 110 F. Supp. 3d 176, 198 (D.D.C. 2015) (absence of disclosure statement's actual text precludes judicial remedy).

Dated: October 30, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Seth Schofield, certify that on October 30, 2020, I served the foregoing document and the Affidavit of I. Andrew Goldberg, with Exhibits 1-11, by sending a copy thereof by electronic service in accordance with the Joint Motion to Set Pleading Deadlines, allowed by the Court on April 14, 2020 to:

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Addendum

1998 WL 1182003
Only the Westlaw citation is currently available.
Superior Court of Massachusetts.

George ABBOTT,
v.
INTERACTIVE COMPUTING DEVICES, INC. et al.

No. 9601764B.
|
Feb. 27, 1998.

MEMORANDUM AND ORDER ON DEFENDANT SUNG CHO'S MOTION TO DISMISS

GANTS.

***1** The defendant Sung Cho has moved to dismiss this case for lack of jurisdiction under Mass.R.Civ.P. 12(b)(2).[1] For the reasons stated below, the motion to dismiss is DENIED.

[1] The defendant Interactive EFX Computing, Inc. initially joined in the motion to dismiss, but withdrew its motion at oral argument.

BACKGROUND

The plaintiff, George Abbott, a Massachusetts resident, was retained by the defendant Interactive Computing Devices, Inc. ("ICD") in 1994 as a management consultant. In March 1995, the defendant Sung Cho, an officer of ICD, asked Abbott to become a full-time employee of ICD, essentially as its Northeast representative, with a base salary of $54,000 per year. Although ICD was headquartered in California, Abbott continued to reside in Massachusetts and provided his employment services largely in the Northeast.

Around this time, ICD became indebted to ANAM Technology America, Inc. ("ANAM") and was unable to pay its considerable debt. To satisfy ANAM and avoid litigation, ICD gave ANAM a security interest essentially in all of its assets. ICD ultimately was unable to meet its debt obligations to ANAM, and ANAM foreclosed on ICD's assets pursuant to its security agreement. Following the foreclosure, ANAM created a new subsidiary, the defendant Interactive EFX, Inc. ("EFX"), and transferred its ICD assets to this newly created company.

The defendant Sung Cho became President of EFX when it was formed to absorb the assets of ICD. He was aware that Abbott, through his employment agreement, was a creditor of ICD and admitted that he felt a "moral obligation" to try to do something for him. He admits that he telephoned Abbott in an effort to resolve this "moral obligation." He also testified at deposition that he or members of his staff at EFX may have agreed to pay Abbott money or things of value, but he insisted that this agreement was not made on behalf of EFX. Abbott insists that Cho personally guaranteed him that he would be paid for his work for ICD in an effort to induce him to continue the work he was doing for ICD on behalf of EFX.

DISCUSSION

This Court may assert personal jurisdiction over Mr. Cho only if two requirements are met: (1) at least one prong of the Massachusetts Long-Arm Statute is satisfied, and (2) the due process requirements of the United States Constitution are fulfilled. See *U.S.S. Yachts, Inc. v. Ocean*

Yachts, 894 F.2d 9, 11 (1st Cir.1990). The burden of proving personal jurisdiction rests with the plaintiff. *American Express Int'l, Inc. v. Mendez-Capellan,* 889 F.2d 1175, 1178 (1st Cir.1989). The plaintiff must establish personal jurisdiction with affirmative evidence, and cannot lean simply on the pleadings. *Boudreau v. Scitex Corporation Ltd.,* 1992 WL 159667 (D.Mass.1992); *Landmark Bank v. Machera,* 736 F.Supp. 375, 380 (1990).

Massachusetts Long-Arm Statute

Under the Massachusetts Long Arm Statute, personal jurisdiction over an individual may be exercised regarding a cause of action arising from that individual's "transacting any business in this commonwealth" or "causing tortious injury by an act or omission in this commonwealth." G.L.c. 223A, § 3(a) and (c). At the very least, there is no dispute that Cho, while President of EFX, telephoned Abbott in Massachusetts and discussed with him some financial arrangement regarding the monies owed him for his work with ICD. There is also no dispute that this telephone call is at the heart of the plaintiff's breach of contract and Chapter 93A claims against Cho. The question is whether this telephone call, whatever its precise content, is sufficient to establish that Cho either transacted business in Massachusetts or caused tortious injury by an act occurring in the Commonwealth, and that the causes of action against him arose from this Massachusetts-connected conduct. I conclude that it is.

***2** Courts have construed the "transacting any business" requirement of Section 3(a) quite broadly. See *United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corp.,* 960 F.2d 1080, 1087 (1st Cir.1992), and cases cited. The defendant need not be present in the Commonwealth; it is enough simply to attempt to participate in the Commonwealth's economic life. *Id*. In *Hahn v. Vermont Law School,* the defendant was found to have transacted business under Section 3(a) of the Long-Arm Statute simply by mailing to the plaintiff in Massachusetts an application and acceptance letter which formed the basis for a breach of contract claim. 698 F.2d 48, 51-52 (1st Cir.1983). In *Bond Leather Co., Inc. v. Q.T. Shoe Mfg. Co., Inc.,* the out-of-state's defendant's communications with the plaintiff in Massachusetts for the purpose of negotiating a guaranty satisfied Section 3(a). 764 F.2d 928, 932 (1st Cir.1985). See also *Boudreau v. Scitex Corporation Ltd.,* 1992 WL at 2 (negotiating employment contract through electronic mail, faxes, and telephone calls directed to Massachusetts constitutes the transaction of business in Massachusetts); *Good Hope Industries, Inc. v. Ryder Scott Co.,* 378 Mass. 1, 8 n. 13, 389 N.E.2d 76 (1979) (isolated activity may be sufficient to satisfy Section 3(a) even if constitutionally insufficient).

Here, Cho made a telephone call to Abbott in Massachusetts for the purpose of negotiating arrangements to resolve a preexisting debt that arose from Abbott's work in Massachusetts on behalf of the company whose assets EFX now owned. If Abbott is correct, Cho in that telephone call guaranteed payment of that debt for the purpose of inducing Abbott to continue to perform this work in Massachusetts on behalf of EFX. Consequently, this case presents a stronger claim of personal jurisdiction than in *Hahn* because, not only was the telephone call made to Massachusetts, but the plaintiff here contends that the purpose of the telephone call was to induce continued employment of the plaintiff in Massachusetts.

If the plaintiff's allegations are true, this telephone call also satisfies the separate jurisdictional prong found in Section 3(c)-it

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caused tortious injury by an act in the Commonwealth. As demonstrated above, there is no doubt that a telephone call made to Massachusetts, even if placed outside Massachusetts, is an act occurring within the Commonwealth for purposes of the Long-Arm Statute. Here, the telephone call is the focus of the plaintiff's Chapter 93A claim; he contends that Cho during this call made a fraudulent promise to guarantee payment of Abbott's past work for ICD in order to induce Abbott to keep on working for EFX.

Due Process

To satisfy the due process requirements of the Fourteenth Amendment, the defendant Cho must possess sufficient minimum contacts with Massachusetts that subjecting him to jurisdiction would not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *United Electrical Workers,* 960 F.2d at 1087-88. Whether his telephone call to the plaintiff is enough to satisfy due process is a closer question under the caselaw. Indeed, the First Circuit has found that personal jurisdiction based on an out-of-state law school's mailing of an application and acceptance to a prospective law student in Massachusetts satisfied due process, *Hahn* at 52-53, but personal jurisdiction based on the giving of a guarantee to a Massachusetts corporation for the payment of goods did not. *Bond Leather Co., Inc. v. Q.T. Shoe Mfg. Co., Inc.,* 764 F.2d at 933. The difference between these two cases rested in the extent and nature of the defendant's business dealings with Massachusetts. In *Hahn,* the First Circuit found that Vermont Law School had actively sought to recruit Massachusetts students, and the plaintiff was simply one of those students. 698 F.2d at 52. In *Bond Leather,* however, the First Circuit found that the defendant had no active role in anything happening in Massachusetts; it simply had guaranteed payment to a Massachusetts company on an isolated transaction. *Bond Leather* at 933-34.

***3** This case is closer to *Hahn* than to *Bond Leather*. Mr. Cho, through his employer, ICD, had previously employed the plaintiff to perform work in Massachusetts on behalf of ICD and, if the plaintiff is correct, his telephone call with the plaintiff was intended to induce him to continue to perform such work in Massachusetts on behalf of EFX. Even if there were only a single telephone call with the plaintiff in Massachusetts, that telephone call concerned the possible continuation of work that Mr. Cho understood would be performed in Massachusetts. This is sufficient to establish the necessary minimum contacts and to find that asserting personal jurisdiction based on those contacts is consistent with fair play and substantial justice. See *Boudreau v. Scitex Corporation Ltd.,* 1992 WL at 3-4.

I also note that exercising personal jurisdiction over Mr. Cho in Massachusetts is unlikely to burden him unfairly. Since EFX does not dispute that this Court has personal jurisdiction over it, there will be a trial in this case in Massachusetts (in the absence of settlement or summary judgment) even if personal jurisdiction were not found over Mr. Cho, and he will almost certainly be present for that trial since he will be a key witness. Since he will likely be in Massachusetts anyway for trial, it is not unfair that he be a party and not merely a witness at that trial. Moreover, if personal jurisdiction over him were not found, the practical result would be that the plaintiff would not be able to press his claims against him since, given the amount at issue, it would not make economic sense for the plaintiff to file a separate

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action in California, where personal jurisdiction over Mr. Cho would be assured.

ORDER

For the reasons stated above, the defendant Sung Cho's motion to dismiss this case for lack of jurisdiction under Mass.R.Civ.P. 12(b)(2) is DENIED.

All Citations

Not Reported in N.E.2d, 1998 WL 1182003

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24 Mass.L.Rptr. 192
Superior Court of Massachusetts,
Essex County.

[1] As guardian on behalf of her son, Joseph J. Bachini, a minor

Shirley M. BACHINI[1]
v.
A.G. EDWARDS & another.[2]

[2] Daniel R. Santanello, individually and as investment broker of A.G. Edwards.

Civil Action No. 03-1068.
|
June 5, 2008.

AMENDED MEMORANDUM OF DECISION AND ORDER ON POST-TRIAL MOTIONS [3]

[3] The court amends its original decision by replacing, on page 17 in the first full paragraph, the word "unreasonably" with "reasonably."

JOHN T. LU, Justice.

INTRODUCTION

***1** The plaintiff, Shirley M. Bachini (Bachini), brought this case against the defendants, A.G. Edwards and Daniel R. Santanello, individually and as an investment broker of A.G. Edwards (Santanello), to recover money the defendants invested on behalf of her son.

After trial, the parties filed various post-trial motions. After considering the parties' arguments and the evidence presented at trial, the court denies the plaintiff's motions for judgment notwithstanding the verdict, for additur, and to amend the verdict. The jury's verdict for the defendants on the negligent misrepresentation and fraud claims were reasonable in light of the evidence because the jury could have found that the defendants' alleged misrepresentations were not actionable opinions or that Bachini did not reasonably rely on the information Santanello provided to her. On the claim under the Uniform Securities Act, G.L. c. 110A, § 410, the jury could reasonably have credited Santanello's testimony and found that he did not make any misrepresentations or omissions of material fact that were necessary to make his statements not misleading to Bachini.

On Counts I (breach of contract) and II (breach of fiduciary duty), the court concludes that the defendants met their burden of proof on the affirmative defense of ratification. The court allows the defendants' motions for judgment notwithstanding the verdict, to set aside the verdict, and to amend/clarify the verdict, because the jury's finding that Bachini ratified her investments bars her recovery on Counts I and II.

On Bachini's G.L. c. 93A claim (Count VII), the court concludes that the defendants did not engage in any unfair or deceptive acts or practices in their dealings with

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Bachini. Santanello acted negligently in failing to accurately determine Bachini's risk tolerance, but this negligence did not rise to the level of an unfair or deceptive act in violation of Chapter 93A. Judgment shall enter for the defendants on Count VII.

BACKGROUND

In June of 2000, Bachini invested $70,000.00 through Santanello, the Vice President and Co-Branch Manager of A.G. Edwards in Peabody. The funds were part of the proceeds of a lawsuit brought by Bachini on behalf of her minor son, Joseph, who was injured by an adverse reaction to a vaccine.

On behalf of Bachini, Santanello invested in a mutual fund and three unit trusts: $20,000 in Goldman Sachs Trust Internet Toll Keeper, $15,000 in FT Internet Growth Portfolio No. 10, $15,000 in Worldwide Wireless First Trust Series Portfolio 415, and $20,000 in the Nuveen Legacy Five-Year Portfolio.

Bachini's technology investments were eventually severely reduced in value by the "Internet bubble burst," which began in March of 2000. By October of 2000, Bachini's account was down from $73,402.57 to $68,718.48, about $1,200.00 from the original $70,000 invested.

Bachini testified at trial that she requested the money be invested conservatively. Santanello testified that Bachini did not state that she wanted only conservative investments and that she could not take risks. Santanello noted on Bachini's intake card that her investments were "growth aggressive." The account statements that Bachini received until March of 2001, however, indicated that her investments were "growth conservative."

***2** Around October 18, 2000, Bachini found out that her investments were more aggressive and riskier than she had thought.

Beginning on October 19, 2000, Bachini and her husband called A.G. Edwards. Bachini spoke by telephone to Padraic Murray (Murray), an A.G. Edwards customer-service representative, and said that she was unhappy with her investments and that they were more aggressive than she wanted. Bachini testified that she initially told Murray that she wanted the funds to be sold as soon as they reached $70,000.00, but later decided to hold onto the investments based on the advice of Santanello.

The value of Bachini's investments continued to decline, and on August 6, 2002, Bachini liquidated her account, which had a balance of $15,251.92.

Bachini filed suit on May 23, 2003. Trial began on June 7, 2007 and on June 26, 2007, the jury returned a verdict in the form of answers to special questions. On Bachini's breach of contract claim (Count I), the jury found for Bachini and awarded $18,636.00 in damages. The jury also found that Bachini ratified her investments by choosing to remain in them, and that she failed to mitigate her damages. The jury reduced Bachini's damages by $17,136.00 for her failure to mitigate for a total award of $1,500.00. The jury also found that Bachini did not waive her right to recover and was not estopped from making her claims.

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On Bachini's breach of fiduciary duty claim (Count II), the jury found that the defendants breached their fiduciary duty to Bachini and awarded $18,636.00 in damages. The jury also found, however, that Bachini ratified her investments and failed to mitigate her damages. The jury also reduced Bachini's damages on this Count by $17,136.00 for her failure to mitigate. The jury did not find that Bachini waived her right to recover or was estopped from bringing this claim.

On Counts IV and V for negligent and fraudulent misrepresentation, the jury found that the defendants did not make a false statement to Bachini regarding a fact that a reasonable person would consider important to the decision that Bachini was about to make.

On Count VI for violation of G.L. c. 110A, § 410, the jury found that the defendants did offer to sell a security in Massachusetts, but that the defendants did not make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made not misleading.

DISCUSSION

I. *Standards*

A. Motion for Judgment Notwithstanding the Verdict

A party who has previously moved for a directed verdict and been denied may then move for judgment notwithstanding the verdict "[n]ot later than 10 days after entry of judgment." Mass. R. Civ. P. 50(b). Judgment notwithstanding the verdict "should be granted 'cautiously and sparingly,' and should only be granted if the trial judge is satisfied that the jury 'failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law.' " *Netherwood v. Am. Fed'n of State, County & Mun. Employees, Local 1725,* 53 Mass.App.Ct. 11, 20 (2001) (quoting Wright & Miller, Federal Practice & Procedure § 2524, at 542 (1995) & *Turnpike Motors, Inc. v. Newbury Group, Inc.,* 413 Mass. 119, 127 (1992)). When deciding a defendant's motion for judgment notwithstanding the verdict, "the judge's task, 'taking into account all of the evidence in its aspect most favorable to the plaintiff, [is] to determine whether, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, the jury reasonably could return a verdict for the plaintiff.' " *DeSantis v. Commonwealth Energy Sys.,* 68 Mass.App.Ct. 759, 762 (2007) (quoting *Totsi v. Ayik,* 394 Mass. 482, 494 (1985)).

B. Motion to Amend the Verdict/Motion for Additur

***3** "[R]ule 59(e) is designed to correct judgments which are erroneous because they lack legal or factual justification." *Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm'n,* 394 Mass. 233, 237 (1985). An additur is appropriate:

> "only when [the trial judge] concludes that the verdict is sound except for inadequacy of the amount and the inadequacy is such as to descend to the level of unreasonableness. An unduly slim verdict,

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> however, may signal the existence of other defects in the work of the jury, or mistakes by the judge. In such a case additur would not be appropriate, and a simple new trial would be called for ."

Freeman v. Wood, 379 Mass. 777, 785-786 (1980). The court has considerable discretion in ruling on a motion for additur. *Tilton v. Union Oil Co. of Cal.,* 64 Mass.App.Ct. 115, 119 (2005), rev. denied, 445 Mass. 1104 (2005).

II. *Defendants' Motions*

The Defendants move under Mass. R. Civ. P. 50(b) for judgment notwithstanding the verdict on Counts I and II, or in the alternative, to amend or clarify the judgment under Mass. R. Civ. P. 59(e). The Defendants make two arguments for why they are entitled to judgment on Count II, breach of fiduciary duty. First they argue that the jury's finding of ratification is a complete bar to Bachini's recovery as a matter of law. Second they argue that Count II should also be set aside because no fiduciary relationship existed between Santanello and Bachini and even if it did, there was no evidence presented at trial that the defendants breached that duty. Because the issue on Count II is disposed of entirely by the jury's finding of ratification, the court does not reach the defendants' argument that Bachini failed to show the existence of a fiduciary relationship.

On Count I, the defendants argue that the jury's finding of ratification also bars Bachini's recovery for breach of contract. In the event that the court does not set aside the jury's verdict on Count I, the defendants request that the court clarify the jury's verdict on this count and declare that the verdict applies only against defendant A.G. Edwards and not against Santanello because there is no claim that Santanello was acting in his individual capacity.

A. Ratification

Ratification of an agent's acts can be express or implied, and the principal generally must have full knowledge of all material facts. *Blais v. Independence Inv. Assocs., Inc.,* Civil No.2001-4484, 2005 WL 705836, *1 (Middlesex Super. Ct. Feb. 7, 2005) (Murtagh, J.) (to prevail on affirmative defense of ratification or waiver, defendant must show that plaintiff investor had full knowledge of defendant's deviation from his desired conservative portfolio strategy such that plaintiff ratified or waived objection to the higher risk stock transactions); *Inn Foods, Inc. v. Equitable Co-Operative Bank,* 45 F.3d 594, 597 (1st Cir.1995) (applying Massachusetts law); *Van Syckle v. C.L. King & Assocs., Inc.,* 822 F.Supp. 98, 104 (N.D.N.Y.1993) ("Ratification of unauthorized trading occurs only when it is clear from all the circumstances that the customer intends to adopt the trade as his own. Knowledge of the pertinent facts and the clear intent to approve the unauthorized action is a precondition to ratification.").

***4** The defendants are correct that an investor who is found to have ratified her investments is barred from recovering for

losses on those investments. See, e.g., *Krinsky v. Whitney,* 315 Mass. 661, 667 (1944) (plaintiff investor lost his right to rescind the contract and get his money back based on allegations of fraud because he did not object within a reasonable time to the defendant's selling his securities when he knew that the market was falling. The plaintiff "could not stand by and withhold deciding until it appeared whether the account would prove profitable or otherwise"); *Nash v. J. Arthur Warner & Co., Inc.,* 137 F.Supp. 615, 616, 618 (D.Mass.1955) (plaintiff investors could not recover under Securities Act and Securities Exchange Act or under the common law for breach of a duty because plaintiffs did not seasonably object to the transactions despite having knowledge of the transactions from confirmation slips and account statements); *Ocrant v. Dean Witter & Co., Inc.,* 502 F.2d 854, 857-859 (10th Cir.1974) (investor was barred from recovery based on breach of contract for losses from unauthorized investments where investor did not object to the investments for several months despite having received, but not read, monthly account statements indicating that the transactions had been made); *Altschul v. Paine, Webber, Jackson & Curtis, Inc.,* 518 F.Supp. 591, 594 (S.D.N.Y.1981) (investor who acquiesced in the management of his investments ratified the transactions conducted on his behalf and could not recover for investment losses); *Ferguson v. Francis I. duPont & Co .,* 369 F.Supp. 1099, 1101 (N.D.Tex.1974) (plaintiff was not entitled to recover for losses on unauthorized securities transactions because plaintiff ratified the defendants' actions).

The jury here found that Bachini ratified her investments by choosing to remain in them; this ends the court's inquiry. As a matter of law, the jury's finding of ratification is a complete bar to Bachini's recovery on her breach of contract and breach of fiduciary duty claims. See *Krinsky,* 315 Mass. at 666-667 (no right to rescind contract where investor found to have ratified his investments); *Carr v. Warner,* 137 F.Supp. 611, 612, 614-615 (D.Mass.1955) (plaintiff investor barred from seeking recovery for breach of contract, "breaches of a relation of trust," and violations of the Securities Act where she ratified her investments); *Gordon v. duPont Glore Forgan Inc.,* 487 F.2d 1260, 1262 (5th Cir.1973), cert. denied, 417 U.S. 946, (investor "who knows of his broker's breach of duty and takes no action will be barred from bringing suit.") (citing *Hayden, Stone Inc. v. Brown,* 218 So.2d 230 (Fla.Dist.Ct.App.1969)); *Herman v. T & S Commodities, Inc.,* 592 F.Supp. 1406, 1417 (S.D.N.Y.1984). See also *Linkage Corp. v. Trustees of Boston Univ.,* 425 Mass. 1, 18 (1997) ("Ratification relates back, and has the same effect, as a prior grant of authority by the principal to the agent."), cert. denied, 522 U.S. 1015; 12 Am.Jur.2d, Brokers § 185 (2008) ("If proven, ratification is a complete defense to unauthorized trading by a broker.") (citing *Elwood v. Mid State Commodities, Inc.,* 404 N.W.2d. 174, 179 (Iowa 1987) (ratification bars investors' recovery against broker on claims for unauthorized trading)); Alperin, Summary of Basic Law, § 1.38, at 49 (2006) ("Once the affirmance has occurred, the principal, or ratifier, is bound just as if the agent's original act had been authorized; the ratification relates back to the time the act was done.") (citing Restatement (Second) of

Agency § 82, cmt. c).

***5** The jury found that Bachini ratified her investments, Bachini waived her right to rescind and is now barred from recovery on her breach of contract and breach of fiduciary duty claims. Her damages on those claims shall be reduced to zero.

II. *Plaintiff's Motions*

In her motions under Mass. R. Civ. P. 50(b), 59(e), and 59(a) for, respectively, judgment notwithstanding the verdict, to amend the verdict, and for additur, Bachini moves for exactly the same relief. The court will address her motions together in the interest of efficiency since they request the same relief for the same reasons.

A. Inconsistency of Verdicts on Counts I and II

Bachini argues that the jury's finding of control under Count II, breach of fiduciary duty, is inconsistent with its damages award of $18,636 and its reduction of damages by $17,136 on Count I, breach of contract.[4] Bachini argues that the jury's reduction of her damages on the breach of contract claim for her failure to mitigate is inconsistent with the jury's finding on Count II that the defendants had control over the account and that Bachini reasonably relied on the defendants' expertise. Bachini contends that as a matter of law, she is entitled to damages of $69,000, an amount which will put her in as good a position financially than if the defendants had not breached their contract by failing to make a proper suitability determination.

4 The jury awarded Bachini $18,636 on Counts I and II. This represents the amount of money Bachini's account was down by in December of 2000, when Murray informed Bachini that she could sell the investments to avoid losing money.

Because the court has determined that Bachini cannot receive damages on Counts I and II as a matter of law based on the jury's finding of ratification, the court need not reach Bachini's argument that the jury's findings on Counts I and II are inconsistent.

The jury's award and reduction of damages on the breach of contract claim are not inconsistent with the jury's finding that the defendants breached their fiduciary duty. Based on the evidence, the jury could have found that the defendants breached the contract and their fiduciary duty owed to Bachini by investing in higher risk investments than Bachini wanted. However, the jury was also reasonable in limiting Bachini's damages to those incurred before she knew that the investments were higher risk. In October of 2000, Bachini found out that her investments were more aggressive, and could have sold her investments at that time to avoid further losses. By December, Bachini knew, from talking to Murray, that she could sell the investments to avoid losing more money. The jury could have found that the defendants did not have control over Bachini's investments in the sense that they prevented her from selling them. Rather, Bachini *could* sell but instead chose to remain in the investments. The jury was entitled to assess the reasonableness of

her decision to stay in the investments based on the advice of defendants. The jury's reduction of her damages because of her failure to mitigate damages by staying in the investments and not selling sooner was reasonable.

B. Defendants' Failure to Meet Burden of Proof on Affirmative Defenses

***6** Bachini argues that the defendants failed as a matter of law to prove her intent to ratify. Bachini again argues that she could not have ratified her investments because the defendants had control over them. Based on the evidence, the jury could have found that Bachini ratified her investments by not selling when she learned that the investments were higher risk. See *Linkage Corp.,* 425 Mass. at 18 ("Where an agent lacks actual authority to agree on behalf of his principal, the principal may still be bound if the principal acquiesces in the agent's action, or fails promptly to disavow the unauthorized conduct after disclosure of material facts.").

On October 18, 2000, Bachini found out that her investments were more aggressive than she thought. She could have sold her investments to avoid further losses. By December, Bachini knew, from talking to Murray, that she could sell the investments to avoid losing more money. Bachini elected to remain in the investments. The jury could have found from this evidence that although Santanello "controlled" Bachini's account in the sense that he owed her a fiduciary duty, this control did not prevent Bachini from selling her investments once she learned that they were aggressive. The jury's verdict reflects this analysis, as the jury found that although Santanello owed Bachini a fiduciary duty, Santanello's liability for breach of fiduciary duty had to be reduced because Bachini ratified her investments and failed to mitigate her damages.

Bachini also argues that the defendants did not meet their burden of proof on mitigation of damages. She argues that her efforts to mitigate were reasonable as a matter of law, because she called A.G. Edwards beginning in October of 2000. She also states that it was reasonable for her to rely on defendants' optimistic financial reports and assurances that the market would turn around, particularly in light of the jury's finding that defendants breached their fiduciary duty.

The court need not reach this argument, as the jury's finding of ratification bars Bachini from recovering any damages on Counts I and II.

There was sufficient evidence to support the defendants' affirmative defense of failure to mitigate damages. The jury was reasonable in reducing Bachini's damages due to her failure to mitigate beginning when she learned in October that her investments were not conservative. As previously explained, the finding that Bachini did not mitigate her damages is not inconsistent with the jury's finding that the defendants breached their fiduciary duty; the jury could have found that the defendants breached their fiduciary duty by making higher risk investments than Bachini wanted and also could have reasonably found that despite defendants' improper selection of investments, Bachini breached her obligation to mitigate damages once she learned about the level of risk of

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the investments.

C. Negligent Misrepresentation Claim

Bachini argues that the court should vacate the jury's finding for the defendants on Count IV for negligent misrepresentation, and enter judgment in her favor. Bachini argues that the defendants misrepresented, among other things, that her investments were appropriate for her circumstances, and that the market would soon turn around.

***7** To recover on her claim for negligent misrepresentation, the plaintiff must establish that the defendants (1) in the course of their business (2) supplied false information when guiding the plaintiff (3) in her business transactions, (4) which caused pecuniary loss to the plaintiff (5) by her justifiable reliance on the information, and (6) defendants did so without exercising reasonable care or competence in obtaining or communicating the information. *Marram v. Kobrick Offshore Fund, Ltd.,* 442 Mass. 43, 59 n. 25 (2004). Statements of expectation, estimate, opinion, or judgment may not form the bases of a claim for misrepresentation. *Zimmerman v. Kent,* 31 Mass.App.Ct. 72, 79 (1991).

Based on the evidence presented at trial, the jury was reasonable in finding that the defendants were not liable for negligent misrepresentation. Not only could the jury have found that the defendants' alleged misrepresentations were inactionable opinions, expectations, or judgments, see *id.,* but the jury also could have found that Bachini was not justified in relying on the information, as she received full prospectuses in the mail detailing the risks of her investments after the June 2000 initial meeting. The jury also could have credited Santanello's testimony that Bachini did not state at their June meeting that she wanted only conservative investments, that she could not withstand any risks, and that she needed the money for Joseph's on-going needs. The court cannot disturb the jury's verdict where, based on the evidence, the jury appears to have exercised " 'an honest and reasonable judgment in accordance with the controlling principles of law.' " *Netherwood,* 53 Mass.App.Ct. at 20 (2001) (quoting Wright & Miller, Federal Practice & Procedure § 2524, at 542 (1995) & *Turnpike Motors, Inc. v. Newbury Group, Inc.,* 413 Mass. 119, 127 (1992)).

D. Fraud Claim

Bachini argues that the court should vacate the jury's finding for the defendants on Count V, fraud, and enter judgment in her favor.

To establish a claim for fraud, the plaintiff must show that the defendant " 'made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to [her] damage.' " *Stolzoff v. Waste Systems Int'l, Inc.,* 58 Mass.App.Ct. 747, 759 (2003) (quoting *Danca v. Taunton Sav. Bank,* 385 Mass. 1, 8 (1982)). The plaintiff must also show that her reliance on the misrepresentation was reasonable. *Id.* at 760. As with a claim for negligent misrepresentation, "[a] statement on which liability for fraud may be based must be one of fact; it may not be one of opinion, or conditions to exist in the

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future, or matters promissory in nature." *Id.* at 759.

The jury was warranted in finding that the defendants were not liable for negligent misrepresentation, the jury was also reasonable in finding that the defendants were not liable for fraud. In short, the jury could have found that the defendants' alleged false statements were mere statements of opinion or predictions of future conditions. There was also no evidence presented from which the jury could infer that Santanello purposefully did not disclose his commissions to Bachini in order to deceive her, or that he made other material misrepresentations for the purpose of having her investment portfolio fail. The jury's verdict shall stand.

E. Claim Under G.L. c. 110A, § 410

***8** Bachini argues that the court should vacate the jury's finding for the defendants on her claim under the Uniform Securities Act, G.L. c. 110A, § 410. Bachini argues that Santanello offered and sold securities to her by means of untrue statements of material fact or omissions of material fact. Bachini argues that Santanello stated that the investments were diversified when they were not and provided her with advice and materials that were inaccurate given the volatility of the high tech and Internet stock markets at that time. She also argues that Santanello violated the Act by failing to provide her with full prospectuses at the June 2000 meeting.

General Laws c. 110A, § 410(a)(2) states:

> "Any person who ... offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him...."

In their answers to the special questions, the jury found on Count VI that the defendants did offer to sell a security in Massachusetts, but did not make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made not misleading. Bachini's argument that Santanello made misrepresentations fails for the same reasons that her negligent misrepresentation and fraud claims fail. The jury was entitled based on the evidence to find that Santanello did not make any misrepresentations of material fact. Although Bachini's expert opined that her investments were not diversified, Santanello testified that they were diversified. The jury was entitled to credit Santanello's testimony instead of Bachini's expert.

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Regarding Bachini's contention that Santanello provided her with advice and information that was misleading and outdated in light of the Internet bubble burst of March of 2000, the jury could have credited Santanello's testimony that he informed Bachini of the risks of each investment, including that the Internet and wireless investments had the highest risk. To the extent that Bachini is arguing that Santanello's assurances painted a more optimistic picture of the state of the stock market than was true in June 2000, puffery or sales talk regarding the likelihood of Bachini's portfolio's success cannot by itself form the basis for a claim under G.L. c. 110A, § 410. See *Marram,* 442 Mass. at 57 n. 24 (opinions or beliefs are generally not actionable unless they are inconsistent with facts known at the time the opinion or belief is stated).

Bachini also argues that the defendants violated the Securities Act by failing to provide full prospectuses at the time of sale. However, she cites to no case establishing this proposition. The district court case from the Southern District of Indiana that Bachini does cite, *Pyle v. White,* 796 F.Supp. 380, 387 (S.D.Ind .1992), is not only not binding on this court, but also concerned the application of the Indiana Securities Act.

***9** In *Pyle,* the court addressed whether the jury could consider the *complete failure* to deliver a prospectus in determining whether there was a violation of the Securities Act. *Id.* at 382-383. The court rejected the argument that the failure to provide full prospectuses was a *per se* violation of the Securities Act, and instead held that the failure is a factor that the jury can consider in determining whether there has been a violation. *Id.* at 387. Even if *Pyle* was binding on this court, which it is not, *Pyle* would not change the outcome in this case because it did not hold that the failure to provide full prospectuses at the time of sale is a violation of the Securities Act. Rather the court held that the jury could consider this failure as a factor in its analysis. *Id.* at 386-387. Here, not only was the jury able to consider the defendants' delay in providing the full prospectuses, in determining whether the defendants sold securities to Bachini, by means of an omission of information necessary to inform Bachini of the risks of the investment, but unlike in *Pyle,* in addition to providing Bachini with abbreviated prospectuses at the time of sale, the defendants mailed Bachini full prospectuses within a week of the sale.

The court does conclude that the jury acted reasonably, in finding that Santanello did not make a misrepresentation or omission of a material fact necessary to make the statements made not misleading. See G.L. c. 110A, § 410(a)(2). The court will not disturb the jury's verdict on the Securities Act claim.

III. *G. L. c. 93A Claim*

Bachini seeks damages against the defendants for violation of the Massachusetts Consumer Protection Act, G.L. c. 93A, § 9. Bachini argues that Santanello committed unfair or deceptive acts by putting her son's money in high-risk investments despite knowing that Bachini wanted conservative, low-risk investments and stating to Bachini that the investments

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were safe. She contends that Santanello: purposefully stated on her intake form that her investment objective was growth aggressive despite Bachini's indication that she wanted conservative investments; misstated her previous investment experience and net worth on her intake card that led to an inaccurate suitability determination; and gained her trust, then advised her to purchase undiversified investments based on false assurances that the investments were safe.

With the agreement of the parties, the court reserved Bachini's c. 93A claim at trial, and will now make its findings and rulings on this claim. In making its findings, the court is not constrained by the jury's findings on the common law claims, as the jury's findings do not have a preclusive effect on the c. 93A claim. *Chamberlayne Sch. & Chamberlayne Junior Coll. v. Banker,* 30 Mass.App.Ct. 346, 354-355 (1991).

A. *FINDINGS OF FACT*

Based on all of the evidence presented at trial and reasonable inferences from the evidence, the court finds the following facts:

***10** (1) Bachini is a teacher, with a bachelor's degree and a master's degree in education.

(2) In June of 2000, Bachini invested $70,000.00 with Santanello, the Vice President and Co-Branch Manager of A.G. Edwards in Peabody. At the time, Santanello had over seventeen years of experience as a financial consultant. The funds were part of the proceeds of a lawsuit brought by Bachini on behalf of her son, Joseph, who was injured by an adverse reaction to a vaccine. The $70,000 was a portion of the first $100,000 payment the Bachinis received; the Bachinis were to receive three more payments of $100,000 each before Joseph turned eighteen, as long as Joseph survived. Bachini was the court-appointed guardian of the proceeds.

(3) At their June 1, 2000 meeting, Santanello filled out an intake form (account card) on Bachini. Santanello went through the form generally with Bachini, and unintentionally put some inaccurate information in it. He checked off growth aggressive on the card and noted that Bachini's net worth was $400,000 excluding residence. This figure was inaccurate as her net worth was significantly lower. The card also stated that the type of account was a guardianship and that Bachini had invested in stocks/bonds for the past ten years and in certificates of deposits (CDs) for fifteen years. Based on Bachini's husband, William John Bachini's, previous investment experience with another brokerage firm, Santanello recorded the information about Bachini's experience with stocks and bonds correctly. However, Santanello incorrectly recorded Bachini's prior experience with savings bonds as experience with CDs. Bachini did not have any experience with CDs. Bachini did not review the intake form at the meeting.

(4) The court credits Bachini's testimony that she gave Santanello essentially

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correct information on her financial background.

(5) Bachini did not tell Santanello to, or want to invest the proceeds conservatively, did not tell him that she wanted to use the money over a period of fourteen years to fund Joseph's college education and for his ongoing needs, and also did not tell him that she could not tolerate risk well.[5] She did not tell Santanello that she wanted "little more than a savings account because she didn't know what the future would hold."

5 Bachini actually needed a small amount of the investment for her son's ongoing needs but at the time of the meeting, she did not know how small her son's legitimate need for funds from the settlement would be.

(6) Santanello did not, however, seek to determine Bachini's risk tolerance, which was very low. His failures to accurately determine Bachini's risk tolerance and accurately record her financial information were unintentional and not based on an intent to deceive.

(7) Bachini did not explicitly discuss investing "conservatively" in mutual funds, but they did discuss "household names" such as GE and Home Depot, as well as more speculative investments in Internet, wireless, and "Tollkeepers." The court credits Bachini's testimony that she trusted and relied on Santanello when he told her that he would "take care of Joseph" and would put the money where he put his wife's and children's money.

***11** (8) Bachini was an unsophisticated investor that wanted the potentially high returns of the investments Santanello championed without their unacceptable level of risk.

(9) Santanello explained to Bachini, in a general fashion, how he was going to set up the investments and where he was going to invest the money.

(10) Santanello thought, mistakenly, that the investments were somewhat diversified. He told Bachini that she had specialty funds in wireless and the Internet, which he stated had the highest risk.

(11) Santanello did not fully disclose the risks of the investments which he did not fully appreciate because he himself was caught up in the Internet boom.

(12) Santanello provided Bachini with a folder containing marketing materials on the investment experience of A.G. Edwards compared to other investment brokers, which indicated that A.G. Edwards was top-ranked. Bachini also took home abbreviated prospectuses on some of the investments.

(13) Santanello did not inform Bachini, in any detail, of the commissions he would receive from the investments.

(14) On behalf of Bachini, Santanello invested in a mutual fund and three unit

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trusts: $20,000 in Goldman Sachs Trust Internet Toll Keeper, $15,000 in FT Internet Growth Portfolio No. 10, $15,000 in Worldwide Wireless First Trust Series Portfolio 415, and $20,000 in the Nuveen Legacy Five-Year Portfolio. Of the $70,000 invested, $30,000 was invested in wireless and Internet. The Nuveen Legacy Five-Year Portfolio was the more conservative of the investments. The technology investments were drastically affected by the "Internet bubble burst," which began in March of 2000.

(15) Bachini's intent was to broker the purchase of securities by the plaintiff and to achieve large increases in the securities' value. Despite several significant errors, he did not intentionally deceive the Bachinis.

(16) Notwithstanding any labels attached to the investments by the defendants Santanello and A.G. Edwards, the investments were largely inappropriate for Bachini because of her lack of investment experience, perspective, and risk intolerance.

(17) The quarterly statement Bachini received from A.G. Edwards stated that the investments were "growth conservative."

(18) Bachini received full prospectuses in the mail about one week after the investments were made.

(19) The value of the investments soon began to decline, and by October of 2000, Bachini's account was down from $73,402.57 to $68,718.48, about $1,200.00 from the original $70,000 invested. On October 18, 2000, Bachini called Santanello and asked to see her intake form. A.G. Edwards did not provide her with the form.

(20) Around October 18, 2000, as a result of a conversation between William Bachini and his stockbroker, Shannon Smith, Bachini believed that her investments were very aggressive and high risk.

(21) Beginning October 19, 2000, Bachini and her husband called A.G. Edwards. Bachini spoke by telephone to Murray, an A.G. Edwards customer-service representative, and said that she was unhappy with her investments and that they were more aggressive than she wanted. Murray reviewed the account-activity statements and contacted Santanello to find out why the account was labeled growth conservative when the intake form noted growth aggressive. Santanello told Murray that the information had not been inputted into the computer accurately. On October 25, Bachini told Murray that she wanted the funds to be sold as soon as they reached $70,000 .00.

***12** (22) Murray concluded, after conducting an investigation, that while some of the investments were aggressive, the investments on the whole were not overly aggressive.

(23) On December 20, when the

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account was down to $48,364.39, Murray told Bachini that she could sell to avoid losing more money. Murray told Bachini that A.G. Edwards was not going to return her full investment. During the investigation, as provided by A.G. Edwards policies, the Bachinis could not speak to Santanello and the Bachinis could not talk to Santanello.

(24) On January 10, 2001, Santanello visited the Bachinis at their home and advised them to stay the course and not sell because the Internet was not going away. The court does not credit the Bachinis' testimony that Santanello told them that they could not sell the trust investments for five years. Santanello brought to the meeting a financial analysis he prepared on Bachini's investments and other information on whether technology sectors would rebound.

(25) Bachini called Murray in January 2001 and told him that she was happy with Santanello's explanation of the account and that she would remain in the investments.

(26) In March of 2001, Santanello met with the Bachinis at their home. Santanello brought a financial analysis he created on Bachini's investments and advised them to remain in the investments.

(27) On March 8, 2001, Santanello changed the coding of Bachini's account from "growth conservative" to "growth aggressive." Bachini called Santanello after she received the notice of the change in coding on her account, and stated that she did not ask for this and wanted the account to be growth conservative.

(28) In February of 2002, Bachini went to A.G. Edwards and requested $3,000 from her account. $3,045.29 was sold from the Nuveen Legacy Fund on February 27, 2002.

(29) On August 6, 2002, Bachini liquidated her account, which had a balance of $15,251.92.

(30) On August 8, 2003, Bachini, through her attorney, sent the defendants a Chapter 93A demand letter seeking a full reimbursement of the $70,000 invested minus the money Bachini received from selling a portion of her investment in February of 2002 and minus the amount left over when she closed her account.

(31) The defendants responded to Bachini's demand letter on September 8, 2003 and denied any liability, but offered $9,500.00 in settlement of Bachini's claim. Bachini did not accept the offer of settlement, and filed suit.

B. *LEGAL DISCUSSIONS*

General Laws c. 93A, § 2(a) makes unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce." "Courts have deliberately avoided setting down a clear definition of conduct constituting a violation of G.L. c. 93A." *Spence v. Boston Edison Co.,* 390 Mass. 604, 616 (1983). " 'It has been

held, generally, that for conduct to violate the standard of § 2(a), (1) it must fall 'within at least the penumbra of some common-law, statutory, or other established concept of fairness,' (2) it must be unethical or unscrupulous, and (3) it must cause substantial injury to a consumer or another businessman.' " *Wasserman v. Agnastopoulos,* 22 Mass.App.Ct. 672, 679 (1986) (quoting *PMP Assocs., Inc. v. Globe Newspaper Co.,* 366 Mass. 593, 596 (1975)), rev. denied, 398 Mass. 1105 (Oct. 30, 1986). Mere negligence is not a violation of c. 93A; however, a deceptive act resulting from a defendant's negligence is. *Linthicum,* 379 Mass. at 388; *Squeri v. McCarrick,* 32 Mass.App.Ct. 203, 207 (1992).

***13** Santanello and A.G. Edwards are engaged in trade or commerce, as they provide the service of selling securities in Massachusetts. See G.L. c. 93A, § 1 (defining "trade" and "commerce" as including "the offering for sale ... of ... any security [as defined in G.L. c. 110A, § 401(k)]").

Santanello made inaccurate assumptions about Bachini's investment-risk tolerance that caused Bachini to be placed in investments that were much higher risk than she could tolerate. Although his actions and inactions were a contributing factor to Bachini's losses, they did not rise to the level of unfair or deceptive acts or practices under c. 93A. Santanello did not accurately record Bachini's experience with CDs, and also did not correctly record her net worth. Santanello did not gather an accurate picture of Bachini's investment intentions. He did not seek to determine, other than in a superficial way, whether she needed the money in the long or short term, or otherwise determine her risk tolerance. This failure to determine Bachini's risk tolerance was unintentional and resulted from Santanello's negligence. It was also due, in part, to Bachini's failure to inform him that she needed a small amount of the money for her son's on-going needs and that she wanted the money to be invested conservatively (to the extent that she understood the degree of risk associated with "conservative" investments). Although they did discuss "household names" such as GE and Home Depot and other more conservative investments, Santanello informed Bachini that some of the money would be put in more speculative investments such as the Internet, wireless, and "Tollkeepers." Santanello did not discuss in detail the risks of each investment, but Bachini was aware that some of her investments were not conservative.

Santanello's initial recommendations for Bachini and advice to remain in the investments was based on his honest and reasoned judgment as a financial consultant that the market would turn around. Santanello was caught up in the Internet boom like many others, and believed that the market would rebound. Although it is unfortunate that Bachini suffered catastrophic losses, Santanello cannot be liable for these losses under c. 93A because he did not act unfairly or deceptively in serving as her investment broker. Liability under c. 93A does not lie in negligent acts standing by themselves. *Squeri,* 32 Mass.App.Ct. at 207 (negligent act by itself does not give rise to c. 93A

liability; in addition there must be evidence that the negligent act was or resulted in an unfair or deceptive act). Because the evidence at trial revealed only negligent acts, failures to act, or mistakes that do not rise to the level of unfair or deceptive acts, Santanello did not violate c. 93A. Therefore, judgment shall enter for the defendants on this Count.

ORDER

The plaintiff, Shirley M. Bachini, as guardian of her son, Joseph J. Bachini, a minor's, motion for judgment notwithstanding the verdict, motion for additur, and motion to amend the verdict are ***DENIED.*** and the defendants, Daniel R. Santanello, Individually and as an investment broker of AG Edward's, motions for judgment notwithstanding the verdict, to set aside the verdict, and to amend/clarify the verdict are ***ALLOWED.*** Bachini's damages on Count I (breach of contract) and Count II (breach of fiduciary duty) shall be reduced to zero.

***14** Final judgment shall enter for the defendants on Count VII for violation of G.L. c. 93A.

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35 Mass.L.Rptr. 106
Superior Court of Massachusetts, Suffolk, Business Litigation Session.

COMMONWEALTH of Massachusetts
v.
EQUIFAX, INC.

1784CV03009BLS2
|
Caption Date: April 2, 2018
|
File Date: April 3, 2018

MEMORANDUM AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Kenneth W. Salinger, Justice of the Superior Court

***1** This lawsuit concerns a massive breach of databases maintained by Equifax, Inc., as part of its credit-reporting business. Equifax collects, organizes, analyzes, and stores data concerning individual consumers, and then creates and sells "credit reports" and "credit scores" for those consumers. In 2017 hackers infiltrated Equifax's computer systems. They accessed and presumably stole credit card numbers and other personal identifying information belonging to millions of people.

The Commonwealth of Massachusetts, acting through its Attorney General, has sued Equifax on behalf of Massachusetts residents whose personal information was stolen. The Commonwealth alleges that Equifax failed to properly safeguard its databases and failed to provide prompt notice of the data breach. It asserts claims under G.L.c. 93H (the Massachusetts Data Breach Notification Law), 201 C.M.R. § 17.00 et seq. (the Massachusetts Data Security Regulations), and G.L.c. 93A (the Massachusetts Consumer Protect Act).

Equifax seeks to dismiss all claims against it under Mass.R.Civ.P. 12(b)(6). The Court will DENY this motion because the Commonwealth alleges facts plausibly suggesting that Equifax violated Massachusetts law by not taking reasonable steps to protect personal information and by not promptly informing Massachusetts consumers about and taking adequate steps to remedy the data breach.[1]

[1] See generally *Lopez v. Commonwealth,* 463 Mass. 696, 701 (2012) (to survive a motion to dismiss under Mass.R.Civ.P. 12(b)(6), a complaint or counterclaim must allege facts that, if true, would "plausibly suggest[ ] ... an entitlement to relief") (quoting *Iannacchino v. Ford Motor Co.,* 451 Mass. 623, 636 (2008), and *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 557 (2007)).

1. Claims Under G.L.c. 93H and the Implementing Regulations

1.1. Count II Adequately Alleges Violation of Data Security Regulations

Count II of the Commonwealth's complaint alleges that Equifax failed to develop, implement, and maintain an adequate written information security program (or "WISP"), and that this failure made the data breach possible. In particular, the complaint alleges that Equifax knew or should have known by March 7, 2017, that there was a serious security vulnerability in certain open-source computer code that Equifax used in its systems, that Equifax could have but

failed to patch or upgrade its software to eliminate this vulnerability, and that as a direct result hackers accessed and stole personal information from Equifax's databases. The complaint also alleges that Equifax did not even take reasonable steps to determine whether unauthorized parties were infiltrating its computer systems. The Commonwealth alleges that these failures by Equifax violated 201 C.M.R. §§ 17.03 and 17.04.

These allegations state a viable claim for violation of the data security regulations. The Court agrees with Equifax that the mere existence of a data breach "does not translate into a violation of Chapter 93H or the Data Security Regulations." But here the Commonwealth alleges that Equifax knew for months it needed to patch its open-source code in order to keep its databases secure—or at least that it should have been aware that the software provider had provided public notice of the software vulnerability and how to fix it—and that it failed to do so. These allegations plausibly suggest that Equifax breached its legal duties to address all reasonably foreseeable risks to its data security under 201 C.M.R. § 17.03(2)(h), and to implement reasonably up-to-date patches to its software under 201 C.M.R. § 17.04(6) and (7).

***2** Equifax argued for the first time during oral argument that these regulations cannot be applied here because: (i) the statute distinguishes between and imposes different data breach disclosure obligations upon someone "that owns or licenses data that includes personal information," on the one hand, and someone "that maintains or stores, but does not own or license" such data, see G.L.c. 94H, § 3; (ii) the Legislature authorized the Department of Consumer Affairs and Business Regulation (the "Department") to "adopt regulations relative to any person that owns or licenses personal information of residents of the commonwealth," but did not authorize data security regulations to govern entities that maintain or store but do not own or license such information, see G.L.c. 93H, § 2(a); and (iii) although Equifax may store or maintain such personal information, the Commonwealth has not adequately alleged that Equifax "owns or licenses" such information. The Court is not convinced.[2]

2 Although Equifax hinted at this argument in a footnote, it did not develop the point or explain its significance in its original or reply memorandum. Instead, Equifax first articulated the point during oral argument.
Normally this would waive the point. In the Superior Court, moving parties are required by rule to file a written memorandum that includes "a statement of reasons, with supporting authorities, why the motion should be granted." Sup.Ct. Rule 9A(a)(2). This requirement is in part an "an 'anti-ferreting' rule designed to assist a trial judge" in identifying what legal arguments are being pressed by each party. Cf., *Dziamba v. Warner & Stackpole, LLP,* 56 Mass.App.Ct. 397, 399 (2002) (same as to requirement in Rule 9A(b)(5) that summary judgment motions be accompanied by joint statements of material facts).
An undeveloped assertion buried in a footnote does not satisfy the requirements of Rule 9A(a)(2). Cf., *Providence & Worcester R.R. Co. v. Energy Facilities Siting Bd.,* 453 Mass. 135, 140 n.10 (2009) ("Arguments relegated to a footnote do not rise to the level of appellate argument." (quoting *Commonwealth v. Lydon,* 413 Mass. 309, 317–18 (1992)); *Lobisser Bldg. Corp. v. Planning Bd. of Bellingham,* 454

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Mass. 123, 134 n.15 (2009) (a "three-sentence, conclusory argument does not rise to the level of acceptable appellate argument"); *McCullen v. Coakley,* 571 F.3d 167, 182 n.3 (1st Cir. 2009), cert. denied, 130 S.Ct. 1881 (2010) ("avoiding waiver requires more than a hint that a particular theory may be lurking, it necessitates some developed argumentation addressed to that particular theory").
The Court will nonetheless address the merits of this argument, or the lack thereof, because it has now been fully addressed both orally and in post-hearing letters by both sides.

The facts alleged by the Commonwealth plausibly suggest that Equifax owns or licenses data containing personal information, for purposes and within the meaning of § 93H and the data security regulations. The Commonwealth alleges that the "primary business" of Equifax "consists of acquiring, compiling, analyzing, and selling sensitive and personal data." It asserts that "Equifax largely controls how, when, and to whom the consumer data it stockpiles is disclosed." The complaint further alleges that Equifax maintains proprietary databases that contain "consumer names, addresses, full social security numbers, dates of birth, and for some consumers, driver's license numbers and/or credit card numbers." And it contends that Equifax uses this data to create and sell "credit reports" that include this and other personal information. All of these subsidiary allegations readily support the Commonwealth's express allegation that "Equifax owned or licensed personal information of at least one Massachusetts resident."

An entity that creates and owns proprietary databases containing consumers' personal information would appear to "own" that information within the meaning of G.L.c. 93H. As noted above, the statute distinguishes entities that merely "maintain" or "store" personal information from those that have an ownership interest in the data. Companies that offer cloud storage services, for example, may and probably do maintain and store personal information that they cannot sell or otherwise control as owners. In contrast, Equifax allegedly maintains its own proprietary database and sells reports containing consumers' personal information.

***3** These allegations plausibly suggest that Equifax should be treated as an "owner" of this database and the personal information it contains for the purposes of G.L.c. 93H, even if the underlying data themselves belong to someone else or have been shared and thus are no longer confidential.[3] Compare *New England Overall Co. v. Woltmann,* 343 Mass. 69, 77 (1961) (employer had proprietary interest in confidential customer database) with *American Window Cleaning Co. of Springfield, Mass. v. Cohen,* 343 Mass. 195, 199 (1961) ("Remembered information as to the plaintiff's prices, the frequency of service, and the specific needs and business habits of particular customers was not confidential") and *DiAngeles v. Scauzillo,* 287 Mass. 291, 297–98 (1934) (employer may own written list of customers, even though it cannot own employee's memory or personal notes of client information).

3 The Court therefore need not and does not reach the Commonwealth's further argument that the Department's authority to promulgate data security regulations is not limited to entities that own or license personal information, but extends to entities that only maintain or store such data.

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1.2 Count I Adequately Alleges Untimely Disclosure

Count I alleges that Equifax violated the Massachusetts Data Breach Statute by failing to provide prompt notice to the Attorney General, the Department, and affected individual consumers about the data breach. The Commonwealth alleges that Equifax knew or should have known about the data breach by July 29, 2017; and that Equifax waited to provide the required notice until September 7, 2017. It further alleges that Equifax did not provide notice "as soon as practicable and without unreasonable delays" as required by G.L.c. 93H, § 3(b).[4]

[4] The Legislature has authorized the Attorney General to bring suit under G.L.c. 93A, § 4, "to remedy violations of" the Data Breach Statute. See G.L.c. 93H, § 6.

Equifax argues that the facts alleged in the complaint do not plausibly suggest that it failed to give the required notice of the data breach without unreasonable delay.

This is not an issue that can be resolved on a motion to dismiss. "[T]he question what constitutes a reasonable time is normally treated as one for the finder of fact"; it is not a question of law that can be decided on a motion to dismiss. See *Cablevision of Boston, Inc. v. Shamatta,* 63 Mass.App.Ct. 523, 526, rev. denied, 444 Mass. 1105 (2005); accord *Loranger Const. Corp. v. E.F. Hauserman Co.,* 6 Mass.App.Ct. 152, 158 (1978). The same is true where a party has a duty to provide notice within a reasonable time after they knew or should have known that some event or condition has occurred. In such a case, "[w]hether the notice was given within a reasonable time was a question of fact" to be decided at trial. *Johnson v. Kanavos,* 296 Mass. 373, 377 (1937); accord *Fortin v. Ox–Bow Marina, Inc.,* 408 Mass. 310, 315 (1990).

1.3. Non–Compliance with Federal Law is Not an Element

In addition, Equifax seeks dismissal of Counts I and II on the alternative ground that the Commonwealth failed to allege that Equifax was not in compliance with federal law.

The data breach act provides that "a person who maintains procedures for responding to breach of security pursuant to federal laws, rules, regulations, guidance, or guidelines is deemed to be in compliance with this chapter if the person notifies affected Massachusetts residents in accordance with the maintained or required procedures when a breach occurs ..." G.L.c. 93H, § 5.

The Commonwealth is not required to allege or prove non-compliance with federal rules as an element of a claim under the data breach statute, however.

Instead, any assertion by Equifax that it is exempt from liability under the statute or regulations, because of the separate safe harbor provision of § 5, is an affirmative defense that must be pleaded and proved by Equifax. "Generally, the party claiming an exemption from the provisions of a statute has the burden to show that it is entitled to the exemption." *Goodrow v. Lane Bryant, Inc.,* 432 Mass. 165, 170 (2000) (employer had burden of proving claimed exemption from overtime pay statute). Thus, where a statute imposes some "duty or obligation," and a "separate or distinct clause or statute" creates an exception to the general rule of liability, "then the party relying on such exception must allege and prove it." *Ansell v. City of Boston,* 254 Mass. 208, 211 (1926); accord *Afienko v. Harvard Club of*

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Boston, 365 Mass. 320, 331 (1974).

2. Claims Under G.L.c. 93A

2.1. Count III Adequately Alleges Violations of c. 93H

***4** In Count III, the Commonwealth alleges that every violation of 201 C.M.R. §§ 17.03–17.04 and of G.L.c. 93H is a separate violation of G.L.c. 93A, and that as a result Equifax should be ordered to pay civil penalties, attorneys fees and costs; to disgorge profits obtained as a result of the data breach; and to comply with a permanent injunction.

Equifax argues that Count III is completely derivative of the claims asserted in Counts I and II, and thus that if the claims under the data security regulations and the data breach act are dismissed the related claim under Count III must also be dismissed. Cf. *Park Drive Towing, Inc. v. City of Revere,* 442 Mass. 80, 85–86 (2004) (where c. 93A claim is based on and derivative of some underlying claim that fails as a matter of law, that 93A claim "must also fail").

But the Court concludes, as explained above, that Counts I and II state viable claims. It follows that Equifax has not shown any ground for dismissing Count III.

2.2. Count IV Adequately Alleges Deceptive Misrepresentations

Count IV alleges that Equifax engaged in unfair or deceptive conduct in violation of G.L.c. 93A by making misrepresentations regarding its efforts to protect personal information held in its databases. According to the Commonwealth, Equifax represented to consumers that it would maintain "reasonable, physical, technical and procedural safeguards to help protect your personal information." But, the Commonwealth alleges, these representations were false and deceptive, because Equifax actually knew it was not taking all reasonable steps to patch its software and protect the personal information contained in its databases.

Equifax argues that this claim should be dismissed for three different reasons. None has merit.

First, Equifax argues that the Commonwealth may not sue for a violation of c. 93A based only on allegations that the efforts made by Equifax to keep its databases secure proved to be inadequate.

The legal premise of this argument is correct as far as it goes. "[A] violation of c. 93A requires, at the very least, more than a finding of mere negligence." *Boyle v. Zurich American Ins. Co.,* 472 Mass. 649, 662 (2015), quoting *Darviris v. Petros,* 442 Mass. 274, 278 (2004). Thus, "a negligent miscalculation" that involved no kind of willful or knowing misrepresentation or deceit does not violate c. 93A. *Id.*

But the Commonwealth alleges more than mere negligence. As explained above, it alleges that Equifax deceived consumers by asserting that it was taking all reasonable steps to keep its data secure when Equifax knew that was not true.

Those allegations plausibly suggest that Equifax engaged in the kind of unfair or deceptive misrepresentations that violate c. 93A. "A negligent misrepresentation of fact may ... constitute an unfair or deceptive act within the meaning of G.L.c. 93A, if the truth could have been reasonably ascertained." *Quinlan v. Clasby,* 71 Mass.App.Ct. 97, 102, rev. denied, 451 Mass. 1103 (2008); accord, e.g., *Briggs v. Carol Cars, Inc.,* 407 Mass. 391, 396–97 (1990); *Golber v. BayBank Valley Trust Co.,* 46 Mass.App.Ct. 256, 261 (1999); *Glickman*

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v. Brown, 21 Mass.App.Ct. 229, 235 (1985). It would therefore be reversible error to dismiss a c. 93A claim based on plausible allegations, like those in this case, that a participant in trade or commerce used negligent misrepresentation to deceive consumers. *Marram v. Kobrick Offshore Fund, Ltd.,* 442 Mass. 43, 62 (2004) (reversing dismissal).

***5** Second, Equifax argues that at least some of its public representations regarding keeping consumers' information secure were mere "puffery" that no reasonable person would take seriously.

This is yet another issue that cannot be resolved as a matter of law and therefore cannot be resolved on a motion to dismiss. See *Marram, supra* (reversing Rule 12(b)(6) dismissal of claim under G.L.c. 93A because whether statements by defendant "are unactionable 'mere puffery' " could not be resolved on the pleadings).

Third, Equifax argues that the Commonwealth has not alleged facts plausibly suggesting that the alleged misrepresentations caused Massachusetts consumers to suffer any actual economic injury.

This argument fails because the Attorney General, unlike a private litigant who sues under § 9 or § 11 of c. 93A, is only required to prove that unfair or deceptive acts or practice took place in trade or commerce; she is not required to prove or quantify resulting economic injury. The Attorney General may seek injunctive relief or civil penalties "[w]henever" she "has reason to believe that any person is using or is about to use" an unfair or deceptive act or practice in violation of the consumer protection act. See G.L.c. 93A, § 4. She is not required to allege or prove that any individual consumer was actually harmed by the allegedly unfair or deceptive act or practice. See *Commonwealth v. Fall River Motor Sales, Inc.,* 409 Mass. 302, 312 (1991); *Commonwealth v. Chatham Development Co., Inc.,* 49 Mass.App.Ct. 525, 528–29, rev. denied, 432 Mass. 1107 (2000).

2.3. Count V's Allegations of Inadequate Response Are Not Moot

Finally, Count V alleges that Equifax has not taken adequate steps to mitigate all the harm caused by the data breach, and that its failure to do so is an unfair or deceptive act or practice that violates G.L.c. 93A.

Equifax disagrees. It insists that its remedial efforts have been more than adequate, and that Count V is therefore moot.

Whether a violation of the consumer protection act has been adequately and completely remedied is not something that can be resolved on a motion to dismiss. Indeed, Equifax fails to cite a single appellate decision affirming or requiring dismissal of a c. 93A on this ground.

ORDER

Defendant's motion to dismiss is DENIED. The Court will hold a Rule 16 scheduling conference with the parties on May 1, 2018, at 2:00 p.m.

All Citations

Not Reported in N.E. Rptr., 35 Mass.L.Rptr. 106, 2018 WL 3013918

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1884CV01808 -BLS2

COMMONWEALTH OF MASSACHUSETTS

vs.

PURDUE PHARMA L.P. & others[1]

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

The Commonwealth commenced this action against Purdue Pharma L.P. and Purdue Pharma Inc. (collectively, Purdue) seeking redress for harms that it claims were caused by Purdue's deceptive marketing and sale of its opioid products in Massachusetts. The First Amended Complaint (the Complaint) also names as defendants current and former Purdue directors, CEOs, and a vice president of sales. All defendants have moved to dismiss the claims against them pursuant to Mass. R. Civ. P. 12(b)(6). This Memorandum concerns only the Motion to Dismiss by Purdue.[2] For the following reasons, this Court concludes that it must be **DENIED**.

BACKGROUND

The Complaint is notable both in its length (274 pages) and its level of detail, including its citation to and quotations from Purdue's own internal communications. This Court only briefly summarizes those allegations, which are taken as true for purposes of this Motion.

[1] Purdue Pharma, Inc., Richard Sackler, Theresa Sackler, Kathe Sackler, Jonathan Sackler, Mortimer D.A. Sackler, Beverly Sackler, David Sackler, Ilene Sackler Lefcourt, Peter Boer, Paulo Costa, Cecil Pickett, Ralph Snyderman, Judith Lewent, Craig Landau, John Stewart, Mark Timney, and Russell J. Gasdia.

[2] The Court expects to issue decisions on the motions made by the individual defendants within the next few weeks.

Purdue manufactures prescription opioid medications used for the treatment of chronic pain. The Complaint largely focuses on Purdue's OxyContin, which is a tablet patients take orally, and which is sold in different dosing strengths. Butrans and Hysingla are Purdue's other opioid products.[3] Purdue's opioid formulations include "extended release" or "long acting" doses because they release the active ingredient into a person's system over time. Other opioids on the market are "immediate release" formulations. Opioids, including Purdue's products, carry several risks to the user, including physical dependence, addiction, and related withdrawal symptoms. Opioids can also cause respiratory depression, which is life-threatening.

Purdue released OxyContin in 1996. In the years thereafter, opioid-related deaths rose across the nation and in Massachusetts in particular. In 2007, after multiple state and federal investigations, a predecessor corporation and three executives pleaded guilty to illegal misbranding. An agreed statement of facts submitted in connection with that plea stated that Purdue supervisors and employees intentionally deceived doctors about OxyContin's addictive properties in the previous six years. Also in 2007, Purdue reached a consent judgment with several states, including Massachusetts (the 2007 Judgment). The 2007 Judgment prohibited Purdue from making "any written or oral claim that is false, misleading, or deceptive" in the promotion or marketing of OxyContin. It also required Purdue to establish and follow an abuse and diversion detection program to identify high-prescribing doctors who show signs of inappropriate prescribing, to stop promoting drugs to them, and to report them to authorities.

In the years following the 2007 Judgment, Purdue, despite its promises, did not substantively alter its deceptive and illegal marketing practices. Rather, it continued to downplay its opioids' propensities for addiction and abuse in its messaging to doctors so as to

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[3] Butrans releases opioids into the body from a skin patch; the Complaint does not describe Hysingla's dosing route.

persuade them to prescribe the opioids at greater frequency, at ever-higher (and more expensive) doses, and for longer treatment durations. Purdue also influenced prescribing to inappropriate patient populations. For example, it promoted opioids for use by geriatric osteoarthritis patients, even though opioids were more dangerous for elderly individuals and studies had not shown opioids to be a more effective treatment for them. According to the Complaint, Purdue knew that its marketing tactics caused more patients to become addicted and substantially increased the likelihood that they would overdose and die. Despite this knowledge, Purdue continued to minimize the dangers associated with the use of its drugs and to make false representations regarding their safety. It did so in order to maximize its profits.

The Complaint goes into extensive detail about Purdue's marketing tactics. For example, Purdue deployed its sales staff to make frequent in-person visits to doctors' offices in Massachusetts, targeting doctors who were already suspected of overprescribing. It dispensed money, meals, or other gifts to prescribers, and paid doctors to act as spokespersons for its opioids. Purdue funded programs at Tufts University and Massachusetts General Hospital in order to influence physicians associated with those institutions. Its sales representatives dispensed savings cards, knowing that their use would encourage patients to stay on opioids longer.

The Complaint alleges that, because of Purdue's unfair and deceptive conduct, the Commonwealth has sustained substantial damage. In particular, the Commonwealth asserts that Purdue's actions significantly contributed to the opioid epidemic in Massachusetts, which has been the cause of thousands of deaths and non-fatal overdoses. Included within the thousands who have died are 671 people who filled prescriptions for Purdue opioids. Those that have survived their addictions have imposed a heavy burden on the Commonwealth: many cannot

work, and they require lengthy and expensive care and treatment, for both themselves and their dependents. The Commonwealth is seeking damages from the defendants to offset the costs of the opioid epidemic, which has been declared a public health emergency in Massachusetts.

DISCUSSION

The standard that this Court applies to the instant motion is well established. Although the complaint must contain more than "labels and conclusions," Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), the ultimately inquiry is whether the plaintiff has alleged facts that are "adequately detailed so as to plausibly suggest an entitlement to relief." Greenleaf Arms Realty Trust, LLC v. New Boston Fund, Inc., 81 Mass. App. Ct. 282, 288 (2012) (reversing lower court's allowance of Rule 12(b)(6) motion). In ruling on the motion, the Court accepts the factual allegations as true and draws all reasonable inferences in the plaintiff's favor. Sisson v. Lhowe, 460 Mass. 705, 707 (2011). Its review is also confined to the four corners of the complaint, with consideration of other materials appropriate only where the complaint attaches them or where they are of the type of which this Court can take judicial notice. Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000).

Many of Purdue's arguments in support of its Motion disregard this standard. A good portion of Purdue's memoranda and a large part of its oral argument dispute the factual basis for the Commonwealth's allegations. For example, it argues that addiction is complex and multifaceted, and that the Commonwealth has itself contributed to the problem. It argues that OxyContin makes up only a small fraction of the opioids prescribed nationally and that Purdue is being unfairly scapegoated for a problem not of its making. Such arguments are better made to the fact finder at trial. They cannot be resolved under Rule 12(b)(6). Purdue also asks this Court to take into account matters beyond the four corners of the Complaint that it says contradict the

Complaint's allegations, citing to findings by the Massachusetts Department of Public Health, for example. This too ignores the standard this Court applies at this early stage of the case. The Court therefore declines to address these arguments, and turns instead to the legal arguments Purdue offers in support of the Motion.

The Complaint asserts two causes of action: violations of G. L. c. 93A (Count I) and public nuisance (Count II). In support of its Motion, Purdue argues that the Complaint fails to state a claim because its allegations conflict with federal law — namely, FDA approval of the opioids at issue. In a related vein, it contends that the challenged conduct is exempt from Chapter 93A because it is a "permitted practice." As to the nuisance claim, Purdue asserts that it fails as a matter of law because there is no allegation that Purdue has infringed on any "public right." More generally, Purdue contends that it cannot be legally liable for harms flowing from prescriptions written by doctors because the "learned intermediary" doctrine breaks the chain of causation between its conduct and the harms alleged. Similar arguments have been raised and rejected in litigation against Purdue proceeding in other states. See, e.g., Alaska v. Purdue Pharma L.P., 2018 WL 4468439 (Alaska Super. Ct. 2018); State of Arkansas v. Purdue Pharma L.P., No. 60CV-18-2018 (Ark. Cir. Ct. Apr. 5, 2019); Minnesota v. Purdue Pharma L.P., No. 27-CV-18-10788 (Minn. Dist. Ct. Jan. 4, 2019); New Hampshire v. Purdue Pharma Inc., 2018 WL 4566129 (N.H. Super Ct. 2018); Ohio v. Purdue Pharma L.P., 2018 WL 4080052 (Ohio C.P. 2018); Oklahoma v. Purdue Pharma L.P., 2017 WL 10152334 (Okl. Dist. Ct. 2017); Tennessee v. Purdue Pharma L.P., No. 1-173-18 (Tenn. Cir. Ct. Feb. 22, 2019); Vermont v. Purdue Pharma L.P., No. 757-9-18 (Ver. Super. Ct. March 19, 2019). In line with these other states, this Court concludes that Purdue's arguments do not support dismissal and offers the following by way of explanation.

1. Conflict with Federal Law

Purdue argues that the Commonwealth's claims conflict with FDA decisions approving the sale of the opioids at issue in this litigation and the labeling that accompanied them. In particular, Purdue maintains that, because the representations and conduct that the Commonwealth claims to be deceptive conform to determinations the FDA made in the exercise of its regulatory authority, then it necessarily follows that those statements are not actionable as a matter of law. Although Purdue does not use the term "preemption," that appears to be the doctrine upon which it is relying. Neither the law nor the facts as alleged in the Complaint support Purdue's position, however.

"In all preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [the court starts] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (alterations removed; internal quotations and citations omitted). Wyeth v. Levine, 555 U.S. 555, 565 (2009). Conflict preemption (which Purdue appears to assert) is a type of implied preemption that "occurs where compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (internal quotations and citations omitted). Reckis v. Johnson & Johnson, 471 Mass. 272, 283 (2015). A party's contention that state law claims are preempted because it is impossible it to comply both with state and federal law has been described as a "demanding defense." Wyeth, 555 U.S. at 573. Purdue falls well short of demonstrating what the case law requires for this type of preemption to apply. In particular, there is nothing about this lawsuit which seeks to impose

restraints on Purdue that would put it at odds with the FDA, or which would make it impossible for Purdue to comply both with federal and state regulations.

This becomes particularly apparent upon a fair reading of the Complaint itself. It does not challenge the contents of the relevant opioid labels, nor does it seek to remove Purdue's opioids from the marketplace. Instead, the Complaint contains numerous allegations that Purdue's marketing activities were *inconsistent* with label warnings. For example, despite prominent warnings in the label concerning the risk of abuse and addiction, Purdue put out publications which sought to minimize those risks in a false and deceptive manner.[4] Its sales force also actively and forcefully marketed opioids for elderly arthritis patients, even though the FDA approved label clearly warned against use in that population.[5]

The Commonwealth points out that courts in other states have rejected similar arguments made by Purdue. See, e.g., Delaware v. Purdue Pharma L.P., 2019 WL 446382 (Del. Super. 2019); Grewal, Attorney General of New Jersey v. Purdue Pharma L.P., 2018 WL 4829660 (N.J. Super. Ct. 2018), and state decisions cited at page 5, supra. Those courts reasoned that there was no conflict between the state and federal law, given the allegations leveled against Purdue that it promoted use of opioids far beyond that which was consistent with the FDA-approved labeling. Purdue makes no effort to explain why the reasoning of these other courts is flawed except to direct this Court to a single decision handed down by a North Dakota court which concluded that federal law did preempt that state's claims against Purdue. See North Dakota v. Purdue Pharma

[4] One Purdue publication cited in the Complaint stated: "addiction is rare in patients who become physiologically dependent on opioids while using them for pain control." Another stated that only "a small minority of people may not be reliable or trustworthy" and therefore not suitable for opioids. A third stated that addiction "is not caused by drugs."

[5] The OxyContin label provides: "Life-threatening respiratory depression is more likely to occur in elderly . . . patients because they may have altered pharmacokinetics or altered clearance compared to younger, healthier patients. . . . Monitor such patients closely, particularly when initiating and titrating OXYCONTIN and when OXYCONTIN is given concomitantly with other drugs that depress respiration . . . . Alternatively, consider the use of non-opioid analgesics in these patients."

L.P., Case No. 08-2018-CV-01300 (May 10, 2019), attached to Purdue's Reply Brief as Exhibit A. This holding appears to be an outlier and is of questionable value, however, particularly given a decision handed down by the United States Supreme Court that same day which clarified the showing a drug manufacturer must make on a claim of "impossibility preemption." Merck Sharp & Dohme Corp. v. Albrecht, ____U.S. _____, 139 S.Ct. 1668 (May 20, 2019).

2. Permitted Practice Under c. 93A

Purdue argues that even if federal law does not preempt the state law claims, it cannot be held liable on a c. 93A claim because the conduct that the Commonwealth challenges is actually permitted by federal law and, as such, is a "permitted practice" exempt from c. 93A liability. In support, it relies on G. L. c. 93A, §3, which expressly exempts from the reach of the statute "transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States." Purdue argues that, because the FDA approved high-dose opioids, the conduct at issue here falls within that § 3 exemption. This Court disagrees, for much the same reasons that it concludes there is no federal preemption.

Section 3 precludes the assertion of a 93A claim "when a regulator authorized to review the defendant's actions has determined that those actions, in particular, were not unfair or deceptive." O'Hara v. Diageo-Guinness, USA, Inc., 306 F. Supp. 3d 441, 454 (D. Mass. 2018), and cases cited therein. A defendant who seeks protection from c. 93A liability under this section bears a "heavy" burden of proving that the exemption applies. Aspinall v. Philip Morris, Inc., 453 Mass. 431, 434 (2009). In particular, the defendant "must show more than the mere existence of a related or even overlapping regulatory scheme that covers the transaction." Bierig v. Everett Sq. Plaza Assocs., 34 Mass. App. Ct. 354, 367 n.14 (1993). Rather, the defendant

must demonstrate that the regulatory scheme "affirmatively *permits* the practice which is alleged to be unfair or deceptive." Id. (italics in original).

The Complaint in the instant case does not describe conduct that has been affirmatively approved by the FDA. Instead, it describes marketing practices that minimized addiction risks, promoted misuse of the drugs, and targeted inappropriate patient populations — conduct which no state or federal regulatory authority has condoned. Citing a September 10, 2013, letter from the FDA in response to a citizen's petition, Purdue argues that the FDA rejected proposed labeling restrictions on the dose and duration for opioid use. It does not follow, however, that this action authorized Purdue to make the false claims the Complaint alleges that it did regarding addiction and abuse. In any event, the exemption enunciated in § 3 is an affirmative defense that is rarely decided on a Rule 12(b)(6) motion. Compare Fleming v. Nat'l Union Fire Ins. Co. 445 Mass. 381, 389-391 (2005).

3. Public Nuisance

Purdue attacks Count II of the Complaint both on factual and legal grounds. As already, explained, factual disputes cannot be resolved on a motion to dismiss. As to the legal basis, Purdue contends that the Complaint fails to state a claim for public nuisance because it does not allege an interference with a public right. Rather, the Commonwealth's nuisance claim is (according to Purdue), "exactly the sort of poorly disguised, repackaged products liability claim courts have rejected." Purdue cites decisions by courts in Delaware and Connecticut dismissing similar public nuisance claims against it. See Delaware, 2019 WL 446382 at *12-*13; New Haven v. Purdue Pharma, L.P., 67 Conn. L. Rptr. 644, 2019 WL 423990 (January 8, 2019). Applying Massachusetts law, this Court reaches a different conclusion.

A public nuisance, as opposed to a private nuisance, is one that "interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury." Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court, 448 Mass. 15, 34 (2006), quoting Connerty v. Metropolitan Dist. Comm'n, 398 Mass. 140, 148 (1986), and citing Restatement (Second) of Torts § 821B (1979) ("A public nuisance is an unreasonable interference with a right common to the general public"). "In determining whether there has been an unreasonable interference with a public right, a court may consider, inter alia, '[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience.'" Sullivan, 448 Mass. at 15, quoting Restatement (Second) of Torts § 821B. Applying these legal principles, this Court concludes that the Complaint's allegations are sufficient to support a claim that Purdue's conduct has interfered with public health and safety.

This Court also disagrees with Purdue that this is simply a repackaged product liability claim that cannot as a matter of law be brought as a public nuisance claim. In fact, Massachusetts courts have allowed public nuisance claims concerning dangerous products. See, e.g., Evans v. Lorillard Tobacco Co., 2007 WL 796175 at *18-*19 (Mass. Super. Ct. 2007) (denying motion to dismiss public nuisance action against cigarette manufacturer); Boston v. Smith & Wesson Corp., 2000 WL 1473568 at *14 (Mass. Super. 2000) (denying motion to dismiss public nuisance action against gun manufacturer). In support of its position that the claims here fall outside the traditional scope of public nuisance law, Purdue relies on Jupin v. Kask, 447 Mass. 141 (2006). In that case, however, the SJC concluded only that the storage of a lawfully obtained unloaded weapon in one's home could not support a claim for public nuisance. The allegations in the Complaint against Purdue are far different.

4. Causation

Purdue argues that the Complaint does not contain sufficient factual allegations to show causation. In opposing the Motion, the Commonwealth points out (quite correctly) that questions of causation generally should not be decided on a motion to dismiss, given their fact intensive nature. The Commonwealth also contends that, at least with respect to the c. 93A claim, it need not prove that any consumer actually was harmed. See Commonwealth v. Equifax, Inc., 35 Mass. L. Rptr. 106, 2018 WL 3013918 at *5 (Mass. Super. 2018) (the Attorney General, unlike a private litigant, need only prove that the unfair and deceptive acts took place in trade or commerce, not that they caused any quantifiable economic injury). That is because, in actions by the Attorney General under c. 93A, the court may impose civil penalties and require the defendant to pay the costs of abatement in lieu of damages. See G. L. c. 93A, §4. For purposes of this Motion, however, this Court assumes that some causation between the conduct at issue and some quantifiable harm must be established. The Court concludes that the Complaint contains sufficient allegations to meets the standard applicable to a 12(b)(6) motion.

In order to show causation, the Commonwealth must plead and prove both "cause in fact" and proximate cause. Cause in fact means injury or harm that would not have occurred but for the defendant's conduct. Proximate cause is an injury to a plaintiff that was a "foreseeable result" of the defendant's actions. Kent v. Commonwealth, 437 Mass. 312, 320 (2002). Purdue contends that this case raises several causation issues. Many of these arguments are fact-based, which this Court sees no need to discuss, given the standard applicable to a Rule 12(b)(6) motion. There is one legal issue that does merit some comment, however. Purdue argues that, because doctors prescribed the drugs alleged to have caused the harm here, they are an

intervening cause that shields Purdue from liability. This argument appears to rely in large part on the learned intermediary doctrine.

The learned intermediary doctrine is based on the proposition that a drug manufacturer's duty to warn may be discharged if the manufacturer provides the physician with an adequate warning about any risks associated with its prescription drug. Niedner v. Ortho-McNiel Pharm., Inc., 90 Mass. App. Ct. 306, 309 (2016). If an adequate warning is provided, then the chain of causation between the defendant drug maker and the consumer plaintiff is broken, since the physician is presumed to make an independent and educated prescribing decision. Liu v. Boehringer Ingelheim Pharm., Inc., 230 F. Supp. 3d 3, 9 (D. Mass. 2017). That causation chain is not broken, however, where the prescribing decision is affected by deceptive and misleading conduct on the part of the drug manufacturer. See, e.g., In re Neurontin Mktg. & Sales Practices Litig., 712 F.3d 21, 39 (1st Cir. 2013) (physician held not to be an independent intervening cause in case involving fraudulent marketing of prescription drug). In other words, because of the defendant's wrongful conduct, the physician is no longer acting independently and the learned intermediary doctrine is not applicable. That is precisely what the Complaint alleges here: by actively undermining the warnings on its products through its deceptive conduct, Purdue is alleged to have caused physicians to write prescriptions they otherwise would not have written. That is sufficient.

5. Miscellaneous Arguments

Purdue's remaining arguments require little discussion. It asserts that the 2007 Judgment estops the Commonwealth from bringing the present action because its terms require Purdue to market its products consistently with approved uses and labeling, which it has done. This is not what the Complaint alleges, however: it accuses Purdue of engaging in marketing practices that

were inconsistent with the relevant approved product labels, and, thus, in violation of the 2007 judgment. Purdue next argues that the statute of limitations bars any claim that relies on allegations predating 2012.[6] The statute of limitations begins to run, however, only when the plaintiff knew or should have known of the defendant's harmful conduct. Koe v. Mercer, 450 Mass. 97, 101 (2007); see also Szymanski v. Boston Mut. Life Ins. Co., 56 Mass. App. Ct. 367, 370 (2002) (discovery rule applies to G. L. c. 93A actions). That is ordinarily a question of fact. Doe v. Creighton, 439 Mass. 281, 283-284 (2003). The Complaint contains sufficient factual allegations with regard to the pre-2012 conduct to raise at least a factual issue. Finally, Purdue argues that certain of the damages the Commonwealth seeks are unavailable, and, for that reason, those portions of the Complaint must be dismissed. A motion to dismiss, however, tests the plaintiff's entitlement to *any* relief under the causes of action pleaded, not the scope of that relief following a determination of liability. Mass. R. Civ. P. 12(b)(6); Iannacchino, 451 Mass. at 635-636. Purdue may pursue these arguments at later stages of litigation, where appropriate.

Janet L. Sanders
Justice of the Superior Court

Dated: September 16, 2019

[6] The Complaint was filed on June 12, 2018. Claims under G. L. c. 93A have a four-year statute of limitations, G. L. c. 260, § 5A. Moreover, the parties entered into a consent agreement to toll the statute of limitations during the period from August 2, 2016, through May 18, 2018.

36 Mass.L.Rptr. 107
Superior Court of Massachusetts, Suffolk County..

COMMONWEALTH of Massachusetts
v.
PURDUE PHARMA, L.P. et al.[1]

[1] Purdue Pharma, Inc., Richard Sackler, Theresa Sackler, Kathe Sackler, Jonathan Sackler, Mortimer D.A. Sackler, Beverly Sackler, David Sackler, Ilene Sackler Lefcourt, Peter Boer, Paulo Costa, Cecil Pickett, Ralph Snyderman, Judith Lewent, Craig Landau, John Stewart, Mark Timney, and Russell J. Gasdia.

1884CV01808
|
October 8, 2019

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANT RUSSELL GASDIA'S MOTION TO DISMISS

Janet L. Sanders, Justice of the Superior Court

***1** The Commonwealth brought this action against Purdue Pharma, L.P. and Purdue Pharma, Inc. (collectively, Purdue) seeking redress for harms that it claims were caused by Purdue's deceptive marketing and sale of its opioid products in Massachusetts. The First Amended Complaint (the Complaint) also names as defendants seventeen other individuals; among them is defendant Russell Gasdia, who was Purdue's Vice President of Sales and Marketing beginning in 2007. Gasdia now moves to dismiss the claims against him pursuant to Mass.R.Civ.P. 12(b)(6). In support, he contends that the Attorney General has no legal grounds for pursuing the claims against him because there is no evidence that he has engaged in misconduct after his retirement from Purdue in December 2014. In the alternative, Gasdia argues that the claims are time-barred. For the following reasons, this Court concludes that the Motion to Dismiss must be *DENIED*.

BACKGROUND

For purposes of this Motion, this Court assumes as true all the allegations in the Complaint. Those allegations have already been summarized in this Court's Memorandum of Decision dated September 16, 2019, denying Purdue's Motion to Dismiss (the September 16 Decision). As to those allegations specific to Gasdia, he is described in the Complaint as one of four key executives who oversaw or promoted the activities alleged to be unfair and deceptive. Complaint, ¶596. In his position as Vice President of Sales and Marketing, he was defendant Richard Sackler's "voice in the field." Complaint, ¶706. He was involved in the "fundamentals of getting more patients on opioids at higher doses for longer periods" and of targeting the most prolific opioid prescribers. Complaint, ¶700. He worked to expand the number of sales representatives promoting opioids and drove them to visit prescribers more frequently. Complaint, ¶¶702-06. He engaged in these efforts even though he knew that higher doses of Purdue opioids put patients in danger. Complaint, ¶712. He also knew and intended that sales representatives would not warn doctors that higher doses put patients at risk. Complaint, ¶¶712-13, 719.

The Complaint gives some specifics as to Gasdia's involvement. In 2011, as the Sacklers looked for ways to increase sales, Gasdia reported to Richard Sackler that Purdue was instructing its sale representatives to focus on

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converting "opioid naïve patients" (those who had never been on opioids or who were on low doses of Vicodin or Percocet) to Purdue opioids, even though he knew that plan posed an increased risk to those patients. Complaint, ¶¶348-49. In 2013, he strategized with other staff on ways to market Purdue opioids directly to insurance companies and managed care formularies in an effort to convince them to cover opioids, using data that the FDA had never approved. Complaint, ¶566. Gasdia wrote scripts used to train Purdue sales representatives, including, for example, a plan to use fake patient profiles to encourage doctors to prescribe Butrans to patients not on opioids. Complaint, ¶707. He tracked his staff's adherence to sales targets, and placed sales representatives on "performance enhancement plans" if they were not generating enough opioid prescriptions. Complaint, ¶350. Gasdia had a "special interest" in Massachusetts where he had started his career. Complaint, ¶742. He oversaw Purdue's negotiations with Massachusetts insurers and tracked Massachusetts regulations to ensure a growing market of opioids here. Complaint, ¶750.

***2** In short, Gasdia (according to the Complaint) "worked at the heart of Purdue's deceptive sales campaign," carrying out the orders of Richard Sacker and other Sackler defendants to promote higher doses of opioids for longer periods of time. Complaint, ¶¶698, 747. Between 2007 and 2014, Purdue paid Gasdia millions of dollars for his efforts. Complaint, ¶752.

DISCUSSION

The Complaint asserts two causes of action against Gasdia: violations of G.L.c. 93A (Count I) and public nuisance (Count II). As to the c. 93A claim, Gasdia argues that G.L.c. 93A, § 4 makes clear that the Attorney General's authority can be wielded only where there is reason to believe that the defendant "is using or is about to use" an unfair and deceptive business practice. As the Complaint acknowledges, Gasdia stepped down from his position as Purdue's Vice President of Sales and Marketing in June 2014, and left Purdue entirely in December of that year. Gasdia notes that there is nothing in the Complaint to suggest that he has had any association with the company since then, or that he has any intention of returning. Because he is not currently engaging in the acts on which the Complaint is based, Gasdia argues that the Attorney General has no standing to assert a c. 93A violation against him. Gasdia makes a similar argument as to the public nuisance claim: he contends that the Attorney General's remedy is limited to injunctive relief and that, with no allegations of ongoing misconduct on his part, there is nothing to enjoin. In the alternative, Gasdia argues that both Counts must be dismissed because the Commonwealth knew or had reason to know of Gasdia's misconduct well before 2014, and that the statute of limitations for prosecuting him has run. This Court concludes that none of these arguments supports dismissal.

1. Chapter 93A Violation

Section 4 of Chapter 93A states:

> Whenever the attorney general has reason to believe that any person *is using or is about to use* any method, act, or practice declared by section two to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the commonwealth against such person to restrain by temporary restraining order or preliminary or permanent

> injunction the use of such method, act or practice ...

(italics added). Gasdia has seized on the phrase "is using or is about to use" and argues that it prevents the Attorney General from pursuing a c. 93A claim against any individual or entity who has ceased engaging in the suspect conduct. This argument, however, reads § 4 too narrowly and without regard to other sections of c. 93A, which clearly give the Attorney General the power to investigate and prosecute those who are no longer engaged in the alleged misconduct. See *DiFiore v. American Airlines, Inc.*, 454 Mass. 486, 491 (2009) ("Where possible, [the court] construe[s] the various provisions of a statute in harmony with one another, recognizing that the Legislature did not intend internal contradiction"). Perhaps most important, this argument also has been rejected by the Supreme Judicial Court in *Lowell Gas Co. v. Attorney General*, 377 Mass. 37 (1979) (*Lowell Gas*).

The phrase in Section 4 on which Gasdia relies is used in conjunction with the Attorney General's power to obtain injunctive relief. Section 4, however, goes on to describe other remedies that the Attorney General can seek, all with reference to past conduct. The court may issue any order or judgment "as may be necessary to restore any person who *has suffered* any ascertainable loss" because of the unfair or deceptive act or practice. G.L.c. 93A, § 4 (italics added). If the court concludes that the defendant "*has employed*" any such practice and the defendant knew or should have known that the conduct was unfair or deceptive, the court may order a civil penalty of up to $5,000 for each violation. *Id.* (italics added). In authorizing restitution and civil penalties in addition to injunctive relief, § 4 by its own terms contemplates that the statute is not limited to those situations where the alleged misconduct is ongoing. See *id.*

***3** Section 4 also must be read together with other provisions of c. 93A. *DiFiore,* 454 Mass. at 491. Section 6 authorizes the Attorney General to issue civil investigative demands where she believes that any person "*has engaged in* or is engaging in" an unfair or deceptive practice. G.L.c. 93A, § 6 (italics added). Section 5 allows the Attorney General to "accept an assurance of discontinuance of any method, act or practice in violation of this chapter from any person alleged to be engaged or *to have been engaged in* such method, act or practice" "in lieu" of instituting an action or proceeding in court. G.L.c. 93A, § 5 (italics added). Chapter 93A claims also have a four-year statute of limitations. G.L.c. 260, § 5A (expressly applying to c. 93A action brought by the Attorney General). If the Attorney General could prosecute only ongoing conduct, there would be no need for a time limit.

More generally, this Court takes into account the legislature's intent in enacting c. 93A, which has been described as a "statute of broad impact." *Exxon Mobil Corp. v. Attorney General,* 479 Mass. 312, 315 (2018), quoting *Slaney v. Westwood Auto, Inc.,* 366 Mass. 688, 693-94 (1975). Section 4 in particular was intended "to provide an efficient, inexpensive, prompt and broad solution" to the Attorney General in the event that she discovers unfair or deceptive practices that have caused widespread harm. *Commonwealth v. DeCotis,* 366 Mass. 234, 245 (1974); see also *Auto Flat Car Crushers, Inc. v. Hanover Ins. Co.,* 469 Mass. 813, 824-25 (2014) ("General Laws c. 93A is a broad remedial statute; the Legislature's manifest purpose in enacting it was to deter misconduct, and to encourage vindictive lawsuits" [internal citations and quotations omitted]). Construing the statute as a

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whole and keeping in mind this legislative purpose, this Court does not construe § 4 as a prohibition against the prosecution of unfair and deceptive business practices that have ceased. Such a construction would frustrate the remedial purposes of c. 93A by broadly exempting from liability anyone who stopped the wrongdoing before the Attorney General filed a claim, no matter how grave the damages inflicted.

Finally and perhaps most important, this Court's construction of § 4 is in line with the Supreme Judicial Court's interpretation of that section. In *Lowell Gas,* the Attorney General brought a complaint against two gas companies alleged to have unfairly passed on certain costs to consumers. 477 Mass. at 37. The companies moved to dismiss, asserting among other things that the Attorney General was not authorized to bring the action pursuant to G.L.c. 93A, § 4 because the companies had terminated the practices complained of. *Id.* at 46-47. Although the court noted that the complaint could be construed as targeting practices that were continuing, it went on to reject the companies' argument on broader grounds. Reading § 4 together with § 6, as well as the relevant statute of limitations, G.L.c. 260, § 5A, the court concluded that "the broad remedial language of § 4 cannot be read to preclude suits by the Attorney General against parties who have engaged in, but recently suspended, practices violative of c. 93A." *Lowell Gas,* 377 Mass. at 47-48. That is, there was no basis to dismiss the action simply because the companies had ceased their practice of passing on the costs alleged to be unlawful. Although *Lowell Gas* was decided forty years ago, this Court is aware of no Massachusetts case that questions its reasoning.

In an attempt to avoid the implications of *Lowell Gas,* Gasdia looks to cases interpreting the Federal Trade Commission (FTC) Act. In particular, he relies on *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3rd Cir. 2019). In that case, the court held only that the FTC could not, pursuant to the express language of *Section 13(b)* of the Act, 15 U.S.C. § 53(b), seek injunctive relief against the defendant company for conduct that took place five years before the suit and that related to a drug that the company no longer sold. The court noted, however, that the FTC could have proceeded under Section 5 of the Act, 15 U.S.C. § 45(b). In reaching its conclusion regarding G.L.c. 93A, § 4, the court in *Lowell Gas* relied on those federal cases that interpreted *Section 5* of the FTC Act. 377 Mass. at 47. It cites, for example, *Goodman v. FTC,* 244 F.2d 584, 593 (9th Cir. 1957). *Id.* Indeed, G.L.c. 93A, § 2(b) directs the courts to look for guidance in FTC and federal court interpretations of *Section 5,* "as from time to time amended." Gasdia contends that one of those amendments is Section 13 of the FTC Act, which was added to that statute only recently and well after the *Lowell Gas* decision. This Court is not convinced, however, that the Supreme Judicial Court today interpreting G.L.c. 93A, § 4 would reach a different result than it did in *Lowell Gas.*[2]

[2] Cases interpreting the FTC Act are in any event not controlling, since the comparison between the provisions that Act and Chapter 93A is not a perfect one. For example, as the court explained in *FTC v. Shire ViroPharma,* the FTC Act from its inception provides for an administrative process to remedy unfair methods of competition. 917 F.3d at 155. Section 13 was added to allow the FTC to skip this administrative process and go direct to court where there was a need to act quickly to enjoin ongoing illegal conduct. By contrast, Chapter 93A

does not have built into it an administrative regime.

2. Public Nuisance

***4** Count II of the Complaint asserts a claim of public nuisance. Although it is based on the common law and not on a statute, Gasdia makes an argument quite similar to that which he asserts with respect to the c. 93A claim—namely, that there is no legal basis to bring this claim because it targets conduct that has ceased. Specifically, Gasdia contends that a public nuisance claim can proceed only if there is an immediate need for injunctive relief; since Gasdia has long since left Purdue, it necessarily follows that Count II fails to state a claim upon which relief may be granted. This Court disagrees.

As to the elements of this claim, Massachusetts follows the Restatement (Second) of Torts § 821B, which defines a public nuisance "as an unreasonable interference with a right common to the general public." See *Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court,* 448 Mass. 15, 34 (2006). "In determining whether there has been an unreasonable interference with a public right, a court may consider, *inter alia*, '[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience.' " *Id.*, quoting Restatement (Second) of Torts § 821B. This Court already has concluded that the Complaint supports a public nuisance claim against Purdue, see September 16 Decision, pp. 8-10, and reaches the same conclusion as to Gasdia: the Complaint, if true, alleges conduct on his part involving a significant interference with the public health and safety of Massachusetts residents.

Gasdia argues that, even assuming these allegations are true, the public nuisance claim is equitable nature, and the court's jurisdiction is limited to those public nuisances requiring "immediate judicial interposition." In support of this proposition, Gasdia relies on a case handed down 140 years ago, *Attorney General v Metro. R.R. Co.,* 125 Mass. 515 (1878). Quoting that case, Gasdia contends that, because there is no ongoing conduct on his part, there is no need for immediate judicial action and the Attorney General thus has no authority to bring a public nuisance claim. This Court finds this argument puzzling—and ultimately unpersuasive.

If Gasdia is arguing that this action is one in equity, he ignores the fact that the court's equitable powers also extend to abatement orders. Count II would appear to seek this kind of relief in asking the court to require the defendants to reimburse the Commonwealth for the expenses incurred in abating the nuisance. Gasdia nevertheless maintains that, because the underlying conduct that created the nuisance has ceased, there is "no nuisance to abate," and this Count thus fails to state a claim. This position is not supported by the case law, however. For example, in *Taygeta Corp. v. Varian Assoc, Inc.,* the Supreme Judicial Court concluded that the continuing seepage of pollutants on the plaintiff's property gave rise to an actionable nuisance claim even though the dumping of the hazardous material that caused the contamination had stopped many years before. 436 Mass. 217, 231-32 (2002).[3] See also Restatement (Second) of Torts § 834 comment e, at 150-51 (a person who substantially participated in creating a nuisance condition remains subject to liability "even though he is no longer in a position to abate the condition and stop the harm"). In the instant case, the Complaint contains sufficient allegations to show that Gasdia participated in conduct which significantly interfered with the public health and safety. That is enough.

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3 It is true that *Taygeta* involved a private nuisance. But this Court does not see why the same principles should not also apply to a public nuisance claim like this one.

***5** Although this Court need not determine on a motion to dismiss precisely what relief the Commonwealth would be entitled to receive, this Court would note that an abatement order in a public nuisance case could include a requirement that the defendants expend the money necessary to abate the nuisance. That is precisely what the Supreme Judicial Court decided in *Attorney General v. Baldwin,* 361 Mass. 199, 208 (1972). In that case, the court upheld the lower court's order that the defendants remove debris that they had caused to be dumped into a Massachusetts waterway, even though the cleanup would necessarily require a "large expenditure of money." *Id.*[4]

4 In support of his position that the Commonwealth cannot seek such reimbursement costs, Gasdia relies on *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCP Pollution,* 712 F.Sup. 994, 1004 (D.Mass. 1989). However, the court there ruled only that the Commonwealth's claim for public nuisance abatement expenses presented issues that had to be tried to a jury.

3. Statute of Limitations

The Attorney General filed her initial complaint June 12, 2018; the First Amended Complaint adding Gasdia as a defendant was filed on December 21, 2018. A four-year statute of limitations applies to the c. 93A claim. G.L.c. 260, § 5A. A three-year statute of limitations applies to the public nuisance claim. G.L.c. 260, § 2A. Gasdia, who stepped down from his sales and marketing position at Purdue in June 2014, argues that both claims are time-barred. This Court concludes that the limitations issue cannot be decided on a Rule 12(b)(6) motion.

Both statutes of limitations are subject to the discovery rule, which states that "a cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that (1) he has suffered harm; (2) his harm was caused by the conduct of another; and (3) the defendant is the person who caused that harm." *Harrington v. Costello,* 467 Mass. 720, 727 (2014). When the cause of action "accrues" for statute of limitations purposes is ordinarily a question of fact that cannot be determined from the pleadings alone. See *Riley v. Presnell,* 409 Mass. 239, 247 (1991) (reversing summary judgment against plaintiff on statute of limitations grounds). Rarely can the issue be determined on a Rule 12(b)(6) motion. See *Commonwealth v. Tradition (North America), Inc.,* 91 Mass.App.Ct. 63, 70 (2017) (dismissal pursuant to Rule 12(b)(6) based on statute of limitations is appropriate only where "it is undisputed from the face of the complaint that the action was commenced beyond the applicable deadline").

In the instant case, the Complaint alleges that the defendants (including Gasdia) concealed their conduct, and that determining the nature and extent of that conduct required a complex investigation, including civil investigative demands that continued until March 2018. That is enough to prevent dismissal on statute of limitations grounds. Gasdia cites various lawsuits filed against Purdue and others in other jurisdictions as early as 2013 that contain allegations quite similar to those asserted against Gasdia here: indeed, one lawsuit (filed in South Carolina) actually names Gasdia as a defendant. That only underscores the fact-intensive nature of the inquiry, however. See, e.g., *In re Massachusetts Diet Drug*

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Litig., 338 F.Sup.2d 198, 205-06 (D.Mass. 2004) (that there was extensive publicity regarding diet drugs at issue was not enough to determine that plaintiffs' claims were time-barred as a matter of law). In short, it would be premature for this Court to resolve this question before any discovery has taken place.

CONCLUSION AND ORDER

***6** For these reasons and for other reasons set forth in the Commonwealth's Memorandum in Opposition, Gasdia's Motion to Dismiss is *DENIED*.

All Citations

Not Reported in N.E. Rptr., 36 Mass.L.Rptr. 107, 2019 WL 5495716

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36 Mass.L.Rptr. 111
Superior Court of Massachusetts,
Suffolk County..

COMMONWEALTH of Massachusetts
v.
PURDUE PHARMA, L.P. et al.[1]

[1] Purdue Pharma, Inc., Richard Sackler, Theresa Sackler, Kathe Sackler, Jonathan Sackler, Mortimer D.A. Sackler, Beverly Sackler, David Sackler, Ilene Sackler Lefcourt, Peter Boer, Paulo Costa, Cecil Pickett, Ralph Snyderman, Judith Lewent, Craig Landau, John Stewart, Mark Timney, and Russell J. Gasdia.

1884CV01808
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October 8, 2019

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANT DIRECTORS' AND EXECUTIVES' RULE 12(b)(2) MOTIONS TO DISMISS

Janet L. Sanders, Justice of the Superior Court

***1** The Commonwealth brought this action against Purdue Pharma, L.P. and Purdue Pharma, Inc. (collectively, Purdue) seeking redress for harms that it claims were caused by Purdue's deceptive marketing and sale of its opioid products in Massachusetts. The First Amended Complaint (the Complaint) also names as defendants seventeen other individuals who worked at Purdue in high level positions or who served on its Board of Directors. All but one of those individual defendants (that exception being defendant Russell Gasdia)[2] now move to dismiss the claims against them pursuant to Mass.R.Civ.P. 12(b)(2). With the exception of Gasdia, none of the individual defendants resides in Massachusetts or has had any significant contact with the state apart from his or her role at Purdue. As to these defendants' activities at Purdue, they contend that it cannot support the assertion of personal jurisdiction over them in Massachusetts because they did not personally participate in any wrongdoing described in the Complaint that was directed at this state. After thorough review of the parties' submissions, which included affidavits and exhibits, this Court concludes that the Motions must be *DENIED*.

[2] Gasdia did move to dismiss pursuant to Rule 12(b)(6). In a separate Memorandum of Decision issued today, this Court denied that motion.

BACKGROUND

For purposes of these Motions, this Court assumes that the allegations in the Complaint are true and views those allegations in the light most favorable to the Commonwealth. The Complaint is unusual both in its length and in its detail; it also cites to and quotes from hundreds of Purdue documents, many of which have been presented to this Court for review. The Complaint outlines what the Commonwealth claims to be years of unfair and deceptive conduct directed at residents in Massachusetts and in other states. The allegations of the Complaint have already been summarized in a Memorandum of Decision denying Purdue's Motion to Dismiss pursuant to Rule 12(b)(6), dated September 16, 2019. For purposes of the instant motions, this Court focuses only on those allegations that are relevant to the jurisdictional analysis.

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Purdue is a pharmaceutical company that has been owned by certain members of the Sackler family since the 1950s. In 1990, Purdue Pharma, Inc. was incorporated.[3] Sackler family members named as defendants in this case are: Richard, Beverly, Ilene, Jonathan, Kathe, Mortimer, Theresa, and David. With the exception of David (who joined in July 2012), all of them have been members of Purdue's Board of Directors (the Board) since Purdue, Inc.'s inception. From 1999 to 2003, Richard was also Purdue's CEO, while Jonathan, Kathe, and Mortimer served from time to time as vice presidents. At all relevant times, the Sackler family held a majority of Board seats and have, as a result of their positions, received all quarterly reports and other information directed to the Board. Those reports contained detailed information about Purdue's business, its sales practices, and its marketing techniques.

3 Purdue has several subsidiaries and/or related entities. For the purposes of this motion, the Court collectively refers to them as "Purdue."

***2** The majority of Purdue's business derives from its manufacture and sale of prescription opioid pain medications, including OxyContin. Opioids, including Purdue's products, carry several risks to the user, including physical dependence, addiction, and related withdrawal symptoms. Opioids can also cause respiratory depression, which is life threatening. In the years following the release of OxyContin in 1996, opioid-related deaths rose across the nation and in Massachusetts in particular: that number spiked in 2016 to 2,155 opioid-related deaths in Massachusetts alone. The Commonwealth alleges that Purdue and the individual defendants are responsible for this opioid epidemic.

In 2007, after multiple state and federal investigations, Purdue and three of its executives pleaded guilty to illegally misbranding OxyContin. That guilty plea included an agreed statement of facts where it was admitted that, for the previous six years, Purdue supervisors and employees intentionally deceived doctors about OxyContin's addictive properties. Richard, Beverly, Ilene, Jonathan, Kathe, Mortimer, and Theresa Sackler all voted as Board members to have Purdue plead guilty and thus were aware of what the company and its executives admitted to. Although the conduct at issue here took place after this guilty plea, it is reasonable to infer that all of the individual defendants knew of these criminal convictions and of the accusations leading to them.

The same year as the guilty plea, Richard, Beverly, Ilene, Jonathan, Kathe, Mortimer, and Theresa Sackler voted to have Purdue enter into a consent judgment with several states, including Massachusetts (the 2007 Judgment). The 2007 Judgment prohibited Purdue from making "any written or oral claim that is false, misleading, or deceptive" in the promotion or marketing of OxyContin. It also required that Purdue establish and follow an abuse and diversion detection program to identify high-prescribing doctors who showed signs of inappropriate prescribing, stop promoting drugs to those doctors, and report them to authorities. The 2007 Judgment further required Purdue "to review news media stories addressing the abuse or diversion of OxyContin and undertake appropriate measures as reasonable under the circumstances to address abuse and diversion." Covered persons under the 2007 Judgment include all officers, employees, and certain contract sales representatives. It is reasonable to infer that all of the individual defendants knew of the 2007 Judgment and what it required of Purdue.

Around the same time as this 2007 Judgment, Richard, Beverly, Ilene, Jonathan, Kathe,

Mortimer, and Theresa Sackler voted to have Purdue enter into a corporate integrity agreement (CIA) with the Office of the Inspector General of the United States Department of Health and Human Services. In the CIA, Purdue agreed to establish a corporate Compliance Program to prevent the deceptive marketing of its opioids. The Compliance Program was to include a dedicated compliance officer and committee, a written code of conduct, and training of all covered persons. Richard, Beverly, Ilene, Jonathan, Kathe, Mortimer, and Theresa Sackler each certified in writing to the government that he or she had read and understood the rules contained in the CIA and would obey them. It can be reasonably inferred that the other individual defendants were or became aware of the CIA and the importance of complying with it, as they received reports and information suggesting that there were compliance problems.

Following the guilty plea, the CIA, and the 2007 Judgment, several outside, non-Sackler directors joined the Board. In 2008, defendant Peter Boer became a director. In 2009, defendant Judith Lewent joined the Board until her resignation in 2013. In 2010, defendant Cecil Pickett joined the Board. In 2012, defendants Paulo Costa and Ralph Snyderman became directors. Snyderman ended his tenure in 2017 and Costa resigned in 2018.

***3** Between 2007 and the filing of the Complaint in 2018, Purdue has had three different CEOs: John Stewart, who was CEO from 2007 to 2013; Mark Timney, who served in that role from January 2014 to June 2017; and Craig Landau, who became CEO thereafter. Prior to becoming CEOs, both Stewart and Landau were long-time Purdue employees—Stewart since at least 1997, and Landau since 1999. Between 2007 and 2013, Landau was Purdue's Chief Medical Officer.[4] Stewart, Timney, and Landau are all named as defendants.

4 The Complaint does not specify Landau's role between 2013 and 2017, when he became CEO.

The Complaint alleges that, under the leadership and at the behest of the individual defendants, Purdue, driven by profit, did not substantively alter its deceptive and illegal marketing practices despite what was required of it by the 2007 Judgment, the CIA, and related agreements. Rather, it continued to downplay its opioids' propensities for addiction and abuse in its messaging to doctors. Purdue expanded its sales force in Massachusetts and increased the number of visits to doctors here with the intent of persuading them to prescribe Purdue opioids at greater frequency and at higher, more expensive doses. Sales representatives were encouraged to target "opioid naïve" patients or vulnerable populations like the elderly. They also went after the most prolific prescribers of opioids, including those suspected of overprescribing. This activity continued into 2018, and had enormous consequences for Massachusetts residents.

The Commonwealth's Memorandum in Opposition to these motions outlines in full the allegations contained in the Complaint as they pertain to the individual defendants. As to the level of specificity provided for each defendant, the Complaint varies quite a bit. For example, the Complaint goes on at considerable length regarding the role that Richard Sackler played in the company: he was constantly seeking information about opioid sales and pressuring staff to develop ways to increase those sales even as he brushed off concerns expressed by staff that patients were becoming addicted or dying. Special sections of the Complaint are also devoted to discussing the role of defendants Timney, Landau, and Stewart. The Complaint is

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less specific about the individual director defendants, describing what they did as a Board collectively rather than on a defendant-by-defendant basis. This is not surprising: according to the Complaint, all of the outside directors vote with the Sackler family at every Board meeting that the Complaint describes.

Rather than attempt to summarize all of the conduct that the Commonwealth alleges is relevant for jurisdictional purposes, this Court chooses to largely focus primarily on one particular category: the promotion and use of opioid savings cards. Quite apart from the allegations of the Complaint, the documents submitted to this Court show that the director defendants not only knew and approved of these cards but also understood that they were being promoted to Massachusetts doctors for use by Massachusetts patients.[5]

5 This Court focuses on the savings card program because all directors are alleged to have had some knowledge about that program and its use in Massachusetts. It is not, however, the only unfair and deceptive practice in which these defendants were involved, according to the Complaint.

The Complaint states that Stewart presented the details of this savings card program to the Board in 2008, explaining that he hoped it would increase the portion of patients who used OxyContin by fifteen percent. Around this same time, it was becoming apparent that abuse of Purdue opioids was increasing: for example, the number of tips to Purdue's compliance hot line was going up. As early as 2009, the Board was informed that Purdue's compliance problems were the result of OxyContin promotional materials, including the opioid savings cards. Complaint, ¶524. Yet the Board continued to approve and promote their use until at least 2013. The savings cards were an important part of the conduct that the Complaint alleges to be unfair and deceptive, since the program provided patients with financial incentives to use more opioids over a longer period. According to the Complaint, the individual defendants (including the director defendants) knew throughout this time period that the longer a patient is on opioids, the greater the risk that the patient will become addicted. In effect, the savings cards acted as coupons to deceptively legitimize long-term opioid use, which posed a high risk to patients of becoming addicted to these drugs. The individual defendants also knew that the program was in use in Massachusetts and intended that the savings cards be used by Massachusetts patients.

***4** The documents to which the Complaint refers do not directly implicate Timney in the savings card program since he joined Purdue in 2014, when the paper trail concerning savings cards disappears. However, he is alleged to have played a part in other aspects of Purdue's marketing campaign, which the Complaint likewise alleges to have been unfair and deceptive. For example, when some health care systems stopped allowing sales representatives to visit doctors' offices, Timney developed a "work around." Complaint, ¶¶755, 763. Under his direction, Purdue staff created call centers where sales representatives telephoned doctors or hospitals covered by these "no see" policies to encourage them to prescribe more opioids. Massachusetts was among four "high value geographies" for this initiative, since it included the Partners and Steward Hospital systems. Timney also continued strategies that had begun earlier under defendant Stewart to target the most prolific opioid prescribers, some of whom were in Massachusetts. Complaint, ¶759.

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DISCUSSION

The Complaint asserts two causes of action: violations of G.L.c. 93A and public nuisance. The individual defendants argue that this Court does not have jurisdiction over them for these claims because they did not personally participate in conduct that was directed at Massachusetts. In making that argument, they have submitted affidavits and exhibits disputing those allegations relating to their own personal liability and calling into question the factual basis for the Commonwealth's argument that jurisdiction is proper. Given these factual disputes, it is important to keep in mind the standard of proof this Court applies at this early stage in the proceedings. Under Appeals Court precedent, the court is to apply a "prima facie" standard of proof where the jurisdictional facts are in dispute. *Cepeda v. Kass*, 62 Mass.App.Ct. 732, 737-38 (2004) (*Cepeda*); see also *Cannonball Fund Ltd. v. Dutchess Capital Mgmt., LLC*, 84 Mass.App.Ct. 75, 97 (2013). Under the prima facie standard as outlined in *Cepeda*, this Court is to "take specific facts affirmatively alleged by the plaintiff as true (whether or not disputed) and construe them in the light most congenial to the plaintiff's jurisdictional claim." *Cepeda*, 62 Mass.App.Ct. at 738, quoting *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 34 (1st Cir. 1998). It is a burden of production, not persuasion, with the court acting more as "data collector, not as a fact finder." *Cepeda*, 62 Mass.App.Ct. at 738-39. That the individual defendants dispute the liability that gives rise to the assertion of jurisdiction is not enough to overcome a prima facie showing. Rather, it means only that the final determination of personal jurisdiction must be deferred until trial, where the Commonwealth will have to prove the relevant facts by a preponderance of the evidence. *Id.* at 738.

Here, the parties agree that, for purposes of these Motions, the Court takes as true the allegations in the Complaint. This Court concludes that those allegations are specific and detailed enough (and indeed supported by Purdue's own internal documents) to satisfy the prima facie burden of proof outlined in *Cepeda.*

There is no question that this Court has personal jurisdiction over Purdue, an entity that does business throughout the United States. As the Commonwealth concedes, however, this Court may not assert jurisdiction over the individual defendants simply because they were officers and/or directors of the company. *Kleinerman v. Morse*, 26 Mass.App.Ct. 819, 824 (1989), citing *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 573 F.Sup. 1106, 1111 (D.Mass. 1983). Rather, personal jurisdiction over an individual corporate defendant is "based on the individual's actions, regardless of the capacity in which those actions were taken[,]" *Rissman Hendricks & Oliverio, LLP v. MIV Therapeutics, Inc.*, 901 F.Sup.2d 255, 263 (D.Mass. 2012), and requires evidence of "direct personal involvement" in conduct that "is causally related to the plaintiff's injury" in the forum state. *Hebb v. Greens Worldwide, Inc.*, 2007 WL 2935811 at *4 (Mass.Super. 2007) (Fabricant, J.), quoting *Charles River Data Systems, Inc. v. Oracle Complex Systems Corp.*, 788 F.Sup. 54, 57 (1991). Within this framework, the individual defendants challenge personal jurisdiction on two grounds. First, they contend that, as Board members and CEOs, they did not personally participate in and/or direct the sales and marketing activity that is alleged in the Complaint as unfair and deceptive. Second, they argue that whatever conduct they did engage in was not sufficiently targeted to Massachusetts. Determining personal jurisdiction requires an analysis under the long-arm statute, G.L.c. 223A, § 3, and a constitutional analysis to ensure that any assertion of jurisdiction is consistent with the Due Process clause. This Court turns first to the

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statute.

A. Statutory Analysis

***5** The Massachusetts longarm statute, G.L.c. 223A, § 3, "sets out a list of specific instances in which a Massachusetts court may acquire personal jurisdiction over a nonresident defendant." *Exxon Mobil Corp.*, 479 Mass. at 317, quoting *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 767 (1994). Because the Commonwealth relies primarily on subsection (c) of the statute, the Court begins its analysis there. That subsection permits jurisdiction over a nonresident defendant who "cause[s] tortious injury by an act or omission in this commonwealth." None of the individual defendants now contesting jurisdiction came to Massachusetts on Purdue business, with the exception of defendants Stewart and Landau. They therefore argue that they have committed no act in this state which caused tortious injury within the meaning of § 3(c). In response, the Commonwealth contends that each of them has committed an act within this state for jurisdictional purposes because the allegations in the Complaint show that they sent or caused to be sent into Massachusetts fraudulent misrepresentations which caused injury to Massachusetts residents. The Commonwealth's position that such conduct can confer jurisdiction over a nonresident defendant is supported by the case law.

In *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661 (1st Cir. 1972), for example, the First Circuit was called upon to interpret and apply § 3(c) where the nonresident defendant was accused of sending fraudulent statements into Massachusetts by letter and in telephone conversations with the Massachusetts plaintiff. The court concluded that the defendants had committed an act within this state under that section, holding that "where a defendant knowingly sends into a state a false statement, intending that it should be relied upon to the injury of a resident of that state, he has for jurisdictional purposes acted within that state." *Id.* at 664. Relying on *Murphy*, the court reached the same result in *Ealing Corp. v. Harrods Ltd.*, 790 F.2d 978, 982 (1st Cir. 1986); see also *The Scuderi Grp., LLC v. LGD Tech., LLC*, 575 F.Sup.2d 312, 320-21 (D.Mass. 2008) (where the nonresident defendants were accused of misappropriation of trade secrets, fraud, and violations of c. 93A). In *Burtner v. Burnham*, 13 Mass.App.Ct. 158, 159 (1982), the nonresident defendants made false statements, by mail and by telephone, regarding the acreage of certain land in New Hampshire that the defendants conveyed to the Massachusetts plaintiffs. Following *Murphy*, the Appeals Court concluded that the defendants had committed a tortious act within the state, since the defendants intended that those statements be relied upon by the in-state plaintiff. *Id.* at 163-64.[6]

6 The individual defendants' reliance on *Roberts v. Legendary Marine Sales*, 447 Mass. 860, 864 (2006), is misplaced. That case concerned monetary damages that were grounded in breach of contract and thus did not constitute "tortious injury" as contemplated under § 3(c).

Here, the Commonwealth alleges that the individual defendants sent, or caused to be sent, into this state deceptive marketing materials, knowing and intending that doctors would rely on them and place more patients on dangerous opioids at higher doses for longer periods of time. Because the allegations in the Complaint must be taken as true, the Court assumes for the purposes of this motion that these sales and marketing efforts constituted intentional misrepresentations and deceptive acts in violation of c. 93A. Thus, the question for purposes of the instant motion is the extent to

which any individual defendant was involved in or participated in these practices as they related to Massachusetts. In answering that question, this Court considers the context in which each of the individual defendants was operating.

Here, that context was not the typical "business as usual." During the relevant period following 2007, it should have been one of vigilance: each of the individual defendants was aware of the 2007 Judgment and related agreements that required Purdue to take certain affirmative steps to address and prevent opioid abuse. Indeed, compliance was a major requirement of those agreements. Accordingly, it is reasonable to infer that the individual defendants, in fulfilling their obligations, had a heightened, affirmative duty to be on notice of deceptive corporate conduct, and to report instances of abuse and diversion where applicable. For this reason, the Court rejects the individual director defendants' assertion that they could not have participated in any alleged misconduct because they were merely, in their capacity as Board members, casting votes that approved policies and practices carried out by others.

***6** As already noted, the Complaint does not always speak with specificity in terms of which person or persons directed or approved of the conduct in question. For example, with regard to the director defendants' liability, the Complaint more often than not talks only about actions by the Board as a whole. Moreover, the Complaint speaks in generally conclusory terms about certain individual defendants' knowledge regarding the nature and extent of the practices at issue. Given the standard that this Court is applying at this stage in the case, this may be sufficient. This Court has nevertheless examined the documents—including Board minutes—relating to these allegations and is satisfied that the Commonwealth has met its burden of producing evidence showing that each of the named defendants participated in making or approving false representations knowingly sent into Massachusetts with the intent that Massachusetts residents rely on those misrepresentations, resulting in injury to them.

With regard to the director defendants, this Court turns to Purdue's promotion of the savings cards, which it highlighted above by way of example. The allegations of the Complaint, if true, show that the Board was regularly informed about these savings cards between 2008 and 2013 and that the director defendants knew that they were being used in Massachusetts among other states. For example, a July 23, 2013 quarterly report to the Board explained how the cards were being used to provide incentives to patients using OxyContin and how they were being promoted to health care providers in Massachusetts in particular. A later October 2013 "Analgesic Market Update" presentation to the Board notes the return on investment of the savings cards, and the percent of increased total prescriptions that it generated in 2013. Assuming (as I must) that Purdue's promotion of savings cards constitutes a c. 93A violation, this Court concludes that the Board (and each individual director defendant) not only knew and approved of this tactic, but also understood that it was targeted at Massachusetts, with the result that any injury would be sustained here. I reach this conclusion taking into account the Board's heightened duty to remain vigilant against any practice that could be seen to conflict with the 2007 Judgment and related agreements. That the individual defendants did not themselves carry out the targeted conduct but simply approved and/or directed it, is irrelevant for jurisdictional purposes. See generally *Townsends, Inc. v. Beaupre*, 47 Mass.App.Ct. 747, 751 (1999) (a corporate officer is personally liable for a tort committed by the corporation that employs him, if he personally participated in the tort by, for example, directing, controlling, approving, or ratifying the act that injured the aggrieved

party).

As to the individual defendant officers, this Court concludes that Stewart, as CEO, and Landau, as Chief Medical Officer, also were aware of and involved in the savings card promotion. Moreover, they engaged in other alleged conduct that involved sending false representations about Purdue opioids into Massachusetts, and that they intended local patients and doctors to rely on them. One such misrepresentation from Stewart involved the assertion that reformulated OxyContin was safer; sales representatives used this script in Massachusetts at least 100 times. Stewart directed that representatives should promote Purdue opioids for "moderate persistent pain" even though the FDA had removed moderate pain from the drug's indications. According to the Complaint, Stewart "led Purdue's strategy" to drive patients to take opioids at higher doses for longer periods, working with Gasdia to increase the sales force in Massachusetts and to have sales representatives visit Massachusetts prescribers more frequently. As to Landau, he helped develop and then oversaw Purdue sales strategy, repeatedly targeting Massachusetts in particular. See Complaint, ¶¶791, 793. As CEO, he ensured that sales staff met their targets for prescriber visits and opioid sales in Massachusetts and elsewhere. He also made misleading statements about Purdue opioids by making calls into this state in defense of Purdue and appeared at opioid conferences in Massachusetts in 2012 and 2013. Complaint, ¶811, 814.

***7** The Complaint and record before the Court do not provide information about Timney's knowledge of the savings card promotion or whether it continued into 2014 when his tenure at Purdue began. Like Landau and Stewart, however, he is implicated in other activities whereby false statements about Purdue opioids were allegedly directed into this state. In particular, he organized efforts to increase OxyContin sales by aggressively targeting existing high-volume prescribers, including those in Massachusetts. One way he did this was through the call centers initiative, which reached "no see" physicians in hospital networks that had policies restricting sales representative visits. As noted, Massachusetts was among four "high value geographies" for this initiative. In short, this Court concludes that the Complaint sufficiently alleges personal and direct involvement by Timney, Landau, and Stewart in the alleged conduct giving rise to the c. 93A claim.

Having concluded that the Commonwealth has met its prima facie statutory burden as to each of the individual defendants under § 3(c), this Court sees no need to address the other subsections of G.L.c. 223A, § 3 upon which the Commonwealth relies to support jurisdiction. It therefore turns to the relevant constitutional analysis.

B. Constitutional Analysis

"The constitutional touchstone of the determination whether an exercise of personal jurisdiction comports with due process remains whether the defendant established minimum contacts in the forum state" (citations omitted). *Bulldog Investors Gen. P'ship v. Secretary of the Commonwealth,* 457 Mass. 210, 217 (2010). "The due process analysis entails three requirements. First, minimum contacts must arise from some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws ... Second, the claim must arise out of or relate to the defendant's contacts with the forum ... Third, the assertion of jurisdiction over the defendant must not offend traditional notions of fair play and substantial justice" (citations omitted). *Id.*

The first prong, purposeful availment, "assure[s] that personal jurisdiction is not premised solely upon a defendant's random, isolated, or fortuitous contacts with the forum state ..., [but] on whether a defendant has engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable" (citations omitted). *Sawtelle v. Farrell*, 70 F.3d 1381, 1391 (1st Cir. 1995). In *Calder v. Jones*, 465 U.S. 783, 788-90 (1984), the United States Supreme Court held that for a state to exercise jurisdiction over a nonresident defendant, the defendant must aim his actions at the forum state, knowing that they will have a devastating impact on the plaintiff, and that the brunt of the injury will be felt in the forum state. In sum, "[t]he court looks to the voluntariness of the defendant's contacts with the forum and the foreseeability that he would be subject to a lawsuit there." *Rissman Hendricks & Oliverio, LLP*, 901 F.Sup.2d at 265.

Here, where intentional misrepresentations and deceptive conduct are alleged to have occurred through marketing efforts targeted at and sent to Massachusetts, those requirements have been met. See *Bulldog Investors Gen. P'ship*, 457 Mass. at 217 (where "plaintiffs operated a Web site accessible in Massachusetts and sent a solicitation that is prohibited by Massachusetts law to a Massachusetts resident, it was reasonable for the plaintiffs to anticipate being held responsible in Massachusetts"); *Grice v. VIM Holdings Grp., LLC*, 280 F.Sup.3d 258, 274 (D.Mass. 2017) ("[w]hen the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment" [citations omitted]); *Women, Action & The Media Corp. v. Women in the Arts & Media Coal., Inc.*, 2013 WL 3728414 at *3 (D.Mass. July 12, 2013) ("The evidence presented [including targeted solicitation] shows a voluntary decision by defendant to reach into Massachusetts").

***8** In particular, the individual defendants, who held positions of control over Purdue's activities, reasonably were aware that Purdue had sales operations based in Massachusetts. Each, (with the exception of Timney) tacitly or explicitly approved sending tailored marketing materials, i.e., the savings card promotion emails, to Massachusetts doctors. This alleged conduct was knowing and purposeful, not merely negligent. As for Timney, as already described, he knowingly targeted Massachusetts via a telephonic call center and engaged in other conduct aimed at this state that is alleged to be unfair and deceptive. That these same practices occurred in other states as well does not change this Court's conclusion, since the contacts with Massachusetts were not random or fortuitous, but purposeful and voluntary. *Johnson Creative Arts, Inc.*, 573 F.Sup. at 1110-11. In short, the exercise of jurisdiction against the individual defendants on the facts alleged is reasonable and foreseeable.

The second prong, requiring the claim to arise out of or relate to the defendant's contacts with the forum, is also satisfied where the Complaint is related to and entirely premised on the alleged misrepresentations and deceptive conduct the individual defendants allegedly directed to Massachusetts.

Finally this Court concludes that exercising personal jurisdiction in these circumstances comports with fair play and substantial justice—the third prong of the analysis. "In determining whether fair play and substantial justice are satisfied, [the court] weigh[s] the Commonwealth's interest in adjudicating the dispute, the burden on the out-of-State party of litigating in Massachusetts, and the Commonwealth's interest in obtaining convenient and effective relief." *Bulldog Investors Gen. P'ship*, 457 Mass. at 218, citing

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Burger King Corp. v. Rudzewicz, 471 U.S. 462, 467-77 (1985). Here, the Commonwealth, which has brought this suit, has a significant interest in remediating the opioid crisis, which, no one disputes, has exacted a heavy toll in Massachusetts. See *Exxon Mobil Corp.*, 479 Mass at 323 (personal jurisdiction comported with fair play and substantial justice where Attorney General, as chief law enforcement officer, "has a manifest interest in enforcing G.L.c. 93A"). On the other hand, the individual defendants make no particularized argument that litigating this case in Massachusetts would pose a hardship or other burden on them. Indeed, the Purdue headquarters are in Connecticut, a short distance away. The individual defendants also are persons of significant means. See *Rissman Hendricks & Oliverio, LLP*, 901 F.Sup.2d at 266 (corporate individual defendant, who engaged in business from various international locations, had not shown hardship in having to litigate case in Massachusetts). Under these circumstances, jurisdiction is reasonable and notions of fair play and substantial justice are satisfied.[7]

[7] Because the prima facie burden has been met on the c. 93A claim, the Court need not address personal jurisdiction in relation to the public nuisance claim.

CONCLUSION AND ORDER

For the foregoing reasons and for other reasons articulated in the Commonwealth's Opposition, the individual defendants' Motions to Dismiss pursuant to Rule 12(b)(2) is hereby *DENIED.*

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FEDERAL HOME LOAN BANK OF BOSTON
v.
ALLY FINANCIAL, INC. et al.

SUCV201101533BLS1
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August 29, 2019

MEMORANDUM OF DECISION AND ORDER ON THE MOTIONS FOR SUMMARY JUDGMENT BROUGHT BY THE CREDIT SUISSE DEFENDANTS, NOMURA DEFENDANTS, AND RBS DEFENDANTS

Mitchell H. Kaplan, Justice of the Superior Court

***1** This 2011 case finds its genesis in the residential mortgage crisis of the previous decade. Plaintiff Federal Home Loan Bank of Boston (the Bank) is one of the many institutional investors that purchased residential mortgage-backed securities (RMBS) before the market for this type of security collapsed. The purchases still at issue in this case occurred in 2006 and 2007. The remaining defendants are referred to as the "Credit Suisse Defendants" (Credit Suisse), "Nomura Defendants" (Nomura), and "RBS Defendants" (RBS).[1] The Bank alleges the offering documents used to market these RMBS contained materially false representations concerning underwriting standards, loan-to-value ratios, and credit ratings. It asserts claims against these defendants for violations of the Massachusetts Uniform Securities Act (MUSA), G.L.c. 110A, §§ 410(a)(2) and 410(b), negligent misrepresentation, and violations of G.L.c. 93A, § 11. The matter is presently before the court on motions for summary judgment filed by Nomura and RBS and a motion for partial summary judgment filed by Credit Suisse. For the reasons that follow, both motions are *ALLOWED* in part and *DENIED* in part.

1 The Credit Suisse Defendants consist of: Credit Suisse (USA), Inc.; Credit Suisse First Boston Mortgage Securities Corp.; Credit Suisse Holdings (USA), Inc.; Credit Suisse Securities (USA), LLC; and DLJ Mortgage Capital, Inc. The Nomura Defendants consist of: Nomura Asset Acceptance Corporation; Nomura Credit & Capital, Inc.; Nomura Holding America, Inc.; and Nomura Securities International, Inc. The RBS Defendants consist of: RBS Holdings USA, Inc. f/k/a Greenwich Capital Holdings, Inc. and RBS Securities, Inc. f/k/a Greenwich Capital Markets, Inc.

BACKGROUND

The claims against Nomura, RBS, and Credit Suisse relate to several RMBS trust certificates each apparently including a number of so-called Alt-A mortgage loans. For the purposes of these motions, it is sufficient to note that Alt-A mortgage loans have characteristics that tend to make them at greater risk of default than traditional, prime mortgages.

Between July 2006 and July 2007, the Bank acquired six "certificates" representing ownership interests in income streams generated by pools of residential mortgages that Nomura

had sponsored: NAAC 2006-AR4, NAAC 2006-AF2, NAAC 2007-1, and NAAC 2007-3. It purchased two of the certificates (NAAC 2006-AF2 and NAAC 2006-AR4 certificates) directly from Nomura/RBS[2] in 2006 and four of the certificates (two NAAC 2007-1 certificates, a NAAC 2006-AR4 certificate, and a NAAC 2007-3 certificate) from Bear, Stearns & Co., Inc. (Bear Stearns) in 2007. Nomura/RBS prepared or assisted in preparing the offering documents (e.g., free writing prospectuses and prospectus supplements) through which the certificates were marketed.

2 For the purposes of their motions the defendants have, for the most part, not distinguished between the roles of Nomura and RBS in the creation and sale of these trust certificates and therefore for simplicity this group of defendants will simply be referred to as Nomura/RBS unless it is necessary to distinguish between them.

***2** Between February 2006 and September 2007, the Bank also acquired nine certificates, again representing income streams from pooled residential mortgages that were sponsored by Credit Suisse and Chevy Chase Funding, LLC (Chevy Chase): ARMT 2006-1, ARMT 2006-2, ARMT 2006-3, ARMT 2007-1, ARMT 2007-2, CCMFC 2006-2A, CCMFC 2007-1A and CCMFC 2007-2A. It purchased six of the certificates (five ARMT certificates and one CCMFC certificate) from Credit Suisse and three certificates (all CCMFC certificates) from Barclays.[3] Barclays and Credit Suisse acted as co-underwriters in connection with the CCMFC certificates, each purchasing 50% of the certificates for resale to investors.

3 The Bank committed to purchase the ARMT certificates from Credit Suisse between February 2006 and May 2007 and the CCMFC certificate from Credit Suisse in March 2007. The Bank committed to purchase the other three CCMFC certificates from Barclays between May 2006 and September 2007.

DISCUSSION

As noted, the Bank asserts the same three claims against Nomura/RBS and Credit Suisse: (1) violation of MUSA; (2) negligent misrepresentation; and (3) violation of c. 93A. The claims asserted against Nomura/RBS concern two categories of certificates: (1) those the Bank purchased from Bear Stearns; and (2) those the Bank acquired directly from Nomura/RBS. The claims asserted against Credit Suisse also concern two similar categories of certificates: (1) those the Bank purchased from Barclays; and (2) those the Bank purchased directly from Credit Suisse. Nomura/RBS and Credit Suisse make similar arguments in support of their motions each differentiating the claims involving securities that they sold directly to the Bank from those where Bear Stearns or Barclays was the Bank's seller.[4]

4 Although they have filed separate briefs, Credit Suisse and Nomura/RBS have adopted and incorporated each other's arguments, except that Credit Suisse does not argue for dismissal on the grounds that the offering materials do not contain any misstatements of fact (while not conceding that they do). Credit Suisse has also repeated many of the same arguments in its briefing as those asserted by Nomura/RBS. Unless otherwise noted, if an argument made by Nomura/RBS is rejected by this Court, the argument is also rejected in so far as it applies to Credit Suisse for the same or similar

reasons.

Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c); *Cassesso v. Commissioner of Corr.,* 390 Mass. 419, 422 (1983). To prevail on a motion for summary judgment, the moving party must affirmatively demonstrate the absence of a triable issue, and that the summary judgment record entitles it to a judgment as a matter of law. *Pederson v. Time, Inc.,* 404 Mass. 14, 16-17 (1989). "[A]ll evidentiary inferences must be resolved in favor of the [nonmoving party]." *Boyd v. National R.R. Passenger Corp.,* 446 Mass. 540, 544 (2006).

A. MUSA

MUSA imposes liability on any person or entity who "offers or sells a security by means of any untrue statement of a material fact or any omission ... [of] a material fact." G.L.c. 110A, § 410(a)(2). Liability as a seller under the statute extends to "[a] person who successfully solicits the purchase motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Cohen v. State Street Bank and Trust Co.,* 72 Mass.App.Ct. 627, 635, quoting *Stolzoff v. Waste Sys. Intl., Inc.,* 58 Mass.App.Ct. 747, 766 n.21 (2003). To establish a violation of MUSA, a plaintiff must prove that: "(1) the defendant 'offers or sells a security'; (2) in Massachusetts; (3) by making 'any untrue statement of a material fact' or by omitting to state a material fact; (4) the plaintiff did not know of the untruth or omission; and (5) the defendant knew, or 'in the exercise of reasonable care [would] have known,' of the untruth or omission." *Marram v. Kobrick Offshore Fund, Ltd.,* 442 Mass. 43, 52 (2004), quoting G.L.c. 110A, § 410(a)(2). MUSA claims are subject to a four-year statute of limitations. G.L.c. 110A, § 410(e).

1. Claims Against Nomura/RBS

***3** With regard to the four certificates purchased from Bear Stearns, the MUSA claims asserted against Nomura/ RBS are dismissed. While Nomura/RBS created the trusts that held the mortgages and prepared the offering documents used to market them, it was not the seller of the certificates to the Bank, as the term "seller" is construed under MUSA and the cognate federal securities laws. See *Shaw v. Digital Equip. Corp.,* 82 F.3d 1194, 1216 (1st Cir. 1996) ("[N]either involvement in preparation of a registration statement or prospectus nor participation in 'activities' relating to the sale of securities, standing alone, demonstrates the kind of *relationship between defendant and plaintiff* that could establish statutory seller status") (emphasis in original). The court finds the Bank's arguments to avoid the settled case law in this area unavailing. Indeed, the court has addressed some of these arguments in deciding other motions in this case. See Memorandum of Decision and Order on Plaintiff's Motion for Reconsideration, dated June 26, 2018 [35 Mass. L. Rptr. 168]. With respect to those certificates purchased from Bear Stearns, there is no evidence that Nomura/RBS was more than the seller's seller. See *Pinter v. Dahl,* 486 U.S. 622, 644-47 (1988).

Nomura/RBS is, however, undisputedly the "seller" with respect to the other two Nomura certificates. As to these certificates, Nomura/RBS argues that: (i) the MUSA claims are time barred; and (ii) the Bank has failed to establish an essential element of a MUSA claim, namely, that the offering documents contained an "untrue statement of a material fact." G.L.c. 110A, § 410(a)(2). The court disagrees.

Nomura/RBS asserts that the MUSA claims are time barred because, by March 2007 (more than four years before the Bank filed its complaint), the Bank noticed or should have noticed that

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something was amiss with regard to the representations in the offering documents to the effect that the mortgages represented by the certificates had been reviewed and determined to comply with applicable underwriting and property appraisal guidelines. See *Genovisi v. Nelson,* 85 Mass.App.Ct. 43, 47 (2014), quoting *Marram,* 442 Mass. at 54 n.20 (“A claim under MUSA accrues when a reasonable investor would have noticed that something was ‘amiss’ ”).[5] Nomura/RBS points out that between February and March 2007: Bank officers and its regulator, the Federal Housing Finance Board (FHFB), exchanged and discussed news articles regarding the growing delinquency problem with Alt-A loans and the potential effects of this phenomenon on the Bank's RMBS portfolio; Bank officers asked the Bank's Credit and Treasury Department to analyze the Bank's exposure to RMBS backed by Alt-A loans in light of the developing turmoil in the Alt-A mortgage market; and the chairman of the Bank's Finance Committee expressed concern regarding the Bank's exposure to problems within the subprime sector. This evidence is certainly relevant and shows that the Bank was concerned about Alt-A mortgages generally and the possibility that the delinquency problem could affect its portfolio. But, it does not establish as a matter of law that the Bank was on inquiry notice that Nomura/RBS had misrepresented the underwriting and real estate appraisal standards that it had used in reviewing the mortgages that it pooled to create the certificates. See *In re Countrywide Fin. Corp. Mortg-Backed Sec. Litig.,* 2012 WL 1322884, at *4 (C.D.Cal. Apr. 16, 2012) (where the court observes that: “2007 was a turbulent time during which the causes, consequences, and interrelated natures of the housing downturn and subprime crisis were still being worked out”). As a result, the court cannot conclude as a matter of law that the Bank was on inquiry notice of its claim in March 2007 and that therefore its claims are time barred. This is a question that must be resolved at trial.

5 Based on a 2015 unpublished decision from a Massachusetts Federal District Court, the Bank argues that the “discovery rule” rather than the inquiry notice standard articulated in *Genovisi* governs the date on which the cause of action accrued. See *Massachusetts Mut. Life Ins. Co. v. DB Structured Prods., Inc.* (*Mass Mutual*), 2015 WL 3964560, at *8 (D.Mass. June 19, 2015). In *Mass Mutual,* the District Court concluded that the discovery rule should apply to MUSA's statute of limitations because the Supreme Court's decision in *Merck & Co., Inc. v. Reynolds,* 559 U.S. 633, 653 (2010) held that the discovery rule applies to claims brought under section 10(b) of the Securities Exchange Act of 1934. The District Court reasoned that Massachusetts courts would hereafter apply the discovery rule since Section 410(e) of MUSA uses similar “discovery” language to that found in the Securities Exchange Act and Securities Act and Massachusetts courts would reassess their interpretation of the trigger point for the statute of limitations in light of this Supreme Court decision. The Court need not address this argument because, as discussed below, the claim survives even under the less demanding inquiry notice standard.

***4** Turning to Nomura/RBS's second argument, the court also finds that there are genuine issues of disputed fact on the question of whether the offering documents contained untrue statements of a material fact. The Amended Complaint alleges that Nomura/RBS misrepresented the underwriting standards it used in selecting the pooled mortgages and the loan to value ratios of

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the residential property securing the mortgages. Nomura/RBS maintains that to the extent the claims are based on these representations, the claims fail because the Bank's experts witness opinions are inadequate to support jury questions concerning whether these statements were untrue. Again, the court disagrees.

With respect to underwriting standards, the so-called prospective supplements (pro-supps) for the certificates stated: "All of the Mortgage Loans have been purchased by the sponsor from various banks, savings and loan associations, mortgage bankers and other mortgage loan originators and purchasers of mortgage loans in the secondary market, and were originated generally in accordance with underwriting criteria described in this section." Another section of the pro-supps stated that the mortgages had been originated in accordance with each originator's underwriting guidelines. Whether these representations could reasonably be interpreted to mean that the mortgage loans complied with generally used underwriting standards applied by Nomura in its due diligence and/or the standards used by each loan originator is a question of fact to be decided at trial. The Bank has offered expert reports that state that, based on a review of a number of loan files selected in a statistically appropriate manner, these loans did not meet either underwriting standard. To the extent that Nomura/RBS moving papers suggest possible flaws in the plaintiff's expert's opinions, that goes to the creditability and weight of the opinions and does not preclude their admissibility.

The pro-supps also contained representations concerning the loan to value ratios (LTV) of the loans being pooled, including that the property values had been determined by appraisals that conformed to the Uniform Standards of Professional Appraisals. Although an appraisal of the value of a property is an opinion, this court has held that statements concerning LTVs may constitute materially false statements if they can be shown to be both objectively false and subjectively false. See *Cambridge Place Inv. Mgmt., Inc. v. Morgan Stanley & Co, Inc.,* 2012 Mass.Super. LEXIS 272, at *57 (Sept. 28, 2012) (Billings, J.) [30 Mass. L. Rptr. 594]. Additionally, statements that certain professional standards were used in determining property values can be false, if those standards were not actually employed. *Id.* at *58-59. The Bank's valuation experts reviewed the same sampling of loans reviewed by the underwriting guideline experts and opined that statistically significant percentages of the property valuations were materially overstated. With respect to subjective falsity, this clearly does not require testimony from the individuals who reviewed the appraised values at the time Nomura purchased the loans to the effect that they were aware of the inflated values. State of mind almost always has to be proved by reliance on circumstantial evidence. For example, in criminal trials, where the jury must find that *scienter* has been proven beyond a reasonable doubt, evidence offered to prove the defendant's state of mind is often circumstantial. See, e.g., *Commonwealth v. Zanetti,* 454 Mass. 449, 470 Appendix (2009) (providing model instruction on aiding and abetting liability).

2. Claims Against Credit Suisse

Credit Suisse only moves for summary judgment on the MUSA claims against it that are based on the three CMFC certificates that the Bank purchased from Barclays.[6] With regard to those certificates, Credit Suisse, like Nomura/RBS, argues that it cannot be liable under MUSA because it did not offer or sell these certificates. Credit Suisse's relationship to these sales is not the same as Nomura/RBS's relationship to its certificates sold by Bear Stearns.

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[6] Credit Suisse has not moved for summary judgment to the extent the Bank's MUSA claims are based on the certificates it directly sold to the Bank.

***5** Credit Suisse's Vice President admitted that "Credit Suisse and Barclays ... marketed deals together to get marketing power," a road show agenda for CCMFC 2007-2 shows that Credit Suisse and Barclay's made a joint presentation to the Bank, and the record contains electronic communications in which both Credit Suisse and Barclays apparently solicited the Bank to purchase each of the CCMFC certificates at issue. Indeed, it is not clear from the summary judgment record why the Bank purchased certain certificates that were owned by Barclay's rather than Credit Suisse, i.e., how or why certain purchases were allocated to one underwriter as opposed to the other. In any event, the evidence permits an inference that Barclays *and* Credit Suisse jointly solicited the Bank to purchase the CCMFC securities, including the certificates purchased from Barclays, and that Credit Suisse engaged in this joint marketing effort in service of its own financial interests. Under these circumstances, a reasonable jury could conclude that Credit Suisse was a "seller" of these certificates under MUSA. See *Cohen,* 72 Mass.App.Ct. at 635, quoting *Stolzoff,* 58 Mass.App.Ct. at 766 n.21 (liability as a seller under the statute extends to "[a] person who successfully solicits the purchase motivated at least in part by a desire to serve his own financial interests or those of the securities owner"); *In re WorldCom, Inc. Sec. Litig.,* 294 F.Sup.2d 392, 423 (S.D.N.Y. 2003) (alleged participation in "road show" meetings indicated that defendants actively solicited the sale of the notes issued under Section 12(a)(2) of the Securities Act). Cf. *Fed. Hous. Fin. Agency v. Stanley,* 2012 WL 5868300, at *4 (S.D.N.Y. Nov. 19, 2012) (defendant could not be liable under Section 12(a)(2) because plaintiff only alleged that defendant assisted in some *unspecified* marketing efforts and assisted in the preparation and filing of a registration statement).

B. Negligent Misrepresentation

1. Claims Against Nomura/RBS

With respect to the certificates Nomura/RBS itself sold to the Bank, the defendants argue that the Bank's negligent misrepresentation claims fail because the Bank cannot establish that it relied on the information in the pro supps. See *Gossels v. Fleet Nat'l Bank,* 453 Mass. 366, 372 (2009) (justifiable reliance element of negligent misrepresentation claim). It argues that reliance was not possible because the pro supps were issued after or on the same day the Bank purchased the certificates. However, negligent misrepresentation claims such as those asserted here may be based on the preliminary offering documents, such as a free writing prospectus (FWP). There is evidence in the record that the FWPs for the certificates at issue contained the same representations as the pro supps, and that the Bank relied on the FWPs in deciding to purchase the certificates. See *Federal Hous. Fin. Agency v. Nomura Holding Am., Inc.,* 68 F.Sup.3d 499, 503 (S.D.N.Y. 2014), aff'd sub nom. *Federal Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.,* 873 F.3d 85 (2d Cir. 2017), quoting 17 C.F.R. § 230.433(c)(1)(i) (explaining that governing SEC regulations mandate that a FWP "not conflict with [i]nformation contained in the filed registration statement, including any prospectus or prospectus supplement"); *Landesbank Baden-Wurttemberg v. RBS Holdings USA, Inc.,* 14 F.Sup.3d 488, 511 (S.D.N.Y. 2014) (plaintiffs could rely on FWPs where they contained same representations as pro supps); *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.,* 932 F.Sup.2d 1095, 1115 (C.D.Cal. 2013).[7]

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7 The defendants contend that the cautionary disclaimers contained in the FWPs to the effect that the information therein was subject to change rendered the Bank's reliance upon them unjustifiable. The court finds that this cautionary language is insufficient to establish lack of *reasonable* reliance, as a matter of law. See *Federal Hous. Fin. Agency v. Deutsche Bank AG*, 903 F.Sup.2d 285, 289 (S.D.N.Y. 2012) (rejecting contention that cautionary disclaimers in FWPs precluded the plaintiff from pleading reasonable reliance as a matter of law). The court does not understand the facts of this case to be such that the defendants' position with respect to the LTVs or the underwriting guidelines used, if at all, to review the mortgage loans subsequently changed. Rather, this part of the FWPs and pro-supps referred to historic actions undertaken or not undertaken at the time the loan pools were assembled by the sponsors. Also, whether any Bank personnel actually reviewed these documents and reasonably relied upon them is a question of fact for the jury. Reasonable reliance may be proven with circumstantial evidence.

***6** Turning next to the negligent misrepresentation claims that are based on the Bear Stearns sales, a difficult question is presented concerning choice of law: does New York or Massachusetts law govern these claims? This question is important to the outcome of this motion because, unlike Massachusetts, New York has not adopted § 552 of the Restatement (Second) of Torts which, as relevant to this case, defines the class of plaintiffs who may bring an action based on representations made by professionals with whom the plaintiff is not in privity. See *Nycal Corp. v. KPMG Peat Marwick, LLP*, 426 Mass. 491, 495-96 (1998) (holding that near-privity test adopted under New York law is inconsistent with the standard Massachusetts courts have applied and adopting and interpreting § 552).

The court applies Massachusetts choice of law rules to determine which law governs the claims. See *Clarendon Nat. Ins. Co. v. Arbella Mut. Ins. Co.*, 60 Mass.App.Ct. 492, 495 (2004). Massachusetts has adopted a functional choice-of-law approach guided by the Restatement (Second) of Conflict of Laws (1971) (the Restatement of Conflicts). *Cosme v. Whitin Mach. Works, Inc.*, 417 Mass. 643, 646-47 (1994); *Clarendon Nat. Ins. Co.*, 60 Mass.App.Ct. at 496. If, as here, a claim involves alleged misrepresentations in which the defendant's misrepresentation and the plaintiff's reliance occurred in different states, the court applies the factors set out in § 148(2) of the Restatement to determine which state has the most significant relationship to the claim. Those factors include: "(a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations, (b) the place where the plaintiff received the representations, (c) the place where the defendant made the representations, (d) the domicile, residence, nationality, place of incorporation and place of business of the parties ..." Restatement of Conflicts § 148(2). The relative importance given to each factor "should be determined in the light of the [general] choice-of-law principles stated in § 6 with emphasis upon the purpose sought to be achieved by the relevant tort rules of the potentially interested states, the particular issue and the tort involved." *Id.*, cmt. (e).[8] § 6 identifies the following principles: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the

protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied." *Id.*, § 6(2).

8 Section 145 of the Restatement of Conflicts, which discusses principals applicable to all tort actions, similarly provides that of the principles set forth in § 6, the following are most relevant to consider in a tort action: "the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states and particularly of the state with the dominant interest in the determination of the particular issue, and ease in the determination and application of the law to be applied." Restatement of Conflicts § 145, cmt. (b).

In arguing that New York law governs, Nomura/RBS passes by the § 148(2) analysis to focus on the § 6 factors.[9] And, as to these factors, Nomura/RBS does not actually perform a factor-by-factor analysis but instead relies on Judge O'Toole's consideration of this issue, when the case was before him in federal court prior to remand, on motions presented by the rating agencies, Moody's and S&P. There, Judge O'Toole held that misrepresentation claims asserted against those defendants were governed by New York law. See *Federal Home Loan Bank of Boston v. Ally Fin., Inc.*, 2013 WL 5466628, at *1-2 (D.Mass. Sept. 30, 2013). In that decision, Judge O'Toole explained:

> ***7** The Bank argues that Section 148 of the Restatement overwhelmingly favors the application of Massachusetts law, as Massachusetts is where the Bank received and relied on the Rating Agency Defendants' representations. That emphasizes only some of the considerations, however, at the expense of others. Instead of mechanically applying Section 148, I am to view the factors in light of the general choice-influencing factors of Section 6 ... New York has a strong interest in overseeing the conduct of financial institutions operating within its borders. Further, the Rating Agency Defendants did not specifically communicate their ratings to the Bank in Massachusetts; rather, the ratings were disseminated broadly by various entities. For the sake of uniformity and predictability, it is preferable that New York law should apply to these claims, rather than the law of the various and numerous States to which the ratings ended up being disseminated. Therefore, I conclude that New York law governs all three claims against the Rating Agency Defendants.

Id. (internal quotation marks and citations omitted). Nomura and RBS contend that the same reasoning applies here. The court disagrees.

9 Although factor (c) favors New York law

> because the alleged misrepresentations were made there, factors (a), (b), and (d) favor Massachusetts law because the Bank relied on and received the alleged misrepresentations in Massachusetts and is headquartered in Massachusetts. See Restatement of Conflicts § 148, cmt. (i) (with regard to factor (d), explaining that "[t]he domicil, residence and place of business of the plaintiff are more important than are similar contacts on the part of the defendant").

In rendering his conclusion, Judge O'Toole stressed the need for "uniformity and predictability" (factor (f)). Some courts have questioned whether uniformity and predictability concerns are paramount in the context of negligent misrepresentation claims of the type asserted here. See *Tidemark Bank for Sav., F.S.B. v. Morris*, 57 F.3d 1061, 1995 WL 368418, at *4 (1st Cir. 1995) (unpublished) (Factor (d) "is insignificant in negligence actions where the parties probably acted without considering the significance of the applicable rule of law"). See also Restatement of Conflicts § 148, cmt. (e) (uniformity and predictability not among the § 6 factors to be emphasized when weighing the relative importance given to each § 148 factor); *id.*, § 145, cmt. (b) (including the uniformity and predictability factor as one of factors that are of "relative insignificance" when § 6 analysis is conducted with regard to tort claim). But, in any event, such concerns are of very different weight in deciding the choice of law for the claims asserted against the present investment banking defendants, who are in a very different relationship with the Bank, than the rating agency defendants. Unlike Moody's and S&P, the investment banking defendants were the sponsors and/or marketers of these securities. They made the representations at issue in this case for the purpose of selling the securities and chose to sell them in a number of different states, including Massachusetts. They were aware of the states in which the securities could be marketed and the public policy decisions that governed the law of professional misrepresentation that applied in each.

Furthermore, the other relevant Section 6 factors are either neutral or weigh in favor of Massachusetts, where the impact of the alleged misrepresentations will be experienced and, as with most states, § 552 of the Restatement (Second) of Torts has been adopted. The § 148 factors also point to Massachusetts. The court concludes that Massachusetts law applies to the negligent misrepresentation claims concerning the Bear Stearns sales.

Nomura/RBS also raises two arguments for summary judgment under Massachusetts law. First, it contends that the Bank's negligent misrepresentation claims are time barred under the applicable three-year statute of limitations. Second, it asserts that the Bank cannot satisfy essential elements of its negligent misrepresentation claims.

***8** Nomura/RBS contends that the claims are time barred because, more than three years before the Bank filed its complaint, another investor filed a class action complaint against Nomura, which alleged many of the same misrepresentations concerning underwriting practices and credit quality of the loans pooled to create the certificates. See *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.,* SUCV 2008-00544 (*Plumbers' Union*). According to the defendant, the filing of the *Plumbers' Union* complaint is dispositive evidence that a reasonable investor in the Bank's position would have had reason to know of the alleged misconduct at issue no later than January 31, 2008. See *Bowen v. Eli Lilly & Co.,* 408 Mass. 204, 206 (1990) (limitations period for tort claim begins to run when the

plaintiff "knew or had reason to know that [it] had been harmed by the defendant's conduct").

Nomura/RBS is unable to cite any relevant Massachusetts authority to support this proposition. Moreover, the case law it does cite from other jurisdictions generally indicates that the filing of a third party's complaint, *without more,* is not sufficient to trigger the statute of limitations as a matter of law. See, e.g., *In re American Funds Securities Litigation,* 556 F.Sup.2d 1100, 1105-10 (C.D.Cal. 2008) (detailed news articles in prominent national publications, SEC press releases discussing enforcement orders in several proceedings addressing similar issues, *and* a prior complaint filed by other investors that alleged a nearly identical scheme of wrongdoing were sufficient to put the plaintiffs on inquiry notice for purposes of claim under Section 10(b) of the 1934 Act); *Domenikos v. Roth,* 288 F.App'x 718, 720 (2d Cir. 2008) (a class action complaint filed in the wake of a substantial decline in stock price *that received extensive media coverage* put plaintiffs on inquiry notice). The court does not find the filing of a complaint by another party triggers the running of the statute of limitations in the absence of evidence that the plaintiff was aware of the complaint and what was alleged in it or of the facts alleged disclosed in other sources.

Normura/RBS also argues that the claims are time barred because the record evidence demonstrates that the Bank was on inquiry notice of its claims more than three years before the filing of the complaint. The defendant points out that: between August and September 2007, the Bank's Credit Department, Chief Risk Officer, and Portfolio Manager expressed concern about the unexpected risk posed by NAAC 2006-AR4;[10] in September 2007, the Bank stopped purchasing private label RMBS on the advice of the FHFB (the Bank's regulator), which expressed concern that the underlying loans would default; and in March 2008, Moody's put three certificates (NAAC 2006-AR4, NAAC 2006-AF2, and NAAC 2007-1) on review for downgrade.[11] Again, this is relevant evidence, but not conclusive, as a matter of law, that the Bank was on inquiry notice that the specific representations made in the offering materials regarding the due diligence undertaken in assembling the loans for these particular certificates were false.

10 Nomura/RBS also points out that the Bank's Chief Risk Officer admitted that by early 2008 and into mid-2008, NAAC 2006-AR4 "sort of stood out as a bond that carried more risk" than originally believed.

11 Nomura/RBS further notes that on April 9, 2008, the Bank's Enterprise Risk Management Group prepared a preliminary other-than-temporary-impairment analysis of the Bank's RMBS portfolio. However, this analysis concluded that none of the Bank's RMBS were other than temporarily impaired. In other words, the report indicated that, at that point, there was no reason to believe that the RMBS would not perform as anticipated if held to maturity. Thus, the report does not establish that the statute of limitations was necessarily triggered the date it issued. In fact, it could be argued that the report suggested that the RMBS would perform adequately if held to maturity.

***9** Nomura/RBS also argues that the Bank has failed to provide evidence necessary to satisfy essential elements of their negligent misrepresentation claims concerning those sales. In situations, such as the one in the present case,

where a plaintiff asserts a negligent misrepresentation claim against a defendant who supplied information for the guidance of others in a business transaction and who was not in contractual privity with the plaintiff, Massachusetts has specifically adopted the reasoning of the Restatement (Second) of Torts, § 552 (1977). See *Nycal Corp.,* 426 Mass. at 495-96. Under the Restatement: "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Id.,* quoting Restatement (Second) of Torts § 522. The SJC has interpreted this standard to require that a plaintiff establish that the defendant had "actual knowledge ... of the limited—though unnamed—group of potential [third parties of which the plaintiff was a member] that will rely on the [defendant's advice], as well as actual knowledge of the particular financial transaction that such information is designed to influence." *Id.* at 498, quoting *First Nat'l Bank of Commerce v. Monco Agency, Inc.,* 911 F.2d 1053, 1062 (5th Cir. 1990). Nomura/RBS contends that there is no record evidence that it had actual knowledge of the Bear Stearns sales (i.e., the transaction that its alleged misrepresentation was designed to influence). It also contends that there is no record evidence that it had actual knowledge of the group of potential third parties, such as the Bank, that would rely on the alleged misrepresentations. The court disagrees.

First, actual knowledge of the specific transaction—here the Bank's purchases from Bear Stearns—is not required. Actual knowledge of a "substantially similar transaction" is sufficient. See Restatement (Second) of Torts § 552; *North Am. Specialty Ins. Co. v. Lapalme,* 258 F.3d 35, 40-41 (1st Cir. 2001). Second, there is sufficient evidence in the record to create a triable question of fact as to whether Nomura/RBS had actual knowledge that Bear Stearns intended to supply the offering materials to a group of sophisticated institutional investors with very substantial financial resources available for investment in RMBS, like the Bank, for their use in deciding whether to purchase the certificates. There even appears to be some evidence suggesting that Nomura/RBS knew that the Bank, in particular, was among these potential purchasers.[12]

[12] RBS/Nomura argues, without citing authority directly on point, that the population of institutional investors that may have relied on the offering documents it created is simply too large to support a negligent misrepresentation claim. However, at least two other courts, applying the Restatement test in a manner consistent with *Nycal,* have rejected this position. See *Public Employees' Ret. Sys. v. Moody's Investors Serv., Inc.,* 226 Cal.App.4th 643, 669-70 (2014) ("CalPERS and the other [qualified institutional investors/qualified purchasers] constitute a sufficiently narrow and circumscribed class that would have access to and rely upon the ratings when deciding whether to purchase the SIV products"); *Anschutz Corp. v. Merrill Lynch & Co.,* 785 F.Sup.2d 799, 826 (N.D.Cal. 2011) ("although the class of [qualified institutional buyers] might number in the thousands, it is still a circumscribed and identifiable group that the Ratings Defendants not only knew would have access to the ratings but who necessarily rely on the ratings in order to purchase investment grade securities").

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2. Claims Against Credit Suisse

a. Loss Causation

Credit Suisse contends that it is entitled to summary judgment on all the negligent misrepresentation claims asserted against it (whether they arise from the certificates the Bank purchased from Barclays or from the certificates it purchased directly from Credit Suisse) because there is no record evidence that the Bank's losses were proximately caused by the alleged misrepresentations in the offering documents. In making this argument, Credit Suisse principally relies on the United States Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 343-46 (2005). It asserts that, by application of the principles announced in *Dura,* it is entitled to summary judgment because the Bank has not proffered expert testimony demonstrating that its losses were attributable solely to the misstatements allegedly set out in the certificates rather than the effects of the Great Recession or other market conditions affecting RMBS.[13] Credit Suisse's reliance on *Dura* is misplaced. *Dura* was a securities fraud class action in which the plaintiff class asserted reliance on a false statement under the theory of "fraud on the market," where the market price of a publicly traded security in an efficient market is deemed to reflect any inflated value attributable to a false statement. In holding that the complaint failed to state a claim, the Supreme Court explained that the plaintiffs had not alleged that when the truth was revealed to the market, the stock price moved. In other words, there was no factual allegation that the allegedly false statement had inflated the market price at the time of purchase and caused the plaintiff class any loss.

13 Credit Suisse also points out that the Bank has not offered any expert testimony on damages.

***10** This is not a fraud on the market case. In this case, if the Bank can prove that the alleged misrepresentations were a substantial factor in causing it to purchase the certificates, it is then entitled to recover any resulting "pecuniary loss ..., if [its] reliance is a substantial factor in determining the course of conduct that results in [its] loss." See *Reisman v. KPMG Peat Marwick, LLP,* 57 Mass.App.Ct. 100, 112 (2003), quoting Restatement of Torts § 546. *Reisman* defines Massachusetts law in the context of common-law claims for fraud or negligent misrepresentation of the type alleged in this case. See *id.* at 120 (rejecting application of the type of loss causation rule proposed by Credit Suisse and stating that "we [do not] think this troubled concept a desirable addition to our jurisprudence"). See also *Lawrence Sav. Bank v. Levenson,* 59 Mass.App.Ct. 699, 707 (2003) ("The question of causation is generally one of fact for the jury, and a plaintiff need only show that there was greater likelihood or probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause ...") (internal quotation marks omitted).[14]

14 Credit Suisse' reliance on *Vaso Active Pharm., Inc. v. Robinson & Cole, LLP,* 2009 WL 971161, at *8 (Mass.Super. Jan. 23, 2009) (Fabricant, J.) [25 Mass. L. Rptr. 424], is misplaced. In that unusual case, the question was whether the defendant's alleged legal malpractice caused any injury to the plaintiff corporation, as opposed to its shareholders who had already settled a securities class action. The question was whether the defendant law firm's alleged failure to detect a misrepresentation in an SEC filing caused any loss to the

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enterprise value of the corporate plaintiff, as the decline in the market price of the plaintiff's stock appeared to be the result of the disclosure of the true state of affairs not any act attributable to the defendant.

b. The Barclay's Sales

Summary judgment will enter on the negligent misrepresentation claims based on the Barclays sales.[15] It is undisputed that Chevy Chase, not Credit Suisse, made all the representations in the offering materials for the CCMFC certificates. Because Credit Suisse did not make the challenged misrepresentation or sell the certificates to the Bank, it cannot be held liable for negligent misrepresentation. See *Savers Prop. & Cas. Ins. Co. v. Admiral Ins. Agency, Inc.,* 61 Mass.App.Ct. 158, 169 (2004) (defendant entitled to directed verdict on negligent misrepresentation claim where plaintiff "offered no evidence that [defendant] made any representations, let alone misrepresentations, for the guidance of [the plaintiff] that [plaintiff] relied on to its pecuniary detriment"). The Bank contends that simply passing along false information is sufficient for liability and therefore Credit Suisse may be liable because there is evidence that it sent the offering documents to the Bank. The court finds no law that supports this contention. The single Superior Court decision cited by the Bank, *Schoembs v. Schena,* 2015 WL 1012065 (Mass.Super. Mar. 13, 2015), actually stands for the converse, i.e., passing along false information contained in a report prepared by another does not make one liable for a false statement contained in that report, even if the defendant recommended to the plaintiff the professional who prepared the report.

15 In a footnote in its opening brief, Credit Suisse asserts, in conclusory fashion, that New York law applies to the extent the Bank's negligent misrepresentation claims are based on the Barclays sales. See Def. Brief at 11, n.9. For the reasons already explained, the court does not find that New York has the most significant relationship to the claims.

C. G.L.c. 93A

1. The Direct Sales Claims

With respect to the c. 93A claims based on the direct sales by Nomura/RBS and Credit Suisse to the Bank, the defendants contend that the claims should be dismissed because the Bank failed to establish that any of the negligent misrepresentations that underlie the claims are extreme or egregious. See *Marram,* 442 Mass. at 62 ("a negligent misrepresentation may be so extreme or egregious as to constitute a violation of G.L.c. 93A, § 11"). A negligent misrepresentation may be extreme or egregious "if the truth could have been reasonably ascertained." *Quinlan v. Clasby,* 71 Mass.App.Ct. 97, 102 (2008); see also *Golber v. BayBank Valley Trust Co.,* 46 Mass.App.Ct. 256, 261 (1999), quoting *Glickman v. Brown,* 21 Mass.App.Ct. 229, 235 (1985) ("negligent misrepresentation of fact the truth of which is reasonably capable of ascertainment is an unfair and deceptive act or practice under G.L.c. 93A, § 2(a)"). Whether the alleged misstatements at issue here are "extreme or egregious" presents a question of fact for resolution at trial.

2. Bear Stearns and Barclay Sales

***11** The last paragraph of G.L.c. 93A, § 11 (par. 8), provides that:

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> 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. For the purposes of this paragraph, the burden of proof shall be upon the person claiming that such transactions and actions did not occur primarily and substantially within the commonwealth.

The unfair method of competition or unfair or deceptive act or practice occurred "primarily and substantially" in Massachusetts when "the center of gravity of the circumstances that give rise to the claim is primarily and substantially within the Commonwealth." *Kuwaiti Danish Comp. Co. v. Digital Equip Corp.,* 438 Mass. 459, 473 (2003). To determine the center of gravity, the court "[l]ook[s] only to the allegedly unscrupulous conduct" and examines "factors ... includ[ing], but ... not ... limited to, the place of conduct, and the 'situs of loss.' " *Skyhook Wireless, Inc. v. Google, Inc.,* 86 Mass.App.Ct. 611, 622 (2014).

Nomura/RBS and Credit Suisse argue that even though they have the burden of proof on this element, they have met their burden with regard to the claims arising from the Bank's purchases of RMBS certificates from Bear Stearns and Barclays, respectively. The defendants' arguments concerning the center of gravity of the c. 93A claims asserted against them with respect to the certificates sold to the Bank by other investment banks are not without merit. This is particularly true with respect to Credit Suisse, as it did not even prepare the offering materials used to market the RMBS sponsored by Chevy Chase. Nonetheless, the court finds that the c. 93A claims ought not be unbundled in the manner proposed by the defendants. Rather, their course of conduct in respect of the sale of the certificates and their relationship to the Bank should be viewed in its entirety in deciding the center of gravity of any unscrupulous conduct that may be proved at trial.

In this case, the direct sale c. 93A claims will be tried, all of the negligent misrepresentation claims with respect to the Nomura certificates will be tried, and all the MUSA claims with respect to Credit Suisse will be tried. As a result, it does not appear that any additional evidence will be required at trial with respect to the c. 93A claims associated with the Bear Stearn's and Barclay's transactions. Prudence suggests that if unfair or deceptive conduct is proven at trial with respect to either Nomura/RBS or Credit Suisse, the court consider the center of gravity of that conduct in the context of all the relevant evidence presented at trial.[16]

[16] It is a well "established principle that the absence of privity of contract does not bar a claim under the statute so long as the parties [were] engaged in more than a minor or insignificant business relationship." *Imprimis Inv'rs, LLC v. KPMG Peat Marwick, LLP,* 69 Mass.App.Ct. 218, 230 (2007) (internal quotation marks omitted). Nomura/RBS suggests that with regard to the certificates sold by Bear Stearns, the c. 93A claim fails because the Bank did not have a commercial relationship with it. Although Nomura/RBS had no direct contact with the Bank in connection with these sales, its business relationship with the Bank was such that liability under c.

93A is not foreclosed as a matter of law because of a lack of privity.

ORDER

***12** For the forgoing reasons:

1. The Nomura and RBS Defendants' motion for summary judgment is *ALLOWED* with respect to the claims for violation of MUSA that are based upon the Bear Stearns sales, but otherwise *DENIED*; and

2. The Credit Suisse Defendants' motion for partial summary judgment is *ALLOWED* with respect to the claims for negligent misrepresentation that are based on the Barclays sales, but otherwise *DENIED*.

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End of Document

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21 Mass.L.Rptr. 41
Superior Court of Massachusetts,
Suffolk County.

1 Richard Simon, Joan Frishman and Sheila Nassberg.

Alan FRISHMAN et al.[1]
v.
Robert A. MAGINN, Jr.
No. 040673BLS1.
|
April 12, 2006.

MEMORANDUM AND ORDER ON MOTION FOR SUMMARY JUDGMENT

ALLAN VAN GESTEL, Justice.

***1** This matter is before the Court on the Defendant's Motion for Summary Judgment, Paper # 75.

BACKGROUND

The facts that follow are undisputed.

iBasis, Inc. ("iBasis"), is a company in the business of providing voice-over IP services, which involves the use of the Internet to transmit telephone communications. The name of the company was changed from VIP Calling to iBasis on August 4, 1999.[2]

2 For simplicity, in this memorandum the Court will refer to the company as iBasis, unless the context otherwise requires, even though by way of timing it may have been in the VIP Calling years.

In 1996 or 1997, the defendant, Robert A. Maginn, Jr. ("Maginn"), then a partner at Bain & Company ("Bain"), approached the CEO of iBasis looking for consulting business. Thereafter, Bain accepted an engagement to perform consulting work for iBasis. After performing these services, Maginn and other partners at Bain became interested in iBasis as an investment opportunity. Maginn was appointed to the iBasis Board of Directors on November 11, 1997. He continued in that position until the end of May 2000.

In 1997, certain Bain partners, including Maginn, invested in iBasis through an entity known as Sunapee Securities, Inc. ("Sunapee"). Sunapee was an employee security company formed by Bain that allowed Bain employees to make investments using pre-tax dollars. Participation in Sunapee was limited to Bain partners who were "accredited investors" as defined in Rule 501 of the Securities Act of 1933.

In December 1997, and June 1998, Sunapee purchased unregistered shares of Series A Convertible Preferred iBasis stock for $1 per share. This stock would automatically convert into iBasis common stock upon the closing of an iBasis public offering.

Seventy-five thousand dollars was withheld from Maginn's compensation at Bain for purposes of his investment in iBasis through Sunapee. Maginn, thereby, owned an interest in 75,000 of the Series A iBasis shares purchased by Sunapee.

In the first or second quarter of 1999, iBasis decided to offer unregistered Series C Convertible Preferred shares. Only existing holders of iBasis securities who had preemptive rights were permitted to acquire iBasis Series C shares. Again, like Series A, iBasis Series C

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Convertible Preferred stock automatically converted into iBasis common stock upon the closing of an iBasis public offering.

iBasis raised $25.1 million through the sale of the Series C shares.

In issuing the Series C shares, iBasis relied upon the exemption from the registration requirements of the Securities Act of 1933 set forth in Regulation D (17 C.F.R. secs. 501-06). As part of their purchase of Series C shares, all purchasers were required to represent and warrant that they were "accredited investors," and acknowledge that iBasis was relying upon such representation and warranty to establish that an exception from registration of the shares was available.

As a result of the earlier purchase of Series A shares, the Bain partners, including Maginn, who participated in that investment obtained preemptive rights to invest in the Series C shares.

Maginn and the plaintiff Alan Frishman ("Frishman") first came into contact in May or June of 1999. At that time, Maginn was raising capital for a privately held company now known as Jenzabar, Inc. ("Jenzabar"). A common acquaintance of Maginn and Frishman, Charles Farkas ("Farkas"), inquired of Frishman about his interest in the Jenzabar investment. Farkas had been an early investor in Jenzabar.

***2** Jenzabar was then a leading provider of enterprise software to colleges and universities. The company was formed in 1998 by Maginn's then fiancée (now wife), Ling Chai ("Chai"). Jenzabar was originally known as CollegeNet, Inc. As of the summer of 1999, Chai was the CEO of Jenzabar and Maginn was Chairman of its Board of Directors. In March of 2001, Maginn became CEO of Jenzabar.

On May 27, 1999, a limited liability company known as New Media Investors II, L.L.C. ("NM II"), was formed as a vehicle for investing in unregistered securities of Jenzabar.

Participation in NM II was limited to "accredited investors." Maginn was named the Managing Member of NM II.

NM II's Limited Liability Company Agreement grants to its Managing Member "the right, power and authority, in the management of the business and affairs of the Company, to do or cause to be done, any and all acts deemed by the Managing Member to be necessary or appropriate to effectuate the business, purpose, and objectives of the Company ..." In addition, the Managing Member has "the power to appoint agents ... to act for the Company ... and to delegate to such agents the powers as are held by the Managing Member."

In May and June 1999, Frishman informed a number of his friends and family members about the opportunity to invest in Jenzabar. Thereafter, Frishman assembled a group of investors that invested a total of $200,000 in Jenzabar through NM II. Frishman's group included himself, the plaintiff Richard Simon ("Simon"), Jack Frishman, Edward Nassberg, Kenneth Gross, Yun Peng Wei ("Johnny Wei"), Gang Xiao ("Kevin Xiao"), and Lily E. Deng ("Lily E.").

By checks dated June 2, 1999, Frishman, in his own name, invested $50,000 in Jenzabar through NM II, and $12,000 for his daughter Dana. He wrote checks in these amounts to CollegeNet, Inc. In connection with his investment, Frishman executed a NM II Subscription and Adoption Agreement in his name, and another on behalf of his daughter Dana. Frishman also executed a NM II Limited Liability Company Agreement and submitted a Jenzabar Investor Suitability Questionnaire.

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By check dated June 8, 1999, Jack Frishman, in his wife Joan Frishman's name, invested $25,000. By check dated June 9, 1999, Edward Nassberg, in his wife Sheila Nassberg's name, invested $25,000. Also, at about the same time, Kenneth Gross, in his wife Felicia Gross's name, invested $25,000. By check dated June 21, 1999, Simon invested $50,000 in Jenzabar through NM II. These various checks, like Frishman's, were each made out to CollegeNet, Inc.

In connection with their investments, in June 1999, Simon, Joan Frishman, Sheila Nassberg and Felicia Gross each also executed a NM II Subscription and Adoption Agreement and filled out and submitted a Jenzabar Investor Suitability Questionnaire. By executing the NM II Subscription and Adoption Agreement, Frishman, Simon, Joan Frishman, Sheila Nassberg and Felicia Gross became members of NM II.

***3** Still further, by another check dated June 9, 1999, Lily E. attempted to invest $5,000 in Jenzabar through NM II. However, because Lily E. was not an accredited investor, Maginn returned to her $5,100, being her attempted investment, plus agreed-upon interest of $100.

Maginn advised Frishman that neither Lily E., nor Johnny Wei or Kevin Xiao, because none of them were accredited investors, could invest directly in Jenzabar. Instead, Maginn told Frishman that if they wanted to invest in Jenzabar through NM II they would have to do so through Frishman. Thereafter, on June 14, 1999, Frishman sent one of his own checks in the amount of $13,000 to CollegeNet, Inc. as an investment through NM II. Later in June 1999, Frishman accepted $5,000 each from Lily E. and Johnny Wei, and $3,000 from Kevin Xiao.

On June 29, 1999, another limited liability company known as New Media Investors III, L.L.C. ("NM III") was formed to allow Bain partners with preemptive rights to acquire an interest in the unregistered Series C shares of iBasis mentioned above. Participation in NM III was limited to Bain partners who were "accredited investors." Maginn and Gary Wilkinson ("Wilkinson"), Bain's corporate treasurer at the time, were named co-Managing Members of NM III.

Some Bain partners who had preemptive rights to purchase iBasis Series C shares chose not to do so. Maginn then acquired the interest of the iBasis Series C shares of all Bain partners who decided not to exercise their preemptive rights though NM III.

iBasis issued the Series C shares to NM III on July 12, 1999. NM III purchased the shares at a price of $4.37 per share. Maginn contributed $340,062 to the capital of NM III for the purchase of Series C shares. He paid for his interest with a check dated August 16, 1999. Maginn, thereby, acquired an interest in 77,817 Series C shares of iBasis through NM III. This purchase of $340,062 covered both Maginn's initial allotment and the "extra" shares he had picked up from those Bain partners who decided not to exercise their preemptive rights.

In July or August of 1999, Frishman sent an e-mail to Maginn setting forth several ideas for services that Jenzabar could provide to its customers. Also, on August 10, 1999, Maginn sent an e-mail to Frishman indicating that he wanted to talk with Frishman about "what might be possible on [iBasis]." Maginn further stated, "I will not be able to offer shares of [iBasis] broadly but in a few selective cases I may be able to offer $25-34k ..."

Later in the day on August 10, 1999, Frishman replied to Maginn. In his response, Frishman stated in part, "Thanks for your email earlier today. The Frishman's [sic] are taken aback by

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your generosity You can also count us in for VIP and I'll send you a check tomorrow after we go over all the details."

On August 11, 1999, Frishman spoke to Maginn by telephone about the proposed assignment from Maginn's NM III position. During the conversation, Maginn indicated that the proposed assignment "wasn't a done deal and that he would try to make it work." Further, Maginn told Frishman that he hoped to provide him with $40,000 worth of pre-IPO shares in iBasis. iBasis was planning an initial public offering in late 1999. He further advised Frishman that the iBasis shares which he would be assigning to Frishman would of necessity be "locked up" for a period of six months following the IPO.

***4** Later on August 11, 1999, Frishman sent another e-mail to Maginn. This e-mail read, in part:

> I am posting to you a check for $40,000 to cover the 20% "linkage" in [iBasis] through New Media III based on our group's $200,000 investment in Jenzabar. The group consists of the following accredited investors (Jenzabar investment):
>
> Dick Simon ($50,000)
>
> Alan Frishman ($50,000)
>
> Jack Frishman ($25,000)
>
> Ed Nassberg ($25,000)
>
> Ken Gross ($25,000)
>
> The remaining $25,000 is a consortium (boy, is that an overstatement or what?) headed by Dana's trust and including 3 other friends of Lily. This stock is held in my name given the eventual investment accreditation [sic] requirement in Jenzabar.

On August 12, 1999, Frishman sent an e-mail to Simon, Edward Nassberg, Kenneth Gross, Kevin Xiao and Lily E informing them of the proposed assignment from Maginn's NM III position. Frishman indicated in the e-mail that the proposed assignment was not certain yet. He also advised that, "As an insider, however, we will have to hold the stock before we can sell it for 6 months from the IPO date."

Maginn responded to Frishman's August 11, 1999, e-mail on August 12, 1999. In his reply, Maginn stated, in part:

> thank you for your email. I will have the lawyer draft an assignment from my new media III position to you and your group. Your share will be 75k over 200k and the rest as indicated in your email. As you know only accredited investors can invested [sic] in New Media II or III. Have a great trip. I believe the lawyers should have the assignment drafted by next week so I would go ahead and ask for the others to reimburse you next week and I will deposit your check then too.

On August 12, 1999, Frishman mailed a check to Maginn for $40,000. On the "Memo" line of the check, Frishman wrote "assignment of New Media III." When Frishman wrote these words, it was his understanding that he was to be given some type of document by which Maginn would assign his rights in NM III to Frishman. Maginn deposited Frishman's cheek on August 31, 1999.

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In October 1999, Frishman received from the following persons, the amounts after their names: Simon, $10,000; Sheila Nassberg, $5,000; Jack Frishman, $5,000; Kevin Xiao, $600; Johnny Wei, $1,000; and Lily E., $1000. Frishman considered these people to be his co-investors in the proposed assignment from Maginn's NM III position.

Kevin Xiao, Johnny Wei and Lily E. remained unaccredited investors.

Kenneth Gross never sent Frishman any money for the purpose of the proposed assignment from Maginn's NM III position. His share was picked up by Frishman.

As of October 7, 1999, Frishman advised Edward Nassberg that the iBasis opportunity "is not yet fully resolved." This was in a letter asking Nassberg for his reimbursement. What Frishman meant was that he "had no paperwork from [Maginn] at that point." Frishman was concerned about this. "If it turned out to be a huge successful deal and [Maginn] decided it's too good a deal and changed his mind, [Frishman] could have a problem."

***5** iBasis had its initial IPO on November 10, 1999.

On November 13, 1999, Maginn sent an e-mail to Frishman. It said, in part:

> Thanks for your email ... lets [sic] keep thinking what we can each do to help IBAS make its numbers. New Media III will be locked up for at least 6 months and IBAS may well be a stock for the ages like ATT.
>
> Thanks for the attached email since I was confused about which one you referred too [sic] on the phone. As indicated in my old email, I have only deposited your 40K and will leave you to deal with the others. They are only in new media because of you and I dont [sic] have time as this 430am email attests to deal with these small amounts (eg $2k for gary and key should have been sent to you not me).

In November 1999, Frishman had a series of meetings with Maginn and Ling Chai which resulted in their offering him a position at Jenzabar as its Senior Vice President for Operations. Frishman accepted their offer and on December 1, 1999, went to work at Jenzabar in that capacity.

On January 31, 2000, Frishman was fired under bad terms by Jenzabar. During the brief time that Frishman was employed by Jenzabar, he saw Maginn "when he would come over to the Jenzabar office, frequently, on a daily basis." Frishman and Maginn never discussed the $40,000 Frishman had given Maginn for the proposed assignment of Maginn's NM III position during the time Frishman was at Jenzabar.

On May 15, 2000, Frishman filed a civil action in Middlesex Superior Court against Jenzabar, Chai, Maginn and NM II asserting claims arising out of his employment (the "Jenzabar litigation").

About two months after attempted mediation of the Jenzabar litigation, Maginn's counsel in that suit, on April 11, 2002, enclosed a check for $40,000 from Maginn representing a return of the money given by Frishman to Maginn for the proposed assignment of Maginn's NM III position. By letter dated May 3, 2002, Frishman advised Maginn's attorney that he would credit the $40,000 check against the damages owed to him by reason of Maginn's breach of his contract to sell the iBasis shares, but not in full satisfaction of the amount owed.

On June 25, 2002, Frishman filed a motion in

the Jenzabar litigation seeking to enforce a settlement agreement that was negotiated by the parties but was not approved by the Jenzabar Board of Directors. On July 12, 2002, Judge Gants denied Frishman's motion, but granted Frishman leave to amend his complaint to include a claim or claims seeking reliance damages stemming from the failure of Jenzabar's Board of Directors to approve the settlement agreement which excepted from the general release Frishman's claims against Maginn relating to iBasis.

On July 31, 2002, Frishman filed a motion in the Jenzabar litigation seeking leave to file late his Second Amended Complaint. This motion was allowed on August 6, 2002. The Second Amended Complaint contained a count in which Frishman sought damages stemming from alleged representations by Maginn during a mediation and the subsequent failure of the Jenzabar Board to approve the settlement agreement which excepted from the general release Frishman's claim against Maginn relating to iBasis.

***6** The Jenzabar litigation was ultimately resolved by a Release and Settlement Agreement dated October 31, 2002. The Release and Settlement Agreement was between and among "Alan Frishman ... and Jenzebar, Inc., ... Robert A. Maginn, Jr., Ling Chai and New Media II, LLC." In the release portion of the Release and Settlement Agreement, the following language is included:

> [P]rovided, however, that: (1) Frishman does not release, waive or discharge, in whole or in part, any demands, claims, actions, causes of action, suits, liens, or controversies, proceedings, debts and liabilities, of every name and description (including without limitation those in law, equity, negligence, tort, breach of contract, fraud, misrepresentation, or violation of G.L.c. 93A or other statute) against Maginn arising from or relating to the investment, or alleged, promised, or intended investment, by Frishman in the stock of [iBasis] and/or New Media III, LLC and/or Maginn's interest in [iBasis] and New Media III, LLC ...

A stipulation of dismissal, with prejudice, executed by counsel for both sides of the case, thereafter was filed in the Jenzabar litigation.

On November 12, 2002, then counsel to Frishman sent a G.L.c. 93A claim letter to then counsel for Maginn concerning the matters in issue in this case. Then counsel for Maginn duly responded to the November 12, 2002 letter by a letter dated December 13, 2002. Thereafter, a year later, present counsel to Frishman, on November 11, 2003, sent a supplemental c. 93A claim letter directly to Maginn.

This case was filed on February 13, 2004.

In early 2004, Jenzabar was involved in a recapitalization and refinancing. As part of the recapitalization, Jenzabar and NM II entered into certain agreements. One of those agreements related to certain Jenzabar Series A shares. Maginn, as Managing Member of NM II appointed Dennis Yannatos ("Yannatos") as NM II's authorized agent to solicit the vote of each of the members of NM II relating to the recapitalization of Jenzabar. Frishman, Simon, Joan Frishman and Sheila Nassberg were among

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the members solicited by Yannatos.

In the recapitalization, NM II agreed to exchange its Jenzabar stock for shares of a Series A Junior Preferred Stock and warrants. Section 6.1 of the exchange agreements provided general releases of all claims against Jenzabar "and its respective predecessors, successors, affiliates, subsidiaries, parents or controlling entities and each of their respective affiliates and subsidiaries, and all of their respective past, present and future shareholders, directors, officers, partners, members, employees, investors, representatives, attorneys, agents and assigns" Maginn was named as a releasee in the Jenzabar Series A agreement. A majority of NM II's membership voted in favor of the Jenzabar capitalization.

DISCUSSION

"Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." *M.P.M. Builders, LLC v. Dwyer,* 442 Mass. 87, 89, 809 N.E.2d 1053 (2004); *Kesler v. Pritchard,* 362 Mass. 132, 134, 284 N.E.2d 602 (1972). Mass.R.Civ.P. Rule 56(c). Here, the moving party is Maginn and the nonmoving parties are Frishman and the other plaintiffs. "The inferences which may be drawn from the facts alleged are to be viewed 'in the light most favorable to the parties opposing summary judgment.' " *Davidson Pipe Supply Co., Inc., v. Johnson,* 14 Mass.App.Ct. 518, 522, 440 N.E.2d 1194 (1982). "[T]he judge's function is not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "[T]he judge must ask himself not whether he thinks the evidence un-mistakenly favors one side or the other but whether a fair-minded jury could return a verdict for [the nonmoving party] on the evidence presented." *Flesner v. Technical Communications Corp.,* 410 Mass. 805, 809, 575 N.E.2d 1107 (1991).

***7** At trial Maginn does not have the burden of proof. There the burden is on Frishman and the other plaintiffs. Where the party who does not have the burden of proof at trial establishes that the other parties cannot prove an essential element of their case, summary judgment is appropriate. *Manning v. Nobile,* 411 Mass. 382, 388, 582 N.E.2d 942 (1991); *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 714, 575 N.E.2d 734 (1991).

The complaint here is in two counts. Count I charges a breach of contract by Maginn with regard to the conveyance to the plaintiffs of the iBasis shares. Count II claims violations of G.L.c. 93A, secs. 2, 9 and/or 11.

In the introduction to Maginn's memorandum in support of his motion he sets out his grounds therefor.

> Both of plaintiffs' claims fail because they have been released under agreements entered into by a limited liability corporation authorized to act on plaintiffs' behalf.
>
> The breach of contract claim also fails because: (1) Frishman and Maginn never reduced the alleged contract to writing, as both had contemplated, nor agreed on all material terms; and (2) as a result of Frishman's inclusion of unaccredited investors in his group, enforcement of the alleged contract would violate the public policy underlying applicable federal securities laws and regulations ...
>
> The c. 93A claim also fails because: (1) Frishman released it under a release and

settlement agreement executed in connection with his employment litigation against Maginn and others; (2) the allegedly unfair conduct at issue did not take place in trade or commerce; (3) plaintiffs have not suffered any loss of money or property, as required under section 11; and (4) to the extent Richard Simon, Joan Frishman and Sheila Nassberg allege a claim under section 9, it is barred for failure to submit a pre-suit demand letter to Maginn.

The Court will address first Count I that asserts that Maginn breached an agreement to convey iBasis shares, then will take up Count II which charges him with violation of G.L.c. 93A and conclude, if necessary, with the release arguments.

The contract claims.

The Court begins with the basic issue of whether there ever was a contract between Maginn and the plaintiffs regarding the sale or transfer from him to them of any iBasis shares or at least an agreement to assign to the plaintiffs a portion of Maginn's interest in the iBasis shares.

Here, both Frishman and Maginn contemplated that Maginn's lawyer would "draft an assignment from [Maginn's] [N]ew [M]edia III position to [Frishman] and [his] group." Maginn's August 12, 1999 e-mail so stated; and Frishman understood that to be the case. However, no draft of an assignment or any other document of agreement ever came into being.

> [W]here the facts show that the parties intended to be bound at some point in their negotiations before execution of a formal contract, they will not be bound unless there is agreement as to the basic terms of the undertaking. See *Geo. W. Wilcox, Inc. v. Shell E. Petroleum Prod., Inc.,* 283 Mass. 383, 387, 390, 186 N.E. 562 (1933). There must be agreement on the essential terms of the transaction in order that the nature and extent of the parties' obligations can be determined and, hence, enforced. See *Simons v. American Dry Ginger Ale Co.,* 335 Mass. 521, 525-26, 140 N.E.2d 649 (1957).

***8** *Novel Iron Works, Inc. v. Wexler Construction Co.,* 26 Mass.App.Ct. 401, 408, 528 N.E.2d 142 (1988).

An agreement may be enforceable that anticipates a more formal writing, but in such case, the parties must have agreed upon either the material terms, or upon the "formulae and procedures" that will provide the material terms at some future date. See *Lafeyette Place Assocs. v. Boston Redev. Authy,* 427 Mass. 509, 521, 694 N.E.2d 820 (1998). See also *Situation Mgmt. Sys., Inc. v. Malouf, Inc.,* 430 Mass. 875, 878, 724 N.E.2d 699 (2000); *Goren v. Royal Invs., Inc.,* 25 Mass.App.Ct. 137, 140, 516 N.E.2d 173 (1987).

For Maginn to be bound to Frishman and his group regarding the iBasis shares, at a minimum there must be agreement as to the amount or quantity of shares involved, the amount to be paid for the shares and the time at which the shares are to be delivered or any interest therein to be assigned. See, e.g., *McCarthy v. Tobin,* 429 Mass. 84, 86, 706 N.E.2d 629 (1999). The

controlling fact of course, is the intention of the parties. *Id.* at 87, 706 N.E.2d 629.

Here, the e-mail and telephone exchanges between Maginn and Frishman in August and November 1999, provide the grist. The amount to be paid was $40,000, and by the end of August 1999, Frishman's check for that amount was in Maginn's hands and deposited by Maginn into his account. That amount, together with the amount Maginn paid for his shares, provides a ready and simple formula or procedure for determining with precision the quantity of shares involved.

NM III purchased the iBasis shares for $4.37 per share. Maginn contributed $340,062 to the capital of NM III for the shares he purchased. This results in Maginn acquiring 77,817.39 shares. Frishman's $40,000, at $4.37 per share would result in 9,153.32 shares.

Thus, two of the key elements for an agreement are known.

The element of "when," that is the time when the shares, or the interest therein, were to be conveyed to Frishman is less clear. Both Maginn and Frishman, however, were aware that the New Media III shares would be "locked-up" for six months from the iBasis IPO, which occurred on November 10, 1999. The lock-up time would, therefore, expire in mid-May of 2000.[3]

[3] In Frishman's opposition to the present motion he cites to a June 6, 2000 memorandum from Wilkinson, the managing partner at NM III, stating that there was a one-year lock-up on the iBasis shares that would expire on July 12, 2000.

This Court, in assessing the summary judgment record must view any inferences from the facts alleged "in the light most favorable to [the Frishman group] the parties opposing summary judgment." *Davidson Pipe Supply Co., Inc., supra,* 14 Mass.App.Ct. at 522, 440 N.E.2d 1194. Consequently, for purposes of the present motion at least, the Court infers that on the date in May 2000 when the lock-up period expired or, at the latest, on the July 12, 2000 date referred to in the Wilkinson memorandum of June 6, 2000, Maginn was obligated to transfer 9,153.32 shares of iBasis shares, or assign the interest therein, to Frishman and his group.

Further, implicit in such a transfer of the shares or the interest therein, it is inferred that the Frishman parties then would be free to sell or hold those shares, as they chose, without limitation by NM III or Maginn.

> ***9** If ... the parties have agreed upon all material terms, it may be inferred that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract. *Goren, supra.* See *Coan v. Holbrook,* 327 Mass. 221, 224, 97 N.E.2d 649 (1951) ("Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof ...").

McCarthy, supra, 429 Mass. at 87, 706 N.E.2d 629.

Maginn's first contention-that the Frishman parties' breach of contract claim fails because the parties did not reduce their agreement to writing and did not agree upon the material terms-cannot succeed on his motion at the summary judgment stage.

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Maginn also argues that enforcement of the agreement alleged by the Frishman parties would violate public policy. He argues that because Frishman has admittedly included unaccredited investors in his group-Kevin Xiao, Johnny Wei and Lily E.-enforcement would violate the policy underlying the Securities Act of 1933 and SEC Regulation D. The argument is that both the Securities Act and Regulation D are designed to protect unsophisticated investors of limited means who are less capable of "fending for themselves." Maginn cites to *Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.,* 422 Mass. 318, 319, 662 N.E.2d 1015 (1996), for the proposition that there should be no enforcement of a contract that would violate public policy.

Maginn points out that "Regulation D is a series of six rules, designated Rules 501-506, that establish three exemptions from the registration requirements of the Securities Act ..." 1982 WL 35662 (SEC Release No. 33-6389 (March 8, 1982)). The phrase "accredited investor" in Rule 501 means any person who comes within, or whom an issuer of stock reasonably believes comes within, any of eight categories of investors at the time of sale. 17 C.F.R. sec. 230.501(a)(1)-(8). These categories define "types of purchasers that, based upon objective criteria indicating financial sophistication and ability to fend for themselves, do not require the protections of registration under the federal securities laws." 2001 WL 34681692 (SEC Release No. 33-8041 (December 19, 2001)). "Generally, these categories include wealthy and/or financially sophisticated investors such as banks, insurance companies, tax-exempt organizations, directors and executive officers of the issuer, and natural persons who have considerable net worth or large annual incomes." Thomas Lee Hazen, LAW OF SECURITIES REGULATION, sec. 4.20[2][A] (5th ed.2005).

Whether persons to whom unregistered securities-like those here-are offered under Regulation D qualify as "accredited investors" significantly affects the issuer's disclosure obligations. If sales are made to unaccredited investors, the issuer must make an extensive disclosure of information to those unaccredited investors. See 17 C.F.R. sec. 501(b)(1)-(2).

***10** In the case of the iBasis shares in issue here, there were specific requirements, including representations and warranties, that all investors were accredited.

"The design of the [Securities Act] is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions." *Sec. and Exch. Comm'n v. Ralston Purina Co.,* 346 U.S. 119, 124, 73 S.Ct. 981, 97 L.Ed. 1494 (1953). The purpose of the requirements "is to facilitate and expedite specially designed offerings, while at the same time offsetting the danger posed by the lack of SEC scrutiny of the offer and sale by precluding those from participating in the offering who are inexperienced purchasers of securities and unable to afford professional advice regarding the merits and risks of purchasing the offered securities." *Integrated Res. Real Estate Ltd. P'ships Litig.,* 815 F.Supp. 620, 628 (S.D.N.Y.1993).

An entity, such as Frishman's group of investors, qualifies as an "accredited investor" only where all equity owners are accredited investors. 17 C.F.R. sec. 230.501(8).

Both Maginn and Frishman were fully aware of the unacceptability of unaccredited investors in the iBasis transactions in issue. Maginn reminded Frishman constantly about the issue. Indeed, in the Jenzabar transaction, Maginn returned to Lily E. the $5,000 she sent him because she was unaccredited.

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Further, Frishman, in his August 11, 1999, e-mail to Maginn described his "group" to include $25,000 of investment from a "consortium" which he described parenthetically as "(boy, is that an overstatement or what?)." Frishman was clearly referring to Kevin Xiao, Johnny Wei and Lily E.

Maginn argues, persuasively, that Frishman-and Maginn, as well-should not be able so facilely to avoid the protections of Regulation D by the simple artifice of having iBasis issue the shares to NM III, in which Maginn had an interest, and then permit Maginn to transfer or assign his interest in those very same shares to Frishman, who was known to be acting on behalf of some unaccredited investors.

Frishman responds with an argument that "Regulation D is inapplicable to this case, and after the expiration of the lock-up period, [Maginn] was free to sell his iBasis stock to accredited and unaccredited investors under SEC Rule 144." He contends that the Rule 506 exemption on which iBasis relied in issuing the Series C shares is promulgated for the purpose of providing a safe harbor to an issuer which is engaging in a nonpublic offering. See *Hazen, supra,* at secs. 4.19 and 4.20. The essence of Frishman's argument is that Regulation D only applies "to the issuer of the securities and not to any affiliate of that issuer or to any other person for resale of the issuer's securities." He cites to *West Park Associates v. Butterfield Sav. & Loan Ass'n,* 60 F.3d 1452, 1457 (9th Cir.1995).

Further, Frishman points to the June 6, 2000 Wilkinson memorandum which makes reference to Rule 144. In material part that memorandum reads:

> ***11** The iBasis shares are restricted and are not registered with the securities and exchange commission ("SEC"). Your ability to sell shares will be subject to the provisions of Rule 144 under the Securities Act of 1933. Rule 144 sets forth numerous conditions that must be met in order to sell restricted shares. For your general information, the following conditions apply to any sales: (i) the amount of securities which may be sold in any three-month period is limited; (ii) the securities must be sold in a broker's transaction or directly to a dealer who is a market maker in the securities and (iii) a notice of the proposed sale on Form 144 must be sent to the SEC and to the principal exchange on which the shares are lists [sic] ...

Frishman's argument overlooks two significant concepts in applying the securities laws and regulations. First, the law must not be construed technically and restrictively, but flexibly to effectuate its remedial purpose. *SEC v. Brigadoon Scotch Distributors, Ltd.,* 388 F.Supp. 1288, 1290 (S.D.N.Y.1975). Second, "the registration provisions are designed not only to protect immediate recipients of distributed securities ... but also subsequent purchasers from them." *SEC v. Harwyn Industries Corp.,* 326 F.Supp. 943, 953 (S.D.N.Y.1971).

Here, Frishman claims a contractual right on behalf of his investing group-which includes three unaccredited investors-to 9,153.32 shares of unregistered iBasis shares, from Maginn,

immediately upon the conclusion of the lock-up period. If Rule 144 can be read to permit this kind of a transaction then it appears to be "loophole" similar in kind to that not permitted in *SEC v. Harwyn Industries Corp.* It is not something that this Court believes correctly applies the relevant law. "It is well established that courts will not enforce contracts that violate public policy." *A.Z. v. B.Z.,* 431 Mass. 150, 160, 725 N.E.2d 1051 (2000).

Frishman's contention that the three unaccredited investors in his group relied upon Frishman's knowledge in making the investment in iBasis is unconvincing. Frishman, in his deposition taken on July 13, 2005, testified as follows:

> Q. When was the first time in your conversations, your oral conversations with Mr. Maginn, when was the first time VIP Calling or iBasis was mentioned?
>
> A. The day of or after Mr. Maginn's e-mail when he brought up the opportunity. I believe it was either August 10th or 11th.
>
> Q. Had you not discussed VIP Calling or iBasis with Mr. Farkas before August 10, 1999?
>
> A. I had never heard the name before August 10th, to the best of my recollection.
>
> Q. So then is it your testimony, as soon as he mentioned the subject of VIP Calling/iBasis, you were very interested in making an investment, is that right?
>
> A. When he mentioned it?
>
> Q. Yes.
>
> A. No.
>
> * * * * *
>
> Q. And what did you do to check out ... VIP Calling before you decided to send Mr. Maginn a check for $40,000?
>
> ***12** A. I called Chuck Farkas.
>
> Q. Did you do anything else?
>
> A. Excuse me?
>
> Q. Did you do anything else?
>
> A. No.
>
> Q. You didn't check publicly available sources?
>
> A. No.

Frishman did not possess any knowledge at all that would enable him to provide his unaccredited investors the "professional advice regarding the merits and risks of purchasing the offered securities" called for in *Integrated Res. Real Estate Ltd. P'ships Litig., supra,* 815 F.Supp. at 628.

> Where there is no conflicting evidence as to the terms of an oral contract, the construction of those terms is a matter of law for the judge rather than the jury ... Thus, where the terms of the contract are not disputed, whether a contract is void as in contravention of public policy or otherwise illegal or in violation of law is a question of law for determination by the judge ... Even if, at the time of contracting, the parties to the contract did not mean the

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> services to be rendered to include illegal conduct, there can be no recovery if the performance was in fact illegal, and the illegality was serious and not merely an incidental part of the performance of the agreement ... The question whether the illegality was serious or more than an incidental part of the performance has been held in some cases to be an issue of law which should not be left to the jury.

Green v. Richmond, 369 Mass. 47, 51, 337 N.E.2d 691 (1975).

Clearly, the Securities Act of 1933 and the regulations in aid of applying it coming, as they did, so soon after the stock market crash in 1929 and at the height of the Great Depression, must be seen and interpreted as setting strong public policy supporting the protection of innocent, naive and impecunious investors. Kevin Xiao, Johnny Wei and Lily E. were precisely the kinds of investors targeted for protection by the Securities Act of 1933 and Regulation D.

> "Public policy" in this context refers to a court's conviction, grounded in legislation and precedent, that denying enforcement of a contractual term is necessary to protect some aspect of the public welfare ... ("The test is, whether the underlying tendency of the contract under the conditions described was manifestly injurious to the public interest and welfare.") ... In determining the public interest and welfare in these circumstances, we look to the Legislature's statutory enactment. Although the policy that induced the enactment may not be set out in terms, "[t]he Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed."

Beacon Hill Civic Association, supra, 422 Mass. at 321, 662 N.E.2d 1015. See also *Eisenstein v. David G. Conlin, P.C.; Nixon Peabody, LLP,* 444 Mass. 258, 259, 263-65, 827 N.E.2d 686 (2005).

Certainly, if the public policy surrounding the licensing of the sale of alcoholic beverages in a Beacon Hill restaurant warrants declaring illegal an agreement by that restaurant not to seek more than a beer and wine license, the public policy behind protecting unaccredited investors by forbidding the sale to them of unregistered securities deserves equal recognition by this Court.

***13** The agreement here between Frishman and Maginn relating to the sale of iBasis shares to a group including Kevin Xiao, Johnny Wei and Lily E., each unaccredited investors, is void and unenforceable.

The G.L.c. 93A claims.

Count II repeats and re-alleges the paragraphs in the complaint upon which the contract claims are based and then says that the actions of Maginn "described in this complaint violated M.G.L.c. 93A, Sections 2, 9 and/or 11."

Mere breach of a contract, without more, is insufficient to base a recovery under c. 93A *Credit Data of Central Massachusetts, Inc. v. TRW, Inc.,* 37 Mass.App.Ct. 442, 448, 640 N.E.2d 499 (1994). Even more so, is it insufficient when the contract has been determined unenforceable because of its clash with public policy.

Another hurdle to be overcome with the c. 93A

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claim is whether the "trade or commerce" requirement can be met. Although c. 93A, after the 1988 amendment, clearly applies to securities transactions, there still must be a commercial transaction, not a deal between private citizens. The breach of contract for sale of the iBasis stock was a private deal between Maginn and Frishman.

Further, a reading of paragraphs 18 and 19 of the complaint suggest that it was Maginn's holding of the $40,000 as leverage in the Jenzabar settlement that was the real unfair act on which the c. 93A claim is grounded. If so, this clearly is not an act in trade or commerce.

Still further, the Supreme Judicial Court "has consistently recognized that, to warrant an award of damages under G.L.c. 93A, there must be a 'causal connection between the seller's deception and the buyer's loss.' " *Hershenow v. Enterprise Rent-A-Car Company of Boston, Inc.,* 445 Mass. 790, 797, 840 N.E.2d 526 (2006). Here, Frishman sent Maginn $40,000 on August 12, 1999, which Maginn deposited in his account on August 31, 1999. This amount was made up of Frishman's money and some additional portion from the others in his group. The $40,000 was returned by Maginn on April 11, 2002. The only "damages" thus suffered is interest on the $40,000 because of Maginn's deprivation of the use of that money by Frishman and his group for a period of 31 plus months. At the statutory rate of 12% per annum, that amounts to something in the vicinity of $12,000. Thus, even if the other hurdles could be overcome, that is hardly worth the cost of this litigation.

Given the foregoing, this Court need not delve into the array of other issues put forward by Maginn in support of his motion.

ORDER

For the foregoing reasons, the Defendant's Motion for Summary Judgment, Paper # 75, is *ALLOWED,* and the complaint must be dismissed.

Pursuant to the provisions of Mass.R.Civ.P. Rule 56(d), this Court hereby specifies that the facts recited in the Background section hereof, pp. 1-11, appear without substantial controversy insofar as any further proceedings in this matter are concerned.

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11 Mass.L.Rptr. 647
Superior Court of Massachusetts.
Ernest C. HOUSTON et al.,
v.
Alan GREENWALD and others.[1]

[1] Steven A. Greenwald and John D. Powers, d/b/a/ Greenwald, Greenwald, & Powers, Attorneys at Law, and Francis X. Desimone, P.L.S.

No. CV961385C.
|
June 1, 2000.

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

HILLMAN

***1** The plaintiffs, Ernest C. and Patricia L. Houston, bring this action to recover against the defendant law firm Greenwald, Greenwald and Powers, for allegedly rendering an incorrect certificate of title in connection with the plaintiff's purchase of a single-family home located on Irene Court, in Bellingham, Massachusetts. The defendant represented the plaintiffs' mortgage lender, and purportedly rendered a certificate of title, in accordance with G.L. c. 93, § 70. The plaintiffs subsequently discovered a title defect, and seek recovery under the following theories: violation of G.L. c. 93, § 70; deceit; breach of a duty of good faith and fair dealing; negligent misrepresentation; breach of warranty; and violation of G.L. c. 93A. Both plaintiffs and defendant moved for summary judgment. For the following reasons, summary judgment is *ALLOWED* in favor of the defendant.

BACKGROUND

The undisputed material facts as established by the summary judgment record are as follows. This matter arises out of the plaintiffs' purchase of a parcel of property in Bellingham, Massachusetts from Alfred DaPrato, Trustee of the Fredap Realty Trust in 1992. DaPrato built a house on the property as part of the purchase transaction. The plaintiffs made arrangements to purchase and occupy the single-family home, which is located at 19 Irene Court in Bellingham, Massachusetts. In furtherance of this purchase, the plaintiffs took a loan from First Eastern Mortgage Company (First Eastern) and granted a purchase money first mortgage to First Eastern to finance the purchase. Stefan M. Nathanson, an attorney employed by the defendant law firm, represented First Eastern at the June 30, 1992 closing. As is customary, the plaintiffs paid the fees and expenses incurred as a result of the defendant's delivery of legal services to the bank. The charges included a closing fee, title examination fee, and document preparation fee. On July 1, 1992, Jacqueline Nastro Hathaway, an employee of the defendant law firm, certified title to the property. The certificate of title indicated that, at the time of recording, the plaintiffs had good, clear and marketable title to Lot 9, Irene Court, Bellingham, Massachusetts.[2]

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She mailed a copy of this certification to the plaintiffs. Several years later, in April of 1996, the plaintiffs discovered there was a problem with their title. Both the deed and the mortgage described the wrong property, which has been subdivided and conveyed by prior lot deeds. Because of this error, the plaintiffs do not own the land upon which their house sits, however, they continue to reside at their home on 19 Irene Court.

2 The certification of title stated that there were certain encumbrances upon DaPrato's title to the property, including easements to American Telephone and Telegraph Company, Massachusetts Electric, New England Telephone and Telegraph and a railway easement.

DISCUSSION

"Summary judgment is proper when there is no genuine issue of material fact or when resolution of the case depends solely on answers to questions of law." *Gross v. Prudential Insurance Co. of America,* 48 Mass.App.Ct. 115, 118 (1999). The moving party, "bears the burden of affirmatively demonstrating the absence of a triable issue." *Jackson v. Commissioner of Correction,* 40 Mass .App.Ct. 127, 130 (1996). Once the moving party establishes the absence of a triable issue, the opposing party must respond and allege specific facts establishing the existence of a genuine issue of material fact. *Pederson v. Time, Inc.,* 404 Mass 14, 17 (1989). The party opposing summary judgment must adequately bring any factual disputes to the attention of the trial judge. *Dupont v. Dracut,* 41 Mass.App.Ct. 293, 297, (1996), citing *Berry v. Dawes,* 34 Mass.App.Ct. 506, 508 n. 3 (1993). These disputed facts must be supported by affidavits or other documents. Mass.R.Civ.P. 56. See *Dupont v. Dracut, supra* at 297. "[B]are assertions and conclusions regarding [an individual's] understandings, beliefs, and assumptions are not enough to withstand a wellpleaded motion for summary judgment." *Polaroid Corp. v. Rollins Envtl. Servs. (N.J.), Inc.,* 416 Mass. 684, 696 (1993). Where, as here, both parties have moved for summary judgment and "in essence there is no real dispute as to the salient facts or if only a question of law is involved," summary judgment shall be granted to the party entitled to judgment as a matter of law. *Cassesso v. Commissioner of Correction,* 390 Mass. 419, 422 (1983).

***2** The question presented in this case is what duty, to the plaintiffs, arises out of the defendant law firm's representation of the plaintiffs' mortgage lender in the above-mentioned real estate transaction. Other than the obligations imposed by G.L. c. 93, § 70, attorneys representing a mortgage lender do not, under ordinary circumstances, owe a duty to the mortgagor. See *Page v. Frazier,* 388 Mass. 55, 61-65 (1983). In accordance with this principle, the plaintiffs assert that the defendant owed them a duty not under the traditional attorney-client relationship, but only under G.L.c. 93, § 70.

I. *Title Certification Requirement*

G.L. c. 93 § 70 provides, in relevant part:

In connection with the

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> granting of any loan or credit to be secured by a purchased first money mortgage on real estate improved with a dwelling designed to be occupied by not more than four families and occupied or to be occupied in whole or in part by the mortgagor, if the mortgagor is required or agrees to pay or be responsible for any fee or expense charged or incurred by an attorney acting for or on behalf of the mortgagee in connection with the rendering of a certification of title to the mortgaged premises, such certification shall be rendered to the mortgagor and the mortgagee.[3]

[3] This statute has since been modified by St.1994 c. 350, § 3.

The closing documents indicate that the plaintiffs paid the legal fees resulting from the transaction. A title examination fee comprised part of these fees. Consequently, the requirement that the mortgagor-plaintiffs pay an expense charged in connection with title certification has been fulfilled, and the defendant was therefore statutorily required to certify title to both the plaintiff-mortgagors and the lender-mortgagee. The plaintiffs argue that, because the title certification listed the wrong property, the defendant violated the statute. The court disagrees, because the mortgage and certification of title described the same premises, thereby satisfying the statutory requirement that the defendant certify title to the mortgaged premises.[4] "When language of a statute is clear and unambiguous, plain meaning of language must be given effect." *Cohen v. Commissioner of Division of Medical Assistance,* 423 Mass. 399, 409 (1996), quoting *Construction Indus. of Mass. v. Commissioner of Labor & Indus.,* 406 Mass. 162, 167 (1989). Whether the title certification was rendered in accordance with the statute is a separate question, which the court now addresses.

[4] The mortgage lists the property as "Lot 9 Irene Court, Bellingham, Massachusetts, 02019." The Certification of Title lists the property as "Lot 9 Irene Court, Bellingham, Norfolk County, Massachusetts, as shown on a Plan recorded with the Norfolk Registry of Deeds Plan # 598 of 1959 in book 4611, Page 597."

II. *G.L. c. 93, § 70-Fifty-Year Title Search*

G.L. c. 93, § 70 requires that, "... said certification shall include a title examination which covers a period of at least fifty years with the earliest instrument being a warranty or quitclaim deed which on its face does not suggest a defect in said title ..." The plaintiffs assert that the title examination did not meet the above-mentioned requirements. In making this claim, the plaintiffs rely on the affidavit of Susan DeCoster Buxton, a title examiner for the defendant law firm. According to her affidavit, Ms. Buxton was instructed to perform a title "run-down,"

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instead of the full fifty-year search, which the statute requires. The plaintiffs further support their claim with an affidavit of Attorney James L. Roberti, indicating that, based upon his review of the documentary evidence, the law firm did not conduct a fifty-year title examination. The certificate of title states "Note: this certificate is based on a fifty year title run."

***3** The defendant claims it performed a fifty-year title examination because, in addition to doing a partial title examination, it used a "back title" to cover the statutorily required fifty-year period. According to the defendants, where their firm had previously examined the title of a parcel that included property to be currently examined, or a parcel having common ownership with the property currently under examination, the firm's custom and practice was to rely on the search previously conducted, and perform the current search only from the ending date of the prior search to the present. "Of the many areas of law practice, conveyancing is one which lends itself particularly to formulation through decisional law and commentary as to what are appropriate procedures. There may be no definitive rules which prescribe a right or wrong way to conduct a deposition but certain rules have evolved for passing on a title." *Fall River Savings Bank v. Callahan,* 18 Mass.App.Ct. 76, 83 (1984). According to the defendants, this use of a "back title" is a common and accepted practice in Massachusetts real estate conveyancing, especially with respect to title examinations of lots in sub-divisions. The defendants maintain that, in performing the title examination at issue, they relied on a "back title" and contend that their use of this labor saving procedure does not mean that there was no fifty-year title examination, but rather that a portion of the required search was already performed, and used to produce the current title certificate. The defendant asserts that the previous "back title," in combination with the examination Ms. Buxton performed, constitutes the equivalent of a fifty-year title examination. Because Attorney Roberti failed to consider this, his conclusion the firm failed to perform a fifty-year title search is incorrect. This raises the following question of law: whether the use of a back title, in rendering title certification, satisfies the above-mentioned fifty-year search requirement.

In deciding this question, the court finds instructive the following definition of "title search." "An examination of the records of the registry of deeds or other office which contains records of title documents to determine whether title to the property is good, i.e. whether there are any defects in title. The examiner then prepares an abstract of the documents examined." Blacks Law Dictionary (6th ed.1990). "Examination" is defined as: "[A]n investigation; search; inspection; interrogation." *Id* . at 55. It is well established that the words used in a statute will be interpreted with regard to both their literal meaning and the purpose and history of the statute within which they appear. *Town of Dover v. Massachusetts Water Resources Authority,* 414 Mass. 274, 280 (1993), citing *Massachusetts Hosp. Ass'n v. Department of Medical Sec.,* 412 Mass. 340, 346 (1992). "Where the language of a statute is plain, it is the sole function of the courts ... to enforce it according to its terms." *D'Avella v.. McGonigle,* 429 Mass.

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820, 823-24 (1999), quoting *Boston Neighborhood Taxi Ass'n. v. Department of Public Utilities,* 410 Mass. 686, 690 (1991). In applying the above-mentioned definitions and principles of statutory construction to the statute, this court finds that the defendants' use of a back title, as part of the required fifty-year title examination, satisfied the title examination requirement of G.L. c. 93, § 70.

III. *G.L. c. 93, § 70-Willful Failure to Render Certificate of Title*

***4** G.L. c. 93, § 70 allows for recovery under G.L. c. 93A where an attorney who is statutorily required to render a certificate of title fails to do so. The certificate in question, which identifies the plaintiffs as mortgagors, reads in relevant part: "We also hereby certify to said mortgagee and mortgagors that at the time of recording said mortgage, the mortgagors held good, clear, marketable title record to the premises described in said mortgage ..." The certificate of title was rendered, by mail, to the plaintiffs. Consequently, as this court finds no failure to certify title, it does not reach the question of willfulness. As a result of this finding, G.L. c. 93, § 70 limits the plaintiffs' recoverable damages, under the aforementioned common-law claims to the amount of consideration shown on the deed.

IV. *Deceit*

In order to prevail on their deceit claim, the plaintiffs must prove "that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to his damage." *Danca v.. Taunton Savings Bank,* 385 Mass. 1, 7 (1982), quoting *Barrett Assocs. v. Aronson,* 346 Mass. 150, 152 (1963). The only communication between the plaintiffs and defendant, which the plaintiffs offer in support of their claim, consists of an April 1992 letter from the defendants indicating that, inter alia, before the closing could be scheduled, "We must satisfy ourselves that your seller has good title to the property." The letter also indicated that, prior to the closing, the defendant must obtain a municipal lien certificate and plot plan. If no problems were encountered, the letter indicated that the defendant would contact the plaintiffs, upon completion of the legal work. This letter is devoid of any factual representation as to the state of the title at issue. However, the plaintiffs appear to claim that, by virtue of the above-mentioned statements, the defendant misrepresented that the loan would not close unless and until the title was good. This is a statement indicating what is expected to occur in the future. As the defendant correctly points out, in a deceit claim, "false statements of opinion, of conditions to exist in the future, or of matters promissory in nature are not actionable." *Saxon Theatre Corp. of Boston v. Sage,* 347 Mass. 662, 667 (1964), quoting *Yerid v. Mason,* 341 Mass. 527, 530 (1960). Consequently, the forward-looking statement that the loan would not close until title was good cannot, as a matter of law, form the basis of the plaintiffs' deceit claim. Moreover, even if the above-mentioned statement constituted a misrepresentation, the plaintiffs must prove that they detrimentally and justifiably relied upon it. *Golber v. BayBank Valley Trust Co.,* 46

Mass.App.Ct. 256, 257 (1999). While the plaintiffs spend much of their memorandum discussing what facts they expect witnesses to testify to at trial, there is no mention of any evidence, existing or expected, relating to the plaintiffs' reliance upon the alleged misrepresentation. See *Page,* 388 Mass. at 67. Consequently, since the plaintiffs have failed to satisfy a required element of their claim, summary judgment must enter for the defendant with respect to the deceit count of the complaint.

V. *Negligent Misrepresentation*

***5** According to the defendant, in order to prove negligent misrepresentation, the plaintiffs must establish that the defendants, (1) in the course of their business; (2) supplied false information for the guidance of others in their business transactions; (3) are subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information; (4) failed to exercise reasonable care or competence in obtaining or communicating the information. Restatement (Second) of Torts, § 522; see *NYCAL v. KPMG Peat Marwick LLP,* 426 Mass. 491, 496 (1998). The plaintiffs claim that the *Craig* principle of foreseeable reliance provides a basis for finding liability. *Craig v. Everett M. Brooks Co.,* 351 Mass. 497 (1967). According to this principle, a professional's duty to a third party arises when the defendant knows of the plaintiff's identity and the precise purpose for which the work was to be performed, as well as the plaintiffs' reliance on the work. *Id.* Although it is unclear what specifically the plaintiffs rely upon in alleging negligent misrepresentation, they could not have relied upon the title certification, because it was rendered after the closing. Furthermore, the reasonableness of the plaintiffs' reliance on the statements contained in the above-mentioned letter is questionable because, in addition to enumerating what must occur before the closing, the letter advises the plaintiffs to provide the defendant with the identity of the plaintiffs' attorney, "... [I]f you intend to be represented in this matter." Aside from the reasonableness issue, this claim must also fail for the same reason that the deceit claim fails; the record does not show that the plaintiffs made inquiry as to the condition of the title, nor that the defendants made any representation with respect to the status of the title prior to closing. See *Page, supra.* In the absence of affirmative conduct on the part of the defendants, there could be "no reasonable understanding or reliance by the plaintiffs at the time the plaintiffs would have had to rely on such conduct, i.e. before they closed the sale." *Id.* Therefore, with respect to the claim for negligent misrepresentation, summary judgment must enter for the defendant.

VI. *Breach of Warranty*

It is the plaintiffs' position, without any citation to legal authority, that the certificate of title, rendered pursuant to G.L. c. 93, § 70, constituted a warranty that the defendants breached, by improperly certifying title. "A party opposing summary judgment is not entitled to rely upon vague and general allegations of expected proof and conclusions of law." *D & P Equipment Corp. v. Harvey Construction Corp., Inc.,* 5 Mass.App.Ct. 851, 852 (1977); See *Community National Bank v. Dawes,* 369 Mass. 550 (1976); *Madden v. Palmer,* 371

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Mass. 894 (1976). The plaintiffs insist that the existence of an attorney-client relationship between the parties is irrelevant and that the defendant's sole obligation was to certify title in accordance with G.L. c. 93, § 70. In the absence of a contractual relationship, the plaintiffs will be precluded from advancing a claim for breach of warranty.

VII. *Breach of Covenant of Good Faith and Fair Dealing*

***6** The plaintiffs further allege that defendant breached an implied covenant of good faith and fair dealing. To support such a claim, however, the plaintiffs must demonstrate the existence of a contract. As the plaintiffs correctly point out, "Every contract implies good faith and fair dealing between the parties to it." *Warner Ins. Co. v. Commissioner of Ins.,* 406 Mass. 354, 362 n. 9 (1990), quoting *Kerrigan v. Boston,* 361 Mass. 24, 33 (1974). The implied covenant of good faith and fair dealing provides "that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Anthony's Pier Four, Inc. v. NBC Associates,* 411 Mass. 451, 471-72 (1991). While the plaintiffs' statements of law are correct, their claim fails because the plaintiffs cannot demonstrate the execution of a contract between them and defendant. See *Levenson v. LMI Realty Corp.,* 31 Mass.App.Ct. 127, 131 (1991) (holding where parties had not reached a binding contract, the implied covenant of good faith and fair dealing did not apply). In fact, the implied covenant of good faith and fair dealing is specifically derived from the Uniform Commercial Code, G.L. c. 106, § 1-203, which provides that "[e]very contract within this chapter imposes an obligation of good faith in its performance or enforcement." *Fortune v. National Cash Register,* 373 Mass. 96, 102-03 (1977). Here, the plaintiffs admit that the existence of an attorney-client relationship between the parties is irrelevant, and the defendant's sole obligation was to certify title in accordance with G.L. c. 93, § 70. Consequently, the implied covenant of good faith and fair dealing has no application to the instant matter. As no contract existed between the parties with respect to the alleged breach of covenant of good faith and fair dealing, summary judgment must enter for the defendant.

VIII. *Violation of G.L. c. 93A*

The plaintiffs allege that the defendant committed an unfair and deceptive practice by failing to certify title. They base this claim on G.L. c. 93, § 70, which provides in relevant part, "[W]illful failure by an attorney to render a certification to the mortgagor as required by the provisions of this section shall constitute an unfair or deceptive practice under the provisions of Chapter 93A." As this court ruled that the defendant rendered a certificate of title, the express provision allowing Chapter 93A recovery for failure to certify title cannot be invoked. Since this court has found no failure to certify title, which is the sole basis of the plaintiffs' Chapter 93A claim, summary judgment must enter for the defendant.

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ORDER

It is therefore *ORDERED* that the plaintiffs' motion for summary judgment is *DENIED*. It is further ordered that the defendants' motion for summary judgment is *ALLOWED*.

All Citations

Not Reported in N.E.2d, 11 Mass.L.Rptr. 647, 2000 WL 1273373

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2020 WL 2769681
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

Commonwealth of MASSACHUSETTS, Plaintiff,
v.
EXXON MOBIL CORPORATION, Defendant.

CIVIL ACTION NO. 19-12430-WGY
|
Filed 05/28/2020

Synopsis

Background: Massachusetts filed state court action under Massachusetts Consumer Protection Act alleging that oil and gas company fraudulently concealed and misrepresented risks posed by increasing greenhouse gas emissions from consumers and investors in state. After removal, state moved to remand.

Holdings: The District Court, William G. Young, J., held that:

[1] action was not governed by federal common law;

[2] action was not subject to removal pursuant to *Grable*, 125 S.Ct. 2363, exception to well-pleaded complaint rule;

[3] action was not subject to removal pursuant to federal officer removal statute; and

[4] action was not "class action" subject to removal pursuant to Class Action Fairness Act (CAFA).

Motion granted.

Procedural Posture(s): Motion for Remand.

West Headnotes (18)

[1] **Federal Courts** Governmental bodies and officers

State is not "citizen" for purposes of diversity jurisdiction.

[2] **Removal of Cases** Nature and source of jurisdiction

Right of removal is entirely creature of statute, and suit commenced in state court must remain there until cause is shown for its transfer under some act of Congress.

[3] **Removal of Cases** Constitutional and statutory provisions

Removal statutes generally are to be strictly construed.

[4] **Removal of Cases** Evidence

Burden to prove that federal question has been pled lies with party seeking removal, and any ambiguity as to source of law ought to be resolved

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against removal. 28 U.S.C.A. §§ 1331, 1441.

[5] **Removal of Cases**Evidence

When removal is based on class action or federal officer involvement, no presumption against removal applies. 28 U.S.C.A. §§ 1442(a)(1), 1453(b).

[6] **Federal Courts**"Well-pleaded complaint" rule

Presence or absence of federal-question jurisdiction is governed by well-pleaded complaint rule, which provides that federal jurisdiction exists only when federal question is presented on face of plaintiff's properly pleaded complaint. 28 U.S.C.A. § 1331.

[7] **Federal Courts**"Well-pleaded complaint" rule

Well-pleaded complaint rule makes plaintiff the master of claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

[8] **Removal of Cases**Allegations in Pleadings

Case may not be removed to federal court on basis of federal defense, including defense of preemption, even if defense is anticipated in plaintiff's complaint.

[9] **Removal of Cases**Allegations in Pleadings

As general rule, absent diversity jurisdiction, case will not be removable if complaint does not affirmatively allege federal claim. 28 U.S.C.A. § 1441.

[10] **Federal Courts**Complete preemption
StatesPreemption in general

Linchpin of complete preemption analysis is whether Congress intended that federal law provide exclusive cause of action for claims asserted by plaintiff.

[11] **Removal of Cases**Allegations in Pleadings

State's action alleging that oil and gas company violated Massachusetts Consumer Protection Act by fraudulently concealing and

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misrepresenting risks posed by increasing greenhouse gas emissions from state's consumers and investors was not governed by federal common law, and thus was not subject to removal on that basis; nothing about state's allegations implicated uniquely federal interests. 28 U.S.C.A. § 1441; Mass. Gen. Laws Ann. ch. 93A, §§ 2, 4.

[12] Federal Courts—Federal common law

Federal common law may be created where there is overriding federal interest in need for uniform rule of decision or where controversy touches basic interests of federalism.

[13] Federal Courts—State-law claims and causes of action

Federal jurisdiction over state law claim will lie if federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting federal-state balance approved by Congress.

[14] Removal of Cases—Allegations in Pleadings

State's action alleging that oil and gas company violated Massachusetts Consumer Protection Act by fraudulently concealing and misrepresenting risks posed by increasing greenhouse gas emissions from state's consumers and investors did not necessarily raise any federal issue, and thus was not subject to removal pursuant to *Grable*, 125 S.Ct. 2363, exception to well-pleaded complaint rule, despite company's contentions that complaint touched on foreign relations, and that adjudication of complaint would require factfinder to question careful balance Congress and federal agencies struck between greenhouse gas regulation and nation's energy needs. Mass. Gen. Laws Ann. ch. 93A, §§ 2, 4.

[15] Removal of Cases—Actions against or for acts of United States officers

To remove case under federal officer removal statute, private defendant must show that: (1) it acted under federal officer, (2) it has colorable federal defense, and (3) charged conduct was carried out for or in relation to asserted official authority. 28 U.S.C.A. § 1442(a)(1).

[16] Removal of Cases—Actions against or for acts of United States officers

Oil and gas company's marketing and

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sale tactics were not plausibly related to its drilling and production activities supposedly done under federal government's direction, and thus state's action alleging that company violated Massachusetts Consumer Protection Act by fraudulently concealing and misrepresenting risks posed by increasing greenhouse gas emissions from state's consumers and investors was not subject to removal pursuant to federal officer removal statute, despite company's contention that state's ultimate intention was to stop or reduce production and sale of fossil fuel products from federal leases, where state sought only fines for alleged deceptions. 28 U.S.C.A. § 1442(a)(1); Mass. Gen. Laws Ann. ch. 93A, §§ 2, 4.

[17] Removal of Cases—Constitutional and statutory provisions

State's parens patriae action alleging that oil and gas company violated Massachusetts Consumer Protection Act (MCPA) by fraudulently concealing and misrepresenting risks posed by increasing greenhouse gas emissions from state's consumers and investors was not "class action" subject to removal pursuant to Class Action Fairness Act (CAFA), even though Massachusetts Appeals Court had stated that action brought by Attorney General under MCPA "is comparable to a class action"; MCPA did not contain procedures similar to those under federal class action rule, and authorized injunctive relief and civil penalty payable to state. 28 U.S.C.A. §§ 1332(d), 1453(b); Fed. R. Civ. P. 23.

[18] Removal of Cases—Constitutional and statutory provisions

Similar state statute or rule need not contain all conditions and administrative aspects of federal class action rule in order for action brought under that statute or rule to qualify as "class action" under Class Action Fairness Act (CAFA), but it must at minimum, provide procedure by which class member whose claim is typical of all class members can bring action not only on his own behalf but also on behalf of all others in class. 28 U.S.C.A. § 1332(d)(1)(B); Fed. R. Civ. P. 23.

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MEMORANDUM OF DECISION

YOUNG, D.J.

I. INTRODUCTION

***1** The parties offer the Court sharply diverging theories of this case. As Exxon Mobil Corporation tells it, Massachusetts has brought this suit to hold a single oil company liable for global climate change. To the Commonwealth, this case is about seismic corporate fraud perpetrated on millions of consumers and investors. Yet as it reaches this Court on a motion to remand, this case is about the well-pleaded complaint rule -- nothing more and nothing less. That rule, in turn, implicates the fault lines dividing the federal and state judiciaries.

After oral argument and careful consideration, the Court remanded the case to state court for want of federal jurisdiction. This memorandum fully explicates the Court's reasoning. In brief, the Commonwealth's well-pleaded complaint pleads only state law claims, which are not completely preempted by federal law and do not harbor an embedded federal question. Additionally, contrary to the defendant's assertions, the statutory grants of federal jurisdiction for cases involving federal officers or for class actions do not apply here.

A. Procedural Background

This case has a complex pre-history dating back to April 19, 2016, when Massachusetts Attorney General Maura Healey ("the Attorney General") issued a Civil Investigative Demand ("CID") to Exxon Mobil Corporation ("ExxonMobil") for potentially defrauding ExxonMobil's consumers and investors, requesting ExxonMobil's internal documents since 1976 relating to carbon dioxide emissions. See Office of the Attorney General, Civil Investigative Demand No. 2016-EPD-36 (Apr. 19, 2016), https://www.mass.gov/files/documents/2016/10/op/ma-exxon-cid-.pdf. This investigation was presaged with fanfare by the "AG's United for Clean Power Press Conference" held on March 29, 2016, in which the Attorney General (joined by several counterparts from other states and former Vice President Al Gore) announced a band of twenty attorneys general -- dubbed "the Green 20" -- and noted "the troubling disconnect between what Exxon knew [about climate change] ... and what the company and industry chose to share with investors and with the American public." Notice of Removal ("Notice"), Ex. 2, AGs United for Clean Power Press Conference 1-2, 12-13, ECF No. 1-2.[1]

[1] The Attorney General's focus on ExxonMobil followed a barrage of investigative exposés alleging that the company knew for decades of the destructive climate consequences of its products yet publicly represented otherwise. Notice, Ex. 13, Compl. ¶ 3, ECF No. 1-13; see, e.g., Katie Jennings, Dino Grandoni & Susanne Rust, How Exxon Went from Leader to Skeptic on Climate Change Research, L.A. Times (Oct. 23, 2015), https://graphics.latimes.com/exxon-research/ (all internet sources last accessed May 27, 2020); Sara Jerving, Katie Jennings, Masako Melissa Hirsch & Susanne Rust, What Exxon Knew about the Earth's Melting Artic, L.A. Times (Oct. 9, 2015), https://graphics.latimes.com/exxon-arctic/ ; Neela Banerjee, Lisa Song & David Hasemyer, Exxon's Own Research

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Confirmed Fossil Fuels' Role in Global Warming Decades Ago, InsideClimate News (Sept. 16, 2015), https://insideclimatenews.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-warming; Finalist: InsideClimate News, Pulitzer.org, https://www.pulitzer.org/finalists/insideclimate-news (collecting 2015 InsideClimate News series of articles for 2016 Pulitzer Prize Finalist in Public Service).

2 ExxonMobil did, however, successfully induce the attorney general of the U.S. Virgin Islands to withdraw its subpoena. See Joint Stipulation Dismissal, Exxon Mobil Corporation v. Walker, Civ. A. No. 16-CV-00364-K (N.D. Tex. June 29, 2016), ECF No. 40; Terry Wade, U.S. Virgin Islands to Withdraw Subpoena in Climate Probe into Exxon, Reuters.com (June 29, 2016 7:55 pm), https://www.reuters.com/article/us-exxon-mobil-climatechange/u-s-virgin-islands-to-withdraw-subpoena-in-climate-probe-into-exxon-idUSKCN0ZF2ZP.

***2** Hardly a potted plant, ExxonMobil swiftly countered the CID with lawsuits in state and federal court. See In re Civil Investigative Demand No. 2016-EPD-36, 34 Mass. L. Rptr. 104, 2017 WL 627305, at *1 (Mass. Super. Ct. Jan. 11, 2017) (Brieger, J.), aff'd sub nom. Exxon Mobil Corp. v. Attorney General, 479 Mass. 312, 94 N.E.3d 786 (2018), cert. denied, —— U.S. ——, 139 S. Ct. 794, 202 L.Ed.2d 570 (2019); Exxon Mobil Corp. v. Schneiderman, 316 F. Supp. 3d 679, 686 (S.D.N.Y. 2018) ("Running roughshod over the adage that the best defense is a good offense, [ExxonMobil] has sued the Attorneys General of Massachusetts and New York ... each of whom has an open investigation of Exxon."), appeal docketed sub nom. Exxon Mobil Corp. v. Healey, No. 18-1170 (2d Cir. Apr. 23, 2018); Exxon Mobil Corp. v. Healey, Civ. A. No. 16-CV-469-K (N.D. Tex. March 29, 2017); Exxon Mobil Corp. v. Healey, 215 F. Supp. 3d 520 (N.D. Tex. 2016). When these efforts to quash the subpoenas failed in New York and Massachusetts,[2] ExxonMobil fought through a bench trial in New York and won a favorable decision. People of New York v. Exxon Mobil Corp., No. 452044/2018, 2019 WL 6795771 (Sup. Ct. N.Y. Dec. 10, 2019).

In this case, the Attorney General filed her 205-page complaint in Massachusetts Superior Court on October 24, 2019. Notice, Ex. 13, Compl., ECF No. 1-13. ExxonMobil removed the case to this Court on November 29, 2019, ECF No. 1, and the Commonwealth filed a motion to remand on December 26, 2019, ECF No. 13. The parties briefed this motion. Mem. L. Comm. Mass. Supp. Mot. Remand ("Mem. Remand"), ECF No. 14; ExxonMobil's Opp'n Pl.'s Mot. Remand ("Opp'n"), ECF No. 18; Reply Comm. Mass. Supp. Mot. Remand ("Reply"), ECF No. 21. After a hearing on March 17, 2020, conducted telephonically due to the coronavirus pandemic, the Court ALLOWED the motion to remand and the case was remanded to Suffolk County Superior Court. ECF Nos. 28-29.

B. Facts Alleged[3]

3 The following facts are drawn from the complaint. See Ortiz–Bonilla v. Federación de Ajedrez de Puerto Rico, Inc., 734 F.3d 28, 34 (1st Cir. 2013) ("The jurisdictional question is determined from what appears on the

plaintiff's claim, without reference to any other pleadings.").

[1]Spawned from the marriage of oil leviathans Exxon Corporation ("Exxon") and Mobil Oil Corporation ("Mobil") in 1999, ExxonMobil is "the world's largest publicly traded oil and gas company." Compl. ¶¶ 1, 47. It is a New Jersey corporation with its principal place of business in Texas. Id. ¶ 46.[4] Id. ¶¶ 52-53. As an integrated oil and gas company, ExxonMobil "locates, extracts, refines, transports, markets, and sells fossil fuel products." Id. ¶ 54. Its business may be divided into three segments: " 'upstream' exploration and production operations; 'downstream' refinery and retail operations; and its chemical business, which include[s] the manufacturing and sale of various fossil fuel products that it advertises and sells to Massachusetts consumers." Id. ¶ 55. Business has been good. Recent assessments placed ExxonMobil's market capitalization at $343.43 billion and counted approximately 4.27 billion shares of its common stock issued and outstanding. Id. ¶ 53. Selling over 42 billion barrels of petroleum products and taking in more than $5.6 trillion in revenue from 2001-2017, ExxonMobil's sale of petroleum products in those years averaged roughly 8% of the world's daily petroleum consumption. Id. ¶¶ 58-59.

4 Though ExxonMobil is not a Massachusetts citizen, diversity jurisdiction is unavailable because the Commonwealth "is not a 'citizen' for purposes of the diversity jurisdiction." Moor v. Alameda County, 411 U.S. 693, 717, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973).

1. Greenhouse Gases and Climate Change

***3** Production and use of fossil fuels, including ExxonMobil's products, emit greenhouse gases such as carbon dioxide and methane. Id. ¶ 65. Between 1988 and 2015, ExxonMobil was the single largest emitter of greenhouse gases of all U.S. companies, when consumer use of the products is factored in, and it was the fifth largest emitter among all non-governmentally owned fossil fuel producers worldwide. Id. ¶ 67. According to the Intergovernmental Panel on Climate Change, carbon dioxide emissions from fossil fuels "contributed about seventy-eight percent of the total greenhouse gas emissions increase from 1970 to 2010." Id. ¶ 202. Our Earth is plainly getting hotter, and scientists have reached a consensus that this is largely due to rising carbon dioxide concentrations and other greenhouse gas emissions. Id. ¶¶ 196-199. This fact threatens our planet and all its people, including those in Massachusetts, with intolerable disaster: "The atmosphere and oceans are warming, snow and ice cover is shrinking, and sea levels are rising." Id. ¶ 201.

The Commonwealth alleges that ExxonMobil knew these basic scientific facts decades ago -- that, in fact, ExxonMobil's scientists "were among the earliest to understand the risks posed by increasing greenhouse gas emissions" -- and yet devised a "systematic effort ..., reminiscent of the tobacco industry's long denial campaign about the dangerous effects of cigarettes, to mislead both investors and consumers in Massachusetts." Id. ¶¶ 4-5. Nearly forty years ago, the Commonwealth asserts, ExxoMobil already "knew that climate change presented dramatic risks to human civilization and the environment as well as a major potential constraint on fossil fuel use." Id. ¶ 115.

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2. ExxonMobil's Campaign of Deception

Despite this knowledge, "[a]n August 1988 Exxon internal memorandum, captioned 'The Greenhouse Effect,' captures Exxon's intentional decision to misrepresent both its knowledge of climate change and the role of Exxon's products in causing climate change." Id. ¶ 118. This memorandum "set forth an 'Exxon Position' in which Exxon would '[e]mphasize the uncertainty in scientific conclusions regarding the potential enhanced Greenhouse effect,' " and it "made clear that Exxon 'has not modified its energy outlook or forecasts to account for possible changes in fossil fuel demand or utilization due to the [g]reenhouse effect.' " Id. ¶ 120 (alterations in original).

In order to advance this position, ExxonMobil and other fossil-fuel-affiliated corporations and trade groups formed the "Global Climate Coalition" in 1989, which generally represented to "investors and consumers of fossil fuels ... that, contrary to Exxon's internal knowledge, the role of greenhouse gases in climate change was not well understood." Id. ¶¶ 125-126. Through the Global Climate Coalition, both Exxon and Mobil pushed a false narrative that climate science was plagued with doubts. Id. ¶¶ 127-147. In 1998, Exxon and other corporations established the "Global Climate Science Communications Team" in cahoots with a veteran of Philip Morris' tobacco-misinformation campaign. Id. ¶¶ 148-149. Using a panoply of doubt-sowing tactics -- including "advertorials" in the New York Times typically published every Thursday for decades -- this organization, and ExxonMobil in particular, sought to publicly shroud the devastating facts that it internally knew. Id. ¶¶ 157-170. ExxonMobil continued this effort "to downplay and obscure the risks posed by climate change" through the 2000s and 2010s. Id. ¶¶ 187-196.

3. ExxonMobil's Misrepresentations to Investors

The Commonwealth alleges that ExxonMobil has deceived its Massachusetts investors through misrepresentations and omissions, both general and specific. In general, "ExxonMobil's supposed climate risk disclosures together assert that ExxonMobil has accounted for and is responsibly managing climate change risks and that, in any event, they pose no meaningful threat to the Company's business model, its assets, or the value of its securities." Id. ¶ 416. Yet "[t]hese communications are deceptive because they deny or ignore the numerous systemic risks that climate change presents to the global economy, the world's financial markets, the fossil fuel industry, and ultimately ExxonMobil's own business." Id. ¶ 417. Indeed, the Commonwealth claims that "ExxonMobil's affirmative disclosures, which incorporate its energy forecasts, not only fail to disclose these risks; in many cases, the disclosures deceptively deny and downplay these risks." Id. ¶ 430.

***4** More specifically, the Commonwealth alleges that "ExxonMobil has repeatedly represented to investors ... that ExxonMobil used escalating proxy costs" as a way to estimate the financial dangers of climate change to the corporation, yet often "ExxonMobil was not actually using proxy costs in this manner." Id. ¶¶ 472-473. Documents disclosed through other litigation revealed that ExxonMobil was internally using a lower proxy carbon cost than what it told investors, or that it failed entirely to use a proxy cost of carbon across many sectors of its business. Id. ¶¶ 473-589. By not internally applying the proxy cost as it publicly claimed to do, ExxonMobil avoided "project[ing] billions of dollars of additional climate-related costs." Id. ¶ 595.

4. ExxonMobil's Misrepresentations to Consumers

The Commonwealth alleges that "ExxonMobil has misled and continues to mislead Massachusetts consumers by representing that their use of ExxonMobil's Synergy™ fuels and 'green' Mobil 1™ motor oil products will reduce greenhouse gas emissions." Id. ¶ 601. In marketing these products, "ExxonMobil makes misleading representations about the products' environmental benefits and fails to disclose that the development, refining, and consumer use of ExxonMobil fossil fuel products emit large volumes of greenhouse gases." Id.

The Commonwealth also charges ExxonMobil with "greenwashing," which it defines as "advertising and promotional materials designed to convey a false impression that a company is more environmentally responsible than it really is, and so to induce consumers to purchase its products." Id. ¶ 603. In short, "ExxonMobil promotes its products by falsely depicting ExxonMobil as a leader in addressing climate change through technical innovation and various 'sustainability' measures, without disclosing (i) ExxonMobil's ramp up of fossil fuel production in the face of a growing climate emergency; (ii) the minimal investment ExxonMobil is actually making in clean energy compared to its investment in business-as-usual fossil fuel production; and (iii) ExxonMobil's efforts to undermine measures that would improve consumer fuel economy." Id. ¶ 604. The consequences of all these lies are dire, Massachusetts asserts, because "ExxonMobil's deceptive representations and omissions in its communications with consumers, as with its omissions and misrepresentations to investors, had the effect of delaying meaningful action to address climate change." Id. ¶ 767.

5. Causes of Action

The Commonwealth brings four causes of action against ExxonMobil under the Massachusetts Consumer Protection Act, two for defrauding investors and two for defrauding consumers:

(1) Count I alleges that ExxonMobil has misrepresented and failed to disclose material facts regarding systemic climate change risks to its investors, in violation of Mass. Gen. Laws ch. 93A, § 4 and 940 C.M.R. §§ 3.16(1)-(2). Compl. ¶¶ 781-793.

(2) Count II alleges that ExxonMobil has made materially false and misleading statements to Massachusetts investors regarding its use of a proxy cost of carbon, in violation of Mass. Gen. Laws ch. 93A, § 4. Id. 794-806.

(3) Count III alleges that ExxonMobil has deceived Massachusetts consumers by misrepresenting the purported environmental benefit of using its "Synergy™" and " 'green' Mobil 1™" products and failing to disclose the risks of climate change caused by its fossil fuel products, in violation of Mass. Gen. Laws ch. 93A, § 2. Compl. ¶¶ 807-820.

(4) Count IV alleges that ExxonMobil has deceived Massachusetts consumers by promoting a false and misleading "greenwashing" campaign, in violation of Mass. Gen. Laws ch. 93A, § 2. Id. ¶¶ 821-830.

The Commonwealth seeks declaratory and injunctive relief, the statutory penalty of $5,000 for each violation of the Massachusetts Consumer Protection Act, and an award of costs and attorneys' fees. Id. 204-05.

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II. ANALYSIS

***5** ExxonMobil asserts four possible bases for federal jurisdiction in this case: (1) complete preemption; (2) embedded federal question; (3) federal officer removal; and (4) the Class Action Fairness Act. After first canvassing the legal framework of removal, the well-pleaded complaint rule, and other judicial opinions in similar cases, the Court will analyze these four potential grounds for federal jurisdiction.

A. Removal Jurisdiction

[2] [3] [4] [5]A defendant may remove a case to federal court when the federal district court would have original jurisdiction, 28 U.S.C. § 1441, such as federal-question jurisdiction, id. § 1331. "The right of removal is entirely a creature of statute and 'a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress.' " Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32, 123 S.Ct. 366, 154 L.Ed.2d 368 (2002) (quoting Great Northern Ry. Co. v. Alexander, 246 U.S. 276, 280, 38 S.Ct. 237, 62 L.Ed. 713 (1918)). Removal statutes generally "are to be strictly construed." Id. "[T]he burden to prove that a federal question has been pled lies with the party seeking removal," and "any ambiguity as to the source of law ... ought to be resolved against removal." Rossello-Gonzalez v. Calderon-Serra, 398 F.3d 1, 11 (1st Cir. 2004). When removal is based on class action or federal officer involvement, however, no presumption against removal applies. See Dart Cherokee Basin Operating Co., LLC v. Owens, 574 U.S. 81, 135 S. Ct. 547, 554, 190 L.Ed.2d 495 (2014) (no presumption against removal under the Class Action Fairness Act); Watson v. Philip Morris Co., 551 U.S. 142, 150, 127 S.Ct. 2301, 168 L.Ed.2d 42 (2007) (federal officer removal statute must be "liberally construed").

B. The Well-Pleaded Complaint Rule

[6] [7] [8] [9]"The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). "The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." Id. Thus, "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint." Id. at 393, 107 S.Ct. 2425. "As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003).

C. The Complete Preemption Exception

[10]The Supreme Court has articulated several exceptions to the well-pleaded complaint rule. One such exception occurs "when a federal statute wholly displaces the state-law cause of action through complete pre-emption." Id. at 8, 123 S.Ct. 2058; López–Muñoz v. Triple–S Salud, Inc., 754 F.3d 1, 5 (1st Cir. 2014) (describing "complete preemption," also called "the artful pleading doctrine," as "a narrow exception to the well-pleaded complaint rule"). The First Circuit has explained that "[c]omplete preemption is a short-hand for the doctrine that in certain matters Congress so strongly intended an exclusive federal cause of action that what a plaintiff calls a state law claim is to be recharacterized as a federal claim." Fayard v. Northeast Vehicle Servs., LLC, 533 F.3d 42, 45 (1st Cir. 2008). For a court to so recharacterize -- or "transmogrif[y]," Lawless v. Steward

Health Care Sys., LLC, 894 F.3d 9, 18 (1st Cir. 2018) -- a purported state claim, there must be "exclusive federal regulation of the subject matter of the asserted state claim coupled with a federal cause of action for wrongs of the same type." Fayard, 533 F.3d at 46 (citations omitted). "The linchpin of the complete preemption analysis is whether Congress intended that federal law provide the exclusive cause of action for the claims asserted by the plaintiff." López–Muñoz, 754 F.3d at 5.

D. The Five District Court Decisions

***6** Five district courts have faced similar motions to remand from governmental plaintiffs suing oil companies on state law grounds related to climate change. Four of those courts (in four separate circuits) have remanded, including the District Court for the District of Rhode Island, a decision now on appeal before the First Circuit.[5] The Fourth and Ninth Circuits recently affirmed two such remands, though their analyses were confined to the federal officer removal issue because appellate jurisdiction over the other issues decided by the district courts was foreclosed by precedent. County of San Mateo v. Chevron Corp., 960 F.3d 586, 602-03 (9th Cir. 2020); Mayor & City Council of Baltimore v. BP P.L.C., 952 F.3d 452, 456 (4th Cir. 2020).

5 Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142 (D.R.I. 2019), appeal docketed, No. 19-1818 (1st Cir. Aug. 20, 2019); Board of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947 (D. Colo. 2019), appeal docketed, No. 19-1330 (10th Cir. Sept. 9, 2019); Mayor & City Council of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019), aff'd, 952 F.3d 452 (4th Cir. 2020), petition for cert. docketed, No. 19-1189 (Mar. 31, 2020); County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018), aff'd in part, 960 F.3d 586 (9th Cir. 2020).

In contrast, Judge Alsup of the District Court for the Northern District of California denied the motion to remand of Oakland and San Francisco. California v. BP P.L.C., Nos. C 17-06011 WHA, 2018 WL 1064293, at *5 (N.D. Cal. Feb. 27, 2018), vacated and remanded sub nom. City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020). Judge Alsup reasoned that removal was proper because the cities' "nuisance claims -- which address the national and international geophysical phenomenon of global warming -- are necessarily governed by federal common law." Id. at *2. Though he did not use the term, Judge Alsup's holding is intelligible only as an application of the complete preemption doctrine. See Gil Seinfeld, Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from California v. BP (hereinafter "Jurisdictional Lessons"), 117 Mich. L. Rev. Online 25, 32 (2018) ("Despite Judge Alsup's failure to say so ... California v. BP is best understood as a complete preemption case.").[6] Judge Alsup then held that the court could not create a federal common law remedy in this case due to separation-of-powers concerns and dismissed the claims. City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017 (N.D. Cal. 2018), vacated and remanded, 960 F.3d 570 (9th Cir. 2020). One other district court has followed Judge Alsup's logic in holding that New York City's state law claims are preempted by federal common law (which, in turn, is displaced by the Clean Air Act), though that case was filed originally in federal court on diversity jurisdiction and so does not address the well-pleaded complaint rule. City of New

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York v. BP P.L.C., 325 F. Supp. 3d 466, 471-76 (S.D.N.Y. 2018), appeal docketed, No. 18-2188 (2d Cir. July 26, 2018).

6 In truth, Judge Alsup's confusion is due to the Ninth Circuit precedent he was following, which seems to consider "federal common law" to be a distinct category of removability apart from "complete preemption." See Wayne v. DHL Worldwide Express, 294 F.3d 1179, 1183-84 (9th Cir. 2002). Yet removability on the basis of federal common law, if it exists at all, must rest on the same theory of "complete preemption" articulated by the Supreme Court. In vacating and remanding Judge Alsup's decision, the Ninth Circuit analyzed the issue under the complete preemption framework but failed to clarify its earlier case law. See City of Oakland, 960 F.3d at 581-83. In any event, the proper inquiry must follow the Supreme Court's "complete preemption" line of cases.

***7** The courts that disagreed with Judge Alsup's reasoning offered two primary objections. First, that the federal common law relating to pollution from greenhouse gases has been displaced, see American Elec. Power Co. v. Connecticut ("AEP"), 564 U.S. 410, 424, 131 S.Ct. 2527, 180 L.Ed.2d 435 (2011); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 854–58 (9th Cir. 2012), and thus the case may not be "removed to federal court on the basis of federal common law that no longer exists." County of San Mateo, 294 F. Supp. 3d at 937; Baltimore, 388 F. Supp. 3d at 557 (noting that "any such federal common law claim has been displaced by the Clean Air Act").[7] Judge Alsup, however, distinguished AEP and Kivalina on the grounds that San Francisco's and Oakland's federal common law claims (1) attacked the production and sale of fossil fuels, not their emissions; and (2) alleged a tort based on global conduct, not simply domestic behavior, as "foreign emissions are out of the EPA and Clean Air Act's reach." California, 2018 WL 1064293, at *4.

7 A related question is whether Judge Alsup is correct that federal common law may completely preempt state law even where (as he subsequently ruled in this case) a federal common law cause of action never springs into existence due to separation-of-powers constraints. Indeed, even Judge Alsup acknowledged that this bait-and-switch "may seem peculiar." City of Oakland, 325 F. Supp. 3d at 1028. On the other hand, the First Circuit has explained that, in complete preemption cases, "the superseding federal scheme may be more limited or different in its scope and still completely preempt," such that the federal cause of action may not provide relief and the state claim "simply disappears." Fayard, 533 F.3d at 46. Even so, it is far from clear that this reasoning would apply when the federal scheme is not simply "more limited" but has not been created at all.
The parties obliquely debate this issue before this Court. Mem. Remand 17; Opp'n 15-16. Since other considerations in this case counsel against adopting Judge Alsup's conclusion, however, the Court need not settle this question.

Second, that complete preemption must emanate from a congressional directive; judge-made law simply cannot do the trick. This is the criticism articulated by Professor Seinfeld, Jurisdictional Lessons 32-38, and echoed by the district courts

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that have parted ways with Judge Alsup. See Baltimore, 388 F. Supp. 3d at 556-58; Rhode Island, 393 F. Supp. 3d at 148-49; Boulder County, 405 F. Supp. 3d at 973; County of San Mateo, 294 F. Supp. 3d at 937-38. On this view, Judge Alsup committed a categorical error in extending the complete preemption doctrine beyond statutory terra firma to ethereal federal common law.

The Ninth Circuit recently vacated and remanded Judge Alsup's ruling. City of Oakland v. BP P.L.C., 960 F.3d 570 (9th Cir. 2020). The panel held that the Clean Water Act does not completely preempt state causes of action. Id. at 581-83. Oddly, the Ninth Circuit did not address Judge Alsup's rationale that federal common law, not the Clean Water Act, is the source of complete preemption. In its silent dismissal of this notion, the Ninth Circuit panel apparently assumed, along with Professor Seinfeld and the other district courts, that complete preemption may flow only from a statute. The panel also rejected an alternative basis for federal jurisdiction not reached by Judge Alsup, namely the embedded federal question doctrine, which will be discussed below. See id. at 579-81.

E. Federal Common Law Does Not Govern These Claims

[11]ExxonMobil argues that this case is removable because, following Judge Alsup's lead in California, these claims arise under federal common law which completely preempts the state causes of action. Notice 12-14; Opp'n 14-16. In resolving the present motion to remand, the Court need not decide the major points of dispute between Judge Alsup and the other courts.[8] Even if Judge Alsup is correct that (1) federal common law may completely preempt state causes of action and (2) the Clean Air Act would not displace any federal common law claims here, the Court would still lack jurisdiction. That is because the Commonwealth's claims simply do not implicate federal common law in the first place. Accordingly, complete preemption fails because these claims do not arise under federal common law.

8 In a nutshell, Professor Seinfeld argues that complete preemption is applicable only to statutes, not federal common law. Jurisdictional Lessons 32-38. The district courts in Rhode Island, Baltimore, Boulder County, and County of San Mateo have rapidly embraced this theory -- and the Ninth Circuit's opinion in City of Oakland, 960 F.3d at 581-83, appears to rest on this assumption. This Court is not persuaded. The main evidence for Professor Seinfeld's view appears to be that case law generally refers to congressional intent as the touchstone of complete preemption. See López–Muñoz, 754 F.3d at 5; Rhode Island, 393 F. Supp. 3d at 148-49 (collecting citations). Yet that language reflects little more than the fact that the cited cases all involved statutory interpretation. Those opinions were not addressing federal common law at all.
Moreover, two reasons support applying the complete preemption doctrine in federal common law cases. First, the Supreme Court appears to have done so in at least one scenario. See Beneficial Nat'l Bank, 539 U.S. at 8 n.4, 123 S.Ct. 2058 (acknowledging complete preemption for "possessory land claims under state law brought by Indian tribes because of the uniquely federal 'nature and source of the possessory rights of Indian tribes.' " (quoting Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974))); County of

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Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 233-36, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (explaining that the tribe's cause of action for possession arose under "federal common law"). Another example may be removal under the federal common law of foreign relations, which some circuits have recognized and analogized to complete preemption. See Republic of Philippines v. Marcos, 806 F.2d 344, 353-54 (2d Cir. 1986). But see Patrickson v. Dole Food Co., 251 F.3d 795, 802 n.5 (9th Cir. 2001) (questioning the Second Circuit's analogy).

The second reason to reject Professor Seinfeld's sharp distinction between statutes and federal common law goes to first principles. In our post-Erie world, the "new" federal common law exists only at the direction of Congress "or where the basic scheme of the Constitution so demands." AEP, 564 U.S. at 421, 131 S.Ct. 2527. It is not a creature of judicial inventiveness. If so, on what grounds can federal common law be categorically excluded from the complete preemption doctrine? Just as a congressional policy may sometimes require the federal cause of action to be exclusive and thus completely preempt state law, so too the "basic scheme of the Constitution" may sometimes require an exclusively federal cause of action.

***8** [12]The Supreme Court recently reiterated that federal common law may exist only when certain "strict conditions" are met, "one of the most basic" being "that "common lawmaking must be 'necessary to protect uniquely federal interests.' " Rodriguez v. FDIC, —— U.S. ——, 140 S. Ct. 713, 717, 206 L.Ed.2d 62 (2020) (quoting Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) & Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)). In other words, federal common law may be created "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism." Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972). In particular, the Supreme Court has repeatedly recognized that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." AEP, 564 U.S. at 421, 131 S.Ct. 2527 (quoting Milwaukee, 406 U.S. at 103, 92 S.Ct. 1385).[9] The Ninth Circuit has surely overstated matters in saying that "federal common law includes the general subject of environmental law," Kivalina, 696 F.3d at 855, but federal public nuisance law undoubtedly applies to certain serious environmental injuries.[10]

9 Contra City of Oakland, 960 F.3d at 579-80 (overbroad dictum that "the Supreme Court has not yet determined that there is a federal common law of public nuisance relating to interstate pollution"). What the Supreme Court left undecided is whether private and municipal plaintiffs may bring such a claim, and whether the "scale and complexity" of global warming distinguish it "from the more bounded pollution giving rise to past federal nuisance suits." AEP, 564 U.S. at 422-23, 131 S.Ct. 2527.

10 The Supreme Court "has not defined the type of harm that might give rise to a federal public nuisance claim," but it has

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> suggested that such a claim is appropriate "when 'the health and comfort of the inhabitants of a State are threatened' to the point where a sovereign would be tempted to go to war." Note, The Sovereign Self-Preservation Doctrine in Environmental Law, 133 Harv. L. Rev. 621, 622-23, 632 (2019) (quoting Missouri v. Illinois, 180 U.S. 208, 241, 21 S.Ct. 331, 45 L.Ed. 497 (1901)). Such a definition "would likely restrict the federal public nuisance claim to environmental or public health threats, although severe economic injuries are conceivably included as well." Id. at 632.

The allegations in this complaint are far afield of any "uniquely federal interests." The complaint, fairly read, alleges that ExxonMobil hid or obscured the scientific evidence of climate change and thus duped its investors about the long-term health of its corporation and defrauded consumers of its fossil fuel products. The Commonwealth's analogy to the tobacco industry, e.g., Compl. ¶¶ 116-117; Mem. Remand 13, is apt. As part of the tobacco multi-district litigation, Bolivia and Venezuela sued 18 tobacco companies in state court on common law claims "that the tobacco industry fraudulently concealed the dangers of smoking." In re Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 34 (D.D.C. 2000). The tobacco companies argued for removal on the grounds that the complaint implicated the federal common law of foreign relations. Id. at 35. Rejecting this argument, the court succinctly explained that "[t]he question is whether the tobacco industry or the named defendants engaged in negligence, fraud, misrepresentation, concealment, or deceit. That question is not governed by a federal common law at all, but by state common law." Id. at 37. This analysis holds for the claims against ExxonMobil. In short, there is no federal common law here because "[n]othing about the allegations in these lawsuits implicates interests that are 'uniquely federal.' " Id.

In this respect, this case is distinguishable from California and City of New York in that both of those cases involved public nuisance claims with a theory of damages tied to the impact of climate change. On those allegations, Judge Alsup concluded that "a uniform standard of decision is necessary," adding:

> ***9** If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints, a problem centuries in the making (and studying) with causes ranging from volcanoes, to wildfires, to deforestation to stimulation of other greenhouse gases—and, most pertinent here, to the combustion of fossil fuels. The range of consequences is likewise universal -- warmer weather in some places that may benefit agriculture but worse weather in others, e.g., worse hurricanes, more drought, more crop failures and -- as here specifically alleged -- the melting of the ice caps, the rising of the oceans, and the inevitable flooding of coastal lands. Taking the complaints at face value, the scope of the worldwide predicament demands the most comprehensive view available, which in our

> American court system means our federal courts and our federal common law. A patchwork of fifty different answers to the same fundamental global issue would be unworkable.

California, 2018 WL 1064293, at *3; see also Robert L. Glicksman & Richard E. Levy, A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change, 102 Nw. U. L. Rev. 579, 598-600, 606-10 (2008) (evaluating value of uniform environmental regulations).

Without expressing an opinion on Judge Alsup's reasoning, the Court notes that it does not apply to the Commonwealth's claims against ExxonMobil since they do not prompt this Court or any other to provide "answers" to the "fundamental global issue" of climate change. Much more modestly, the Commonwealth wants "to hold ExxonMobil accountable for misleading the state's investors and consumers." Compl. ¶ 2. No one doubts that this task falls within the core of a state's responsibility. See, e.g., Edenfield v. Fane, 507 U.S. 761, 769, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) ("[T]here is no question that [a state's] interest in ensuring the accuracy of commercial information in the marketplace is substantial."); Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982) ("[A] State has a quasi-sovereign interest in the health and well-being -- both physical and economic -- of its residents in general."). States routinely enforce consumer protection and securities laws alongside the federal government.[11] Nor has ExxonMobil provided any reason why protecting Massachusetts consumers and investors from fraud implicates "uniquely federal interests." It does not.

[11] See generally James J. Park, Rules, Principles, and the Competition to Enforce the Securities Laws, 100 Cal. L. Rev. 115 (2012); Jared Elosta, Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate, 89 N.C. L. Rev. 1273 (2011).

Accordingly, the Court ruled that the complaint's state law claims are not completely preempted.

F. Grable Exception to the Well-Pleaded Complaint Rule

[13]ExxonMobil invokes another exception to the well-pleaded complaint rule found in Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005). Grable established that, in a "slim category" of cases, "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." Gunn v. Minton, 568 U.S. 251, 258, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013). The Grable inquiry seeks to unearth "an embedded federal question" in a facially state-law complaint. Rhode Island Fishermen's All., Inc. v. Rhode Island Dep't of Envtl. Mgmt., 585 F.3d 42, 48 (1st Cir. 2009)

ExxonMobil asserts that two "federal issues" embedded in the complaint fall within Grable's reach: (1) the complaint " 'touches on foreign relations' and therefore 'must yield to the National Government's policy,' " Opp'n 7 (quoting American Ins. Ass'n v. Garamendi,

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539 U.S. 396, 413, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003)); and (2) adjudication of the complaint "would require a factfinder to question the careful balance Congress and federal agencies have struck between greenhouse gas regulation and the nation's energy needs," id. at 9. Massachusetts responds that "[n]one of those policies is implicated by and no determination of federal law need be made in the Commonwealth's action ... since this case is about Exxon's marketing and sales misrepresentations about its products and securities to Massachusetts consumers and investors." Mem. Remand 12.

***10** [14]The Commonwealth is correct. The Court need not reach the question whether ExxonMobil's two asserted "federal issues" would conjure Grable jurisdiction because those issues are simply absent in this case. Contrary to ExxonMobil's caricature of the complaint, the Commonwealth's allegations do not require any forays into foreign relations or national energy policy. It alleges only corporate fraud. Whether ExxonMobil was honest or deceitful in its marketing campaigns and financial disclosures does not necessarily raise any federal issue whatsoever. Cf. Atlantic Richfield Co. v. Christian, ––– U.S. ––––, 140 S. Ct. 1335, 1350 n.4, 206 L.Ed.2d 516 (2020). Every court to consider the question has rejected the oil-industry defendants' arguments for Grable jurisdiction. See City of Oakland, 960 F.3d at 579-81. Boulder County, 405 F. Supp. 3d at 965-68; Rhode Island, 393 F. Supp. 3d at 150-51; Baltimore, 388 F. Supp. 3d at 558-61; County of San Mateo, 294 F. Supp. 3d at 938.[12] That unanimity is all the more telling since those cases involved nuisance claims in which the states and local governments sought damages from oil companies to offset the disastrous effects of climate change. Such sweeping theories of liability and relief arguably implicate national and international climate policies, yet those courts still deemed Grable inapplicable. Here, in contrast, Massachusetts relies exclusively on mundane theories of fraud against consumers and investors, without seeking to hold ExxonMobil liable for any actual impacts of global warming. There is no federal issue embedded in this complaint.

12 Judge Alsup did not reach the Grable question, though he did partially rely on entanglement with foreign affairs as requiring that federal law govern rather than state law. California, 2018 WL 1064293, at *5. For this same reason, Judge Alsup subsequently ruled that federal courts cannot make common law in this area but should leave the matter to the political branches. City of Oakland, 325 F. Supp. 3d at 1024-28; see also City of New York, 325 F. Supp. 3d at 475-76 (same). ExxonMobil also cites the United States' amicus brief before the Ninth Circuit contending that the claims of Oakland and San Francisco threaten to "undermine the exclusive grants of authority to the representative branches of the federal government to conduct the Nation's foreign policy." Opp'n 8 (quoting Brief of the United States as Amicus Curiae in Support of Appellees and Affirmance at 16, City of Oakland v. BP, P.L.C., No. 18-16663 (9th Cir. May 17, 2019)). These arguments do not persuade the Court.

In its opposing memorandum and at oral argument, ExxonMobil leaned heavily on the Fifth Circuit's decision in Board of Comm'rs of Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co., 850 F.3d 714 (5th Cir. 2017). Opp'n 9-10; Tr. Hr'g 15-16, ECF No. 31. That decision affirmed Grable jurisdiction over state law claims relating to dredging activities

by oil companies when "the scope and limitations of a complex federal regulatory framework [we]re at stake." Opp'n 9 (quoting Board of Commissioners, 850 F.3d at 725). Yet the passage of that opinion quoted by ExxonMobil relates to the substantiality prong of the Grable inquiry, not the "necessarily raised" or "actually disputed" prongs. Indeed, Board of Commissioners is palpably distinguishable because the state law claims at issue were predicated on duties arising from federal statutes, and the "complaint dr[ew] on federal law as the exclusive basis for holding [d]efendants liable for some of their actions." 850 F.3d at 721-22. Nothing of the kind is presented by the Commonwealth's complaint.

Accordingly, the Court declined to find Grable jurisdiction over the Commonwealth's claims.

G. Federal Officer Jurisdiction

[15]ExxonMobil next argues that this case is removable due to the federal officer removal statute, see Opp'n 16-18, which provides that an action may be removed when the suit is against "any officer (or any person acting under that officer) of the United States ... for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). As the Fourth Circuit recently stated the test in Baltimore: "to remove a case under § 1442(a)(1), a private defendant must show: '(1) that it "act[ed] under" a federal officer, (2) that it has "a colorable federal defense," and (3) that the charged conduct was carried out for [or] in relation to the asserted official authority.' " 952 F.3d at 461-62 (alteration in original) (quoting Sawyer v. Foster Wheeler LLC, 860 F.3d 249, 254 (4th Cir. 2017)).

***11** ExxonMobil argues that it was "acting under" federal officers because it "has explored for, developed, and produced oil and gas on federal lands pursuant to leases issued by the federal government," and those "federal leases contain many provisions that demonstrate ExxonMobil acted at the direction of a federal officer." Notice 14-15. ExxonMobil also asserts various colorable federal defenses, such as preemption, the foreign affairs doctrine, and violations of the Commerce Clause, Due Process Clause, and First Amendment. Id. at 16.

The Commonwealth offers no argument that ExxonMobil was not "acting under" federal officials in its drilling and oil production activities. But see Baltimore, 952 F.3d at 463-66 (holding that oil companies were not "acting under" federal officials, within the meaning of § 1442(a)(1), in developing oil and gas pursuant to federal leases); County of San Mateo, 960 F.3d at 601-03 (same); Boulder County, 405 F. Supp. 3d at 976 (same, with specific reference to ExxonMobil). Nor does it argue that ExxonMobil's purported federal defenses are not "colorable." Instead, the Commonwealth focuses its firepower on the "relating to" element, § 1442(a)(1), arguing that "there is simply no nexus, causal or otherwise, between the Commonwealth's causes of action and any Exxon conduct purportedly taken at the direction of federal officials." Mem. Remand 18-19.

This is the nub of the dispute. ExxonMobil seizes on a few lines here and there in the complaint to construe it as alleging that "ExxonMobil's federally-directed actions 'are a major cause of global climate change' and will have 'serious, life-threatening, and costly impacts on the people of the Commonwealth.' " Opp'n 18 (quoting Compl. ¶¶ 54-69, 222-252). Taking these and other lines out of context, ExxonMobil argues that this "suit is thus ultimately directed at stopping or reducing the actions federal leases obliged ExxonMobil to pursue, namely the production and sale of fossil fuels." Id. at 17; id. (quoting Compl. ¶¶

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601-602, 645) ("Plaintiff alleges that ... ExxonMobil's fossil fuel products ... could never be considered 'safe and environmentally beneficial' because 'the development, production, refining, and consumer use of ExxonMobil fossil fuel products' increase 'greenhouse gas emissions.' "). Massachusetts insists that this reading of the complaint is a "sleight-of-hand," as "[t]he Complaint has nothing to do with efforts to stop or reduce Exxon's production or sale of its fossil fuel products" but, in truth, is only "a state action aimed at protecting consumers and investors from Exxon's deceptive representations in the marketplace." Mem. Remand 17-18.

Massachusetts is correct about the fairest reading of the complaint, though it erroneously describes the legal standard for federal officer removal. The Commonwealth mistakenly quotes Watson v. Philip Morris Cos. for the proposition that federal officer removal is permissible only if "the 'act[s]' that are the subject of the petitioner's complaint" were carried out under the direction of federal officers. Mem. Remand 18 (alteration and emphasis in original) (quoting 551 U.S. 142, 150, 127 S.Ct. 2301, 168 L.Ed.2d 42 (2007)). Yet Watson predates the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545, of which section (b)(1)(A) amended the federal officer removal statute to add the words "or relating to" before "any act under color of such office." 28 U.S.C. § 1442(a)(1). This amendment was, plainly enough, "intended to broaden the universe of acts that enable Federal officers to remove to Federal court." H.R. Rep. No. 112-17, pt. 1, at 6 (2011). "By the Removal Clarification Act, Congress broadened federal officer removal to actions, not just causally connected, but alternatively connected or associated, with acts under color of federal office." Latiolais v. Huntington Ingalls, Inc., 951 F.3d 286, 292 (5th Cir. 2020) (en banc) (emphases in original).[13]

13 The Rhode Island Court also relied upon the lack of a "causal connection" between the oil companies' marketing practices and the conduct governed by the federal leases in rejecting federal officer removal jurisdiction, uncritically citing pre-2011 case law. 393 F. Supp. 3d at 152 (citing Mesa v. California, 489 U.S. 121, 131–32, 109 S.Ct. 959, 103 L.Ed.2d 99 (1989)). For the reasons explained below, however, a properly up-to-date analysis reaches the same result.

***12** [16]Nonetheless, even under this more expansive standard, ExxonMobil's marketing and sale tactics were not plausibly "relat[ed] to" the drilling and production activities supposedly done under the direction of the federal government. ExxonMobil seeks to bridge this gap by overreading the complaint, arguing that the "ultimate[ ]" goal of the complaint is "stopping or reducing the actions federal leases obliged ExxonMobil to pursue, namely the production and sale of fossil fuels" -- and that these activities are "at the heart" of the complaint. Opp'n 16-17. A fair reading of the complaint tells a far different story.

The Fourth Circuit recently rejected a similar attempt by oil-industry defendants to establish removal on this basis:

> When read as a whole, the Complaint clearly seeks to challenge the promotion and sale of fossil fuel products without warning and abetted by a sophisticated disinformation campaign. Of course, there are many references to fossil fuel

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> production in the Complaint, which spans 132 pages. But, by and large, these references ... [are] not the source of tort liability. Put differently, Baltimore does not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil fuel products; it is the concealment and misrepresentation of the products' known dangers -- and simultaneous promotion of their unrestrained use -- that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change.

Baltimore, 952 F.3d at 467; see also Boulder County, 405 F. Supp. 3d at 977.

In Baltimore, the actual production of fossil fuels was far more related to the complaint than it is here, because Baltimore sought damages for climate-related injuries while Massachusetts seeks only fines for the alleged deceptions. Even so, the Fourth Circuit found it easy to separate the properly pled misrepresentation allegations from the surrounding context of fossil fuel production, holding that the alleged "disinformation campaign" was the core of the complaint and was unrelated to any action under federal officials. 952 F.3d at 467. This Court similarly construed the Commonwealth's complaint and therefore rebuffed ExxonMobil's effort to remove the case on the grounds of the federal officer removal statute.

H. Class Action Jurisdiction

ExxonMobil's final argument is that the case is removable under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), because the complaint brought by the Attorney General is essentially a class action in disguise. Notice 16-17; Opp'n 18-20. A "class action" filed in state court is removable, 28 U.S.C. § 1453(b), provided there is minimal diversity and the aggregate amount in controversy exceeds $5,000,000. Mississippi ex rel. Hood v. AU Optronics Corp., 571 U.S. 161, 134 S. Ct. 736, 740, 187 L.Ed.2d 654 (2014). The statute defines the term "class action" to mean "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B).

The present complaint was not filed under Rule 23, of course, but ExxonMobil contends that Mass. Gen. Laws ch. 93A, § 4, which authorizes the Attorney General to bring these claims "in the public interest," amounts to a "similar State statute" and therefore establishes federal jurisdiction. Opp'n 18-20. Massachusetts retorts that its complaint "plainly falls within the category of parens patriae actions," which are not similar to a class action under Rule 23 because "a Chapter 93A claim requires none of the elements of a state or federal Rule 23 'class action' -- numerosity, typicality, commonality, or notice to all members of a class." Mem. Remand 20.[14]

[14] Massachusetts could have argued (but did not) that even if the complaint is a "class action" within the meaning of CAFA there is not even minimal diversity because the Commonwealth is not a

"citizen" for purposes of diversity jurisdiction, Moor v. Alameda County, 411 U.S. 693, 717, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), and the Commonwealth is "the real party in interest" rather than the purported class members. See AU Optronics Corp. v. South Carolina, 699 F.3d 385, 394 (4th Cir. 2012); Illinois v. AU Optronics Corp., 794 F. Supp. 2d 845, 856 (N.D. Ill. 2011). This argument is not unique to CAFA, and its corollary could have been raised by ExxonMobil on the basis of the general diversity statute; that is, that the individual consumers and investors are the real parties in interest (with Massachusetts being only a nominal party) and therefore there is complete diversity. See In re Standard & Poor's Rating Agency Litig., 23 F. Supp. 3d 378, 401-07 (S.D.N.Y. 2014). Since neither Massachusetts nor ExxonMobil raises these arguments based on divining the "real party in interest," the Court need not address them. But see West Virginia ex rel. McGraw v. CVS Pharmacy, Inc., 646 F.3d 169, 180 (4th Cir. 2011) (Gilman, J., dissenting) (collapsing the "similarity" inquiry into the "real party in interest" inquiry).

***13** [17] [18]The Commonwealth has the better of this argument. Admittedly, the statutory definition of "class action" is perplexing. For one thing, it states that "the term 'class action' means any civil action filed ... as a class action," 28 U.S.C. § 1332(d)(1)(B), which is hopelessly "circular." West Virginia ex rel. McGraw v. CVS Pharmacy, Inc., 646 F.3d 169, 179 (4th Cir. 2011) (Gilman, J., dissenting). For another, the statute does not disclose the criteria for evaluating when a state statute is "similar" to Rule 23. Id. In making sense of the statute, the Fourth Circuit reasoned that "Congress undoubtedly intended to define 'class action' in terms of its similarity and close resemblance to Rule 23." Id. at 174 (majority opinion). Somewhat differently, the Second Circuit explained that there are two separate elements, such that a state-law based CAFA class action "must be filed under a statute or rule that is both similar to Rule 23 and authorizes the action to proceed 'as a class action.' " Purdue Pharma L.P. v. Kentucky, 704 F.3d 208, 214 (2d Cir. 2013) (emphases supplied). However the sentence is parsed, courts have converged upon a test of similarity that looks to "the familiar hallmarks of Rule 23 class actions; namely, adequacy of representation, numerosity, commonality, typicality, [and] the requirement of class certification." Id.[15] A "similar" state statute or rule need not contain all of the other conditions and administrative aspects of Rule 23, but it must "at a minimum, provide a procedure by which a member of a class whose claim is typical of all members of the class can bring an action not only on his own behalf but also on behalf of all others in the class." Id. at 217 (alterations deleted) (quoting CVS, 646 F.3d at 175).

15 The Second Circuit considers the certification requirement itself as a relevant factor in determining similarity, id. at 216 n.6, whereas the Fourth Circuit refers only to "the four criteria stated in Rule 23(a)," CVS, 646 F.3d at 175. Cf. West Virginia ex rel. McGraw v. Comcast Corp., 705 F. Supp. 2d 441, 453 (E.D. Pa. 2010) (identifying the "three baseline requirements" for protecting the interests of unnamed plaintiffs in class actions as "1) notice, 2) an opt-out opportunity, and 3) adequate representation").

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On this basis, the Second, Fourth, Fifth, Seventh, and Ninth Circuits have held that CAFA generally does not confer federal jurisdiction over state parens patriae actions. Id.; CVS, 646 F.3d at 175-77 (holding that state attorney general's consumer protection claim was not removable under CAFA); Mississippi ex rel. Hood v. AU Optronics Corp., 701 F.3d 796, 798-99 (5th Cir. 2012), rev'd on other grounds, 571 U.S. 161, 134 S. Ct. 736, 739, 187 L.Ed.2d 654 (2014); LG Display Co. v. Madigan, 665 F.3d 768, 774 (7th Cir. 2011); Washington v. Chimei Innolux Corp., 659 F.3d 842, 848-49 (9th Cir. 2011). Though the First Circuit has not addressed the issue, it denied review when a district court in this circuit followed the consensus. New Hampshire v. Purdue Pharma, No. 17-cv-427-PB, 2018 WL 333824, at *2-3 (D.N.H. Jan. 9, 2018) (holding that a New Hampshire's suit alleging fraud by an opioid medication company is a "straightforward parens patriae action that bears no resemblance to a Rule 23 class action"), review denied, No. 17-8041 (1st Cir. Jan. 31, 2018).[16]

16 The class action question did not come up in Rhode Island v. Chevron Corp., so the First Circuit will have no occasion to address the issue when it considers that case on appeal. Nor was class action removal raised in County of San Mateo, Boulder County, or Baltimore.

Here, the authorizing statute for the Attorney General's claims, Mass. Gen. Laws ch. 93A, § 4, contains no procedural requirements akin to those of Rule 23, such as adequacy, typicality, numerosity, commonality, or certification. It is not "similar" to Rule 23 within the meaning of CAFA, as the consensus of judicial authority construes that statute.

ExxonMobil argues that those cases are either wrongly decided or distinguishable. It notes that the Massachusetts Appeals Court has stated that "[a]n action brought by the Attorney General under G.L. c. 93A, § 4, is comparable to a class action." Commonwealth v. Chatham Development Co., Inc., 49 Mass. App. Ct. 525, 528, 731 N.E.2d 89 (2000). ExxonMobil further quotes the Supreme Judicial Court's holding that an Attorney General's action under section 4 of chapter 93A may obtain relief for unnamed similarly situated individuals because "[t]he very purpose of the Attorney General's involvement is to provide an efficient, inexpensive, prompt and broad solution to the alleged wrong," and there is "no logical reason" to distinguish the Attorney General's action from "a class action" in this respect. Commonwealth v. DeCotis, 366 Mass. 234, 245-46, 316 N.E.2d 748 (1974).

***14** Yet the fact that Massachusetts courts recognize chapter 93A, section 4 claims as in some ways analogous to class actions does not bring such claims within CAFA's federal jurisdiction unless the state statute contains procedures "similar" to those under Rule 23. Indeed, one court rejected class action removal for a consumer protection claim brought by the state's attorney general even though the authorizing statute expressly called the attorney general's suit "a class action." Nessel ex rel. Michigan v. Amerigas Partners, L.P., 421 F. Supp. 3d 507, 513 (E.D. Mich. 2019); see also National Consumers League v. Flowers Bakeries, LLC., 36 F. Supp. 3d 26, 35-36 (D.D.C. 2014) (holding that private attorney general action, even when brought under statute that authorizes claim "on behalf of the interests of ... a class of consumers," is not "similar" to

Rule 23 because there are no requirements of adequacy, numerosity, commonality, and typicality).

In addition to the absence of typical class-action procedures, chapter 93A, section 4 differs from class actions with respect to the available remedies. Although the statute does authorize damages paid to individuals who suffered loss, it also authorizes injunctive relief and "a civil penalty" payable to the Commonwealth -- which is the relief Massachusetts seeks here. Compl. 205. This underscores that the Commonwealth acts here not as a representative of a class of injured citizens but in its own right as a sovereign. Cf. Baumann v. Chase Inv. Servs. Corp., 747 F.3d 1117, 1123 (9th Cir. 2014) (holding that state statute authorizing class actions with civil penalties payable to both state and the class was not similar to Rule 23 for purposes of CAFA); Kokesh v. SEC, ––– U.S. ––––, 137 S. Ct. 1635, 1643, 198 L.Ed.2d 86 (2017) (holding that SEC's remedy of disgorgement is a "penalty" because violation was "committed against the United States rather than an aggrieved individual -- this is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution").[17]

17 ExxonMobil argues that the Commonwealth's securities claims here are "brought only on behalf of a discrete, identifiable group of private individuals and institutions, i.e., Massachusetts investors in ExxonMobil securities." Opp'n 19 n.23. CAFA refers to the nature of the statute in general, though, and not to the circumstances of a particular action, so it is doubtful that the facts of the complaint at hand could bear upon whether the state statute is "similar" to Rule 23. Even were that so, it is clear enough that here the Attorney General's action under chapter 93A, section 4 is a sovereign act and not straightforwardly on behalf of the investors.

ExxonMobil further argues that CAFA's purpose and legislative history indicate that federal jurisdiction is appropriate here. Opp'n 20 (CAFA is to be "interpreted liberally" such that "lawsuits that resemble a purported class action should be considered class actions." (quoting S. Rep. No. 109-14, at 35 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 34)). Whatever the quoted portion of the Senate Report means, its authority is dubious. See College of Dental Surgeons v. Connecticut Gen. Life Ins. Co., 585 F.3d 33, 38 n.2 (1st Cir. 2009) (explaining that this Senate Report was not issued until ten days after enactment, so its "value as a means of discerning congressional intent is clouded"). Nor does this Court read much into the fact that Congress rejected an amendment to CAFA that would have exempted suits by state attorneys general. See CVS, 646 F.3d at 177 ("This legislative history is hardly probative."); cf. Central Bank, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 187, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." (quoting United States v. Wise, 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962))).

***15** Finally, nothing much is gained by ExxonMobil's citation of "CAFA's primary objective" as "ensuring 'Federal court consideration of interstate cases of national importance.' " Standard Fire Ins. Co. v. Knowles, 568 U. S. 588, 595, 133 S.Ct. 1345, 185 L.Ed.2d 439 (2013) (quoting CAFA §

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2(b)(2), 119 Stat. 5). This is not an interstate case except in the trivial sense in which all diversity cases are interstate; nor is it of special national importance. On the contrary, since "[t]he [Massachusetts] Attorney General initially filed this action in a [Massachusetts] state court to enforce, on behalf of [Massachusetts] and its citizens, state consumer protection laws applicable only in [Massachusetts]," recognizing federal jurisdiction would "risk trampling on the sovereign dignity of the [Commonwealth] and inappropriately transforming what is essentially a [Massachusetts] matter into a federal case." CVS, 646 F.3d at 178.

Accordingly, the Court followed the unmistakable judicial consensus and ruled that the Commonwealth's action is not a "class action" under CAFA.

III. CONCLUSION

The well-pleaded complaint rule governs this case and deprives this Court of jurisdiction over the Commonwealth's thoroughly state law claims. In the absence of any applicable statutory or doctrinal exception to this rule, the Court ALLOWED the motion to remand the case back to state court.

In disclaiming federal jurisdiction over this case, the Court does not quarrel with Judge Alsup's sensible and eloquent plea that "[i]f ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem" of climate change. California, 2018 WL 1064293, at *3. Rather, the Court concludes that the "problem" at issue in this complaint is not geophysical but economic -- namely, has ExxonMobil been sufficiently candid with its investors and customers in Massachusetts about the simmering calamity of global warming? That question is properly for the courts of the Commonwealth to decide.

SO ORDERED.

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San Jose Division.

Diana HAUCK, et al., Plaintiffs,
v.
ADVANCED MICRO DEVICES, INC., Defendant.

Case No. 18-CV-00447-LHK
|
Signed 04/04/2019

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ORDER GRANTING AMD'S MOTION TO DISMISS PLAINTIFFS' SECOND CONSOLIDATED AMENDED COMPLAINT WITH PREJUDICE

Re: Dkt. No. 97

LUCY H. KOH, United States District Judge

***1** Plaintiffs Diana Hauck, Shon Elliott, Michael Garcia, JoAnn Martinelli, Benjamin Pollack,

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Jonathan Caskey-Medina (collectively, "Plaintiffs") bring suit individually and on behalf of various putative classes against Defendant Advanced Micro Devices, Inc. ("AMD"). Plaintiffs assert claims relating to AMD's manufacture and sale of central processing units ("CPUs" or "processors") that purportedly contain cybersecurity flaws. The parties elected to litigate through summary judgment eight claims, seven of which Plaintiffs reallege in the second consolidated amended complaint ("SCAC"). Before the Court is AMD's motion to dismiss those seven claims. Having considered the parties' submissions, the relevant law, and the record in this case, the Court GRANTS AMD's motion to dismiss with prejudice all seven of Plaintiffs' claims.

I. BACKGROUND

A. Factual Background

AMD designs, manufactures, sells, and distributes central processing units ("CPUs" or "processors"). *See* ECF No. 95 ("SCAC") ¶ 34. AMD's processors are incorporated into end-consumer products such as computers and servers, and are also sold as stand-alone items. *Id.* at ¶ 39. Plaintiffs all purchased AMD's processors either in end-consumer products or as stand-alone items. *Id.* at ¶¶ 8–33.

CPU speed is an element of a consumer's decision to purchase a processor, as sufficient processing speed is necessary to effectively operate a computer's software programs and hardware. *Id.* at ¶ 63. CPU speed is measured in terms of clock speed—the greater the clock speed, the greater the CPU's processing speed. *Id.* at ¶ 64. Broadly, to increase clock speed, modern processors usually implement techniques called branch prediction, speculative execution, and caches. *Id.* at ¶¶ 53–60. AMD's implementation of these three techniques in the microarchitecture of its products exposes users to "security vulnerabilities." *Id.* at ¶ 61.

In a section of the SCAC called "The Defect Explained," Plaintiffs allege that "AMD's use of branch prediction, speculative execution, and caches in its CPU designs ... created an inherent defect in the CPU that compromised consumers' most sensitive information." *Id.* at ¶ 107.

In June 2017, a third party, Google Project Zero, disclosed to AMD the existence of a vulnerability that attackers could use to exploit AMD's processors. *Id.* at ¶ 163. "Mis-speculation is a normal function of the CPU when its branch predictor has incorrectly 'guessed' the next instructions the CPU needs to execute and the CPU speculatively executes instructions down the mispredicted path." *Id.* at ¶ 113. Plaintiffs describe the vulnerability that Google Project Zero disclosed to AMD in June 2017 as: "both the speculative execution process and the branch predictor in AMD's CPUs can be coerced by an attacker to speculatively execute unnecessary instructions hand-picked by the attacker, leading to intentional mis-speculation." *Id.* at ¶¶ 113, 163. *Id.* An attacker can use such intentional mis-speculation to reveal a CPU user's personal information. *Id.* at ¶¶ 113–14. Beginning on January 2, 2018, journalists published articles that disclosed to the public that the mis-speculation vulnerability could exploit AMD's processors, as well as processors manufactured by other companies, including Intel. *Id.* at ¶¶ 161–62.

***2** In Plaintiffs' consolidated amended complaint ("CAC"), Plaintiffs referred to this mis-speculation vulnerability as Spectre. The CAC described Spectre as: "To exploit a high-speed CPU's speculative execution capability, an attacker writes a piece of malicious code that causes the processor to 'mispredict' the result of a branch instruction, inducing the CPU to speculatively execute instructions that it otherwise would not

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execute." ECF No. 53 at ¶ 14. The CAC further alleged, "It is these speculative instructions, executed on the mispredicted path, that leak the information that the attacker is then able to recover." *Id.* The CAC stated that Google Project Zero disclosed Spectre to AMD in June 2017 and that journalists disclosed Spectre to the public beginning on January 2, 2018. *Id.* at 17, ¶¶ 84. Plaintiffs' CAC defined the Defect as "20 years [of] serious security vulnerabilities," *id.* at ¶ 1, but then referred to Spectre as the Defect. For example, Plaintiffs alleged that "Defendant knowingly sold or leased a defective product without informing customers about the Spectre Defect." *Id.* at ¶ 484. As discussed below, Plaintiffs' SCAC deletes all mention of the name Spectre, but continues to describe the mis-speculation vulnerability in terms identical to the CAC's description of Spectre.

Later in January 2018, operating system companies, including Microsoft, released security "patches" intended to mitigate the mis-speculation vulnerability. *Id.* at ¶¶ 160, 165. Plaintiffs do not allege that AMD developed or released any anti-Spectre patches. These third-party patches can slow down a CPU's processing speed. *Id.* at ¶¶ 171–72. For example, Plaintiff Diana Hauck alleges that she installed a patch after learning about the mis-speculation vulnerability, but her "processor no longer could achieve its advertised performance level, and her computer frequently crashed, sometimes several times per day." *Id.* at ¶ 10.

Plaintiffs seek to represent a Nationwide Class of "[a]ll persons that purchased or leased one or more AMD processors, or one or more devices containing an AMD processor in the United States within the applicable statute of limitations." *Id.* at ¶ 193. Plaintiffs also seek to represent various state classes. *Id.*

B. Procedural History

On January 1, 2018, Plaintiffs filed this action. ECF No. 1. On April 9, 2018, this case was consolidated with and related to two later-filed cases. ECF No. 37. On May 23, 2018, the Court ordered Plaintiffs to file a consolidated amended complaint ("CAC") and ordered each side to select four causes of action to litigate through summary judgment. ECF No. 50.

On June 13, 2018, Plaintiffs filed the CAC. ECF No. 53. In the CAC, Plaintiffs alleged 25 causes of action, all relating to the alleged harm suffered by the named Plaintiffs and the putative classes in purchasing AMD chips or products containing them. In brief, Plaintiffs alleged that AMD's implementation of branch prediction and speculative execution in its processors exposes users to the Spectre vulnerability, which Google Project Zero disclosed to AMD in June 2017 and journalists disclosed to the public on January 2, 2018. CAC ¶¶ 17, 58, 67, 84. Plaintiffs defined Spectre as: "To exploit a high-speed CPU's speculative execution capability, an attacker writes a piece of malicious code that causes the processor to 'mispredict' the result of a branch instruction, inducing the CPU to speculatively execute instructions that it otherwise would not execute." *Id.* at ¶ 14. Plaintiffs further alleged, "It is these speculative instructions, executed on the mispredicted path, that leak the information that the attacker is then able to recover." *Id.* Plaintiffs claimed that had they known about Spectre, they would not have purchased the computers or chips or would have paid less for them. *Id.* at ¶¶ 21–26. Plaintiffs also claimed that third-party patches to fix Spectre—patches that AMD did not develop or release—reduce processing speed. *Id.* at ¶ 19.

Plaintiffs elected to litigate four causes of action through summary judgment: (1) Count III—violation of California's Unfair

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Competition Law ("UCL") for unfair business practices, Cal. Bus. & Prof. Code § 17200 *et seq.*, *id.*; (2) Count V—fraud by omission, *id.*; (3) Count XI—violation of Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201, *et seq.*, *id.*; and (4) Count XIX—violation of the Massachusetts Consumer Protection Act ("MCPA"), Mass. Gen. Laws ch. 93A § 1, *et seq.*, *id.* ECF No. 54.

***3** AMD also selected four causes of action to litigate through summary judgment: (1) Count VII—breach of express warranty based on representations, Cal. Comm. Code § 2313, *id.*; (2) Count VIII—breach of implied warranty, Cal Comm. Code §§ 2314-15, *id.*; (3) Count X—negligence, *id.*; and (4) Count XVII—warranty against redhibitory defects, La. Civ. Code Ann. Art. 2520, 2524, *id.* ECF No. 61.

On July 13, 2018, AMD filed a motion to dismiss the CAC. ECF No. 64. AMD sought to dismiss seven of Plaintiffs' eight claims that the parties had elected to litigate through summary judgment. *Id.* On September 4, 2018, Plaintiffs filed their opposition. ECF No. 73. AMD replied on September 25, 2018. ECF No. 75. On September 4, 2018, Plaintiff Jonathan Caskey-Medina voluntarily dismissed without prejudice Count XIX, the MCPA claim. ECF No. 72. AMD also requested that the Court take judicial notice of two documents, ECF No. 65, a request Plaintiffs opposed. ECF No. 74.

On October 29, 2018, the Court granted in part, denied in part, and denied in part as moot AMD's motion to dismiss. ECF No. 88 ("MTD Order"). The Court denied without prejudice AMD's motion to dismiss Count IV because the parties had not elected to litigate Count IV. *Id.* at 7. The Court also denied as moot AMD's motion to dismiss Count XIX, the MCPA claim, because Caskey-Medina—the only Massachusetts plaintiff—had voluntarily dismissed the MCPA claim without prejudice. *Id.* The Court also denied as moot AMD's request for judicial notice of two documents because the Court's order did not rely on either document. *Id.* at 5.

The Court dismissed the remainder of Plaintiffs' claims without prejudice. First, the Court dismissed Plaintiffs' FDUTPA fraud claim because Plaintiffs' definitions of "the Defect" failed to satisfy the heightened pleading standard of Federal Rule of Civil Procedure 9(b). *Id.* at 7–10. Plaintiffs' CAC defined the Defect as "20 years [of] serious security vulnerabilities," CAC at ¶ 1, but then referred to Spectre—the mis-speculation vulnerability that Google Project Zero disclosed to AMD in June 2017 and that journalists disclosed to the public on January 2, 2018—as the Defect. For example, Plaintiffs alleged that "Defendant knowingly sold or leased a defective product without informing customers about the Spectre Defect." *Id.* at ¶ 484. Then, in Plaintiffs' opposition to AMD's motion to dismiss, Plaintiffs claimed that the Defect was not Spectre, but rather "the security vulnerabilities created by AMD's design." ECF No. 73 at 1. However, as the Court explained, "Plaintiffs fail[ed] to identify what security vulnerabilities affected AMD's processors for the last 20 years *other than Spectre* and fail[ed] to explain how AMD's design created those vulnerabilities." MTD Order at 9 (emphasis added). Thus, the Court concluded that "[g]iven Plaintiffs' vague and inconsistent definitions of Defect, AMD can hardly be expected to know exactly what the contents of its alleged misrepresentations are." *Id.* The Court concluded that Plaintiffs' affirmative misrepresentations claim also failed because Plaintiffs failed to plead why AMD's statements about its processors' clock speed were false when made. *Id.* at 9–10.

Second, the Court dismissed Plaintiffs' claim for fraud by omission because Plaintiffs did not

allege that AMD knew about any security vulnerability before Plaintiffs purchased the AMD processors. *Id.* at 11. Plaintiffs relied on "vague, sweeping statements about industry research and general knowledge garnered from conferences," which was insufficient to allege AMD's knowledge of any security vulnerability in AMD's processors. *Id.* Plaintiffs alleged only that Google Project Zero disclosed Spectre to AMD in June 2017, *after* Plaintiffs purchased their processors. *Id.* In addition, the Court explained that given Plaintiffs' "multiple definitions" of the Defect, "AMD cannot meaningfully respond to accusations that it omitted information about the Defect because AMD does not know what the Defect is." *Id.*

***4** Third, the Court dismissed Plaintiffs' California claim for breach of express warranty because Plaintiffs failed to plead the exact terms of the warranty and failed to plead harm. *Id.* at 12–14.

Fourth, the Court dismissed Plaintiffs' California claims for breach of the implied warranty of merchantability and breach of the implied warranty of fitness for a particular purpose because Plaintiffs failed to plead that any security vulnerability compromised the basic functionality of AMD's processors and failed to plead that Plaintiffs purchased the processors for a particular purpose. *Id.* at 14–17.

Fifth, the Court dismissed Plaintiffs' Louisiana redhibition claim because Hauck, the sole Louisiana plaintiff, made only conclusory allegations parroting the elements of a redhibition claim. *Id.* at 17–18.

Sixth, the Court dismissed Plaintiffs' California negligence claim for failure to adequately allege property damage. *Id.* at 18–20.

The Court gave Plaintiffs leave to amend the claims dismissed in the order. *Id.* at 20. The Court informed Plaintiffs that "failure to cure the deficiencies identified in this Order will result in dismissal with prejudice of the claims dismissed in this Order." *Id.*

On November 9, 2018, AMD filed a motion to stay discovery until Plaintiffs' pleadings survived a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). ECF No. 90. On November 14, 2018, the Court *sua sponte* stayed discovery pending the Court's ruling on AMD's instant motion to dismiss. ECF No. 93.

On December 6, 2018, Plaintiffs filed the second consolidated amended complaint ("SCAC"). ECF No. 95. The SCAC spans 121 pages and includes 24 causes of action. *Id.* Plaintiffs no longer bring a cause of action for negligence, one of the eight causes of action the parties originally elected to litigate through summary judgment. *Id.* at ¶ 569. Accordingly, the parties are now litigating seven causes of action through summary judgment. As explained in more detail below, the SCAC refers generally to the Spectre mis-speculation vulnerability that Google Project Zero disclosed to AMD in June 2017 and that journalists disclosed to the public beginning on January 2, 2018, but conspicuously avoids using the term "Spectre."

On January 3, 2019, AMD filed a motion to dismiss the SCAC. ECF No. 97 ("Mot."). AMD moves to dismiss the remaining seven causes of action that the parties are litigating to summary judgment: (1) Count III for unfair practices under the UCL; (2) Count V for fraud by omission; (3) Count VII for breach of express warranty; (4) Count VIII for breach of the implied warranty of merchantability; (5) Count XI for violation of FDUTPA; (6) Count XVII for redhibition; and (7) Count XIX for violation of the MCPA.

On January 24, 2019, Plaintiffs filed their

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opposition. ECF No. 101 ("Opp."). On February 7, 2019, AMD replied. ECF No. 104 ("Reply").

AMD also asks the Court to take judicial notice of nine documents. ECF No. 98. Plaintiffs oppose AMD's request in part, and themselves ask the Court to take judicial notice of one document. ECF No. 102. In its ruling on the motion to dismiss, the Court has not relied upon any of the documents in either AMD's request for judicial notice or Plaintiffs' request for judicial notice. Therefore, the Court denies as moot AMD's and Plaintiffs' requests for judicial notice.

II. LEGAL STANDARD

A. Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)

***5** Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). The U.S. Supreme Court has held that Rule 8(a) requires a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted). For purposes of ruling on a Rule 12(b)(6) motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

The Court, however, need not accept as true allegations contradicted by judicially noticeable facts, *see* *Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it "may look beyond the plaintiff's complaint to matters of public record" without converting the Rule 12(b)(6) motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995). Nor must the Court "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (internal quotation marks omitted). Mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).

B. Motion to Dismiss Under Federal Rule of Civil Procedure 9(b)

Claims sounding in fraud are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001). Under the federal rules, a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). To satisfy this standard, the allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Thus, claims sounding in fraud must allege "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). In other

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words, "[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted). The plaintiff must also plead facts explaining why the statement was false when it was made. *See* *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1549 (9th Cir. 1994) (en banc), *superseded by statute on other grounds as stated in* *Marksman Partners, L.P. v. Chantal Pharm. Corp.*, 927 F.Supp. 1297 (C.D. Cal. 1996).

"When an entire complaint ... is grounded in fraud and its allegations fail to satisfy the heightened pleading requirements of Rule 9(b), a district court may dismiss the complaint...." *Vess*, 317 F.3d at 1107. The Ninth Circuit has recognized that "it is established law in this and other circuits that such dismissals are appropriate," even though "there is no explicit basis in the text of the federal rules for the dismissal of a complaint for failure to satisfy 9(b)." *Id.* A motion to dismiss a complaint "under Rule 9(b) for failure to plead with particularity is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim." *Id.*

C. Leave to Amend

***6** If the Court determines that a complaint should be dismissed, it must then decide whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation marks omitted). When dismissing a complaint for failure to state a claim, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Id.* at 1130 (internal quotation marks omitted). Accordingly, leave to amend generally shall be denied only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008).

III. DISCUSSION

AMD's motion to dismiss challenges the following claims in Plaintiffs' SCAC: (1) Count III for unfair practices under California's UCL; (2) Count V for fraud by omission; (3) Count VII for breach of express warranty; (4) Count VIII for breach of the implied warranty of merchantability; (5) Count XI for violation of FDUTPA; (6) Count XVII for redhibition; and (7) Count XIX for violation of the MCPA. At a high level, the claims fall into three buckets: fraud claims, warranty claims, and the Louisiana redhibition claim.

A. Plaintiffs' Failure to Define the Defect

The Court first discusses Plaintiffs' continued failure to define "the Defect." The Court's previous order dismissing Plaintiffs' CAC explained that "[g]iven Plaintiffs' vague and inconsistent definitions of Defect, AMD can hardly be expected to know exactly what the contents of its alleged misrepresentations are." MTD Order at 9.

Plaintiffs' CAC defined the Defect as "20 years [of] serious security vulnerabilities," CAC at ¶ 1, but the CAC also referred to Spectre—the mis-speculation vulnerability that Google Project Zero disclosed to AMD in June 2017 and that journalists disclosed to the public beginning on January 2, 2018—as the Defect.

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For example, Plaintiffs alleged that "Defendant knowingly sold or leased a defective product without informing customers about the Spectre Defect." *Id.* at ¶ 484. Plaintiffs described Spectre as: "To exploit a high-speed CPU's speculative execution capability, an attacker writes a piece of malicious code that causes the processor to 'mispredict' the result of a branch instruction, incuding the CPU to speculatively execute instructions that it otherwise would not execute." *Id.* at ¶ 14. The CAC further alleged that, "It is these speculative instructions, executed on the mispredicted path, that leak the information that the attacker is then able to recover." *Id.*

Plaintiffs' CAC alleged that AMD became aware of Spectre on June 1, 2017 at the latest when Google Project Zero disclosed the vulnerability to AMD. *Id.* at ¶ 84. Plaintiffs claimed that had they known about Spectre, they would not have purchased the computers or chips or would have paid less for them. *Id.* at ¶¶ 21–26. Plaintiffs also claimed that third-party patches to fix Spectre—patches that AMD did not develop or release—significantly reduce processing speed. *Id.* at ¶ 19.

Then, in Plaintiffs' opposition to AMD's first motion to dismiss, Plaintiffs claimed that the Defect was not Spectre, but rather "the security vulnerabilities created by AMD's design." ECF No. 73 at 1. However, as the Court explained, "Plaintiffs fail[ed] to identify what security vulnerabilities affected AMD's processors for the last 20 years *other than Spectre* and fail[ed] to explain how AMD's design created those vulnerabilities." MTD Order at 9 (emphasis added). Plaintiffs could only "point to vague sweeping statements about industry research and general knowledge garnered from conference and academic papers" about *potential* security vulnerabilities. *Id.* at 11. The Court granted Plaintiffs leave to amend their pleadings, but Plaintiffs have again failed to define the Defect in the SCAC.

***7** Although Plaintiffs do not mention Spectre in their 121-page SCAC, the SCAC's description of the mis-speculation vulnerability mirrors the CAC's description of Spectre. The SCAC alleges that in June 2017, a third party, Google Project Zero, informed AMD "of several new methods pursuant to which attackers could exploit the Defect," SCAC at ¶ 163, and that beginning on January 2, 2018, journalists published articles that disclosed the vulnerability to the public. *Id.* at ¶¶ 160–61. Plaintiffs state, "Mis-speculation is a normal function of the CPU when its branch predictor has incorrectly 'guessed' the next instructions the CPU needs to execute and the CPU speculatively executes instructions down the mispredicted path." *Id.* at ¶ 113. Plaintiffs describe the vulnerability as: "both the speculative execution process and the branch predictor in AMD's CPUs can be coerced by an attacker to speculatively execute unnecessary instructions hand-picked by the attacker, leading to intentional mis-speculation." *Id.* at ¶¶ 113, 163. *Id.* An attacker can use such intentional mis-speculation to reveal a CPU user's personal information. *Id.* at ¶¶ 113–14. This mirrors Plaintiffs' description of Spectre in the CAC: "To exploit a high-speed CPU's speculative execution capability, an attacker writes a piece of malicious code that causes the processor to 'mispredict' the result of a branch instruction, inducing the CPU to speculatively execute instructions that it otherwise would not execute." CAC ¶ 14

Instead of explicitly relying on Spectre, as Plaintiffs' CAC did, Plaintiffs' SCAC defines the Defect even more vaguely. Plaintiffs' SCAC identifies the Defect as "AMD's use of branch prediction, speculative execution, and caches in its CPU design," which Plaintiffs allege "created an inherent defect in the CPU that compromised consumers' most sensitive

information." SCAC at ¶ 107.

Plaintiffs' opposition to the instant motion to dismiss makes contradictory statements. First, Plaintiffs concede that the SCAC is describing Spectre, which is the "set of exploits publicized in early January 2018." Opp. at 2, 18. Second, the opposition tries to provide yet another vague definition of the Defect without mentioning Spectre: "key CPU microarchitectural components—branch prediction, speculative execution, and caches—caused consumers' sensitive data to be left unsecured by AMD." Opp. at 7.

Plaintiffs have omitted any specific references to Spectre because Google Project Zero disclosed Spectre's existence to AMD in June 2017, after all Plaintiffs except for Caskey-Medina purchased their AMD processors. Therefore, if Spectre is the vulnerability, Plaintiffs cannot allege that AMD knew about the vulnerability before Plaintiffs purchased their processors between July 2013 and November 2016, and thus cannot allege omission claims. *See* *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1025 (9th Cir. 2017) ("[A] party must allege ... that the manufacturer knew of the defect at the time a sale was made.") (citing *Apodaca v. Whirlpool Corp.*, 2013 WL 6477821, at *9 (C.D. Cal. Nov. 8, 2013)).

Further, if Spectre is the vulnerability, journalists disclosed Spectre to the public on January 2, 2018, before Caskey-Medina purchased his AMD processor on January 6, 2018, and Caskey-Medina thus cannot allege that he failed to receive the benefit of his bargain. *See also* Opp. at 15 n.17 (conceding that Spectre was "made public and discussed extensively in the press" before Caskey-Medina purchased his processor).

As a result, Plaintiffs' SCAC and opposition to the instant motion to dismiss vaguely define the Defect and claim that the Defect encompasses 20 years of AMD designs in order to attempt to allege that AMD knew about security vulnerabilities before Plaintiffs purchased their processors. *See* SCAC at ¶ 107 (alleging that AMD's use of branch prediction, speculative execution, and caches in its CPU designs has delivered dramatic performance improvements since 1995," but "created an inherent defect in the CPU that compromised consumers' most sensitive information"). However, as before, Plaintiffs fail to identify what security vulnerabilities affected AMD's processors *other than Spectre* and fail to explain how AMD's designs created those vulnerabilities.

That is the tension inherent in Plaintiffs' SCAC: Plaintiffs must rely on Spectre because it is the only identified security vulnerability affecting AMD's processors, but Plaintiffs must also disclaim any reliance on Spectre because Caskey-Medina purchased his AMD processor with knowledge of Spectre (and thus cannot claim that he failed to receive the benefit of his bargain) and because Google Project Zero disclosed Spectre to AMD after the remaining Plaintiffs purchased their AMD processors and thus Plaintiffs cannot allege viable omission claims.

***8** That tension is also evident in Plaintiffs' allegations regarding standing, which rely exclusively on Spectre-related events, and not on any other security vulnerabilities. Thus, before addressing the problems with Plaintiffs' individual claims, the Court discusses AMD's challenge to Plaintiffs' standing.

B. Standing

AMD contends that Plaintiffs lack standing under Article III of the United States Constitution. AMD did not raise a standing argument in its first motion to dismiss, *see*

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generally ECF No. 64, and thus the Court has not previously addressed this issue. The Court concludes that Plaintiffs have standing to sue based on the SCAC's Spectre allegations.

"[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Article III standing requires that (1) the plaintiffs suffered an injury in fact, i.e., "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) the injury is " 'fairly traceable' to the challenged conduct"; and (3) the injury is "likely" to be "redressed by a favorable decision." *Id.* at 560–61, 112 S.Ct. 2130. "[A]t the motion to dismiss stage, the plaintiff must clearly ... allege facts demonstrating each element." *Spokeo v. Robins*, ––– U.S. ––––, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (citation and internal quotation marks omitted) (ellipses in original). In class actions, "standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (citation omitted).

AMD contends that Plaintiffs have not adequately alleged that Plaintiffs suffered an injury-in-fact because any risk that a security vulnerability may lead to unauthorized access of Plaintiffs' data is speculative. As the U.S. Supreme Court has explained, "threatened injury must be certainly impending to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). Plaintiffs need not demonstrate "that it is literally certain that the harms they identify will come about," as standing may be "based on a 'substantial risk' that the harm will occur." *Id.* at 414, 133 S.Ct. 1138 n.5 (citation omitted). However, "allegations of possible future injury" based on "a highly attenuated chain of possibilities" do not suffice. *Id.* at 409–10, 133 S.Ct. 1138 (alteration and citation omitted).

In the data breach context, the Ninth Circuit has held that where plaintiffs "have alleged a credible threat of real and immediate harm stemming from the theft of a laptop containing their unencrypted personal information," the injury-in-fact requirement is satisfied. *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010). However, the Ninth Circuit also observed in *Krottner* that "if no laptop had been stolen, and Plaintiffs had sued based on the *risk* that it would be stolen at some point in the future[,] we would find the threat far less credible." *Id.* (emphasis added). In *In re Zappos.com, Inc.*, the Ninth Circuit followed *Krottner*'s reasoning and held that plaintiffs possessed Article III standing where attackers had accessed the plaintiffs' confidential information but had not yet misused the information. 888 F.3d 1020, 1027–28 (9th Cir. 2018), *cert. denied*, ––– U.S. ––––, ––– S.Ct. ––––, ––– L.Ed.2d ––––, 2019 WL 1318579 (Mar. 25, 2019). Such a breach left the plaintiffs at an imminent, "substantial risk" of identity theft or identity fraud. *Id.* at 1028.

***9** By contrast, in the instant case, no Plaintiff alleges that any attacker ever accessed any named Plaintiff's confidential information (or any AMD processor owner's confidential information) as a result of any security vulnerability, whether Spectre or some other unidentified vulnerability. *See also* *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 2017 WL 3727318, at *12–13 (N.D. Cal. Aug. 30, 2017) (concluding plaintiffs alleged an Article III injury where hackers actually accessed the plaintiffs' private information and private information was being sold on dark web).

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Thus, Plaintiffs argue in their opposition that "Plaintiffs' standing is not based on a risk of future harm (*e.g.*, a data breach)." Opp. at 10. Rather, the SCAC alleges that the named plaintiffs experienced slowdowns in clock speed after installing patches—patches that AMD did not develop or release—to mitigate the security vulnerability that journalists disclosed to the public beginning on January 2, 2018. Plaintiffs' opposition to the instant motion to dismiss identifies the vulnerability that journalists disclosed to the public in January 2018 as Spectre, even though Plaintiffs do not mention the term "Spectre" in the SCAC. Opp. at 2 (referring to Spectre as "the set of exploits publicized in early January 2018"). For example, the SCAC alleges that after learning about Spectre, Pollack installed a patch released by a third party, and that his processor "crash[ed] more often and need[ed] more frequent reboots"—especially when Pollack played computer games. SCAC ¶ 26. In the SCAC, Hauck alleges that once she installed a Spectre patch released by a third party, "her computer frequently crashed, sometimes several times per day." *Id.* at ¶ 10. All named Plaintiffs allege in the SCAC that had they been aware of Spectre and that efforts to mitigate the vulnerability would impede the processors' performance, they "would not have purchased the computer, or paid substantially less for the computer [or processor]." *Id.* at ¶¶ 11, 15, 19, 23, 28, 33.

Under Ninth Circuit precedent, Plaintiffs' allegations are sufficient to state an injury-in-fact. The Ninth Circuit has repeatedly held that overpayment is a cognizable Article III injury. *See* *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012) (holding that plaintiffs alleged an injury where "class members paid more for [a product] that they otherwise would have paid, or bought it when they otherwise would not have done so"); *see also* *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 n. 3 (9th Cir. 2013) (explaining that there is "no difficulty ... regarding Article III injury" when plaintiffs allege that they either overpaid for a product or would not have purchased the product); *In re Yahoo*, 2017 WL 3727318, at *17 (finding that plaintiffs' allegations of benefit of the bargain damages were sufficient to allege an Article III injury).

While some courts have rejected conclusory overpayment allegations, Plaintiffs here have alleged that their processors experienced performance slowdowns after Plaintiffs installed patches developed to address Spectre. Plaintiffs do not allege that AMD developed or released any patches. Pollack "stopped using his computer for gaming and later ceased to use the processor altogether." SCAC at ¶ 27; *see also* *In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liability Litig.*, 349 F.Supp.3d 881, 893 (N.D. Cal. 2018) (explaining that "[u]nderlying these no-injury defect cases is a critical eye toward allegations of overpayment for [products] that essentially work as advertised"). Therefore, Plaintiffs have adequately alleged an injury.

***10** AMD contends that Plaintiffs have not alleged a causal connection between any security vulnerability and the performance of Plaintiffs' devices. However, "[a] causal chain does not fail simply because it has several links, provided those links are not hypothetical or tenuous and remain plausible." *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (internal quotation marks and citations omitted). Simply put, the line of causation between a defendant's actions and a plaintiff's harm must not be attenuated. *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 757, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)). Plaintiffs' SCAC alleges that after Plaintiffs installed patches that third parties developed to mitigate the Spectre vulnerability that journalists disclosed to the public beginning on January 2,

2018, Plaintiffs' processors experienced reduced performance, which raises the inference that the patches caused the reduced performance. *See* SCAC ¶¶ 10, 27.

Two recent cases decided in this district further demonstrate why Plaintiffs have adequately alleged that their injuries are "fairly traceable" to AMD's conduct. *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. In *In re Apple Processor Litigation*, 2019 WL 79035 (N.D. Cal. Jan. 2, 2019), which Plaintiffs cite and which involved allegations against Apple based on the Spectre vulnerability, the district court held that the plaintiffs failed to establish standing because none of the named plaintiffs had "personally experienced a degradation of performance of their iDevices." *Id.* at *3. Further, tests on Apple processors failed to support an inference of reduced performance. *Id.* at *4. Similarly, in *Beyer v. Symantec Corp.*, 2019 WL 935135 (N.D. Cal. Feb. 26, 2019), the district court concluded that plaintiffs lacked standing where plaintiffs did not allege that they personally experienced performance problems after installing allegedly deficient antivirus software. *Id.* at *4.

By contrast, all Plaintiffs in the instant case have alleged that they personally experienced decreased performance of their processors after installing patches that third parties—not AMD—released to mitigate the Spectre vulnerability. Accordingly, the Court concludes that Plaintiffs have adequately alleged an injury-in-fact that is fairly traceable to AMD's conduct. Of course, as discussed above, this conclusion—that only Spectre-related events provide Plaintiffs standing—demonstrates the tension in Plaintiffs' simultaneous attempt to disclaim Spectre and broadly define the Defect as 20 years of unspecified security vulnerabilities.

Further, it is a separate question whether Plaintiffs have adequately alleged facts to state a plausible claim for relief, and whether Plaintiffs have alleged those facts with particularity. *See* *Phillips v. Apple, Inc.*, 2016 WL 5846992, at *2 (N.D. Cal. Oct. 6, 2016) (distinguishing the "modest" showing required for Article III standing from the question of "whether Plaintiffs have stated a plausible claim for relief").

C. Fraud Claims

The Court next addresses Plaintiffs' consumer fraud claims. Plaintiffs assert MCPA, FDUTPA, and California fraud by omission claims. As explained above, Plaintiffs' SCAC suffers from an inherent tension: Plaintiffs must rely on Spectre because it is the only identified security vulnerability affecting AMD's processors, but Plaintiffs must also disclaim any reliance on Spectre because Caskey-Medina purchased his AMD processor with knowledge of Spectre (and thus cannot claim that he failed to receive the benefit of his bargain) and because AMD learned about Spectre after the remaining Plaintiffs purchased their AMD processors and thus Plaintiffs cannot allege viable omission claims.

1. Omission Claims

Fraud claims based on omissions are cognizable under both FDUTPA and MCPA. *See* *Keegan v. Am. Honda Motor Co., Inc.*, 838 F.Supp.2d 929, 959 (C.D. Cal. 2012) (holding that Florida courts construe FDUTPA "to permit claims based on omissions alone") (citing *Millennium Commc'ns & Fulfillment, Inc. v. Office of the Att'y Gen.*, 761 So.2d 1256, 1263 (Fla. App. 2000)); *Aspinall v. Philip Morris Cos., Inc.*, 442 Mass. 381, 813 N.E.2d 476, 487–88 (Mass. 2004) (holding that a "material, knowing, and willful nondisclosure" violates the MCPA).

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***11** Further, the parties do not dispute that Rule 9(b)'s heightened particularity standard applies to MCPA fraud claims. *See* *Watkins v. Omni Life Sci., Inc.*, 692 F.Supp.2d 170, 177 (D. Mass. 2010) (applying Rule 9(b) to MCPA fraud claims).

As for FDUTPA, there is a split of authority among Florida courts as to whether Rule 9(b) applies to FDUTPA claims. *State Farm Mut. Auto. Ins. Co. v. Performance Orthopaedics & Neurosurgery, LLC*, 278 F.Supp.3d 1307, 1328 (S.D. Fla. 2017). Nevertheless, this Court applies Ninth Circuit law, which requires the application of Rule 9(b)'s heightened pleading standards to entire claims that sound in fraud even if fraud is not an element of the claim. *Vess*, 317 F.3d at 1103–04 (holding that where a plaintiff's claim sounds in fraud, "the pleading of that claim as a whole" must satisfy Rule 9(b)). Previously, the Court applied Rule 9(b)'s heightened pleading standards to Plaintiffs' FDUTPA claim because the FDUTPA claim alleged that AMD engaged in fraud. MTD Order at 8. Plaintiffs' FDUTPA claim in the SCAC again sounds in fraud. SCAC at ¶ 362 ("Defendant violated FDUPTA by ... fraudulently concealing the existence of the Defect in its processors."). Therefore, the Court finds that Rule 9(b) applies to Plaintiffs' FDUTPA claim.

Under Ninth Circuit precedent, "[a]llegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged...." *Bly-Magee*, 236 F.3d at 1019. Moreover, the Ninth Circuit has held that Rule 9(b) applies to fraud claims based on omission. *See* *Kearns*, 567 F.3d at 1126 (holding that omissions claims are fraud claims that must meet Rule 9(b)'s heightened pleading analysis). Thus, to satisfy Rule 9(b), Plaintiffs must "provide [AMD] with the 'who, what, when, and where' of [AMD's] allegedly fraudulent omissions." *Davidson v. Apple, Inc.*, 2017 WL 3149305, at *13 (N.D. Cal. July 25, 2017) (citing *Kearns*, 567 F.3d at 1127).

To state omission claims, Plaintiffs must also allege that AMD had actual knowledge of the information that AMD allegedly omitted. Under California law, a manufacturer must have known of the defect at the time of sale for a plaintiff to state a claim for fraud by omission against the manufacturer. *Williams*, 851 F.3d at 1025 ("[A] party must allege ... that the manufacturer knew of the defect at the time a sale was made."). The same is true under FDUTPA. *See* *Matthews v. Am. Honda*, 2012 WL 2520675, at *3 (S.D. Fla. Jun. 6, 2012) ("Florida courts have recognized that a FDUTPA claim is stated where defendant knowingly fails to disclose a material defect."). Although Plaintiffs contend that the MCPA contains no "knowledge" requirement, the Massachusetts Supreme Court has squarely held that under the MCPA, "[t]here is no liability for failing to disclose what a person does not know." *Underwood v. Risman*, 414 Mass. 96, 605 N.E.2d 832, 835 (Mass. 1993). Other district courts in this district, in applying the MCPA, have inquired whether the defendant "knew about the defect at the time of each sale." *See, e.g.*, *In re Myford Touch Consumer Litig.*, 2018 WL 3646895, at *3 (N.D. Cal. Aug. 1, 2018).

***12** Moreover, a plaintiff may not state an omission claim with allegations that a defendant *should have* known about a defect from general knowledge. *Morris v. BMW of N. Am., LLC*, 2007 WL 3342612, at *6 (N.D. Cal. Nov. 7, 2007) (holding that allegations that the defendant "should have known" of a defect were insufficient to state a fraud by omission claim, and that the plaintiff must instead allege that the defendant had "actual knowledge" of the defect).

The Court previously dismissed Plaintiffs' omission claim because "Plaintiffs [did] not actually allege [AMD's] actual knowledge of the Defect prior to when Plaintiffs purchased the AMD processors or computers." MTD Order at 11. Plaintiffs could only identify "vague, sweeping statements about industry research and general knowledge garnered from conferences and academic papers of the Defect's potential to exploit processors and gather confidential information." *Id.* Plaintiffs alleged only that AMD knew of a security vulnerability in June 2017, when Google Project Zero disclosed Spectre to AMD. *Id.* at 10–11.

Like the CAC, the SCAC describes only a series of potential security vulnerabilities affecting CPUs in general or affecting non-AMD processors. *See, e.g.*, *id.* at ¶ 133 (describing exploit that "could" affect an *Intel* processor); ¶ 136 (researcher stating generally that companies should identify microarchitectural attacks); ¶ 138 (explaining that side-channel attacks can "exploit[ ] the natural function of a CPU"). Plaintiffs' vague allegations about general knowledge are insufficient to allege that AMD knew of any specific security vulnerability affecting AMD processors, and fail to give AMD "notice of the particular misconduct of the fraud charged so that they can defend against the charge." *Semegen*, 780 F.2d at 731; *see also* *Morris*, 2007 WL 3342612, at *6 (allegations that a defendant "should have known" of defects are insufficient to state an omission claim).

As explained above, Plaintiffs' SCAC defines the Defect vaguely and without mentioning Spectre. Plaintiffs' SCAC identifies the Defect as "AMD's use of branch prediction, speculative execution, and caches in its CPU design," which Plaintiffs allege "created an inherent defect in the CPU that compromised consumers' most sensitive information." SCAC at ¶ 107. Plaintiffs' opposition to the instant motion to dismiss makes contradictory statements. First, Plaintiffs concede that the SCAC is describing Spectre, which is "the set of exploits publicized in early January 2018." Opp. at 2, 18. Second, the opposition tries to provide yet another vague definition of the Defect without mentioning Spectre: "key CPU microarchitectural components—branch prediction, speculative execution, and caches—caused consumers' sensitive data to be left unsecured by AMD." Opp. at 7. Plaintiffs' vague allegation that AMD's CPUs are themselves the Defect does not provide AMD notice of any particular security vulnerability in any particular AMD processor. *See* *Davidson v. Apple, Inc.*, 2017 WL 976408, at *10 (N.D. Cal. Mar. 14, 2017) (dismissing omission allegations that were "too vague" to advise the defendants of what defendants failed to disclose).

Plaintiffs have omitted any specific references to Spectre because Google Project Zero disclosed Spectre to AMD in June 2017, after all Plaintiffs except for Caskey-Medina purchased their AMD processors. Further, if Spectre is the vulnerability, Plaintiffs cannot allege that AMD knew about the vulnerability before Plaintiffs purchased their processors between July 2013 and November 2016, and thus cannot allege omission claims. *See* *Williams*, 851 F.3d at 1025 ("[A] party must allege ... that the manufacturer knew of the defect at the time a sale was made.").

***13** As for Caskey-Medina, journalists disclosed Spectre to the public on January 2, 2018, before Caskey-Medina purchased his AMD processor on January 6, 2018. Thus, Caskey-Medina cannot allege that he failed to receive the benefit of his bargain. In fact, Caskey-Medina does not allege that he was unaware of Spectre when he purchased his processor, *see* SCAC at ¶¶ 29–33, and Plaintiffs concede that Spectre "was made

public and discussed extensively in the press" before Caskey-Medina purchased his processor on January 6, 2018. Opp. at 15 n.17. Caskey-Medina cannot plausibly allege that AMD is liable for failing to disclose to Caskey-Medina information that was already public. *See Carlson v. The Gillette Co.*, 2015 WL 6453147, at *6 (D. Mass. Oct. 23, 2015) (holding that to violate the MCPA, a nondisclosure must be "likely to mislead a reasonable consumer").

As a result, Plaintiffs' SCAC and opposition to the instant motion to dismiss vaguely define the Defect and claim that the Defect encompasses 20 years of AMD designs in order to attempt to allege that AMD knew about security vulnerabilities before all Plaintiffs except for Caskey-Medina purchased their processors. *See* SCAC at ¶ 107 (alleging that AMD's use of branch prediction, speculative execution, and caches in its CPU designs has delivered dramatic performance improvements since 1995," but "created an inherent defect in the CPU that compromised consumers' most sensitive information"). However, Plaintiffs again fail to identify what security vulnerabilities affected AMD's processors *other than Spectre* and fail to explain how AMD's designs created those vulnerabilities. Plaintiffs' allegations are insufficient to show that AMD knew of any security vulnerability affecting AMD processors before June 2017, when Google Project Zero disclosed Spectre to AMD. SCAC at ¶ 163.

Therefore, Plaintiffs have failed to adequately plead fraudulent omission claims under California law, the MCPA, or FDUTPA. The Court finds that granting Plaintiffs leave to amend their omission claims would be futile and unduly prejudicial to AMD. *Leadsinger, Inc.*, 512 F.3d at 532. In its prior Order dismissing Plaintiffs' CAC, the Court dismissed Plaintiffs' omission claims because Plaintiffs failed to define the Defect with any particularity and failed to allege AMD's pre-purchase knowledge of the Defect. MTD Order at 11–12. The Court warned that "failure to cure the deficiencies identified in this Order will result in dismissal with prejudice." *Id.* at 20. Plaintiffs failed to cure the deficiencies, and the Court is dismissing Plaintiffs' omission claims in the SCAC for the same reasons that the Court dismissed Plaintiffs' omission claims in the CAC. If anything, the SCAC defines the Defect even more vaguely than the CAC, and again relies on allegations of general industry knowledge to attempt to show AMD's pre-purchase knowledge of the Defect. Because any amendment would be futile, and it would be unduly prejudicial to AMD to litigate a third motion to dismiss regarding the same deficiencies—especially given the voluminous claims in this case—the Court DENIES Plaintiffs leave to amend their fraudulent omissions claims under California law, the MCPA, and FDUTPA.

2. Affirmative Misrepresentations under MCPA and FDUTPA

Plaintiffs also bring affirmative misrepresentation claims under MCPA and FDUTPA. The Court previously dismissed Plaintiffs' affirmative misrepresentation claims because Plaintiffs failed to plead "why [AMD's] representations of clock speed were false." MTD Order at 9.

In the SCAC, Plaintiffs again fail to allege that AMD made any false representations. To satisfy Rule 9(b), a plaintiff must allege why a statement was "untrue or misleading *when made*." *In re Glenfed*, 42 F.3d at 1549 (emphasis in original). Claims sounding in fraud must also allege "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz*, 476 F.3d at 764.

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***14** Plaintiffs contend that AMD's "representations of clock speed are misleading because its CPUs are incapable of reaching the advertised clock speeds without sacrificing security." Opp. at 13. However, Plaintiffs fail to point to any AMD representations about *security*. The fact that AMD's clock speeds allegedly come hand-in-hand with a security vulnerability does not render AMD's representations about clock speed false. Plaintiffs' SCAC even acknowledges that AMD's representations about clock speed are *true*. *See id.* at ¶ 61 (AMD CPUs reached their "advertised speed" due to the design decisions that Plaintiffs allege constitute the Defect). As before, "Plaintiffs never identify any basis (reasonable or otherwise) for their supposed understanding that the clock speed also constituted a 'promise' that the processors would be immune to security threats." MTD Order at 10.

Alternatively, Plaintiffs contend that AMD's clock speed representations were false when made because Plaintiffs later installed third-party patches—patches that AMD did not release or develop—that slowed the processors' clock speed. Opp. at 14. However, Plaintiffs are unable to identify any AMD representations about processor clock speed with any installed patch—much less third-party patches. Plaintiffs can identify only representations about an AMD processor's clock speed as sold. *See* SCAC ¶ 17 (alleging only that the "AMD processor's specifications, including its clock speed or frequently, were prominently displayed on the box and on the receipt"). Again, Plaintiffs' SCAC acknowledges that AMD's representations about clock speed are *true*. *See id.* at ¶ 61.

Therefore, Plaintiffs have not alleged that AMD made any representations that were "actually false" when made, *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012), and have not stated a claim based on any affirmative misrepresentations.

The Court finds that granting Plaintiffs leave to amend their affirmative misrepresentation claims under the MCPA and FDUTPA would be futile and unduly prejudicial to AMD. *Leadsinger, Inc.*, 512 F.3d at 532. In its prior Order dismissing Plaintiffs' CAC, the Court dismissed Plaintiffs' fraud claims because Plaintiffs failed to define the Defect with particularity and failed to plead facts explaining AMD's representations about clock speed were false. MTD Order at 9. The Court warned that "failure to cure the deficiencies identified in this Order will result in dismissal with prejudice." *Id.* at 20. Plaintiffs failed to cure the deficiencies. As explained above, the SCAC defines the Defect even more vaguely than the CAC. Further, Plaintiffs again fail to plead any facts suggesting that AMD's representations about clock speed were false when made. Because any amendment would be futile, and it would be unduly prejudicial to AMD to litigate a third motion to dismiss regarding the same deficiencies—especially given the voluminous claims in this case—the Court DENIES Plaintiffs leave to amend their affirmative misrepresentation claims under the MCPA and FDUTPA.

3. California UCL Unfair Prong Claim

The Court now turns to Plaintiffs' unfair prong UCL claim. The Court previously did not address this claim, as AMD previously mistakenly moved to dismiss only Plaintiffs' fraud prong UCL claim, which the parties had not elected to litigate at this stage. *See* MTD Order at 4 n.1. AMD now moves to dismiss Plaintiffs' unfair prong UCL claim, which the parties had previously elected to litigate. Mot. at 18.

The unfair prong of the UCL prohibits a

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business practice that "violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1473, 49 Cal.Rptr.3d 227 (2006). California law "is currently unsettled with regard to the standard applied to consumer claims under the unfair prong of the UCL." *Hadley v. Kellogg Sales Co.*, 243 F.Supp.3d 1074, 1104 (N.D. Cal. 2017). Specifically, "[t]he California Supreme Court has rejected the traditional balancing test for UCL claims between business competitors and instead requires that claims under the unfair prong be 'tethered to some legislatively declared policy.' " *Id.* (quoting *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 186, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999)).

***15** Nevertheless, regardless of the test, courts in this district have held that where the "plaintiffs' unfair prong claims overlap entirely with their claims of fraud," the plaintiffs' unfair prong claim cannot survive. *In re Actimmune Mktg. Litig.*, 2009 WL 3740648, at *14 (N.D. Cal. Nov. 6, 2009), *aff'd*, 464 F. App'x 651 (9th Cir. 2011); *see also Punian v. Gillette Co.*, 2016 WL 1029607, at *17 (N.D. Cal. Mar. 15, 2016) (holding unfair prong UCL cause of action does not survive where the "cause of action under the unfair prong of the UCL overlaps entirely with [a plaintiff's] claims" alleging fraud that also do not survive); *see also Kearns*, 567 F.3d at 1127 (affirming dismissal of UCL claim grounded in fraud without further analysis after holding that plaintiff failed to adequately allege fraud).

Here, Plaintiffs' UCL unfair prong claim is premised on AMD's allegedly fraudulent omissions. *See* SCAC at ¶ 245 (alleging that AMD violated the UCL by "failing to disclose" the Defect). Therefore, Plaintiffs' unfair prong claim "overlaps entirely" with Plaintiffs' fraud claims, and must also fail. *Hadley*, 243 F.Supp.3d at 1104. Regardless, the Ninth Circuit has squarely held that under the UCL, the "failure to disclose a ... defect of which [a defendant] is not aware, does not constitute an unfair or fraudulent practice." *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 n.5 (9th Cir. 2012) (citing *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 838–39, 51 Cal.Rptr.3d 118 (2006)). By any measure, Plaintiffs have failed to state a UCL unfair prong claim.

The Court finds that granting Plaintiffs leave to amend their UCL unfair prong claim would be futile and unduly prejudicial to AMD. *Leadsinger, Inc.*, 512 F.3d at 532. Plaintiffs' unfair prong claim is predicated on AMD's allegedly fraudulent omissions and, as explained above, Plaintiffs' SCAC suffers from the same deficiencies that the Court identified in Plaintiffs' CAC. Because any further amendment would be futile, and it would be unduly prejudicial to AMD to litigate a third motion to dismiss regarding the same deficiencies—especially given the voluminous claims in this case—the Court DENIES Plaintiffs leave to amend their UCL unfair prong claim.

D. Warranty Claims

The Court now turns to the breach of express warranty and implied warranty claims.

1. California Breach of Express Warranty

To prevail on a breach of express warranty claim under California law, Plaintiffs must prove that Defendants made "affirmations of fact or promise" or a "description of the goods" that became "part of the basis of the bargain." *Weinstat v. Dentsply Int'l, Inc.*, 180 Cal. App. 4th 1213, 1227, 103 Cal.Rptr.3d 614 (2010); Cal. Comm. Code § 2313 (defining express

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warranty). In order to plead the exact terms of the warranty, the plaintiff must "identify a specific and unequivocal written statement about the product that constitutes an explicit guarantee." *Hadley*, 273 F.Supp.3d at 1092 (internal quotations omitted); *see also* *Maneely v. Gen. Motors Corp.*, 108 F.3d 1176, 1181 (9th Cir. 1997) (same).

In its previous order, the Court dismissed Plaintiffs' warranty claim because Plaintiffs failed to plead the exact terms of the warranty and, even if a warranty was breached, failed to allege harm. MTD Order at 12. AMD contends that the SCAC suffers from the same deficiencies. In particular, AMD contends that Plaintiffs fail to identify any "specific and unequivocal written statement about the product that constitutes an explicit guarantee." Mot. at 20. In opposition, Plaintiffs are unable to quote any language from the SCAC alleging the terms of an express warranty. *See* Opp. at 18–19. AMD prevails here.

***16** Plaintiffs argue only that "the performance specifications" are AMD's express warranty. *See* SCAC at ¶ 304 (alleging that AMD gave express warranties "regarding the security *and* processing speeds of the processors") (emphasis in original). However, Plaintiffs never cite the language of any CPU performance specifications or other written terms. All of the SCAC paragraphs Plaintiffs cite—SCAC ¶¶ 4-7, 11, 15, 19, 23, 28, 33, 61—refer only generally to "AMD's representations that the AMD processor would perform as advertised and was not defective." *Id.* at ¶ 33. Plaintiffs fail to cite any specific representation. The alleged terms of AMD's express warranty resemble the terms "said product was effective, proper and safe for its intended use and consumption," which this Court has held are too general to state express warranty claims. *Ferrari v. Nat. Partners, Inc.*, 2016 WL 4440242, at *10 (N.D. Cal. Aug. 23, 2016); *see also* *Maneely*, 108 F.3d at 1181 (holding that terms that "make no explicit guarantees" are not express warranties).

In sum, Plaintiffs' vague allegations fall far short of alleging the "exact terms of the warranty." *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142, 229 Cal.Rptr. 605 (1986); *cf.* *Kellman v. Whole Foods Market, Inc.*, 313 F.Supp.3d 1031, 1052 (N.D. Cal. 2018) (holding that plaintiff had adequately pled an express warranty claim based on a label representing that a product was "hypoallergenic"). Because the Court concludes that Plaintiffs have not alleged express warranty claims, the Court need not consider whether AMD's written warranty limitations disclaim any such express warranties. *See* Mot. at 22; Opp. at 20–22; *see also* *Davidson v. Apple, Inc.*, 2017 WL 976048, at *12–14 (N.D. Cal. Mar. 14, 2017) (considering unconscionability of warranty only after determining that warranty language was at issue).

Therefore, the Court dismisses Plaintiffs' breach of express warranty claim. The Court finds that granting Plaintiffs leave to amend their express warranty claim would be futile and unduly prejudicial to AMD. *Leadsinger, Inc.*, 512 F.3d at 532. In its prior Order dismissing Plaintiffs' CAC, the Court dismissed Plaintiffs' express warranty claims because Plaintiffs failed to allege the exact terms of an express warranty. MTD Order at 12. The Court warned that "failure to cure the deficiencies identified in this Order will result in dismissal with prejudice." *Id.* at 20. Plaintiffs have again failed to cite any terms of any express warranty, and have thus failed to cure the deficiencies the Court identified. Because any further amendment would be futile, and it would be unduly prejudicial to AMD to litigate a third motion to dismiss regarding the same deficiencies—especially given the voluminous claims in this case—the Court DENIES Plaintiffs leave to amend their breach of express

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warranty claim.

2. California Breach of Implied Warranty of Merchantability

The Court now turns to Plaintiffs' California claim for breach of the implied warranty of merchantability.[1]

[1] Plaintiffs previously raised a claim for breach of the implied warranty of fitness for a particular purpose, which the Court dismissed. MTD Order at 16–17. Plaintiffs represent that they "no longer allege a breach of implied warranty of fitness for a particular purpose under California law." Opp. at 9 n.10.

Among other elements, the California implied warranty of merchantability requires that a product is "fit for the ordinary purpose for which such goods are used." *Mocek v. Alfa Leisure, Inc.*, 114 Cal. App. 4th 402, 406, 7 Cal.Rptr.3d 546 (2003); *see* Cal. Comm. Code § 2314(c). "[A] breach of the implied warranty [of merchantability] means the product did not possess even the most basic degree of fitness for ordinary use." *Mocek*, 114 Cal. App. 4th at 406, 7 Cal.Rptr.3d 546. To state a claim that a product is unfit for its ordinary purpose, a plaintiff must allege that the defect seriously impacts the product's operability. *Troup v. Toyota Motor Corp.*, 545 F. App'x 668, 669 (9th Cir. 2013) (holding that a Prius vehicle was fit for its ordinary purpose because a defect did not "compromise the vehicle's safety, render it inoperable, or drastically reduce its mileage range"); *see also* *Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 (9th Cir. 2009) (holding that the warranty of merchantability provides only that goods are of "a minimum level of quality") (internal quotation marks and citation omitted).

***17** The Court previously dismissed Plaintiffs' implied warranty of merchantability claim because Plaintiffs' pleadings "contain[ed] no allegation that the basic functionality of the processors has been compromised by the Defect." MTD Order at 15. Specifically, Plaintiffs alleged only that patches decreased clock speed, and gave a "ballpark figure of five to 30 per cent slow down." *Id.* (quoting CAC at ¶ 93). Therefore, the Court concluded that the "AMD processors are certainly still operable even assuming they are patched, though the processors may be a little less efficient, much like the Priuses in *Troup*." *Id.*

The same holds true with Plaintiffs' SCAC. Plaintiffs now allege that Plaintiffs experienced slowdowns as a result of third-party patches, and that their AMD processors cannot "reach advertised specifications." Opp. at 22. Plaintiffs do not allege that AMD developed or released those patches. In addition, even where Plaintiffs have added more specific allegations about the performance slowdowns, Plaintiffs do not allege that the "basic functionality" of the processors has been compromised. For example, Plaintiff Garcia alleges that his computer ran "more slowly," but was still able to "perform[ ] graphics and video editing." SCAC at ¶ 18. Thus, even though Garcia "no longer uses the processor," Garcia does not allege that his processor is unusable—only that it is somewhat less efficient, and that he chose to stop using the processor. *Id.* That is insufficient to state a claim for breach of the implied warranty of merchantability. *See* *Minkler v. Apple, Inc.*, 65 F.Supp.3d 810, 819 (N.D. Cal. 2014) (holding that plaintiffs failed to state a claim absent allegations that product "failed to work at all or even that it failed to work a majority of the time"). Plaintiffs, by alleging only that their processors "run more slowly," have failed to allege that any AMD security vulnerability "drastically undermine[s] the ordinary operation" of the processors. *See* *Troup*, 545

F. App'x at 669.

Plaintiffs also argue that they can state a claim for breach of the implied warranty of merchantability because "ensuring the security of a user's information is a basic function of any CPU." Opp. at 8–9 (citing SCAC at ¶ 108). Plaintiffs argue, without citation, that "to compute securely" is "the most basic function of a processor." *Id.* at 22. Even accepting that conclusory premise as true, Plaintiffs fail to allege facts to support an implied warranty claim.

Courts have recognized that a breach of the implied warranty of merchantability claim may lie where a product *actively* interferes with a consumer's confidential information. *See In re Carrier IQ, Inc.*, 78 F.Supp.3d 1051, 1110 (N.D. Cal. 2018) (holding that plaintiffs stated implied warranty claim based on a mobile device defect that "actively intercepts and/or transmits personal communication data to third parties") (emphasis added); *see also In re Nexus 6P Prods. Liability Litig.*, 293 F.Supp.3d 888, 925 (N.D. Cal. 2018) (plaintiffs' devices experienced "total failure" and plaintiffs "permanently [lost] access to any data stored" on the devices). Here, by contrast, Plaintiffs do not allege that *any* AMD processor owner—let alone any named Plaintiff—has lost any confidential information to Spectre or any other security vulnerability, or that a vulnerability "actively" interferes with Plaintiffs' information. Plaintiffs' vague allegations are insufficient to state a claim for breach of the implied warranty of merchantability.

The Court finds that granting Plaintiffs leave to amend their implied warranty claim would be futile and unduly prejudicial to AMD. *Leadsinger, Inc.*, 512 F.3d at 532. In its prior Order dismissing Plaintiffs' CAC, the Court dismissed Plaintiffs' implied warranty claim because Plaintiffs failed to allege that Plaintiffs' processors lacked basic functionality as processors. MTD Order at 15. The Court warned that "failure to cure the deficiencies identified in this Order will result in dismissal with prejudice." *Id.* at 20. As explained above, Plaintiffs have again failed to plead facts sufficient to allege that Plaintiffs' processors lacked basic functionality. Because any further amendment would be futile, and it would be unduly prejudicial to AMD to litigate a third motion to dismiss regarding the same deficiencies—especially given the voluminous claims in this case—the Court DENIES Plaintiffs leave to amend their claim for breach of the implied warranty of merchantability.

E. Louisiana Redhibition Claim

***18** The Court now turns to Plaintiffs' redhibition claim under Louisiana law. A redhibitory defect is one in which the defect "renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect." La. Civ. Code art. 2520. Furthermore, a defect is redhibitory when the defect diminishes a product's usefulness or value so that a buyer would have bought it at a reduced price, or not at all. *Chevron USA, Inc. v. Aker Mar., Inc.*, 604 F.3d 888, 899 (5th Cir. 2010); *see also Becnel v. Mercedes-Benz USA, LLC*, 2014 WL 1918468, at *8 (E.D. La. May 13, 2014) (holding that plaintiff stated redhibition claim where he alleged that the defect rendered the product "unusable").

The Court previously dismissed Plaintiffs' redhibition claim because Hauck, the only Louisiana Plaintiff, "[did] not allege anything other than the elements of a rehibition claim." MTD Order at 18. Plaintiffs have amended the SCAC to allege that Hauck installed a third-party patch "that purportedly mitigated the risk to her sensitive information presented by the Defect." SCAC at ¶ 10. After Hauck

installed the patch, her processor "no longer could achieve its advertised performance level, and her computer frequently crashed, sometimes several times per day." *Id.* at ¶ 11.

AMD contends that Plaintiffs' redhibition claim must again fail because Plaintiff Hauck fails to allege an adequate causal link between any security vulnerability and her processor's performance issues. Mot. at 24. Although Plaintiffs appear to concede AMD's point and do not focus on the processor's performance, any patch-related performance issues are not a redhibitory defect because "[a] redhibitory defect must be latent and have existed at time of sale," and Plaintiffs all installed the patches post-sale. *Page v. Dunn*, 2017 WL 5599512, at *1, 3 (E.D. La. Nov. 21, 2017) (redhibition claim involving "toxic levels of mold" that allegedly made house uninhabitable). Regardless, Plaintiffs also do not allege that AMD developed or released any of the patches that any Plaintiff installed.

Plaintiffs contend that because security is so fundamental to a processor, Hauck's allegations that she would have paid less for the AMD processor if she had known about its security vulnerabilities, such as Spectre, are sufficient to state a redhibition claim. Opp. at 25. Yet Hauck again alleges no facts to support the conclusory, element-mirroring allegation that she would have paid less for the processor had she known of any security vulnerability. For example, Hauck does not allege that after journalists disclosed Spectre to the public in January 2018, the price of AMD processors or of other affected processors dropped or that AMD could not sell any processors. *See Justiss Oil Co., Inc. v. Oil Country Tubular Corp.*, 216 So.3d 346, 361 (La. Ct. App. 2017) (a buyer must allege that a product "is either absolutely useless ... or so inconvenient or imperfect that, judged by the reasonable person standard ... had he known of the defect, he never would have purchased it") (internal quotation marks and citation omitted). Hauck also does not allege that any security vulnerability rendered her processor "useless," only that the processor ran more slowly after she installed Spectre patches that third parties—not AMD—released. La. Civ. Code art. § 2520. As the Court has explained in its prior order, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. Because Hauck's allegations remain entirely conclusory, the Court grants AMD's motion to dismiss the redhibition claim.

***19** The Court finds that granting Plaintiffs leave to amend the redhibition claim would be futile and unduly prejudicial to AMD. *Leadsinger, Inc.*, 512 F.3d at 532. In its prior Order dismissing Plaintiffs' CAC, the Court dismissed Plaintiffs' redhibition claim because Hauck's allegations parroted the elements of a redhibition claim. MTD Order at 17–18. The Court warned that "failure to cure the deficiencies identified in this Order will result in dismissal with prejudice." *Id.* at 20. Plaintiffs' SCAC suffers from the same deficiencies as the CAC. Because any further amendment would be futile, and it would be unduly prejudicial to AMD to litigate a third motion to dismiss regarding the same deficiencies—especially given the voluminous claims in this case—the Court DENIES Plaintiffs leave to amend their redhibition claim.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS AMD's motion to dismiss with prejudice all seven causes of action the parties have elected to litigate through summary judgment: (1) Count III for unfair practices under California's UCL; (2) Count V for fraud by omission; (3) Count VII for breach of express warranty; (4) Count VIII for breach of the implied warranty of

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merchantability; (5) Count XI for violation of FDUTPA; (6) Count XVII for redhibition; and (7) Count XIX for violation of the MCPA.

IT IS SO ORDERED.

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2014 WL 2815571
United States District Court,
S.D. New York.

In re GOLDMAN SACHS GROUP, INC. SECURITIES LITIGATION.
This Document Relates To: All Actions.

Master File No. 10 Civ. 3461(PAC).
|
Signed June 23, 2014.

MEMORANDUM & ORDER

Honorable PAUL A. CROTTY, District Judge.

***1** In this consolidated securities class action, Plaintiffs allege that Goldman Sachs Group, Inc. ("Goldman") and certain of its senior executives (collectively, "Defendants") made material misstatements and misleading omissions relating to four collateralized debt obligation ("CDO") transactions in 2006 and 2007. Previously, the Court (1) granted Defendants' motion to dismiss claims regarding their failure to disclose Goldman's receipt of Wells notices from the Securities and Exchange Commission ("SEC"), but (2) denied the motion with respect to claims that Goldman had made misstatements about its conflicts of interest in those transactions. *See* *Richman v. Goldman Sachs Grp., Inc.,* 868 F.Supp.2d 261 (S.D.N.Y.2012). Defendants now move for partial reconsideration of that decision on the grounds that three intervening Second Circuit decisions have clarified what kinds of statements constitute inactionable "puffery." The motion is denied.

BACKGROUND

A. The Court's Prior Decision

As explained more fully in the Court's prior decision, Plaintiffs allege that Goldman improperly failed to disclose that it, or a favored client, held short positions in certain CDO transactions that it sold to other clients. *See id.* 269–71. That is, Goldman allegedly had conflicts of interests with those buyer-clients because it was selling them the same financial products that it was effectively betting against and profiting from the clients' losses. *See id.* In three of those transactions, "Goldman affirmatively represented that it held a long position in the equity tranches, without disclosing its substantial short positions." *Id.* at 278. In one of those three, "Goldman stated that it had 'aligned incentives' with investors by 'investing in a portion of equity,' which amounted to $6 Million, without disclosing that it also held 100% of the short position at the same time, which amounted to $2 Billion." *Id.* at 278–79.

In light of the foregoing conduct, Plaintiffs claim that the following statements made by Defendants during the class period were materially misleading:

- "[W]e increasingly have to address potential conflicts of interest, including situations where our services to a particular client or our own proprietary investments or other interests conflict, or are perceived to conflict, with the interest of another client...." (Compl. ¶ 134 (Form 10–K))

- "We have extensive procedures and controls that are designed to ... address conflicts of interest." (Compl. ¶¶ 134, 154 (Form 10–K))

• "Our clients' interests always come first. Our experience shows that if we serve our clients well, our own success will follow ." (Compl. ¶ 154 (Goldman Annual Report))

• "We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us. Our continued success depends upon unswerving adherence to this standard." (Compl. ¶ 154 (Goldman Annual Report))

***2** • "Integrity and honesty are at the heart of our business." (Compl. ¶ 289 (Goldman Annual Report))

• "Most importantly, and the basic reason for our success, is our extraordinary focus on our clients." (Compl. ¶ 154 (Viniar's Statements on Goldman's Investor Conference Call))

• "Our reputation is one of our most important assets." (Compl. ¶ 154 (Form 10–K))

See 868 F.Supp.2d at 277.

Both parties previously addressed *ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.,* 553 F.3d 187, 206 (2d Cir.2009) ("*JP Morgan* "), which held that the statements at issue were "no more than 'puffery' " because they were "too general to cause a reasonable investor to rely upon them." The defendant's statements at issue there were that it "had 'risk management processes [that] are highly disciplined and designed to preserve the integrity of the risk management process,' that it 'set the standard' for 'integrity,' and that it would 'continue to reposition and strengthen [its] franchises with a focus on financial discipline.' " *Id.* at 205–06 (citations omitted). The plaintiffs argued that those statements "were misleading because [defendant]'s poor financial discipline led to liability in the WorldCom litigation and involvement in the Enron scandal." *Id.* at 206. The Second Circuit rejected the argument, reasoning that they "were merely generalizations regarding [defendant]'s business practices" and did not "amount to a guarantee that its choices would prevent failures in its risk management practices." *Id.*

In this case, the Court rejected Defendants' argument that *JP Morgan* required dismissal: "[T]he Court cannot say that Goldman's statements that it complies with the letter and spirit of the law and that its success depends on such compliance, its ability to address 'potential' conflict of interests, and valuing its reputation, would be so obviously unimportant to a reasonable investor." 868 F.Supp.2d at 280.

B. Intervening Second Circuit Decisions

Defendants cite three subsequent Second Circuit decisions which held that certain general statements about compliance, reputation, and integrity were inactionable puffery. *See City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG,* No. 12–4355–CV, 2014 WL 1778041, at *5, 6 (2d Cir. May 6, 2014) ("*UBS* "); *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC,* No. 13–2678–CV, 2014 U.S.App. LEXIS 7864, at *22–23, 2014 WL 1645611 (2d Cir. Apr. 25, 2014) ("Barclays"); *Boca Raton Firefighters & Police Pension Fund v. Bahash,* 506 F. App'x 32, 37 (2d Cir.2012) (summary order) ("*Bahash* "). Defendants contend that if applied here, these cases would result in dismissal of the pending claims.

In *UBS,* the defendant stated that it "held its employees to the highest ethical standards and complied with all applicable laws, and that [its] wealth management division did not provide services to clients in the United States when, in

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fact, [it] was [allegedly] engaged in [a] crossborder tax scheme." 752 F.3d 173, 2014 WL 1778041, at *4. The Second Circuit affirmed dismissal of the plaintiffs' claim that the statements were misleading:

> ***3** It is well-established that general statements about reputation, integrity, and compliance with ethical norms are inactionable "puffery".... This is particularly true where, as here, the statements are explicitly aspirational, with qualifiers such as "aims to," "wants to," and "should." Plaintiffs' claim that these statements were knowingly and verifiably false when made does not cure their generality, which is what prevents them from rising to the level of materiality required to form the basis for assessing a potential investment.

Id. at *5 (citing *JP Morgan,* 553 F.3d at 206). The court also affirmed dismissal of a claim that defendant had falsely stated that it "avoided 'concentrated positions' of assets," though it had accumulated a portfolio of $100 billion in residential mortgage-backed securities ("RMBS") and related CDOs. *Id.* at *6–7. The court observed that the plaintiffs' contention that this statement was an "important" representation missed the mark: "[W]hile importance is undoubtedly a necessary element of materiality, importance and materiality are not synonymous. To be 'material' within the meaning of § 10(b), the alleged misstatement must be sufficiently specific for an investor to reasonably rely on that statement as a guarantee of some concrete fact or outcome...." *Id.* at *6 (citing, *inter alia,* *JP Morgan,* 553 F.3d at 206). The court further explained that the statements at issue were "too open-ended and subjective to constitute a guarantee that UBS would not accumulate a $100 billion RMBS portfolio, comprising 5% of UBS's overall portfolio, or 16% of its trading portfolio." *Id.* at *7.

In *Barclays,* the defendant stated that "[m]inimum control requirements have been established for all key areas of identified risk," even though it allegedly "submit[ted] false information for the purpose of calculating the London Interbank Offered Rate ("LIBOR")" and "had no specific systems or controls for its LIBOR submissions process." 2014 U.S.App. LEXIS 7864, at *3, 9, 2014 WL 1645611. The Second Circuit affirmed dismissal on the grounds that the plaintiffs did not "demonstrate with specificity that Barclays's minimum control statements were false or misleading" as required by the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u–4(b)(1)(B). *Id.* at *22–23. The court explained that "Barclays's statements do not mention LIBOR, nor do they say that Barclays had established 'specific systems or controls' relating to LIBOR submission rates .... [,] but only that it had established controls for other areas of its business." *Id.* at *22.

In *Bahash,* the Second Circuit affirmed dismissal of claims that defendants "made public statements about the honesty and integrity of S & P's credit-ratings services while knowing that its ratings method was basically a sham." 506 F. App'x at 34. The court stated that these statements "are the type of mere 'puffery' that we have previously held to be not actionable" due to their "generic, indefinite nature." *Id.* at 37.

DISCUSSION

I. Standard for Motion for Reconsideration

***4** A district court's discretion to reconsider a prior decision is "limited" by the doctrine of the law of the case: "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, L.L.P.,* 322 F.3d 147, 167 (2d Cir.2003) (internal quotation marks omitted). Accordingly, decisions should "not usually be changed unless there is 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent a manifest injustice.' " *Id.*

"It is not enough ... that defendants could now make a more persuasive argument.... The law of the case will be disregarded only when the court has 'a clear conviction of error' with respect to a point of law on which its previous decision was predicated." *Fogel v. Chestnutt,* 668 F.2d 100, 109 (2d Cir.1981) (citation omitted). "Thus generally, there is a strong presumption against amendment of prior orders." *Bergerson v. N.Y. State Office of Mental Health,* 652 F.3d 277, 288 (2d Cir.2011).

II. Analysis

A. Basis for Reconsideration

Contrary to Defendants' argument, *UBS, Barclays,* and *Bahash* do not constitute an intervening change in controlling law, but merely elaborate on *JP Morgan,* which the Court considered in its June 2012 decision.

Defendants principally rely on *UBS,* where the Second Circuit stated that the "puffery" rule it was applying was "well-established" liberally quoted the portion of *JP Morgan* that was at issue in the motion to dismiss. *See* 2014 WL 1778041, at *5 & nn. 43, 44. Likewise, *UBS'* s subsequent observations-regarding the "guarantee" element of materiality and the distinction between "importance" and materiality-cited substantially identical statements in *JP Morgan. See id.* at *6 & nn. 56, 57.

Nor do *Barclays* or *Bahash* constitute a *sub silentio* change in controlling law. *Barclays* did not announce any new rule regarding materiality; rather, it contains a brief discussion applying the PSLRA's heightened pleading standard to the issue of whether particular statements were false or misleading under the circumstances. *See* 2014 U.S.App. LEXIS 7864, at *22–23, 2014 WL 1645611 ("Plaintiffs fail, therefore, to demonstrate with specificity that Barclays's minimum control statements were false or misleading."). *Bahash* was a nonprecedential summary order[1] concluding that the statements at issue "regarding [defendant]'s integrity and credibility and the objectivity of S & P's credit ratings are the type of mere 'puffery' that we have ***previously held*** to be not actionable." 506 F. App'x at 37 (emphasis added) (citing *JP Morgan,* 553 F.3d at 206).

1 *See* 2d Cir. Local R. 32.1.1(a) ("Rulings by summary order do not have precedential effect.").

Defendants apparently seek an exception to the requirement that there be a change in controlling law, suggesting that a decision that "clarif[ies]" or "extend[s] and crystallize[s] the scope and meaning" of a prior decision is sufficient to warrant reconsideration. (Defs.' Mem. at 4, 8.) Of course, the law changes, but reconsideration is not warranted when an appellate court "merely applie[s] the existing standard to a new set of facts." *In re Fannie Mae 2008 ERISA*

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Litig., No. 09–CV–1350, 2014 WL 1577769, at *4 (S.D.N.Y. Apr. 21, 2014). Accordingly, the motion for reconsideration must be denied.

B. There Was No Error in the Prior Decision

***5** Even if the Court were to grant the motion for reconsideration, it would adhere to its prior decision. As Judge Scheindlin noted in distinguishing *Barclays* and *Bahash* from this case, Goldman's "statements about business practices were directly related to the subject of the fraud." *Gusinsky v. Barclays PLC,* 944 F.Supp.2d 279, 290 n. 74 (S.D.N.Y.2013), *aff'd in relevant part, Barclays,* 750 F.3d 227.

The statements at issue in *UBS, Barclays,* and *Bahash* were too open-ended, indefinite, or subjective to be actionable under the circumstances. For instance, in *UBS,* the defendant's statement that it strove to comply with applicable laws could not be interpreted as a guarantee that it would never be out of compliance, and its statement that it avoided "concentrated positions of assets" was not a guarantee that it would avoid investing 5% of its portfolio in RMBS. Likewise, in *Barclays,* stating that "[m]inimum control requirements have been established for all key areas of identified risk" was too general to constitute a guarantee that it had specific control systems for potential manipulations of LIBOR. Finally, in *Bahash,* statements about the reputation and integrity of S & P was not a guarantee against the specific deficiencies alleged to have afflicted its ratings process.

In contrast, Goldman's representations about its purported controls for avoiding conflicts were directly at odds with its alleged conduct. For instance, Goldman represented that "[w]e have extensive procedures and controls that are designed to ... address conflicts of interest" and "we increasingly have to address potential conflicts of interest, including situations where our services to a particular client or our own proprietary investments or other interests conflict, or are perceived to conflict, with the interest of another client...." (Compl. ¶¶ 134, 154 (Form 10–K).) Meanwhile, Goldman is alleged to have sold financial products to clients despite clear and egregious conflicts of interest-indeed, where its "services to a particular client" (Paulson & Co. in the Abacus deal) and its "own proprietary investments" (in short positions in the Hudson, Anderson, and Timberwolf I deals) "conflict[ed] with the interest of [the][ ]other client[s]" investing in those deals. Particularly in light of Goldman's statements prior to the class period regarding its "aligned incentives" with its clients, the Court cannot say that as a matter of law no reasonable investor would have relied on the statements above in making an investment decision. *See* 17 C .F.R. § 240.10b–5 (whether omission is materially misleading is judged "in the light of the circumstances under which [the statements] were made"); *JP Morgan,* 553 F.3d at 197, 206 (statements not immaterial as a matter of law "unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance" "too general to cause a reasonable investor to rely upon them").

***6** The parties have seized upon the Court's observations about the financial crisis in a footnote in the prior decision. *See* 868 F. Supp, 2d at 277 n. 8 ("If Goldman's claim of 'honesty and 'integrity' are simply puffery, the world of finance may be in more trouble than we recognize."). The real issue in the prior decision was whether Plaintiffs had adequately alleged that Defendants made a material misstatement or misleading omission. On the basis of Defendants' statements regarding conflicts of interest alone, the Court adheres to its conclusion that Plaintiffs have pleaded a viable claim.

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CONCLUSION

For the foregoing reasons, Defendants' motion for partial reconsideration is DENIED.

SO ORDERED.

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1995 WL 170122
United States District Court, D. Massachusetts

Morton SALKIND, Plaintiff,
v.
Lorraine C. WANG, Frederick A. Wang, Courtney S. Wang and William J. Pechilis as Co–Executors of the Estate of An Wang; Peter A. Brooke; Louis W. Cabot; Harry H.S. Chou; John J. Cullinane; Michael F. Mee; Richard W. Miller; Earnest F. Stockwell, Jr.; Estate of Howard R. Swearer; Paul E. Tsongas; Courtney S. Wang; Frederick A. Wang and Lorraine C. Wang, Defendants.

Civ. A. No. 93–10912–WGY.
|
March 30, 1995.

Attorneys and Law Firms

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John B. Daukas, Goodwin, Proctor & Hoar, Boston, MA, for Lorraine C. Wang.

MEMORANDUM AND ORDER

YOUNG, District Judge.

***1** Morton Salkind ("Salkind"), owner of over 2,000,000 shares of the outstanding stock of Wang Laboratories, Inc. (the "Company") at the time the Company filed for bankruptcy in August, 1992, has sued the estate of An Wang and various individual directors and officers of the Company for securities fraud (Counts I–IV), common law fraud (Count V), common law negligent misrepresentation (Count VII), unfair and deceptive trade practices under Mass.Gen.L. ch. 93A (Count VI), and for civil liability and conspiracy under the Racketeer Influenced Corrupt Organizations Act ("RICO") (Counts VIII & IX). Salkind alleges a pattern of misrepresentations by the defendants as to the strength, viability, and future performance of the Company. The case was transferred from the District of New Jersey to this Court by joint stipulation of the parties pursuant to 28 U.S.C. § 1404(a). In January, 1994, the defendants moved to dismiss the complaint, asserting, *inter alia,* that Salkind's claims were time-barred; that Salkind failed to state a claim upon which relief could be granted; and that Salkind failed to plead fraud with particularity. While this motion was pending, Salkind filed an amended complaint (the "First Amended Complaint").

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The individual defendants and the co-executors of the estate of An Wang again moved to dismiss under Fed.R.Civ.P. 9(b) and 12(b)(6).

I. THE AMENDED COMPLAINT

Upon the filing of the Company's Chapter 11 bankruptcy petition on August 18, 1992, Richard W. Miller ("Miller"), the Company's Chief Executive Officer ("CEO"), admitted that when he had taken over as president and Chief Operating Manager ("COO") in August, 1989, he was "startled to find that Dr. [An] Wang was having petitions for a Chapter 11 filing drawn up." (First Amended Complaint ["First Am.Comp."] ¶ 49). Miller also stated at the time of the filing that for the three years prior to the bankruptcy filing he and other officers had "fought to bring [the Company] back from the brink of bankruptcy." (First Am.Comp. ¶ 49). Salkind alleges that at this moment he discovered for the first time that the optimistic statements made to him personally by both An Wang and Miller, as well as those contained in the Company's public pronouncements, which induced him to make and maintain his substantial investment in the Company despite its substantial losses, were in fact fraudulent.

II. ANALYSIS

The Court has determined that fifteen statements alleged by Salkind in his behemoth First Amended Complaint are sufficiently material to merit discussion. All remaining statements or omissions alleged are immaterial as matter of law and are hereby dismissed. The Court will analyze the first six statements (more precisely, five statements and one failure to disclose) together and then discuss the final nine statements separately.

A. Statements [1]–[6]

[1] In a day-long meeting at Company headquarters held in January, 1989, in Lowell, Massachusetts, An Wang allegedly "guaranteed" Salkind that the Company's stock, which was then selling at between $8 and $9 per share would reach at least $21 per share "soon," and that the Company's new "IMAGING" system "would make the stock higher than it had ever been." (The Company's class B stock had closed at $64 per share in September, 1980.) (First Am.Comp. ¶¶ 38–40).

***2** [2] Also in January, 1989, Frederick Wang, the president and COO of the Company at the time, met with a group of analysts and stated, "I expect to finish this fiscal year with higher revenue and earnings than last year." (First Am.Comp. ¶ 42).

[3] Beginning in August, 1989, the fact that the Company was on "the brink of bankruptcy" was not disclosed. (First Am.Comp. ¶ 49).

[4] In the quarterly letter and report for the three-month period ending December 31, 1989, An Wang and Miller, the new president and COO, stated without any mention of the specter of bankruptcy that "Wang Laboratories entered the new decade a much stronger Company than it was last August ... [O]ur goal of reaching profitability by June 30 of this year, although difficult, is attainable." (First Am.Comp. ¶ 113).

[5] Miller stated in a January 25, 1990 *Boston Globe* article that the Company's turnaround plan was on track and indicated that Wang *would* earn a profit in the first quarter of fiscal 1991. (First Am.Comp. ¶ 218).

[6] In early 1990, Miller spoke with Salkind on the phone and stated that the stock *would* reach "about $10" in the not too distant future. (First Am.Comp. ¶ 48).

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The Company, however, reported net losses of $715.9 million in fiscal year (FY) 1990, $385.5 million in FY 1991, and $356.6 million in FY 1992, finally filing for bankruptcy in August, 1992. (First Am.Comp. ¶¶ 135, 167, 189, 51).

Sections 10(b) and 20 of the Securities and Exchange Act and Rule 10b–5 (Counts I—IV)

Rule 10b–5, promulgated under § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) (the "Exchange Act"), makes it unlawful, in connection with the purchase or sale of a security, "to make any untrue statement of material fact or to omit to state a material fact necessary to make the statements made, in light of all the circumstances in which they were made, not misleading." 17 C.F.R. § 240.10b–5 (1994). An actionable statement must be "material" in that it is "likely to be viewed by the reasonable investor as significantly altering the total mix of available information," and it must be made with scienter. *Colby v. Hologic, Inc.,* 817 F.Supp. 204, 209 (D.Mass.1993). In addition, under section 20(a) of the Act, the defendants can be held jointly and severally liable for Rule 10b–5 violations as "controlling persons" if they, "directly or indirectly, control [ ] any person [primarily] liable" for those violations. 15 U.S.C.A. § 78t (1981).

(1) The statute of limitations/bar of repose—It is well settled that a claim under Rule 10b–5 must be brought within one year of discovery of the facts that give rise to the violation, and in any event no more than three years after the violation. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 361–62, 364 (1991); *Coopertiva de Ahorro y Credito Aguada v. Kidder, Peabody & Co.,* 993 F.2d 269, 271 (1st Cir.1993). As Salkind did not discover until August, 1992, that the Company had been on "the brink of bankruptcy" since August, 1989, his suit, filed on December 10, 1992, is well within the one year statute of limitations.

***3** Nevertheless, the bar of repose extinguishes 10b–5 liability for any fraudulent statements made before December 10, 1989 (i.e. more than three years before the date the complaint was filed), unless tolling under *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974) is applicable. Pursuant to *American Pipe,* the filing of a class action tolls the statute of limitations "as to all asserted members of the class." 414 U.S. at 554; *see also Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345, 350 (1983). Although equitable tolling is inapplicable, *Lampf,* 501 U.S. at 363, *American Pipe* does toll the *Lampf* bar of repose for as manyof Salkind's claims which are part of a class action against the same defendant(s) until the class is decertified or Salkind opts out. *See Mott v. R.G. Dickinson and Co.,* No. 92–1450–PFK, 1993 WL 63445, at *5 (D.Kan. Feb. 24, 1993); *Trief v. Dun & Bradstreet Corp.,* 144 F.R.D. 193, 202 (S.D.N.Y.1992). "[D]ifferent or peripheral claims," however, which do not "concern the same evidence, memories, and witnesses as the subject matter of the original class suit," cannot take advantage of *American Pipe* tolling. *Crown, Cork,* 462 U.S. at 354–55 (Powell, J., concurring).

Salkind argues that the bar of repose is tolled as to all his otherwise untimely claims by three class actions filed in this Court during the fall of 1989. *See Burke v. Wang Lab., Inc.,* No. 89–1962–WGY (D.Mass. filed Sept. 8, 1989); *Kushner v. Wang Lab., Inc.,* No. 89–1963–WGY (D.Mass. filed Sept. 8, 1989); *Steinharter v. Wang Lab., Inc.,* 89–2387–WGY (D.Mass. filed Oct. 24, 1989).[1] Therefore, as a general matter, statements made prior to December 10, 1989, not encompassed in the consolidated class action complaints, are extinguished by the *Lampf* three-year bar of repose. More specifically, statements made after July 30, 1989, the date the *Burke* class closed

but before December 10, 1989 are barred. Thus, An Wang's January 1989 statement [1], for example, a personal statement made to Salkind not fairly encompassed in the *Burke* class allegations, is barred by *Lampf. Cf. Westinghouse Elec. Corp. v. '21' Int'l Holdings, Inc.,* 821 F.Supp. 212, 224–25 (S.D.N.Y.1993). Fred Wang's statement [2], however, is the same statement alleged in ¶¶ 28–29 of the *Kushner* complaint. *American Pipe* tolling thus saves statement [2] from the bar of repose. Statements [4], [5], and [6] were made after December 10, 1989, and are thus not barred by the statute of repose.

The liability of An Wang is complicated by his death on March 24, 1990. The window of liability as to the estate of An Wang is only open between December 10, 1989 and March 24, 1990. Statements [4] and [5] fall within this window of time. The defendant co-executors argue that Salkind's claims against the estate are time-barred under the Massachusetts non-claim statute, Mass.Gen.L. ch. 197, § 9, because the action was not filed within one year of An Wang's death. Section 10 of that statute, however, allows judgment despite the one-year limitation of section 9 if "justice and equity require it and ... such creditor is not chargeable with culpable neglect."[2] This Court is satisfied that the present cause of action has sufficient merit and that the failure to commence the action was not due to carelessness or lack of diligence. Section 10 thus governs. *See Downey v. Union Trust Co.,* 312 Mass. 405, 408–09 (1942); *Eubank Heights Apartments, Ltd. v. Lebow,* 615 F.2d 571, 574 (1st Cir.1980).[3]

***4** In sum, therefore, statements [2], [4], [5], and [6] survive, but statement [1] is time-barred. Nondisclosure [3] is time-barred to the extent it seeks to impose liability for the failure to disclose that the company was on the brink of bankruptcy between August and December 10, 1989, but otherwise survives. Statement [6] also survives, but is dismissed as to the co-executors of the estate of An Wang.

(2) Materiality—In his 162–page amended complaint, Salkind has alleged at least 60 fraudulent statements between 1987 and August, 1992.[4] Most of the alleged statements, however, are not sufficiently material as matter of law to be actionable under Rule 10b–5, as they are only "[o]ptimistic, vague projections of future success which prove to be ill-founded." *Priest v. Zayre Corp.,* No. 86–2411–Z, 1987 WL 10741, at *2 (D.Mass. May 1, 1987) (Zobel, J.); *see also Elkind v. Liggett & Myers, Inc.,* 635 F.2d 156, 164 (2d Cir.1980) (company's statement that "we expect another good year in 1972" held immaterial); *Colby v. Hologic, Inc.,* 817 F.Supp. 204, 211 (D.Mass.1993) (company's generalized forecast that "prospects for longterm growth ... are bright" held immaterial); *Wilkes v. Heritage Bancorp, Inc.,* 767 F.Supp. 1166, 1175 (D.Mass.1991) (Skinner, J.) (statement arguably creating the "impression that [the bank's] problems were behind it and the future prospects were bright" held immaterial).

Nondisclosure [3], however, that the Company had been on "the brink of bankruptcy" since August, 1989, is material because "the anticipated magnitude of the event upon the totality of company activity" would obviously be substantial. *See Colby,* 817 F.Supp. at 209–10 (citing *Basic, Inc. v. Levinson,* 485 U.S. 224, 238 [1988]). Here, there is the requisite "substantial likelihood that the disclosure of [this] omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" in subsequent statements. *TSC Indus., Inc. v. Northway, Inc.,* 426 U.S. 438, 449 (1976). Thus, to the extent this information was omitted from optimistic financial projections made after December 10, 1989—the earliest date from which statements are not extinguished

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by the bar of repose—these additional statements are material and thus actionable. For example, the only statement made before An Wang's death which could be found materially misleading in light of non-disclosure [3] is statement [4] in the quarterly letter and report for the three-month period ended December 31, 1989, which states that "our goal of reaching profitability by June 30 of this year, although difficult, is attainable." Statements [2], [5], and [6] likewise affirmatively "offer[ ] ... projections of earnings ... [and] a temporal reference point" which are sufficiently certain and empirical materially to affect the total mix of information considered by a reasonable investor. *Colby,* 817 F.Supp. at 211.

B. Statements [7]–[15]

***5** Due to omission [3], an additional nine statements are made sufficiently materially misleading to survive the defendants' 12(b)(6) motion. Again, they are numbered sequentially for ease of discussion. These are:

[7] The quarterly letter and report for the period ending March 31, 1990, which stated: "[I]t is still possible for [the Company] to achieve its goals of performing at near an operating breakeven in the fourth quarter, and of profitable operations in the fiscal year beginning July 1." (First Am.Comp. at ¶ 121).

[8] An August 31, 1990 letter to Salkind and other shareholders as part of the Company's 1990 Annual Report, which stated: "During the past fiscal year, we have made major progress in resolving the serious financial issues that faced the company ... [The Company] is well positioned to achieve profitability in Fiscal 1991." (First Am.Comp. ¶ 133).

[9] An August, 1990 *Wall Street Journal* article, in which Miller stated: "[W]e're a lot stronger now and our financial problems are behind us." (First Am.Comp. ¶ 223).

[10] An October 23, 1990 PR Newswire Association article, in which Miller cited 1990 first-quarter results as "further evidence that our turnaround programs are working.... [The Company] is building an organization that can adapt to ... changes and that can remain competitive in any environment." (First Am.Comp. ¶ 225).

[11] A January 23, 1991 PR Newswire Association article, in which Miller stated: "We have focused our energies on a turnaround program designed to ... position [the Company] for profitability. By all standards, we have made significant progress in these efforts." (First Am.Comp. ¶ 227).

[12] On April 24, 1991, *The Reuter Business Report* quoted Miller as stating: "Despite third-quarter results, the company believes that it has made important progress in positioning itself for the future. [The introduction of OFFICE 2000] repositions the company so that it can grow again and sustain profitability." (First Am.Comp. ¶ 228).

[13] The August, 1991 Annual Report, which stated: "[The Company] made significant progress in building a strong foundation for future success." (First Am.Comp. ¶¶ 167–68).

[14] A July 31, 1990 *Boston Globe* article which quoted Miller as saying that Wang was poised for profitability in the 1991 fiscal year. (First Am.Comp. ¶ 222).

[15] A January 24, 1990 PR Newswire Association article in which Miller stated: "[T]he Company will be positioned for profitability by the end of the fiscal year...." (First Am.Comp. ¶ 216).

In sum, then, statements [1]–[15] are material as

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matter of law, but statement [1] and nondisclosure [3] (between August and December 10, 1989) have already dropped out of the case due to the bar of repose. Statements [6]–[14] are now dismissed as to the co-executors of the estate of An Wang, but are actionable as to all other defendants. Statement [15] is actionable against the estate of An Wang. as well as all other defendants

C. Fed.R.Civ.P. 9(b)

***6** The next question for this Court is whether, with respect to the surviving statements, Salkind has pleaded fraud with sufficient particularity to withstand challenge under Rule 9(b). "It is well settled that Rule 9(b) requires the plaintiff in a securities fraud case to specify the time, place and content of an alleged false representation." *Romani v. Shearson Lehman Hutton,* 929 F.2d 875, 878 (1st Cir.1991). Moreover, "[a]lthough a plaintiff need not specify the circumstances or evidence from which fraudulent intent could be inferred, the complaint must provide some factual support for the allegations of fraud." *Id.*

Miller has admitted that in August, 1989, An Wang was having petitions for a Chapter 11 filing drawn up and that since that time they had been fighting "to bring [the Company] back from the brink of bankruptcy." (First Am.Comp. ¶ 49). Coupled with Company disclosures of net losses of $715.9 million, $385.5 million, and $356.6 million for fiscal years 1990, 1991, and 1992 respectively, and the Company's eventual bankruptcy in 1992, there are sufficient facts alleged to support the inference that An Wang and Miller fraudulently withheld the fact that the Company was "on the brink of bankruptcy" beginning in August, 1989, and that it was not improving during the years in question as their statements led Salkind to believe. Statement [2], however, was made over six months before August, 1989, and there are insufficient "factual allegations that would support a reasonable inference" that circumstances adverse to that statement "were known and deliberately or recklessly disregarded" at the time the statement was made. *Id.* It is, therefore, not actionable.

With respect to the remaining individual defendants, the conclusory allegations are "without specified sources or supporting facts" and based on "information and belief alone, and so must be regarded as speculative and fatally defective." *Colby,* 817 F.Supp. at 212. Although the First Amended Complaint names each director, specifies when each became director, and indicates which Board meetings each attended,[5] no particular statements are specifically attributed to Louis Cabot, Harry Chou, Michael Mee, William Pechilis, Earnest Stockwell, Howard Swearer, Paul Tsongas, Courtney Wang, or Lorraine Wang.[6] Indeed, the Amended Complaint merely alleges in wholly conclusory terms that:

> Each of the individual defendants reviewed or was aware of each of the alleged materially misleading reports and statements complained of here at or about the time they were issued or circulated.

(First Am.Comp. ¶ 32). Direct 10b–5 liability is therefore insufficiently pleaded under Rule 9(b) as to the above named defendants. *See Decker v. Massey–Ferguson, Ltd.,* 681 F.2d 111, 119–20 (2d Cir.1982) (complaint which alleged that company's directors knew of and actively disseminated false and misleading statements in specified documents were "so broad and conclusory to be meaningless" and thus failed to meet the required factual predicate for allegations of fraud).

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***7** Salkind also alleges a concerted scheme among all the defendants. Under Rule 9(b), the complaint "must ... particularize the role of each in the fraud." *Colby,* 817 F.Supp. at 210 (dismissing 10b–5 complaint pursuant to Rule 9[b]); *Hurley v. FDIC,* 719 F.Supp. 27, 31 (D.Mass.1989) (Tauro, J.). The complaint here does not do so.

The alleged fact that the Company was on "the brink of bankruptcy," however, is sufficient to support "control person" liability under section 20(a) of the Exchange Act where each individual defendant was an officer or director who allegedly knew of the materially misleading statements and

> was in a position to control or influence the content of such reports or otherwise cause corrective or accurate disclosure to have been made.[7]

First Am.Comp. ¶ 32; *See also Wells v. Monarch Capital Corp.,* No. 91–10575–MA, 1991 WL 354938, at *11 (D.Mass. Aug. 23, 1991) (Mazzone, J.) ("[i]n the securities context, control means the possession, direct or indirect, of the power to direct or to cause the direction of the management and policies of an entity, whether through the ownership of voting securities, by contract or otherwise"). Although in the original complaint Salkind alleged "control person" claims against all defendants, here Salkind asserts "control person" liability only against the Wang family defendants.

Thus, statements [4] and [5] are actionable as to Miller and the co-executors of the estate of An Wang; statement [6] is only actionable as to Miller. Statements [6]–[14], which have already dropped out with respect to the Wang family, are now dismissed with respect to the outside directors. Statement [15] is also dismissed with respect to the outside directors.

D. Civil RICO and RICO Conspiracy (Counts VIII & IX)

In order to state a RICO claim under 18 U.S.C. § 1962(c), the complaint must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496 (1985). "Racketeering activity" includes "any act which is indictable under ... [18 U.S.C.] section 1341 (relating to mail fraud), section 1343 (relating to wire fraud)," and "any offense involving ... fraud in the sale of securities." 18 U.S.C.A. §§ 1961(1)(B), (D) (West Supp.1993). "[T]o prove a pattern of racketeering activity a plaintiff ... must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 239 (1989) (emphasis in original). The RICO elements are analyzed defendant by defendant. *Feinstein v. Resolution Trust Corp.,* 942 F.2d 34, 41 (1st Cir.1991).

The predicate acts alleged here do not "extend over a substantial period of time" to demonstrate the requisite "continuity" or "long-term criminal conduct" for there to be a legally sufficient "pattern."[8] *See H.J. Inc.,* 492 U.S. at 242, 243 n. 4, 250 ("racketeering predicates occurred with some frequency over at least a 6–year period, which may be sufficient to satisfy the continuity requirement"); *Roberts v. Smith Barney, Harris Upham & Co.,* 653 F.Supp. 406, 412–13 (D.Mass.1986) (Skinner, J.) (activity over 22 months lacked requisite continuity); *see also J.D. Marshall Int'l, Inc. v. Redstart, Inc.,* 935 F.2d 815, 820–21 (7th Cir.1991) (alleged mail and wire fraud "within a relatively short period of time—thirteen months" insufficient to establish continuity); *see generally Apparel Art Int'l, Inc. v. Jacobson,* 967 F.2d 720, 722–24 (1st Cir.1992) (explaining

the elements necessary to prove a pattern of racketeering activity). Moreover, "taken together, [the actionable statements (spanning approximately 19 months) as alleged] comprise a single effort" artificially to inflate the market price of the Company's stock and induce Salkind to purchase 1% of the outstanding stock, "and are appropriately characterized as separate parts of a single criminal episode" and not "several episodes making up a 'pattern.' " *Apparel Art,* 967 F.2d at 723.

***8** The alternative prong of "a threat of ... continuing racketeering activity," *H.J. Inc.,* 492 U.S. at 241, is likewise of no avail as the actionable statements alleged are insufficient to suggest "that the behavior will likely be repeated or that the actions complained of constituted the regular way in which [the defendants] conducted their ongoing business [ ]." *Feinstein v. Resolution Trust Corp.,* 942 F.2d at 47; *see also H.J. Inc.,* 492 U.S. at 242–43. The civil RICO count, therefore, fails as matter of law. The RICO conspiracy count fails for the same reasons and, regardless, "is alleged in wholly conclusory terms [which] will not withstand a motion to dismiss." *Miranda v. Ponce Fed. Bank,* 948 F.2d 41, 48 (1st Cir.1991). Counts VIII and IX are therefore dismissed as to all defendants.

E. Common Law Claims (Counts V and VII)

The claim for common law fraud in Count V fails to allege with particularity the fraudulent statements or collusive acts made by the individual defendants other than the estate of An Wang, Miller, and Cullinane as required by Rule 9(b). Count V, therefore, is dismissed as to all defendants except Miller, the co-executors of the estate of An Wang, and Cullinane.

Similarly, because traditional principles of corporate law preclude individual liability without active personal involvement in the tortious conduct or grounds for piercing the corporate veil, neither of which is sufficiently alleged here, the claims for negligent misrepresentation in Count VII are likewise dismissed as to all defendants except Miller, Cullinane, and the co-executors of the estate of An Wang. *See Cash Energy, Inc. v. Weiner,* 768 F.Supp. 892, 895 (D.Mass.1991) (Keeton, J.).

Although the defendant co-executors argue that the common law claims against the estate of An Wang do not survive his death, this Court applies New Jersey's six year survival statute and the claims, therefore, survive.[9] *See* N.J. STAT.ANN. § 2A:14–1 (West 1994); *id.* § 2A:15–4. The defendant co-executors disputed venue at the time the transfer was sought and Salkind so stipulated.[10] Thus, the rule of *Van Dusen v. Barrack,* 376 U.S. 612, 634 (1964) and *Ferens v. John Deere Co.,* 494 U.S. 516, 530–31 (1990) that "the law does not change following a transfer of venue under § 1404(a)" does not automatically apply. The plaintiff who chooses an improper forum under federal law should not acquire the right to the application of that forum state's law. *See* John D. Currivan, Note, *Choice of Law in Federal Court After Transfer of Venue,* 63 CORNELL L.REV. 149, 160 n. 57 (1977). The Court here applies the law of the transferee forum, including Massachusetts' choice of law provisions.[11] *Cf. Schuman v. Mezzetti,* 702 F.Supp. 52, 54 (E.D.N.Y.1988) (after parties stipulated to a § 1404(a) transfer, the transferee court refused to apply its own choice of law rules because the jurisdiction of the transferor court was not challenged at the time the transfer was sought).

***9** The Massachusetts choice of law rule is a hybrid, mixing *lex loci delicti* and the Second Restatement's "most significant relationship" test. *See Alves v. Siegel's Broadway Auto Parts, Inc.,* 710 F.Supp. 864, 870 (D.Mass.1989) (Harrington, J); *Pevoski v. Pevoski,* 371 Mass. 358, 360 (1976). Under Massachusetts law, the

place of the tort of fraud is the place where the loss is sustained, here New Jersey. *See Doody v. John Sexton & Co.,* 411 F.2d 1119, 1121 n. 3 (1st Cir.1969). Under the Restatement rule the four factors cited by the parties—(1) the place of the plaintiff's reliance; (2) the place where the plaintiff received the representations; (3) the place where the defendant made the representations; and (4) the domicile, residence, and place of business of the parties—in the aggregate also favor New Jersey.[12] New Jersey law thus applies, including its survival statute. The common law claims, therefore, survive An Wang's death pursuant to New Jersey law.

F. Unfair and Deceptive Business Practices Under Mass.Gen.L. ch. 93A, § 2 (Count VI)

The demand letter required by Mass.Gen.L. ch. 93A, § 9(3) to be sent at least 30 days prior to filing suit was not sent until June 17, 1994, the same day Salkind filed the First Amended Complaint. According to the defendants, this failure defeats the purpose of the requirement and bars the claim. Salkind's demand, however, concededly "depend[s] on precisely the same allegation of misconduct" pleaded in the original complaint (Defendant's Brief at 13) and was rejected in July, 1994. Therefore, dismissing the 93A claim for failure timely to send a demand letter requiring Salkind to send yet another letter and file another action 30 days thereafter, would be a particularly "fruitless ceremony." *See York v. Sullivan,* 369 Mass. 157, 163 (1975).

Regardless, Salkind does not allege that any of the defendants, with the exception of Miller, were involved in the "trade or commerce" of selling securities, which includes "advertising, the offering for sale, ... the sale, ... or distribution of ... any security...." MASS.GEN.LAWS ANN. ch. 93A, § 1(b); *cf. Wells v. Monarch Capital Corp.,* No. 91–10575–MA, 1991 WL 354938, at *13 (D.Mass. Aug. 23, 1991) (Mazzone, J.) (93A makes the *seller* of securities liable). The actions by defendants of which Salkind complains—publicly disseminating statements reflecting confidence in the company's future—simply do not constitute "trade or commerce" as defined under 93A when stock is purchased by investors through open markets. *Cf. In re Par Pharmaceutical, Inc. Securities Litigation,* 733 F.Supp. 668, 683–84 (S.D.N.Y.1990) (director defendants did not commit "fraud in the *sale* of securities" under RICO by issuing misleading statements affecting purchasers in the open market) (emphasis supplied). Count VI is therefore dismissed as to all defendants except Miller, who allegedly made statements within the limitations period directly to Salkind (statement [6]) encouraging him to continue investing in the Company by the retention and purchase of securities.

III. CONCLUSION

***10** For the reasons set forth above, the Court hereby rules as follows:

1) Statements [1]–[2], [4]–[15], and nondisclosure [3] are material as matter of law. All other statements and omissions alleged in the First Amended Complaint are immaterial as matter of law and are hereby dismissed.

2) Statement [1] is time-barred by the statute of repose, as is nondisclosure [3] from August to December 10, 1989.

3) Statements [6]–[14] occurred after the death of An Wang, and thus may not proceed against the co-executors of his estate. Those statements are hereby dismissed as to the co-executors.

4) Statement [2] has not been pleaded with the requisite particularity and is hereby dismissed.
5) The counts under section 10(b) and Rule

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10b–5 have not been pleaded with the requisite particularity and are hereby dismissed as to the defendants Louis W. Cabot, Harry H.S. Chou, Michael F. Mee, William J. Pechilis, Earnest Stockwell, Jr., Howard R. Swearer, Paul E. Tsongas, Courtney S. Wang, Lorraine C. Wang, and Peter A. Brooke.

6) The counts under section 20(a) are dismissed except as to Miller and the estate of An Wang regarding statements [4] and [5]. Statements [6]–[15] are hereby dismissed as to the individual defendants.

7) The RICO counts (VIII and IX) are hereby dismissed as to all defendants.

8) The common law claim of fraud and negligent misrepresentation (Counts V and VII) are hereby dismissed as to all defendants except the estate of An Wang, Miller, and Cullinane.

9) The chapter 93A claim (Count VI) is hereby dismissed as to all defendants and statements except Miller and statement [6].

1 The cases were consolidated into *Burke* in October, 1991.

2 Although by its terms Section 10 allows such judgment only upon a determination of its propriety by the Supreme Judicial Court of Massachusetts, the Massachusetts legislature cannot oust the federal courts' jurisdiction and thus culpable neglect must be decided by this Court. *Eubank Heights Apartments, Ltd. v. Lebow,* 615 F.2d 571, 574 (1st Cir.1980).

3 Salkind also argues that the Massachusetts non-claim statute is preempted by federal securities laws and federal RICO statutes. Salkind argues that, although § 10(b) of the Exchange Act contains no specific limitations period, § 27A of that Act implicitly adopts the limitations period imposed by the Supreme Court in *Lampf.* The section provides that the statute of limitations set forth in *Lampf* shall not apply to cases commenced on or before June 19, 1991. Salkind argues that this is an implicit endorsement of the Court imposed limitations period for cases commenced after June 19, 1991. Since uniform statutes of limitations adopted by Congress cannot be shortened by a state statute, Salkind argues that the *Lampf* limitation period is definitive and controlling and thus his suit is not barred by the Massachusetts non-claim statute. Because this Court finds that, even under the Massachusetts statute, Salkind's claim survives, it need not address the preemption issue here.

4 In their memorandum in support of their motion to dismiss the original complaint, the defendants counted 76 fraudulent statements alleged by Salkind.

5 The original complaint failed to do even this.

6 The defendant Peter A. Brooke is charged with statements that are immaterial as matter of law, viz:

> The balance sheet has been strengthened and a plan is now being executed to return [the Company] to profitability. Rick Miller's accomplishments since becoming president in August, his

> experience, and his track record of success make him the individual most qualified to lead [the Company] back to profitability.
>
> * * *
>
> Industry conditions remain extremely difficult, but we believe we have in place the programs necessary to complete the turnaround.
>
> * * *
>
> Our debt reduction and cost reduction plans are on schedule and we will continue the vigorous implementation of these plans in order to return the company to profitability in the near term.
>
> * * *
>
> I am confident that these plans will succeed in returning [the Company] to profitability.

(First Am.Comp. ¶ 219).

7 Although the defendant William J. Pechilis was not elected a Director until 1991 and the defendant John J. Cullinane did not become a director until the second quarter of FY 1992, after the last actionable misleading statement was made, they could, nevertheless, be held liable under section 20(a) for earlier statements which they subsequently discovered to have been misleading pursuant to the continuing duty to correct such statements recognized in *Backman v. Polaroid Corp.,* 910 F.2d 10, 16–17 (1st Cir.1990).

8 To the extent Salkind has also pleaded predicate acts of mail fraud and wire fraud related to the mailing of Company statements and other business transactions, these do not satisfy the particularity requirements of Rule 9(b) as no alleged facts support the defendants "having devised or intending to devise [a] scheme or artifice to defraud." *See* 18 U.S.C.A. §§ 1341, 1343 (West Supp.1993). Regardless, the additional alleged acts of mail and wire fraud are only incidental to the alleged 10b–5 violations and do not add much to any "pattern." *See Trundy v. Strumsky,* 729 F.Supp. 178, 184 (D.Mass.1990) ("[c]ourts are particularly reluctant to rely over much on mail fraud predicates to establish a RICO pattern."); *see also Roeder v. Alpha Indus. Inc.,* 814 F.2d 22, 31 (1st Cir.1987).

9 The Massachusetts survival statute has historically not been applied to torts such as fraud which result in pecuniary loss. *See Gallagher v. First Nat'l Bank of Boston,* 346 Mass. 587, 590–91 (1964). Salkind argues that the Massachusetts Supreme Judicial Court would now hold otherwise in light of its decision in *Harrison v. Loyal Protective Life Insurance Co.,* 379 Mass. 212, 216 (1979), where it held that because the function of damage awards in tort actions is now recognized as compensatory, rather than punitive, the reason for the non-survival rule has ceased to exist and it is time to "reexamine this flexibly drawn statute." In light of this Court's decision to apply New Jersey law, no opinion is expressed on this issue.

10 The Stipulation and Order for Transfer states, *inter alia:*

> IT IS FURTHER STIPULATED AND AGREED that,

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notwithstanding this Stipulation to Transfer the venue of the action pursuant to 28 U.S.C. § 1404(a), defendants deny that the District of New Jersey is or was a proper venue for the action.

11 *Cf. New England Telephone & Telegraph Co. v. Gourdeau Co.,* 419 Mass. 658, 1995 WL 103738 (D.Mass. March 9, 1995) (if a claim would be time-barred under a foreign state's statute of limitations but timely under the Massachusetts statute, Massachusetts will apply its own statute unless it would serve no substantial interest of Massachusetts to allow the suit and the other state has a more significant relationship to the parties and the occurrence.)

12 Alternatively, if the Court were to apply New Jersey's "governmental interest" choice of law rule, *Veazey v. Doremus,* 510 A.2d 1187, 1189 (N.J.1986), which would compare New Jersey's significant interest in recovery for its injured plaintiff despite the death of the defendant with Massachusetts' lesser interest in the expeditious and final resolution of its probate proceedings, the Court would likewise apply New Jersey law.

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