COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. 2025-P-1192

MAJIDA ORTIZ AND URSZULA MASNY-LATOS, ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED

Plaintiffs/Appellants

v.

EVERSOURCE ENERGY
Defendant/Appellee

On Appeal From Suffolk Superior Court

REPLY BRIEF FOR APPELLANTS MAJIDA ORTIZ AND URSZULA MASNY-LATOS, ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED

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INTRODUCTION

Eversource expends considerable space challenging (and distorting) Plaintiffs' well-pled factual allegations and repeating arguments rejected by the trial court. Defendant also contends that Plaintiffs have waived numerous of their arguments, which deceptive strategy it also deployed in opposing Plaintiffs' Petition for Direct Appellate Review. Although Plaintiffs had no opportunity to rebut the falsehoods then, they do so now.

Plaintiffs first address some of Defendant's distortion of Plaintiffs' factual allegations, which goes to its lack of credibility, then address Defendant's waiver allegations and the substance of the underlying issues.

ARGUMENT

I. Defendant's Meritless Attacks on Plaintiffs' Well-Pled Factual Allegations

On a motion to dismiss, the court is bound by Plaintiffs' well-pled factual allegations as the trial court properly held. Order at 4 (RAIII 211); Ps App. Br. at 11-18 (Statement of Facts). Nonetheless, Defendant attempts to undermine those facts, *e.g.*, by misciting and mischaracterizing the allegations and

evidence, taking them out of context (while claiming the opposite) and claiming they are "subjective." *See, e.g.*, Opp at 60-64.[1]

To briefly recap their Statement of Facts, Plaintiffs complain about Defendant's marketing of its gas as "clean" and "safe" for cooking, even though it contains designated Hazardous Air Pollutants and produces toxins during combustion, while furthering the deception by deemphasizing the need for external ventilation, and its marketing of its gas as eco-friendly ("green" "clean" and "good" for the environment) despite it being a significant contributor to climate pollution, on par or worse than coal due to significant pipeline leaks of the methane. Ps App. Br. at 11-13, 19. The *objective* falsehoods of its marketing are established by the myriad scientific studies cited in their Complaint. *Id.* at 13-17, 18-20.

In addition, Plaintiffs alleged that to further conceal its gas' harmful climate impact Defendants made materially misleading misstatements regarding its "sustainability" efforts and its so-called goal of

[1] *See* Ps Opp to MTD at 22-23 for Plaintiffs' rebuttal of Defendant's aspirational and forward-looking contentions. (RAIII 189-190)

"decarbonizing" its pipeline with biogas and hydrogen. These allegations are well supported – *see, e.g.*, regarding biogas sources actually raising emissions,[2] and hydrogen as undeveloped and in short supply.[3] *See* Ps App Br. at 22-24; Compl., ¶¶ 65-67 (RAI 039-41). Defendant's greenwashing as shown in its false "carbon-neutral" marketing is exhaustively detailed. Compl., ¶¶ 69-79. (RAI 041-45) In light of these well-pled facts, Defendant's response to Plaintiffs' allegations that Defendant has "no intent or ability to make good on its statements" are amply supported by the record, not "conclusory." Opp. at 61, fn 7. And its further response that "[n]othing in the

[2] *See* Compl., ¶ 67 (RAI 040-41), with link to Grubert, Emily, *At scale, renewable natural gas systems could be climate intensive: the influence of methane feedstock and leakage rates*, 2020 Environ. Res. Lett. 15 084041 (also in October 31, 2023 demand letter at fn 77). (RAI 086)

[3] *See* Compl., ¶ 2 (RAI 011), which incorporates the factual allegations (and thus vast number of scientific studies therein) in their October 31, 2023 demand letter (Exh A to Complaint) (RAI 059-90). Regarding hydrogen being undeveloped/unsuitable, Complaint, ¶ 67, cites fn 81 of demand letter, which cites multiple studies, as it does for implausibility/impracticability of hydrogen. (RAI 087).

Complaint makes this (false) assertion plausible" (*id.*) is easily disproved.

Defendant shamelessly repeats arguments *that it knows are false* because they were specifically rebutted below. That is, although Plaintiffs detailed *multiple* years of marketing greenwashing (that linked to *multiple* annual "Sustainability" reports that equally omitted or distorted its "carbon-neutral by 2030" claims), Defendant nonetheless reasserts that its allegedly omitted limitations were actually made "on the very same page and in the very same font…" as if stated only once (Opp. at 64). *See* Ps MTD Opp. at 23-24 (rebutting precise argument) (RAI 189-90); Compl., ¶¶ 69-77 (RAI 041-43).[4]

Defendant also references an Eversource video that refers to a carbon-monoxide danger if the gas stove burner is not "adjusted" properly. Opp. at 23, 63. But Plaintiffs' allegation is that this video furthers Defendant's deceptive marketing that is gas is clean and safe: it fails to disclose any of the other noxious byproducts resulting from gas'

[4] *See* Ps App Br. at 23-24 (detailing many statements containing no disclosures, and that later "buried" partial disclosures were still deceptive).

combustion (i.e., nitrous dioxide; formaldehyde), even from "adjusted" burners, or the necessity of ventilation. *See* Ps App. Br. at 17 (citing Compl., ¶ 33-34 discussing ads, RAI 024-26).[5] "Eversource sells its product's "safety" by offering half-measures, while covering up the gas's potential health risks, thereby deceiving its customers that they are protecting themselves." Compl., ¶ 34 (RAI 025-26).

II. Plaintiffs' Arguments Concerning the Filed Rates were Raised Below and are Correct

Most of Defendant's arguments concerning the "filed-rate doctrine" ("FRD") rely on out of state or federal cases. The trial court itself never uses the term, although it cites *Haverhill Gas Co. v. Findlen*, 357 Mass. 417, 420 (1970), which discusses the two prongs associated with FRD. The trial court did discuss the DPU-approved tariff and rejected all of Plaintiffs' claims as if they were all based on an "overpayment" theory of damages on grounds the

[5] Its Facebook ad linked to this video pictures the ventless stove and falsely conveys it will run "safety" if tuned up. *See* Compl., Exh. E (RAI 103-104). The video is still available online: https://www.facebook.com/EversourceMA/videos/whether-its-baking-or-whipping-up-dinner%EF%B8%8F-if-you-have-a-gas-stove-in-your-home-/374915769801174

tariff's filed rates were fixed so there was no economic injury. Order at 8-9. (RAII 215-216) Plaintiffs' appeal concerns their other damage theories, ignored or misconstrued by the court, having nothing to do with the filed rates.

Defendant claims that Plaintiffs waived their arguments with regards both prongs of a FRD analysis. This is false. While neither the trial court, nor any case applicable to consumer protection claims has applied this "doctrine" in Massachusetts,[6] Plaintiffs addressed these issues raised below. The first "non-discrimination" prong *underpinning* the FRD concept concerns preserving rate "equity" among ratepayers. *See Haverhill*, 357 Mass. at 420; Ps App. Br at 36. Defendant contends (Opp. at 42) Plaintiffs waived their argument that prong 1 is inapplicable to a class action (there can be no rate discrimination among a class of all rate payers).[7] But Plaintiffs' opposition to dismissal emphasized: "Lastly, the FRD has no

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[6] *See, e.g. Rodriguez v. Mass. Bay Transp. Auth.*, 33 Mass. L. Rep. 418, *17-18 (2016) ("There appear to be no Massachusetts cases specifically addressing this doctrine").

[7] *See reasoning in, e.g., Villarroel v. Recology, Inc.*, 97 Cal.App.5th 762, 778-780, 789 (2023).

application to Plaintiffs' claim for damages for the value of the carbon offsets… These damages are sought on a Class-wide basis for all its residential customers." Ps MTD Opp. at 19. (RAIII 186) Because the posture of the case renders prong 1 *per se* inapplicable, and Plaintiffs made this point explicitly below, there is no waiver.[8] In any event, the economic and non-economic damages that Plaintiffs seek are direct, indirect or consequential damages having nothing to do with the filed rate as discussed below.

Under the second "non-justiciability" prong *underlying* FRD (prong 2), courts seek to not undermine regulator's jurisdiction as to "rates validly determined." *Haverhill*, 357 Mass. at 421. Here, Defendant makes its waiver argument (Opp. at 44-45) by distorting both its own initial argument (it actually claimed the case would impinge DPU's plenary authority, never mentioning compelled speech), as well

[8] Defendant asserts, without discussion, that "individual determinations will be necessary." Opp. at 43. This is premature, and wrong. The putative Class is all MA residential customers who pay a common rate. Carbon offsets will be uniform, based on volume of gas sold to each. Gas Stove Subclass's damages may be $25 each (or, *e.g.*, based on average diminished values or mitigation costs) as determined in future proceedings.

as Plaintiffs' argument (which was actually that Plaintiffs' claims and relief do not disturb DPU jurisdiction as evidenced by c. 93A, § 9 (7) (a) - (b)). *Compare* D MTD Br. at 24 (RAII 039) and Ps Opp to MTD at 25. (RAIII 192). In fact, Defendant still fails to show how those claims Plaintiffs are pressing on appeal would by "substantial likelihood" "disrupt or be inconsistent with a regulatory scheme" (c. 93A, § 9 (7)(a)) or that the DPU would have a "substantial interest" in pre-reviewing the transaction or could provide the same relief as the court (*id.*, § 9 (7)(b). Ps App Br. 48-49. Thus, these c. 93A deference standards evidence that there are no prong 1 or 2 concerns here. Plaintiffs' claims are allowed under the tariff, and they are entitled to benefit of the bargain damages.

A. The Injury and Relief Plaintiffs Seek are Not Precluded by the Tariff Nor Concern Filed Rates

Defendant claims Plaintiffs conflate the filed rate doctrine and the tariff. It states (Opp. at 43) in relevant part:

> Plaintiffs make no argument that the scope of the filed-rate doctrine is at all affected by the liability-limiting tariff provision.

> For a similar reason, Plaintiffs' argument that their damages theory survives because "byproducts" and "carbon offsets" are not regulated misses the point. Pls.' Br. at 38. Plaintiffs cite nothing for the proposition that a filed rate is open to collateral challenge on such grounds. Plaintiffs' value-deficiency argument squarely and unambiguously asserts that the natural gas they used was worth less than what they paid. Massachusetts law bars this claim.

But this reveals Defendant's fundamental mischaracterization of Plaintiffs' claims. For example, if Defendant ran its truck into Plaintiffs' houses and introduced toxic materials, it would be liable for the damage to the house and for the cost to remove (or mitigate) the toxic materials it introduced under the tariff. *See* Ps App. Br. at 39-41. Here, Defendant did the same thing (without the truck) – it introduced a gas containing pollutants and byproducts into the house all while concealing and covering up its toxic nature around cooking and its adverse climate impact. While it had consent to provide gas it marketed as clean and safe, that was nullified by the coverup.

Thus, Defendant differentiated its gas as <u>fuel</u> (which is subject to its tariff) versus the gas's emissions or byproducts when burned (which are not), but then failed to provide the differentiated "green"

and "clean" product materially important to its customers. Ps App Br. at 44. In the language of *Shaulis v. Nordstrom, Inc.*, 865 F. 3d 1 (1st Cir. 2017), which Defendant relies on, the product was *objectively* deficient (polluting, not green, and emitting toxins in the home, not clean) and therefore represents a harm separate from the deceptive advertising. Ps App Br. at 44.

Defendant has thus cost-shifted the expense of climate mitigation to the Class. These are direct, indirect or consequential damages that the tariff does not preclude and to which Plaintiffs are entitled to relief (by order that Defendant purchase the carbon offsets, or payment to the Class directly so they can do so). The Gas Stove Subclass similarly suffered *Tyler* and *Carr*-like nuisance, changed behavior, and objective diminished value of their gas appliances.[9] As

[9] *See Tyler v. Michaels Stores, Inc.*, 464 Mass. 492, 504, and n. 20 (2013); *Carr v. BG Retail, LLC & Caleres, Inc.*, 2025 WL 254393 (D. Mass. Sept. 4, 2025) (Kelley, J.) at *7 (finding c. 93A injury in putative class action asserting "concrete harms, including nuisance, wasted time, displacement of important messages, and consumption of limited email storage, causally linked to Defendants' use of her email address. These are objective consequences, not merely a subjective sense of diminished value...").

a result, they are entitled to pursue the resulting damages (*e.g.*, accrued costs of mitigating the continuing pollution (e.g., ventilation) to conform to the claimed clean and safe product sold them, and/or diminished value of appliances.[10]

B. Plaintiffs have Adequately Pled Benefit of the Bargain Injury

Defendant claims Plaintiffs are not entitled to the benefit of the bargain. Opp. at 24. This is not a case about a regulated company selling its gas at the grade and price set forth in its tariff, which is what occurred in the individual breach of contact case *Haverhill*. Defendant here differentiated its gas and marketed that differentiated product going beyond the regulated grade and price, then failed to provide that product in violation of the consumer protection statutes from which utilities are not exempt. As a result, Defendant cost-shifted the expense of achieving the admittedly-material characteristics of its gas to Plaintiffs.

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[10] The tariff does not preclude any of Plaintiffs' claims, including under § 6.4. *See* Ps MTD Opp. Br. at 16-18. (RAIII 183-185) Defendant had moved for dismissal based on § 6.4 (D MTD Br. at 9-10), (RAII 024-25) but waived it in light of Plaintiffs' briefing at oral argument. *See* Hearing Trans. at 12-13. (RA (RAIII 254-55)

Thus, Plaintiffs have been injured and are entitled to recover the benefit of their bargain, and may seek the resulting economic and noneconomic damages and/or equitable relief for their injuries.

Plaintiffs would be entitled to statutory damages because they suffered injury caused by Defendant's c. 93A violations, even if their damages were not quantifiable. *See Bellermann v. Fitchburg Gas and Elec. Light Co.*, 475 Mass. 67, 72 (2016) (damages need not be quantifiable). Notably, in *Bellermann*, 475 Mass at 69, the SJC's analysis did not concern the FRD even though plaintiffs claimed they overpaid for the utility's services. Rather, the Court analyzed and determined that the claimed injury (plaintiffs having paid for and been deceived about the electric company's level of [inadequate] storm preparedness) had not resulted in actual injury (no storm having occurred). *Id.* at 77. The SJC's concerns expressed in *Bellermann,* for which it cited at page 76 the district court's *Shaulis* decision (for propositions no injury exists where product no longer owned, and the risk of injury had disappeared), do not apply to Plaintiffs. Here, they suffered separate injuries that occurred and are ongoing, whether or not quantifiable, in

accord with SJC jurisprudence in, *e.g.*, *Tyler*, *Carr* and *Aspinall v. Philip Morris Cos.*, 442 Mass 381 (2004). Ps App Br. at 41-43.

C. Plaintiffs' Over-purchase Theory is Not Equivalent to Overpayment

Plaintiffs allege that, had Defendant not misrepresented its gas as clean, safe and good for the environment and around cooking, which claims were material to consumers, that they would have "purchased less of the gas." Compl., ¶¶ 8, 9. (RAI 013) This is a viable injury under c.93A. Defendant argues that this theory is the same as an overpayment theory (which it argues FRD precludes). Opp. at 40. This analysis does not bear scrutiny. Defendant cites no Massachusetts court holding that, under c.93A, an "over-purchasing" theory is equivalent to a price premium or overpayment theory. Defendant and the trial court relied on *Haverhill*, but that case held only that, in the breach of contract context, a consumer could not refuse to pay for gas on the same basis as every other consumer. It did not analyze c. 93A § 9, which had been enacted by the legislature less than a year prior and was not at issue in the case. And *Haverhill* did not involve the false marketing, toxic exposures and

environmental impacts at issue here nor the resulting non-economic and economic harms. A consumer who, because of Defendant's deceit, unwittingly subjects their family to toxic chemicals, or unwittingly harms the environment instead of helping it as Defendant told them it would, is harmed in a qualitatively different way than simply having paid more for the product than they otherwise would have. Consumers are not solely concerned with the economic value of their purchases. For example, a vegetarian who purchases a hamburger deceptively marketed as meatless has surely suffered injury regardless of whether they received adequate "value" for that purchase. The injury need not be quantifiable.

III. Plaintiffs' Claims Concerning Gas Stoves and the Resulting Non-economic and Economic Injuries were Not Waived

Defendant contends that Plaintiffs disclaimed injury related to the "supposed ill-health effects of natural gas." Opp. at 48. Therefore, it contends Plaintiffs waived all harms "derived from alleged personal injury." *Id*. Ironically, it makes this argument for the first time on appeal, and is waived. It is also a gross distortion of the disclaimer. The Complaint states: "(Plaintiffs are not seeking any

determinations, recovery or damages with regards any personal health injuries that might or could be alleged in this demand or a subsequent lawsuit.)" Compl., ¶ 1 (RAI 010).

Defendant would have this Court convert this disclaimer into a renunciation of what it labels all "incidents of such injuries" akin to crutches after a car accident. Opp. at 49. It grossly misreads the Complaint. Following ¶ 1, the Complaint identifies numerous deceptive marketing claims Defendant made about its gas being, *e.g.*, "clean" and "safe" around cooking, and the studies showing it is neither (*see* Compl., ¶¶ 19-42, RAI 019-29), for which Plaintiffs suffered non-economic injury (nuisance, altered their behavior) and economic injury (accrued costs to mitigate or diminished values, and the cost of testing their air) due to the toxic gases in their home. *See, e.g.*, *Carr,* 2025 WL 254393 at *7; Ps App. Br. at 26, 41-43. These do not concern "personal health injuries," such as illness or medical bills, that Plaintiffs expressly excluded from this lawsuit.[11]

[11] Defendant argues Plaintiffs allege its gas only adversely concerns "vulnerable" populations. Opp at 22; 49-50. Actually, the Complaint cites a recent Boston study finding 21 Hazardous Air Pollutants in

IV. Plaintiffs are Entitled to Enjoin Defendant under Chapter 266, § 91

A. Plaintiffs Timely Pressed Their Argument

Defendant asserts that Plaintiffs waived their argument on how G.L. c. 266, § 91 should be interpreted on grounds Plaintiffs first raised this issue in their Motion for Reconsideration of the Order. Opp. at 52. There is no waiver. The trial court first held that § 91 is subject to the same "injury" standard as c. 93A in its Order at 10 (RAIII 217), to which Plaintiffs responded in seeking reconsideration. RAIII 221-230. Defendant disingenuously cites its motion to dismiss brief (at footnote 4 only) to suggest it raised this issue below. Opp. at 52-53. But Defendant never mentioned an injury requirement akin to that in c. 93A in the footnote nor the entire 7 page section. *See* D MTD Br. at 16-23, RAII 031-38.[12] Instead, it argued its

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the raw gas, and studies identifying toxic pollutants resulting from the gas' combustion. *See, e.g.*, Ps App Br at 13-14. The Complaint notes, *e.g.*, children are "particularly vulnerable". *Id.* at 15.

[12] Neither of the two federal district court cases cited in footnote 4 establish such an injury requirement. And Defendant never even mentioned the term "aggrieved."

marketing was "true (without a tendency to mislead), they are general statements of quality and value, and/or they are aspirational or forward-looking statements." *Id.* at 17.

B. Plaintiffs are "aggrieved part[ies]" under Chapter 266, § 91

Defendant argues that G.L. c. 266, § 91 is a criminal statute and, therefore, should be interpreted narrowly. Opp. at 55. This ignores the civil component providing standing for "any aggrieved party" to seek a civil injunction.[13] To state the obvious, only the Commonwealth may prosecute criminal statutes. *See In The Matter Of Wayne Chapman*, 482 Mass. 1012, 1014 (2019).[14] Judge Woodlock rejected this precise argument in *Bezdek v. Vibram USA Inc.*, 2013 WL 639145, *8 (D. Mass. Feb. 20, 2013) ("I see no reason to apply

[13] Meant to protect consumers "[g]enerally, remedial statutes … are entitled to liberal construction." *Depianti v. Jan-Pro Franchising Int'l, Inc.*, 465 Mass. 607, 620 (2013).

[14] Defendant misleadingly cites *Herman v. Admit One Ticket Agency LLC*, 454 Mass. 611, 618 n. 15 (2009). It does not support the claim criminal statues are construed narrowly even in a civil context. Opp. at 55. *Herman* relies on *Commonwealth v. Pagan*, 445 Mass. 161, 167 (2005), which concerned protecting criminal defendant's rights.

a heightened standard when the statute contemplates a private equitable remedy sounding in fraud").

First of all, Plaintiffs have suffered c. 93A injury as shown above so they are aggrieved under the trial court's analysis.

Second, based on the statute's text and purpose Plaintiffs have shown that they are "aggrieved" under c. 266, § 91, irrespective of whether they meet the c. 93A injury standard. Ps App Br. at 50-53. Defendant's opposition ignores the text in § 91.[15]

Plaintiffs' allegations that Defendant's intent was to, per the express language in § 91, "increase the consumption of" its gas through its deceptive ads (and that it succeeded with Plaintiffs), is more than enough to show they are "aggrieved" -- for purposes of being able to seek prospective injunctive relief to protect themselves (and public writ large) against the false ads. This is particularly apt where Plaintiffs have an ongoing relationship with their gas company

[15] *See Mass. Teachers' Ret. Sys. v. Contributory Ret. Appeal Bd.*, 466 Mass. 292, 298 (2013) ("[o]ur focus at this stage [judgment on the pleadings] is on the text of the statute because its plain meaning will serve as our primary interpretive guide.").

and need to know that its future statements about its gas are true.

It would be illogical to read the same standard applicable to c. 93A (which expressly requires an "injury" and provides for damages) into c. 266, § 91, which uses the different term "aggrieved" and does not provide for damages. These differences are material.[16] In fact, Defendant bemoans precisely what § 91 is designed to do: give standing to a private party (consumer) who is *already* aware of the deceptive advertising in order to pursue prospective injunctive relief to stop the falsehoods from continuing. This is in stark contrast to the general rule. *In re Evenflo Co., Mktg., Sales Pracs. & Prods. Liab. Litig.*, 2022 WL 252331, at *34 (D. Mass. Jan. 27, 2022) (citations omitted) (plaintiff lacked standing to seek injunctive relief once aware of alleged risk). *See Kilbane v. Secretary of Human Services*, 14 Mass. App. Ct. 286, 289-90 (1982) (per

[16] *See Canton v. Comm'r of the Mass. Highway Dep't*, 455 Mass. 783, 794 (2010) ("We do not read into [a] statute a provision which the Legislature did not see fit to put there, nor add words that [it] had an option to, but chose not to include" (citation omitted).

legislative history, c. 266, § 91 is to, *e.g.*, protect consumers from "the excesses of the pitchman").

This is the first time G.L. c. 266, § 91 will be interpreted by a Massachusetts appellate court. None of Defendant's cited cases support its claim that "aggrieved party" in § 91 "parallels" the standing required for a c. 93A,[17] and has been "universally" so interpreted, citing *DiCroce v. McNeil Nutrionals, LLC*, 640 F.Supp.3d 182, 188 (D. Mass. 2022) (appeal citations omitted). Opp. at 55. *DiCroce* never even discussed c. 266, § 91 standing.

The trial court cited *Marashlian v Zoning Board of Appeals*, 421 Mass. 719 (1996) ("person aggrieved" under zoning statute included one who "suffers some infringement of his legal rights."). Order at 11 (RAIII 218). In that case, the SJC also held that the term "person aggrieved" "should not be read narrowly," and plaintiff abutters "enjoy[ed] a rebuttable presumption they are 'persons aggrieved.'" *Marashlian*,

[17] *See* Opp. at 54, citing *Mass. Elec. Co. v. Mass. Comm'n Against Discrimination*, 375 Mass. 160, 161-62 (1978) (involved claim for money damages, *i.e.*, eligibility to receive disability benefits/compensation), and *Slama v. Attorney Gen.*, 384 Mass. 620, 623-624 (1981) (concerned standing to compel A.G. to certify citizen's Initiative).

421 Mass. at 721. Certain "fears, based on all the evidence" met the standard. *Id.* at 723. Similarly, under c. 266, § 91, consumers who succumbed to false advertising should have a similar rebuttable presumption, one that is certainly met if an advertiser tricked them and even induced them to consume (more of) the product.

The two G.L. c. 266, § 91 cases relied on by the trial court, *Bezdek v. Vibram USA Inc.*, 2013 WL639145 (D. Mass. Feb. 20, 2013) and *Chenlen v. Philips Elecs. N. Am.*, 2006 WL 696568 (Mass. Super. Mar. 1, 2006), (Order at 10), RAIII 217, are no precedent. The *Chenlen* decision contains no analysis of "aggrieved" and relied on *Thornton v. Harvard Univ.*, 2 F. Supp. 2d 89 (D. Mass. 1998) although *Thornton* which was silent on this issue. In *Bezdek,* the judge merely "assume[d] that an injury cognizable under chapter 93A is also cognizable under the false advertising statute [c. 266, § 91]," *Id.,* fn. 5.

Defendant stoops to chicanery in citing *Zimmerman v Bogoff*, 402 Mass 650, 662 (1988). That case, which never mentions c. 266, § 91, held c. 93A is not applicable to internal business disputes. From that holding alone, Defendant postulates randomly that with

regards shareholder derivative actions, § 91 "is not expressly so limited." Opp. at 56.

C. Plaintiffs May Also Pursue Their Allegations Under Chapter 266, § 91B

In the event the Court concludes Plaintiffs cannot proceed under G.L. c. 266, § 91(*e.g.*, because of how "criminal" statutes are to be interpreted), they should be permitted to pursue their claim under its sister statute, § 91B, which provides purely injunctive relief:

> Any person offering for sale merchandise, commodities or service … with the intent, design or purpose … not to sell the merchandise, commodities, or service so advertised, may be enjoined from such advertising by a bill in equity in the superior court brought by … any aggrieved party.

Since the civil remedy is the same in both, and Defendant will thus suffer no prejudice, Appellants should be allowed to pursue injunctive relief under § 91B going forward and upon remand will move to amend. *Lanier v. President and Fellows of Harvard College*, 490 Mass. 37, 39-40 (2022) (dismissal reversed and remanded to allow plaintiff to amend complaint to add new, similar cause of action).

V. Declaratory Judgement and Injunctive Relief are Not Moot

Plaintiffs have set forth a prima facia case that Defendant's mass marketing was deceptive, misleading and/or omitted material information and that they have been harmed. Actual controversies are not moot. *Lynn v. Murrell*, 489 Mass. 579 (2002) (courts hear actual controversies); *In re Sturtz*, 410 Mass. 58 (1991) (same). Defendant denies all allegations concerning its marketing (Opp. at 61-65), so declaratory relief is ripe and particularly important given the seriousness of allegations and public importance. *Murrell*, 489 Mass. at 582 (case not moot if court can provide effective relief). Defendant alludes to having ceased making such marketing claims (Opp. at 65), but this is outside the record. *See Nader v. Citron*, 372 Mass. 96, 98 (1977) (on dismissal motion "all materials outside the pleadings are excluded from this review"). Moreover, the Eversource Facebook page currently displaying its deceptive stove video (discussed herein) suggests otherwise. This case is nothing like those finding mootness; *e.g.*, *Murrell* (moot because Covid-mask mandates at issued ended);

Sturtz (moot because guardianship at issue had terminated).

This Court can declare Defendant's conduct violative of law and award damages, order it to make corrective disclosures and/or accurately promote and substantiate its ads going forward (Compl., ¶¶ 102-103, RAI 052-53), and bar it from indirectly funding deceptive ads through third parties (Compl., ¶ 104, RAI 053).

CONCLUSION

For all Plaintiffs' proffered reasons, this Court should find for Plaintiffs and remand the case to the trial court for further proceedings.

April 30, 2026 Respectfully submitted,

Plaintiffs Majida Ortiz and
Urszula Masny-Latos,

By their attorneys,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Jason B. Adkins, hereby certify that the foregoing Reply Brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

> Mass. R. A. P. 16 (a)(13) (addendum);
> Mass. R. A. P. 16 (e) (references to the record);
> Mass. R. A. P. 18 (appendix to the briefs);
> Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and Mass. R. A. P. 21 (redaction).

I further certify that the foregoing reply brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12, and contains 4499 words, total non-excluded sections.

/s/ Jason B. Adkins

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Dated : April 30, 2026

CERTIFICATE OF SERVICE

I, Jason B. Adkins, hereby certify that on this 30th day of April 30, 2026, I served the Appellants' Reply Brief by email upon the following counsel for the Defendant:

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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
Civil No. 24-1455-BLS1

MAJIDA ORTIZ, & another[1]
Plaintiffs

vs.

EVERSOURCE ENERGY
Defendant

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS

In this class action, Majida Ortiz and Urszula Masny-Latos allege that Eversource Energy ("Eversource") marketed and sold natural gas and related services to residential consumers as clean and safe for consumers and the environment although this was not true. They assert claims for declaratory and injunctive relief and damages. Eversource now moves to dismiss for numerous reasons. Because plaintiffs have not alleged a cognizable injury under G.L. c. 93A, § 9, and G.L. c. 266, § 91, among other reasons, I must allow Eversource's motion.

BACKGROUND

A. Plaintiffs' Factual Allegations[2]

Eversource routinely communicates with its residential customers, including plaintiffs, through ads on Facebook, other social media, and traditional media, and through newsletters and information inserted in customers' monthly bills, sent via email, or posted on its website.

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[1] Urszula Masny-Latos. Plaintiffs bring this action on behalf of themselves and all persons similarly situated.

[2] This is a brief summary of the allegations in plaintiffs' 49-page Class Action Complaint and Demand for Trial by Jury ("Complaint") (Docket #1).

Plaintiffs allege that "[t]he cumulative message conveyed" by these communications is that Eversource's gas "is clean and safe (non-toxic) and good for the climate, and that Eversource operates as a good steward of the environment." Complaint ¶ 14. The Complaint provides numerous examples of such communications, including a video on Eversource's website in which the narrator claims that natural gas is clean, safe, and good for the environment, and a 2022 newsletter in which Eversource details its efforts to protect natural resources and achieve carbon neutrality by 2030.

According to plaintiffs, these communications were and are purposefully misleading. To the extent the communications suggest that natural gas is clean and safe, they are inconsistent with scientific studies showing that natural gas emits harmful chemicals – carbon monoxide, nitrogen dioxide, formaldehyde, and benzene – that create potentially dangerous levels of indoor air pollution in the homes of its residential gas customers. Insofar as the communications touch on Eversource's sustainability efforts, plaintiffs charge they constitute "greenwashing," conveying a false impression or providing misleading information to suggest that Eversource's products are more environmentally sound than they are. Eversource's communications also obscure the climate harms caused by its operations, including releasing significant amounts of methane, a potent greenhouse gas, and fracking to extract natural gas with resulting adverse environmental impacts; and obscure deficiencies in its claimed effort to make its operations more environmentally friendly.

Plaintiffs allege that they receive natural gas from Eversource to heat their homes, among other uses; they have received Eversource's promotional material asserting that its natural gas "is clean and safe, including for the environment and climate;" and had they "known the truth about the health and environmental risks of Eversource's natural gas," they "would have purchased less

of the gas in the amount of at least $1 monthly to reduce those risks." Id. ¶¶ 8, 9. Each plaintiff also alleges that she was "entitled to receive the product advertised by Eversource . . . a product that is clean, safe and good for the environment, and for her" and others. Id.

In connection with their greenwashing claim, plaintiffs assert that Eversource could have purchased "carbon offsets to counter the environmental climate impacts of its natural gas, but failed to do so," its "failure to do so has damaged the Class," and therefore "Eversource is liable to and must compensate the Class for the dollar value of the carbon offsets that should have been but were not purchased by Defendant." Id. ¶ 82.

B. Procedural Background

Plaintiffs filed this action in May 2024. They assert class claims for declaratory and injunctive relief (Count I)[3] and for damages for unfair and deceptive business practices in violation of G.L. c. 93A, § 9 (Count II), false advertising in violation of G.L. c. 266, § 91 (Count III), and unjust enrichment (Count IV). Plaintiffs seek: (1) a declaration that defendant's promotion and advertising of its natural gas contain unlawfully false, misleading and/or deceptive statements; (2) an order enjoining defendant from promoting and marketing its natural gas, including gas appliances or conversion to gas, using unlawfully false, misleading and/or deceptive statements; and (3) an order that defendant make reasonable and regular corrective disclosures to plaintiffs and the putative class members that accurately describe the potential health and safety risks of gas stoves as well as the adverse environmental and climate impacts

[3] There is no separate cause of action for injunctive relief. See Healey v. Uber Technologies, Inc., 2021 WL 1222199 at * 1 (Mass. Super. Mar. 25, 2021) (Salinger, J.) ("Though the request for injunctive relief is set out in a separate count, it is not actually a separate cause of action."). Plaintiffs' only cited bases for declaratory and injunctive relief are the alleged violations of G.L. c. 93A, § 9, and G.L. c. 266, § 91, which are separately set out in Counts II and III, respectively.

associated with natural gas. Plaintiffs also seek monetary damages under G.L. c. 93A, § 9, and through their unjust enrichment claim.

Eversource now moves to dismiss under Mass. R. Civ. P. 12(b)(8) for failure to name the correct party. It contends that it is a holding company with no revenue-generating operations, but which operates through subsidiaries, including Yankee Energy System, Inc., which in turn operates through its subsidiary, NSTAR Gas. Eversource also moves to dismiss under Mass. R. Civ. P. 12(b)(6) for failure to state a claim. Among other things, Eversource argues that plaintiffs' claims are barred by Eversource's tariff approved by the Department of Public Utilities ("DPU") and the filed-rate doctrine, and that plaintiffs have failed adequately to allege harm or causation, failed to identify any actionable misstatements by Eversource, and failed to allege a claim for unjust enrichment.

DISCUSSION

I. Standard of Review

Under Mass. R. Civ. P. 12(b)(6), I must accept the factual allegations in the complaint, consider the materials attached to and referenced in the complaint, and draw "all reasonable inferences" in plaintiff's favor. Dunn v. Genzyme Corp., 486 Mass. 713, 717 (2021). See Polay v. McMahon, 468 Mass. 379, 381 n.3 (2014) (and cases cited). Plaintiffs' factual allegations must set forth the basis for their entitlement to relief with "more than labels and conclusions," Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); "'rais[ing] a right to relief above the speculative level[,] . . . plausibly suggesting (not merely consistent with)' an entitlement to relief." Iannacchino, 451 Mass. at 636, quoting Bell Atl. Corp., 550 U.S. at 555.

II. The Named Defendant

Eversource first argues that plaintiffs have named the wrong party and, as a result, the case must be dismissed under Mass. R. Civ. P. 12(b)(8). For present purposes, plaintiffs have alleged, at a minimum, that Eversource controlled the advertising and promotion of the natural gas sold to them and to the purported class. Whether Eversource was wholly uninvolved is a factual question, which must await further development. I cannot dismiss the complaint on this basis.

Moreover, this argument elevates form over substance. Even if they named the wrong party, plaintiffs could amend to name the correct party or parties as defendants (i.e., the entity from which they purchased natural gas and the entity that included literature in their bills or promoted "Eversource" as providing natural gas that was clean and safe). To dismiss on this ground would simply kick the matter down the road until after plaintiffs amend or refile to add or substitute additional defendants.

III. Cognizable Injury for Statutory Claims for Equitable Relief and Damages

Eversource argues, among other things, that plaintiffs fail to allege sufficient facts to demonstrate a plausible basis to believe they have suffered an injury that would entitle them to relief under G.L. c. 93A, § 9, or G.L. c. 266, § 91. I agree and address each statute's requirements in turn.

A. G.L. c. 93A, § 9

For consumers to prevail on a claim under G.L. c. 93A, § 9(1), they must allege that they "ha[ve] been 'injured' by the act or practice claimed to be unfair or deceptive and therefore

unlawful under c. 93A, § 2."[4] Tyler v. Michaels Stores, Inc., 464 Mass. 492, 501-502 (2013). A cognizable injury must be "a 'separate, identifiable harm . . .' that is distinct 'from the claimed unfair or deceptive conduct itself.'" Bellermann v. Fitchburg Gas & Elec. Light Co., 475 Mass. 67, 73 (2016), quoting Tyler, 464 Mass. at 503. See Shaulis v. Nordstrom, Inc., 865 F.3d 1, 10 (1st Cir. 2017) ("To state a viable claim, the plaintiff must allege that she has suffered an 'identifiable harm' caused by the unfair or deceptive act that is separate from the violation itself."). The harm alleged may be economic or noneconomic and need not be quantifiable. Bellermann, 475 Mass. at 72; Chery v. Metropolitan Prop. & Cas. Ins. Co., 79 Mass. App. Ct. 697, 700 (2011) ("A plaintiff seeking redress under c. 93A is not required to show a quantifiable amount of actual damages as an element of her claim. Rather, a plaintiff is required to show only that she suffered some loss caused by the defendant's allegedly unlawful conduct.").

"Paying for a product whose price was artificially inflated by deceptive advertising is an economic injury cognizable under Chapter 93A." Loughlin v. Vi-Jon, LLC, 728 F. Supp. 3d 163, 174 (D. Mass. 2024) (Wolf, J.), citing Shaulis, 865 F.3d at 12. See Bellermann, 475 Mass. at 75 (injury requirement satisfied where product "did not deliver the full anticipated and advertised benefits, and therefore [was] worth less, as used or owned, than what the plaintiffs had paid"). As the Supreme Judicial Court described in Iannacchino:

> If Ford knowingly sold noncompliant (and therefore potentially unsafe) vehicles or if Ford, after learning of noncompliance, failed to initiate a recall and to pay for the condition to be remedied, the

---

[4] The injury requirement for maintenance of a consumer action under § 9 is not found in G.L. c. 93A, § 4. Section 4 authorizes the Attorney General to file enforcement actions – like the pending case of Commonwealth v. Exxon Mobil Corporation, Case No. 1984CV3333-BLS1, to which plaintiffs cite – without showing that the Attorney General or any consumer has been injured. See G.L. c. 93A, § 4 ("Whenever the attorney general has reason to believe that any person is using . . . any method, act, or practice declared by section two to be unlawful, and that proceedings would be in the public interest, he [sic] may bring an action in the name of the commonwealth against such person to restrain . . . the use of such method, act or practice.").

> plaintiffs would have paid for more (viz., safety regulation-compliant vehicles) than they received. Such an overpayment would represent an economic loss – measurable by the cost to bring the vehicles into compliance – for which the plaintiffs could seek redress under G.L. c. 93A, § 9.

451 Mass. at 631.

To state a claim based on an overpayment theory, however, "a plaintiff must show real economic damages, as opposed to some speculative harm. . . . It is thus not enough to claim that the defendant's improper conduct created a risk of real economic damages." Shaulis, 865 F.3d at 10 (emphasis in original, internal quotations omitted). See Bellermann, 475 Mass. at 75-78 (no injury where plaintiffs claimed regulatory noncompliance caused them to pay for inadequate emergency preparedness where no emergency materialized; "there [was] no longer any risk of injury for emergencies that did not occur"). Instead, "there must be factual allegations from which a jury could conclude that the product at issue was 'deficient in some objectively identifiable way.'" O'Hara v. Diageo-Guinness, USA, Inc., 306 F. Supp. 3d 441, 458 (D. Mass. 2018) (Wolf, J.), quoting Shaulis, 865 F.3d at 12.

Plaintiffs do not allege that the natural gas they purchased from Eversource was functionally deficient – e.g., that it failed to heat their homes, stoves, or water – or that they suffered any adverse health effects from the natural gas they purchased. Rather, they allege that they were harmed because had they not been misled regarding the environmental and health risks of the gas, they would have purchased less of it. See Complaint ¶¶ 8, 9. Although plaintiffs argue otherwise, this is essentially a claim for overpayment, albeit one that is creatively framed.[5] Plaintiffs' allegation that they would have spent less on gas is another way of saying that they

[5] Plaintiffs claim to carbon offsets is even more attenuated, but equally inapt under the regulated tariff controlling the rate for natural gas. See, infra, at 8-9.

paid too much for the gas they received. Cf. Haverhill Gas Co. v. Findlen, 357 Mass. 417, 424 (1970) (treating allegation that party would have used less gas as similar to challenging rate charged).

The problem with an overpayment theory in the present context is that, unlike a typical product seller, Eversource does not ultimately control the price of the natural gas that it provides. Utilities like Eversource are regulated by the DPU, see G.L. c. 164, § 76, which has the exclusive power to regulate their operations, services, and rates. See, e.g., G.L. c. 164, §§ 94, 105A; Boston Gas Co. v. Newton, 425 Mass. 697, 701 (1997) (DPU authorized "to oversee [gas utility] and to ensure the safe and efficient distribution of gas"); ENGIE Gas & LNG LLC v. Department of Pub. Utilities, 475 Mass. 191, 193 (2016) (DPU "regulates the rates that . . . local distribution natural gas companies may charge their customers (ratepayers)") (footnote omitted).

Under this regulatory regime, Eversource operates subject to a DPU-approved tariff, which controls and defines the relationship between Eversource and its customers, including the rates they pay. See Boston Gas Co. v. Boston, 13 Mass. App. Ct. 408, 413 (1982) ("terms and conditions of [gas utility's] service are in large part dictated by the DPU"); 220 Code Mass. Regs. § 14.03(2)(b) ("Each Local Distribution Company shall file, for Department approval, a Distribution Service tariff for each rate class"); 64 Am. Jur. 2d Public Utilities § 51 (a tariff "lists a public utility's services and the rates for those services, and the rules and regulations that govern the utility's relationship with its customers") (footnotes omitted). Because the rates Eversource charges are not entirely within its control, the connection between Eversource's purported false statements and the costs plaintiffs incurred for natural gas is simply too attenuated to serve as a cognizable injury separate and apart from the c. 93A violation itself. Plaintiffs cannot establish they would have paid a lower price for Eversource's natural gas had it

been honestly advertised. Phrased another way, plaintiffs have not adequately alleged that the price was artificially inflated as a result of Eversource's allegedly false statements.

In this regard, the case is distinguishable from other cases involving an overpayment theory. In those cases, the defendant controlled the price of the product sold and benefited from the higher price enabled by the purported misrepresentations. See, e.g., Aspinall v. Philip Morris Companies, Inc., 442 Mass. 381, 396-398 (2004), as explained in Bellermann, 475 Mass. at 75 (injury existed where defendant's labelling of "light" cigarettes falsely suggested certain health benefits and class allegedly paid higher price for such cigarettes as a result). See also, e.g., Loughlin, 728 F. Supp. 3d at 176-177 (plaintiff would not have purchased hand sanitizer if it had not falsely claimed to kill 99.99% of germs); Schotte v. Stop & Shop Supermarket Co., LLC, 2024 WL 1251284 at * 4 (D. Mass. Mar. 22, 2024) (Talwani, J.) (allegation that defendant sold non-flushable wipes for less than flushable wipes, sufficient to allege injury based on premium paid for flushable wipes); Downing v. Keurig Green Mountain, Inc., 2021 WL 2403811 at * 7 (D. Mass. June 11, 2021) (Talwani, J.) ("By tying the injury to the difference in the market value between recyclable [coffee] Pods and non-recyclable Pods, [plaintiff] has plausibly stated an injury that is separate from Keurig's allegedly false recyclability claim. The economic harm caused by buying a product that is allegedly misrepresented to be a higher quality than it is viably makes the claim that [plaintiff] has been injured."); O'Hara, 306 F. Supp. 3d at 458-460 (injury requirement satisfied where plaintiff paid premium for beer that falsely suggested it was brewed in Ireland).

Given the regulatory environment in which Eversource operates, the same is not true here. Plaintiffs cannot show that they paid a premium for the Eversource product due to

Eversource's alleged false representations. They have therefore failed to allege a cognizable injury in Counts I and II that plausibly suggests an entitlement to relief under G.L. c. 93A, § 9.

B. G.L. c. 266, § 91

The same analysis applies to Counts I and III through which plaintiffs seek injunctive relief under G.L. c. 266, § 91. Section 91 prohibits dissemination of advertisements which "contains any assertion, representation or statement of fact which is untrue, deceptive or misleading" and provides that "[w]hoever violates the provisions of this section may be enjoined therefrom by a petition in equity brought by the attorney general or any aggrieved party." G.L. c. 266, § 91 (emphasis added).[6] Section 91 does not define an "aggrieved party," nor has either of our appellate courts interpreted that phrase in the statute.

Nonetheless, a plain reading of the statute suggests that it should be construed as imposing an injury requirement like that in G.L. c. 93A. See Randolph v. Commonwealth, 488 Mass. 1, 5 (2021) ("[S]tatutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result."), quoting Commonwealth v. Wassilie, 482 Mass. 562, 573 (2019); G.L. c. 4, § 6, Third ("Words and phrases shall be construed according to the common and approved usage of the language[.]"). In other words, an aggrieved party under G.L. c. 266, § 91, is a person who has suffered injury because of a false advertisement. See Bezdek v. Vibram USA Inc., 2013 WL 639145 at * 4 n.5 (D. Mass. Feb. 20, 2013) (Woodlock, J.) (assuming cognizable injury under G.L. c. 93A also sufficient under G.L. c. 266, § 91); Chenlen v. Philips Electronics N. Am., 2006 WL 696568 at * 8 (Mass. Super. Mar. 1, 2006) (Fishman, J.) ("To state a claim under G.L. c.

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[6] The statute does not provide a private right of action for damages.

266, § 91, the plaintiff must show that he was injured by the untrue, deceptive, or misleading advertisement of any person who sells merchandise."). Cf. Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721 (1996) ("A plaintiff is a 'person aggrieved' [under G.L. c. 40A, § 17] if he suffers some infringement of his legal rights."). Plaintiffs do not argue otherwise. Accordingly, the analysis regarding the injury required to proceed on a claim under G.L. c. 93A, § 9, is equally applicable to Counts I and III to the extent plaintiffs seek injunctive relief under G.L. c. 266, § 91.[7]

IV. Unjust Enrichment

In Count IV, plaintiffs allege a count for unjust enrichment. "Unjust enrichment is defined as 'retention of money or property of another against the fundamental principles of justice or equity and good conscience.'" Santagate v. Tower, 64 Mass. App. Ct. 324, 329 (2005), quoting Taylor Woodrow Blitman Constr. Corp. v. Southfield Gardens Co., 534 F. Supp. 340, 347 (D. Mass. 1982). To state a claim for unjust enrichment, the plaintiff must show "not only that the defendant received a benefit, but also that such a benefit was unjust, 'a quality that turns on the reasonable expectations of the parties.'" Metropolitan Life Ins. Co. v. Cotter, 464 Mass. 623, 644 (2013), quoting Global Investors Agent Corp. v. National Fire Ins. Co., 76 Mass. App. Ct. 812, 826 (2010). "An equitable remedy for unjust enrichment is not available to a party with an adequate remedy at law." Santagate, 64 Mass. App. Ct. at 329.

Eversource contends that the unjust enrichment claim fails because plaintiffs have an adequate remedy at law and because plaintiffs were charged for the natural gas they received consistent with the tariff. Plaintiffs' opposition offers no argument in response. Plaintiff's claim

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[7] Dismissal of plaintiffs' claims does not mean that Eversource is free to engage in deceptive conduct without impunity. The DPU and the Attorney General may choose to address such conduct or a consumer who has actually suffered harm may bring a claim.

is therefore waived. See Matter of Estate of King, 98 Mass. App. Ct. 332, 332 n.2 (2020) (matter not addressed in brief considered waived); Perkins v. City of Attleboro, 969 F. Supp. 2d 158, 177 (D. Mass. 2013) (O'Toole, J.) (where count not addressed in opposition to motion to dismiss, opposition to dismissal of claim deemed waived), citing Rodriguez v. Municipality of San Juan, 659 F.3d 168, 175 (1st Cir. 2011). Even if there were no waiver, I would conclude that plaintiffs failed to state a claim for the reasons argued by Eversource.[8]

ORDER

Defendant's Motion to Dismiss (Docket #15) is **ALLOWED**.

Dated: February 19, 2025

Peter B. Krupp
Justice of the Superior Court

[8] I need not reach the other arguments Eversource advances.

Date Filed 3/17/2025 2:35 PM
Superior Court - Suffolk
Docket Number 2484CV01455

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NOTIFY

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUFFOLK SUPERIOR COURT
CIVIL ACTION NO. 2484CV01455

BLS1

Majida Ortiz and Urszula Masny-Latos, on Behalf of Themselves and All Persons Similarly Situated,

Plaintiffs,

v.

EVERSOURCE ENERGY, a Massachusetts voluntary association,

Defendant.

4/1/25 After careful review, DENIED. The allegations in ¶82 of the plaintiffs' Class Action Complaint do not adequately allege a cognizable injury to the individual plaintiffs or the purported class to support a claim under G.L. c. 93A, § 9, or G.L. c. 266, § 91. To the extent the motion seeks leave to amend, it offers nothing to suggest plaintiffs have any additional facts they could allege that would support such a claim.

PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR LEAVE TO AMEND COMPLAINT[1]

Plaintiffs Majida Ortiz and Urszula Masny-Latos, on behalf of themselves and all persons similarly situated, respectfully request this Court to reconsider its *Memorandum and Order on Defendant's Motion to Dismiss*, dated February 19, 2025 ("Order"). Plaintiffs' Motion for Reconsideration should be granted due to "a particular and demonstrable error in the original ruling or decision." Mass. R. Civ. P. 9D (3).

The particular error in the Court's Order is its assessment of all of Plaintiffs' claims under an "overpayment theory" of injury which, in the context of Eversource as a regulated utility, the Court held was barred because gas rates are controlled by the DPU-approved tariff

[1] Pursuant, *inter alia*, to the Reporter's Notes to Mass.R.Civ.P 60, the 2013 amendment to Mass. R. A. P. 4(a) tolls the time period to file a notice of appeal while a post-judgment motion for reconsideration served within ten days after entry of judgment is pending before the Court.

Typed Version of Endorsement on Motion for Reconsideration of the Court’s Order Granting Defendant's Motion to Dismiss or in the Alternative for Leave to Amend Complaint:

After careful review, Denied. The allegations in paragraph 82 of the plaintiffs’ Class Action Complaint do not adequately allege a cognizable injury to the individual plaintiffs or the purported class to support a claim under G. L. c. 93A, section 9, or G. L. c. 266, section 91. To the extent the motion seeks leave to amend, it offers nothing to suggest plaintiffs have any additional facts they could allege that would support such a claim. (dated 4/1/2025).

ALM GL ch. 93A, § 9

Current through Chapter 42 of the 2026 Legislative Session of the 194th General Court

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE XV REGULATION OF TRADE (Chs. 93 - 110H) > TITLE XV REGULATION OF TRADE (Chs. 93 — 110H) > Chapter 93A Regulation of Business Practices for Consumers Protection (§§ 1 — 11)

§ 9. Civil Remedies of Consumers; Class Actions; Demand for Relief; Award of Costs and Attorney's Fees; Suspension of Proceedings Pending Administrative Action.

(1) Any person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder or any person whose rights are affected by another person violating the provisions of clause (9) of section three of chapter one hundred and seventy-six D may bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-five C whether by way of original complaint, counterclaim, cross-claim or third party action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

(2) Any persons entitled to bring such action may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such manner as the court directs.

(3) At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent. Any person receiving such a demand for relief who, within thirty days of the mailing or delivery of the demand for relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning its rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner. In all other cases, if the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or

employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two. For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of the existence or nonexistence of insurance coverage available in payment of the claim. In addition, the court shall award such other equitable relief, including an injunction, as it deems to be necessary and proper. The demand requirements of this paragraph shall not apply if the claim is asserted by way of counterclaim or cross-claim, or if the prospective respondent does not maintain a place of business or does not keep assets within the commonwealth, but such respondent may otherwise employ the provisions of this section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this section. Notwithstanding any other provision to the contrary, if the court finds any method, act or practice unlawful with regard to any security or any contract of sale of a commodity for future delivery as defined in section two, and if the court finds for the petitioner, recovery shall be in the amount of actual damages.

(3A) A person may assert a claim under this section in a district court, whether by way of original complaint, counterclaim, cross-claim or third-party action, for money damages only. Said damages may include double or treble damages, attorneys' fees and costs, as herein provided. The demand requirements and provision for tender of offer of settlement provided in paragraph (3) shall also be applicable under this paragraph, except that no rights to equitable relief shall be created under this paragraph, nor shall a person asserting a claim hereunder be able to assert any claim on behalf of other similarly injured and situated persons as provided in paragraph (2).

(4) If the court finds in any action commenced hereunder that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and costs incurred in connection with said action; provided, however, the court shall deny recovery of attorney's fees and costs which are incurred after the rejection of a reasonable written offer of settlement made within thirty days of the mailing or delivery of the written demand for relief required by this section.

[There is no paragraph (5).]

(6) Any person entitled to bring an action under this section shall not be required to initiate, pursue or exhaust any remedy established by any regulation, administrative procedure, local, state or federal law or statute or the common law in order to bring an action under this section or to obtain injunctive relief or recover damages or attorney's fees or costs or other relief as provided in this section. Failure to exhaust administrative remedies shall not be a defense to any proceeding under this section, except as provided in paragraph seven.

(7) The court may upon motion by the respondent before the time for answering and after a hearing suspend proceedings brought under this section to permit the respondent to initiate action in which the petitioner shall be named a party before any appropriate

regulatory board or officer providing adjudicatory hearings to complainants if the respondent's evidence indicates that:

(a) there is a substantial likelihood that final action by the court favorable to the petitioner would require of the respondent conduct or practices that would disrupt or be inconsistent with a regulatory scheme that regulates or covers the actions or transactions complained of by the petitioner established and administered under law by any state or federal regulatory board or officer acting under statutory authority of the commonwealth or of the United States; or

(b) that said regulatory board or officer has a substantial interest in reviewing said transactions or actions prior to judicial action under this chapter and that the said regulatory board or officer has the power to provide substantially the relief sought by the petitioner and the class, if any, which the petitioner represents, under this section.

Upon suspending proceedings under this section the court may enter any interlocutory or temporary orders it deems necessary and proper pending final action by the regulatory board or officer and trial, if any, in the court, including issuance of injunctions, certification of a class, and orders concerning the presentation of the matter to the regulatory board or officer. The court shall issue appropriate interlocutory orders, decrees and injunctions to preserve the status quo between the parties pending final action by the regulatory board or officer and trial and shall stay all proceedings in any court or before any regulatory board or officer in which petitioner and respondent are necessarily involved. The court may issue further orders, injunctions or other relief while the matter is before the regulatory board or officer and shall terminate the suspension and bring the matter forward for trial if it finds (a) that proceedings before the regulatory board or officer are unreasonably delayed or otherwise unreasonably prejudicial to the interests of a party before the court, or (b) that the regulatory board or officer has not taken final action within six months of the beginning of the order suspending proceedings under this chapter.

(8) Except as provided in section ten, recovering or failing to recover an award of damages or other relief in any administrative or judicial proceeding, except proceedings authorized by this section, by any person entitled to bring an action under this section, shall not constitute a bar to, or limitation upon relief authorized by this section.

History

1969, 690; 1970, 736, §§ 1, 2; 1971, 241; 1973, 939; 1978, 478, §§ 45, 46; 1979, 72, § 1; 1979, 406, §§ 1, 2; 1986, 557, § 90; 1987, 664 § 3; 1989, 580, § 1; *2004, 252, § 1*.

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ALM GL ch. 266, § 91

Current through Chapter 8 of the 2025 Legislative Session of the 194th General Court

Annotated Laws of Massachusetts > PART IV CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES (Chs. 263 - 280) > TITLE I CRIMES AND PUNISHMENTS (Chs. 263 - 274) > TITLE I CRIMES AND PUNISHMENTS (Chs. 263 — 274) > Chapter 266 Crimes Against Property (§§ 1 — 148)

§ 91. Untrue and Misleading Advertisements Prohibited; Penalty; Exceptions; Injunction.

Any person who, with intent to sell or in any way dispose of merchandise, securities, service, or anything offered by such person, directly or indirectly, to the public for sale or distribution, or who, with intent to increase the consumption of or demand for such merchandise, securities, service or other thing, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, makes, publishes, disseminates, circulates or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated or placed before the public within the commonwealth, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, and which such person knew, or might on reasonable investigation have ascertained to be untrue, deceptive or misleading, shall be punished by a fine of not less than one thousand nor more than two thousand dollars; provided, that this section shall not apply to any owner, publisher, printer, agent or employee of a newspaper or other publication, periodical or circular, or to any agent of the advertiser who in good faith and without knowledge of the falsity or deceptive character thereof publishes, causes to be published, or participates in the publication of such advertisement.

Whoever violates the provisions of this section may be enjoined therefrom by a petition in equity brought by the attorney general or any aggrieved party.

History

1902, 397; 1912, 489; 1914, 288; 1916, 149; 1958, 217, § 1; 1963, 222; *1993, 439*.

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ALM GL ch. 266, § 91B

Current through Chapter 8 of the 2025 Legislative Session of the 194th General Court

Annotated Laws of Massachusetts > PART IV CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES (Chs. 263 - 280) > TITLE I CRIMES AND PUNISHMENTS (Chs. 263 - 274) > TITLE I CRIMES AND PUNISHMENTS (Chs. 263 — 274) > Chapter 266 Crimes Against Property (§§ 1 — 148)

§ 91B. Injunctions Against Untrue and Misleading Advertisements Subject to §§ 91 and 91A; Exceptions.

Any person offering for sale merchandise, commodities or service by making, publishing, disseminating, circulating or placing before the public within the commonwealth in any manner an advertisement of merchandise, commodities, or service, with the intent, design or purpose not to sell the merchandise, commodities, or service so advertised at the price stated therein or otherwise communicated, or with the intent not to sell the merchandise, commodities, or service so advertised, may be enjoined from such advertising by a bill in equity in the superior court brought by the attorney general or any aggrieved party; provided, however, that the provisions of this section shall not apply to any medium for the printing, publishing, or disseminating of advertising, or any owner, agent or employee thereof, nor to any advertising agency or owner, agent or employee thereof, nor to any radio or television station, or owner, agent, or employee thereof, for printing, publishing, or disseminating or causing to be printed, published, or disseminated such advertisement in good faith and without knowledge of the deceptive character thereof.

History

1958, 217, § 3.

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