Docket: 2184CV1327
Date: December 20, 2021
Parties: JESSICA GODINES, on behalf of herself and all others similarly situated vs. EF EXPLORE AMERICA, INC., and DOES 1 THROUGH 10
Judge: /s/MICHAEL D. RICCIUTI Justice of the Superior Court

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS
This is a putative class action brought by the plaintiff, Jessica Godines, the mother of a would-be participant in an educational tour created for students (“Travel Program” or “Tour”), against the tour operator, defendant EF Explore America, Inc, (“EF”) and unnamed others who were involved with EF. Godines alleges that because of the global health pandemic, EF unilaterally cancelled its 2020 Travel Programs. The dispute here is not over the propriety of the cancellation, but EF’s failure to fully refund Godines’ payments thereafter.
In her Verified Complaint (“VC”), Godines, for herself and the putative class, brings claims for violation of the California Consumer Legal Remedies Act, Ca. Civ. Code § 1750 et seq. (“CLRA”) (Count I) and the California Unfair Competition Law, Bus. & Prof. Code § 17200 et seq. (“UCL”) (Count II), breach of contract and the implied covenant of good faith and fair dealing (Count III), and violation of G. L. c. 93A, § 9 (Count IV).
EF moves to dismiss all counts under Mass. R. Civ. P. 12 (b) (6) and, alternatively, Count IV under Mass. R. Civ. P. 12 (b) (9).[1] Godines opposes.

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[1] Even though some of the defendants (Does 1-10) have not been served, the Court sees no reason why the rulings contained herein would not apply equally to them.

-1-

In connection with EF’s Rule 12 (b) (6) motion, both sides attempt to introduce facts outside of the complaint. Only some are appropriately considered here. Through the Affidavit of Harvey J. Wolkoff (“Wolkoff Aff.,” Docket No. 9), EF provided copies of the General Terms and Conditions of Plaintiff’s contract with EF (“Contract”) and a dismissal order from a prior suit brought by Plaintiff in California, to which Plaintiff lodged no objection. See Wolkoff Aff. Exs. A and E. As there appears to be no dispute that the Contract was used in framing the complaint, the Court can rely on it without converting EF’s motion to one for summary judgment under Rule 56. See Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 n. 4 (2004) (“Where, as here, the plaintiff had notice of … documents and relied on them in framing the complaint, the attachment of such documents to a motion to dismiss does not convert the motion to one for summary judgment …”). The Court may also “take judicial notice of facts and proceedings recited in prior judicial opinions.” Amato v. Dist. Att’y for Cape & Islands Dist., 80 Mass. App. Ct. 230, 232 n. 5 (2011). However, and while both sides advocate for it, other facts that the parties put forward are not properly before this Court, such as factual allegations of offers made by EF to Godines to resolve this dispute or facts alleged in filings made in the California litigation. The Court excludes them for present purposes. See Mass. R. Civ. P. 12 (b).
In consideration of the relevant facts, the parties’ memoranda of law and oral arguments, and for the reasons that follow, EF’s motion to dismiss is ALLOWED AS TO COUNTS I, II
AND III, AND DENIED AS TO COUNT IV.
APPLICABLE LEGAL PRINCIPLES
To survive a motion to dismiss under Mass. R. Civ. P. 12 (b) (6), a complaint must allege facts that, if true, would “plausibly suggest[] … an entitlement to relief.” Lopez v. Commonwealth, 463 Mass. 696, 701 (2012), quoting Iannacchino v. Ford Motor Co., 451 Mass.

-2-

623, 636 (2008). For the purpose of deciding Defendants’ motion, the Court assumes the truth of the facts alleged in the VC and any reasonable inferences that may be drawn in plaintiff’s favor from those allegations. See Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 223 (2011); Berish v. Bornstein, 437

Mass. 252, 267 (2002); Nader v. Citron, 372 Mass. 96, 98 (1977). In so doing, however, the court must "look beyond the conclusory allegations in the complaint and focus on whether the factual allegations plausibly suggest an entitlement to relief." Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, 473 Mass. 336, 339 (2015), quoting Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011).

Dismissal is appropriate under Rule 12 (b) (9) when there is pending "a prior action in a court of the Commonwealth."

ALLEGATIONS OF THE VERIFIED COMPLAINT[2]

Plaintiff is a citizen of California. VC, 6. Defendant EF is a Massachusetts corporation and an accredited institution engaged in the business of organizing educational travel programs for students and educators. VC, 7. EF provides such educational tours for students by partnering with educators across the world to create educational Travel Programs that blend classroom, digital and experiential learning for students, and offer educators and students the opportunity to earn academic credit on those trips. EF provides round-trip transportation, hotel accommodations, overnight security, meals, gratuities, guided tours and activities, a full-time tour director, training and support, traveler resources and 24-hour emergency services. VC, 10.

Plaintiff purchased a Travel Program for her daughter to visit Washington D.C., and relied on EF's representations that her daughter would have access to all the benefits and services of the Travel Program. VC, 13.

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[2] Godines' class allegations are not presently at issue. The Court thus focuses on whether Godines herself has sufficiently alleged one or more claims in her own right against EF.

Under the General Terms and Conditions of Plaintiff's contract with EF ("Contract"), which were "subject to change with or without notice," EF included a provision that stated, simply, "EF may cancel any tour for Extraordinary Events." "Extraordinary Events" were defined as follows:

> instability in any city or location on the itinerary including but not limited to actual or threatened civil war, rebellion, revolution, insurrection, riot, sabotage, civil commotion, nationalization, labor dispute, lockout, strike, embargo, blockade and military or usurped power or confiscation, war (declared or undeclared), invasion, acts of foreign enemies, government sanction or restrictions, substantial currency fluctuations, acts of terrorism or incidents of violence, acts of God (including, but not limited to earthquakes, hurricanes, tornadoes, tidal waves, floods, droughts, fires, volcanic activity, landslides and other natural disasters) or severe weather conditions, chemical or radioactive contamination, pollution, public health issues, quarantine or famine, disruption to transportation, interruption or failure of electricity or telephone service, or any other reason that makes it impossible or commercially unreasonable or impracticable to conduct the tour as originally contracted.

(Emphasis added). The Contract thus did not limit EF's authority to cancel a tour only where an Extraordinary Event makes it "impossible"; it also permitted EF to cancel and provide less than full refunds if the Extraordinary Event made the tour "commercially unreasonable or impracticable." The Contract further stated:

> If EF cancels the tour for any Extraordinary Events, participants will receive an EF Future Travel Voucher for all monies paid, less any Non-Refundable Fees.

…

> Non-Refundable Fees are defined as the Enrollment Fee ($95), Travel Protection Plan cost ($99), Anytime Protection Plan cost ($219) and Manual Payment Plan Fee ($50) as well as any late fees, late application fees, Automatic Payment Plan decline charges, return check/direct debit fees, late special travel request fees and cancelled check fees which have been applied to the account at the time of cancellation.

The Contract expressly stated that it was "governed in all respects, and performance hereunder shall be judged, by the laws of the Commonwealth of Massachusetts" and that "[i]n the event of any claim, dispute or proceeding arising out of my relationship with EF … the

-4-

parties submit and consent to the exclusive jurisdiction and venue of the courts of the Commonwealth of Massachusetts …"
In March 2020, as the coronavirus pandemic spread throughout the United States, EF unilaterally cancelled all of its Travel Programs scheduled to depart between March and June 2020. VC, 11. Defendants did not provide a full refund to Godines, which she alleges she "reasonably expected," but only a partial refund, as EF retained $450. VC, 6, 12, 14.[3]
DISCUSSION
Dismissal of Count IV Pursuant to Rule 12 (b) (9)
EF argues that a previously filed putative class action brought in federal district court in Boston, in which the plaintiffs assert a Chapter 93A claim against EF based on similar allegations, see Douglas v. EF Educ. First Int'l, Ltd., No. 20-CV-11740-DJC, 2021 WL 4311822, at *6 (D. Mass. Sept. 22, 2021), warrants dismissal of Godines' Chapter 93A claim in this case under Rule 12 (b) (9). It does not.
"Rule 12(b)(9) provides for the dismissal of a second action in which the parties and the issues are the same as those in a prior action still pending in a court of this Commonwealth. The rule prohibits the long-barred practice of claim-splitting." M.J. Flaherty Co. v. United States Fid. & Guar. Co., 61 Mass. App. Ct. 337, 339 (2004). There is no claim splitting here. Godines is not a party to the federal action, and Rule 12 (b) (9) is limited by its terms to prior actions pending "in a court of the Commonwealth." The federal district court in Boston is not a court of the Commonwealth. See Doe v. Governor, 381 Mass. 702, 706 (1980).
EF's motion to dismiss Count IV on Rule 12 (b) (9) grounds is denied.

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[3] Godines further alleges that had she "known the truth about the nature of Defendants' Travel Programs, [she] either would not have paid for the Travel Program or would have paid much less for it," and thus "suffered a loss of money." VC, 15.

-5-

Dismissal Pursuant to Rule 12 (b) (6)
Counts I and II (California law claims): EF contends that Plaintiff is barred from asserting her CLRA and UCL claims under the choice of law provision in the Contract, which requires claims be brought in Massachusetts and under Massachusetts law. For her part, Godines argues that these provisions of California law should apply in this case.
Where, as here, "the parties have expressed a specific intent as to the governing law, Massachusetts courts will [apply 'functional' choice of law principles and] uphold the parties' choice as long as the result is not contrary to public policy." Oxford Glob. Res., LLC v. Hernandez, 480 Mass. 462, 468 (2018), quoting Hodas v. Morin, 442 Mass. 544, 549-550 (2004). See also Morris v. Watsco, Inc., 385 Mass. 672, 674 (1982) ("Massachusetts law has recognized, within reason, the right of the parties to a transaction to select the law governing their relationship"). A choice of law provision is contrary to public policy if "'(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state' and is the [s]tate whose law would apply under § 188 of the Restatement 'in the absence of an effective choice of law by the parties.'" Hodas, 442 Mass. at 549–550, quoting Restatement (Second) of Conflict of Laws ("Restatement"), § 187 (2). Neither is the case here.
EF has its principal place of business in Massachusetts. Thus, the Contract rationally reflects the selection of Massachusetts law to govern the agreement involving a Massachusetts defendant, and chose a Massachusetts forum in which to hear "any claim, dispute or proceeding" under the Contract or otherwise. Therefore, the selection of Massachusetts law is reasonable because Massachusetts has a substantial relationship to the parties and the transaction. See

-6-

Restatement, § 187, cmt. f ("When the state of the chosen law has some substantial relationship to the parties or the contract, the parties will be held to have had a reasonable basis for their choice. This will be the case, for example, when this state is that where performance by one of the parties is to take place or where one of the parties is domiciled or has his principal place of business.").[4]
Enforcement of the choice of law provision will not, as Godines argues, violate California law and public policy. In its order dismissing Godines' previously-filed California case, the California judge found that the forum selection clause in the Contract was not "unreasonable" under California law, in part because "prior cases analyzing the issue have concluded that the CLRA and UCL consumer protections under California law are less robust or consumer friendly than parallel protections [provided under Chapter 93A and available] under Massachusetts law. Rojas-Lozano v. Google, Inc. (2016), 159 F. Supp. 3d 1101, 1109; In re M3 Power Razor Sys. Mktg. & Sales Practice Litig. (D. Mass. 2010) 270 F.R.D. 45, 60." Godines v. EF Explore America, Inc., et al., Case No. 30-2020-01141986-CU-MC-CXC, Docket No. 56, at 2; Wolkoff Aff. Ex. E. The Court sees no reason to quarrel with that conclusion.
Godines makes two further arguments for application of California law. First, she argues that the Contract should be read only to require application of Massachusetts contract law only and not to call for the application of Chapter 93A. That argument is meritless. The Contract states expressly that it "shall be governed in all respects" by Massachusetts law, and that "any claim, dispute or proceeding arising out of my relationship with EF, or any claim in contract, tort, or otherwise at law or in equity … whether or not related to this agreement" would be heard in a Massachusetts court. Even accepting that the first sentence of that clause did not expressly

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[4] In support of her Chapter 93A claim, Godines alleges that EF's actions took place primarily and substantially in Massachusetts, which further supports the propriety of applying Massachusetts law. VC, 73.

reflect an agreement to accept Massachusetts non-contract law, the second sentence requires the Court to apply Massachusetts choice of law principles, which in turn call for application of Massachusetts law and Chapter 93A in this case. Two cases cited by Godines do not support a contrary result. See Kitner v. CTW Transp., Inc., 53 Mass. App. Ct. 741, 745-747 (2002) (contractual choice of law provision governed contract claims, not Chapter 93A claims that sounded in tort); Brown v. Savings Bank Life Ins. Co., 93 Mass. App. Ct. 572, 578-583 (2018) (Chapter 93A claim based on a tort theory not governed by contract language applicable to contract claims).
Second, Godines' argument that California law should apply because it is more favorable to plaintiff class actions than Chapter 93A is not only undercut by the California court's decision, it ignores well-established law demonstrating that Chapter 93A strongly favors class actions. See, e.g., Layes v. RHP Properties, Inc., 95 Mass. App. Ct. 804, 822 (2019) (citations, internal quotation marks omitted) (noting that "[t]he certification requirements of c. 93A, § 9 (2), and rule 23 are not coextensive. The statutory class certification standard has a more mandatory tone than the rule. In exercising discretion with respect to a c. 93A certification request, the public policy of Massachusetts strongly favoring c. 93A class actions should be considered. Moreover, the judge should bear in mind that our consumer protection statute was designed to meet a pressing need for an effective private remedy for consumers. In sum, the requirements of § 9 (2) are easier to satisfy than those of rule 23 … A plaintiff will prevail on her motion for certification under c. 93A upon showings that (1) she was entitled to seek relief under c. 93A for ... injuries resulting from the defendant['s alleged] unfair or deceptive act or practice; (2) the assertedly unfair or deceptive act or practice that caused [her] injuries caused similar injury to

numerous other persons similarly situated; and (3) the plaintiff would adequately and fairly represent[ ] such other persons.").
Counts I and II are thus dismissed.

Count III (Breach of Contract, Breach of the Implied Duty of Good Faith and Fair Dealing): "To prevail on a claim for breach of contract, a plaintiff must demonstrate that there was an agreement between the parties; the agreement was supported by consideration; the plaintiff was ready, willing, and able to perform his or her part of the contract; the defendant committed a breach of the contract; and the plaintiff suffered harm as a result." Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 690 (2016), citing Singarella v. Boston, 342 Mass. 385, 387 (1961).

Godines alleges a breach of contract because she did not receive the travel experience for which she paid. But the Contract expressly recognized that Extraordinary Events could result in cancellation of a trip like the one Godines sought, and Godines does not contest that the global COVID-19 pandemic is such an Extraordinary Event which led to cancellation of her tour. VC, 3, 11. There was thus no breach on this basis.

Godines does not allege a breach of the Contract's provisions providing relief if an Extraordinary Event occurs, but rather alleges breach of terms the Contract does not contain – that EF promised "to only charge Plaintiff and the Class for the Travel Program if Defendants actually provided the Travel Programs, including the benefits and services associated with the Travel Programs, to Plaintiff and the Class," and breached these alleged terms "by cancelling the Travel Programs without refunding Plaintiff and Class members in full." VC, 61, 62 (emphasis removed). But as noted above, the Contract to which Godines agreed did not promise her this

-9-

relief, but rather set out the more limited relief to which Godines would be entitled in the event of an Extraordinary Event like the pandemic.

Godines also argues that the Contract was breached because it conflicts with a Chapter 93A regulation, 940 CMR § 15.06. That argument is not a breach of contract argument but a claim that Chapter 93A was violated. It is addressed below.

As pled, then, Godines has not alleged an actionable breach of contract. To avoid this result, Godines argues the Contract is unconscionable. This does little to preserve this breach of contract claim; as she recognizes, unconscionability is not a breach of contract theory, but "grounds for avoiding a contract" and finding it unenforceable altogether. Plaintiff's Memo, at 10-11.[5] In any event, unconscionability is not alleged in the Complaint. Under Massachusetts law, "[t]o prove that the terms of a contract are unconscionable, a plaintiff must show both substantive unconscionability (that the terms are oppressive to one party) and procedural unconscionability (that the circumstances surrounding the formation of the contract show that the aggrieved party had no meaningful choice and was subject to unfair surprise)." Machado v. System4 LLC, 471 Mass. 204, 218 (2015), quoting Storie vs. Household Int'l, Inc., U.S. Dist. Ct., No. 03–40268, 2005 WL 3728718 (D. Mass. Sept. 22, 2005). Leaving aside substantive unconscionability, the FAC alleges no facts to show procedural unconscionability. Godines' argument on this point is premised almost entirely on facts outside of the VC that the Court does not consider. See Opposition Memo, at 11-12.

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[5] Godines also argues that the Contract was illusory because its terms were "subject to change with or without notice." However, there are no allegations that EF attempted to change the Contract's terms. See Small Just. LLC v. Xcentric Ventures LLC, 99 F. Supp. 3d 190, 197 n.3 (D. Mass. 2015), amended, No. 13-CV-11701, 2015 WL 5737135 (D. Mass. Sept. 30, 2015), aff'd, 873 F.3d 313 (1st Cir. 2017) (plaintiffs' argument that contract illusory because defendant reserved the right to change the terms and conditions failed where plaintiffs did not "allege … that [defendant] did change terms and conditions in any way during the relevant time period. Without a change to the terms that affected that Plaintiffs' rights or remedies, the Court is not persuaded that the contract was illusory.")

-10-

Godines similarly argues that EF's failure to fully refund the costs she paid violates the implied covenant of good faith and fair dealing. VC, 64, 65. "'Every contract implies good faith and fair dealing between

the parties to it.' A party may not conduct itself in a way 'that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" Gloucester Landing Assocs. Ltd. P'ship v. Gloucester Redevelopment Auth., 60 Mass. App. Ct. 403, 413 (2004), quoting Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471-472 (1991) (citations omitted). As there was no breach of the contract under these facts, there was no breach of the implied covenant, either. The implied covenant regulates only the manner of performance, and "may not be 'invoked to create rights and duties not otherwise provided for in the existing contractual relationship.'" Ayash v. Dana Farber Cancer Institute, 443 Mass. 367, 385 (2005), quoting Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 385 (2004). Godines seeks to enforce rights not found in the Contract.

Count III is thus dismissed.

Count IV (Chapter 93A): The dispute in this case turns primarily on whether Godines has alleged a viable Chapter 93A violation. In the Verified Complaint, Godines alleged the following to support this claim:

> 75. Defendants' retention of Plaintiff and Class members money without providing the full value of services promised, as set forth above, constitutes unlawful and/or unfair business acts or practices.6
>
> 76. A business act or practice is "unlawful" if it violates any established state or federal law.
>
> 77. In the course of conducting business, Defendants committed unlawful business practices by making the conduct described herein. …

> [6] Godines' demand for a "full" refund exceeds not only the scope of the Contract, but may also exceed the requirements of Section 15.06, which only requires a refund of the "fair market retail value of any undelivered, purchased travel service, such cash refund not to exceed the total amount paid by the consumer" Section 15.06 (1). The scope of the remedy, however, is a factual issue that is not yet properly before the Court.

-11-

> 79. Defendants' actions also constitute "unfair" business acts or practices because, as alleged above, inter alia, Defendants engaged in unfair business practices, misrepresented and omitted material facts regarding their Travel Programs, and thereby offended an established public policy, and engaged in unethical, oppressive, and unscrupulous activities that are substantially injurious to consumers.
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> 80. As stated in this complaint, Plaintiff alleges violations of consumer protection and unfair competition laws in Massachusetts, resulting in harm to consumers in California and throughout the United States. Defendants' acts and omissions also violate and offend the public policy against engaging in false and misleading advertising, unfair competition and deceptive conduct towards consumers. This conduct constitutes violations of G.L. c. 93A.
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> 81. Defendants' actions, claims, nondisclosures and misleading statements, as more fully set forth above, were false, misleading and/or likely to deceive the consuming public.
>
> 82. Defendants' conduct caused and continues to cause substantial injury to Plaintiff and the other Class members. Plaintiff and Class members have suffered injury in fact and have lost money as a result of Defendants' unfair conduct.
>
> 83. As a result of its deception, Defendants have been able to reap unjust revenue and profit.

The issue is whether these paragraph and other sections of the Verified Complaint adequately alleged either deception or unfairness under Chapter 93A and its regulations. See G. L. c. 93A, § 2 (a) ("unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful").

Deception: The Supreme Judicial Court has outlined the contours of a claim of deception under Chapter 93A:

> A successful G.L. c. 93A action based on deceptive acts or practices does not require proof that a plaintiff relied on the representation, or that the defendant intended to deceive the plaintiff, or even knowledge on the part of the defendant that the representation was false. Although our cases offer no static definition of the term "deceptive," we have stated that a practice is "deceptive," for purposes of G.L. c. 93A, if it could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted. In the same vein, we have stated that

> conduct is deceptive if it possesses a tendency to deceive. In determining whether an act or practice is deceptive, regard must be had, not to fine spun distinctions and arguments that may be

-12-

> made in excuse, but to the effect which [the act or practice] might reasonably be expected to have upon the general public.

…

> The Legislature, in G.L. c. 93A, § 2 (b), has mandated that Massachusetts courts, in construing which acts are deceptive, must be guided by interpretations of that term as found in the analogous Federal Trade Commission Act (FTC Act), 15 U.S.C. § 45(a)(1). Historically, the standard test for deception prohibited by the FTC Act was whether the act or practice had the capacity or tendency to deceive the general public, rather than whether it was relied on or resulted in actual deception. The FTC later clarified that test as follows: if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.

Aspinall v. Philip Morris Companies, Inc., 442 Mass. 381, 394–395 (2004) (citations, internal quotation marks omitted); see also 940 CMR 15.03 (2) ("No seller of travel services may make any representation, either directly to the public, or through any type of marketing, or through any other seller of travel services, about any travel service it offers to sell, provide, contract for, or arrange, either directly or by implication, that has the capacity or tendency to deceive or mislead a consumer, or that has the effect of deceiving or misleading a consumer, in any material respect …"); 940 CMR 15.04 (outlining required disclosures).

In this case, Godines does not allege facts that show that EF made any misrepresentations or omissions such that its conduct was deceptive. Indeed, the Contract clearly outlined the limitations on refunds following an Extraordinary Event. The facts alleged in the Verified Complaint do not support a claim that the Contract was likely to mislead.

Unfairness: Godines' claim of unfairness under Chapter 93A is on much firmer ground.

A Chapter 93A claim arises where a practice is unfair, meaning that it falls "within ... the penumbra of some common-law, statutory, or other established concept of unfairness; ... is immoral, unethical, oppressive, or unscrupulous; [and] ... causes substantial injury…." Linkage Corp. v. Trustees of Bos. Univ., 425 Mass. 1, 27 (1997), quoting PMP Assocs., Inc. v. Globe

-13-

Newspaper Co., 366 Mass. 593, 596 (1975). Although Chapter 93A does not define unfairness, it permits the Attorney General to "make rules and regulations interpreting the provisions of [Chapter 93A, § 2(a)." Casavant v. Norwegian Cruise Line, Ltd., 460 Mass. 500, 503 (2011), quoting Purity Supreme, Inc. v. Attorney Gen., 380 Mass. 762, 775 (1980). The Attorney General did so generally through 940 CMR 3.16 (3), which made non-compliance with a consumer protection regulation "meant for the protection of the public's health, safety, or welfare promulgated by the Commonwealth" a Chapter 93A violation, and specifically through 940 CMR 15.00 et seq., which contains regulations covering EF's travel services industry. See Casavant, 460 Mass. at 503–04 ("Chapter 15.00 of 940 Code Mass. Regs. (1996) defines and outlaws certain unfair or deceptive business practices in the sale of travel services to the public"). Section 15.01 (1) states that a violation of the regulations contained in Chapter 15.00 "shall be an unfair or deceptive act or practice, under M. G. L. c. 93A, § 2 (a)." 940 CMR 15.01 (1). Section 15.06 reads as follows:

> Whenever for the purpose of a particular transaction a seller of travel services is acting as a tour operator, and the seller fails to provide any of the travel services that a consumer has purchased directly or indirectly from the seller, the seller must offer the consumer the following three options, and must honor the consumer's choice:
>
> (1) the seller will refund to the consumer in cash an amount equal to the fair market retail value of any undelivered, purchased travel service, such cash refund not to exceed the total amount paid by the consumer for the travel package, and such cash refund to be delivered within 30 days of the consumer's selection of this option; or
>
> (2) the seller will provide a specifically identified substitution travel service of equal or greater

fair market retail value for any undelivered, purchased travel service, at no additional cost to the consumer; or
(3) the seller will provide a specifically identified substitute travel service of lower fair market retail value for any undelivered, purchased travel service, and refund to the consumer in cash an amount equal to the difference in the fair market retail prices of the purchased and the substitute travel services, such cash refund to be delivered within 30 days of the consumer's selection of this option.

-14-

EF contests the application of this regulation on three grounds: first, that in the absence of a viable contract breach claim, there can be no Chapter 93A claim; second, that a violation of the regulation alone "without other facts showing unfairness or deception," Reply at 9, does not state a claim under Chapter 93A; and third, that EF did not "fail" to provide the purchased travel services within the meaning of the regulation. None of these arguments is persuasive.
As to its first argument, EF claims that in the absence of a breach of contract, there can be no Chapter 93A violation, citing TSI S. Stations, Inc. v. 695 Atl. Ave. Co., LLC, No. 2084CV1059BLS2, 2020 WL 8182917, at *3 (Mass. Super. Nov. 6, 2020) for the proposition that "there can be no violation of 93A where one party has done no more than what the contract between the parties permits."
EF overreads the import of TSI. In this case, whether or not the Contract was violated, the Plaintiff can still allege a viable Chapter 93A claim, in part because the facts show that EF improperly attempted to contract away obligations imposed upon it under a valid regulation promulgated pursuant to Chapter 93, § 2. A commercial entity like EF cannot override through its contract with a consumer a valid and applicable regulation promulgated under Chapter 93A by the Attorney General. See G. L. c. 93, § 101 (prohibiting waiver by agreement of "[a]ny rights granted to consumers under the provisions of any law or regulation … providing protection of consumers' … welfare"); Ruiz v. Bally Total Fitness Holding Corp., 447 F. Supp. 2d 23, 26 (D. Mass. 2006), aff'd, 496 F.3d 1 (1st Cir. 2007) ("Mass. Gen. Laws ch. 93, § 101 … prohibits the waiver of consumer rights provided by Massachusetts statutes"); Canal Elec. Co. v. Westinghouse Elec. Corp., 406 Mass. 369, 378 (1990) ("we ordinarily would not effectuate a consumer's waiver of rights under c. 93A") (emphasis in original). Rather, EF was required to comply with Section 15.06. See Casavant, 460 Mass. at 504 ("an enterprise engaged in the travel

-15-

service business … properly is held to have had knowledge of its obligations under the Attorney General's regulations specifically directed to that industry."). Section 15.06 required EF, as a "tour operator," i.e., "a seller of travel services that creates and sells travel packages" (940 CMR 15.02), to provide consumers with three options to choose from: a refund of the fair market value of a trip within 30 days, a "specifically identified substitution travel service of equal or greater fair market retail value," and a "specifically identified substitution travel service" of lesser value and a refund of the difference within 30 days. EF's attempt to limit these remedies through the Contract is invalid, as here, the Contract provided none of the remedies required by the regulation – refunds were not offered, promptly made or otherwise, nor were specifically identified substitute trips, just vouchers for future trips with restrictions placed on them unsanctioned by Section 15.06. EF cannot avoid the requirements of Section 15.06 by attempting to contract them away.
Second, to the extent EF disputes it, the Attorney General had the authority to "make rules and regulations interpreting the provisions" of G. L. c. 93A, § 2, including those in Section 15.06, and thereby define unfair or deceptive acts or practices. See G. L. c. 93A, § 2©; Casavant, 460 Mass. at 503. As noted above, the Supreme Judicial Court held in Casavant that
"Chapter 15.00 of 940 Code Mass. Regs. (1996) defines and outlaws certain unfair or deceptive business practices in the sale of travel services to the public," such that it is an unfair or deceptive trade practice to violate them. Id. at 503-504; see also Darviris v. Petros, 442 Mass. 274, 281 (2004), quoting American Shooting Sports Council, Inc. v. Attorney Gen., 429 Mass. 871, 875 (1999) ("G.L. c. 93A, § 2 (c) 'limits the Attorney General's rule-making power to be within the concepts of deception or unfairness, as guided by administrative and judicial interpretation of the [Federal Trade Commission] Act.'"). EF cites Klairmont v. Gainsboro

-16-

Rest., Inc., 465 Mass. 165 (2013) for the position that 940 CMR 3.16 (3)'s declaration that "an act or practice is a violation of M.G.L. c.93A, § 2 if … [i]t fails to comply with existing … regulations … meant for the protection of the public's health, safety, or welfare promulgated by the Commonwealth." As required under 940 CMR 3.16 (3), must be read "as being bound by the scope of c. 93A, § 2 (a) … [such that] a violation of a … regulation … will be a violation of c. 93A, § 2 (a), only if the conduct leading to the violation is both unfair or deceptive and occurs in trade or commerce" under the facts of the case. Klairmont, 465 Mass. at 174. But Klairmont did not concern a regulation specifically designed to implement Chapter 93A, but rather addressed the building code, and held that "not all building code violations" would give rise to Chapter 93A claims "either because they would lack the unfairness or deceptiveness present in this case or because they do not arise in trade or commerce," noting the "ubiquitous" nature of the building code. 465 Mass. at 176-177.[7] In contrast, the regulation at issue here was specifically designed to interpret and enforce Chapter 93A. Godines thus need not allege more than a violation of Section 15.06 to establish unfairness, as the regulations applicable in this case expressly state (and put EF on clear notice) that "[v]iolation of any provisions of 940 CMR 15.00 shall be an unfair or deceptive act or practice, under M. G. L. c. 93A, § 2 (a)." 940 CMR § 15.01 (1). As the federal district court recently explained in Douglas, the very similar case brought against EF mentioned in the Rule 12 (b) (9) discussion:

> [With regard] to the first element of the c. 93A claim … when regulations establish per se unfair or deceptive acts or practices, plaintiffs need not make an additional showing of unfairness or deceptiveness aside from evidence of the violation itself. See Cranmore v. Wells Fargo Bank, N.A., 410 F. Supp. 3d 336, 341–42 (D. Mass. 2019) (concluding that violation of 209 C.M.R. § 18.22(1) "is per se 'an unfair or deceptive act or practice' under Chapter 93A" and rejecting defendants' argument that a Chapter 93A claim requires more than an allegation that action violated regulation, which "explicitly defines a violation of [the regulation] as per se 'an unfair or deceptive act or practice' under

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> [7] Under the facts of that case, the building code violations did, in fact, support a finding that Chapter 93A was violated. Id. at 173-177.

-17-

Chapter 93A"). The SJC has held that "the [A]ttorney [G]eneral may make rules and regulations interpreting the provisions of [Chapter 93A]," like 940 C.M.R. § 15.00, that "define[ ] and outlaw[ ] certain unfair or deceptive business practices in the sale of travel services to the public " Casavant, 460 Mass. at 503–04. Thus, when regulations define such acts or practices, evidence showing "violations [of the Attorney General's Regulations] qualify as unfair or deceptive acts" as a matter of law. Id. at 504 (reversing trial judge's conclusion that no Chapter 93A violation occurred when evidence at trial showed regulatory violation and remanding for determination of damages) …
Douglas, 2021 WL 4311822, at *6; see also Hebert v. Vantage Travel Serv., Inc., No. 17-CV- 10922-DJC, 2021 WL 2516076, at *2-4 (D. Mass. June 18, 2021).
The fact that alleged conduct violates a regulation promulgated by the Attorney General does not relieve the plaintiff in a case like this from establishing the other elements of a Chapter 93 claim, that of showing loss and a causal connection between the breach of the regulation and the loss. See Casavant, 460 Mass. at 503-505. To that extent, EF is correct that a violation of a regulation does not alone establish a violation of Chapter 93A. See Tyler v. Michaels Stores, Inc., 464 Mass. 492, 503 (2013) ("The invasion of a consumer's legal right (a right, for example, established by statute or regulation), without more, may be a violation of G.L. c. 93A, § 2, and even a per se violation of § 2, but the fact that there is such a violation does not necessarily mean the consumer has suffered an injury or a loss entitling her to at least nominal damages and attorney's fees; instead the violation of the legal right that has created the unfair or deceptive act or practice must cause the consumer some kind of separate identifiable harm arising from the violation itself."). But here, Godines alleges that the regulation was violated and, as a result, she has

"lost money." Complaint, ¶ 82. At this stage, this is enough to state a claim under Chapter 93A.

Third, EF's argument that the term "fail" in Section 15.06 connotes an element of fault is mistaken. Before considering the specifics of this argument, it is important to note that EF's definition of "fail" in Section 15.06 to mean any circumstance described in the "Extraordinary

-18-

Events" paragraph of the Contract is unsupported. In other words, even if "fail" meant "did not perform as contracted for some acceptable reason," as EF contends, nothing supports EF's corollary argument that its definition of "Extraordinary Events" is authorized by, or even consistent with, Section 15.06. For example, "Extraordinary Event" included things like "labor dispute[s]" that made a tour not impossible but only "commercially unreasonable" or "impracticable." Thus, EF's argument that its Contract language is the equivalent of "fail" and exempts EF from the obligation to provide the remedies under Section 15.06 would vastly limit Section 15.06's scope and undercut the intent of the regulation to protect consumers from cost- shifting by tour operators. Nothing supports this counterintuitive limitation on a regulation designed to protect consumers.

Leaving this concern aside, EF's definition of "fail" in Section 15.06 is erroneous. Courts "interpret a regulation in the same manner as a statute, and according to traditional rules of construction." Warcewicz v. Department of Envtl. Protection, 410 Mass. 548, 550 (1991). "The words of a regulation are given their usual and ordinary meaning. If the meaning of a term is clear, courts give effect to that language; but if the language is ambiguous enough to support more than one rational interpretation, courts will give effect to the interpretation that furthers the purpose of the framers." Layes v. RHP Properties, 95 Mass. App. Ct. 804, 810 (2019) (citation omitted). To correctly interpret a regulation, "a court must 'carefully consider[ ]' the text, structure, history, and purpose of a regulation." Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) (citation omitted).

In the abstract, the term "fail" can simply mean "did not," although it can also convey an element of fault. Merriam-Webster defines "fail" as free of fault – "to fall short" or "to miss

-19-

performing an expected service" – but also to "neglect." [8] Albeit in another context,[9] the Supreme Court recognized the competing meanings of "fail":

> We do not deny "fail" is sometimes used in a neutral way, not importing fault or want of diligence. So the phrase "We fail to understand his argument" can mean simply "We cannot understand his argument." … In its customary and preferred sense, "fail" connotes some omission, fault, or negligence on the part of the person who has failed to do something. See, e.g., Webster's New International Dictionary 910 (2d ed.1939) (defining "fail" as "to be wanting; to fall short; to be or become deficient in any measure or degree," and "failure" as "a falling short," "a deficiency or lack," and an "[o]mission to perform"); Webster's New International Dictionary 814 (3d ed.1993) ("to leave some possible or expected action unperformed or some condition unachieved"). See also Black's Law Dictionary 594 (6th ed.1990) (defining "fail" as "[f]ault, negligence, or refusal"). To say a person has failed in a duty implies he did not take the necessary steps to fulfill it. He is, as a consequence, at fault and bears responsibility for the failure. In this sense, a person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance. Fault lies, in those circumstances, either with the person who interfered with the accomplishment of the act or with no one at all. We conclude Congress used the word "failed" in the sense just described. Had Congress intended a no-fault standard, it would have had no difficulty in making its intent plain. It would have had to do no more than use, in lieu of the phrase "has failed to," the phrase "did not."

Williams v. Taylor, 529 U.S. 420, 431–432 (2000). But here, the most natural reading of the term Section 15.06 does not suggest that an element of fault must be found. See Hebert v. Vantage Travel Service, Inc., 444 F.Supp.3d 233, 252-254 (D. Mass. 2020) (Section 15.06 applied to a tour operated that failed to provide a purchased travel service on a ship because of mechanical failure on the ship, which was owned by another company). Indeed, Title 940 repeatedly uses the term "fail" to mean "did not," without incorporating an element of fault, confirming that "fail" used in Section 15.06 does not incorporate an element of fault. For instance, 940 CMR 5.03 (4) (c), a regulation governing motor vehicle

manufacturers, states that "[i]t is an unfair or deceptive act or practice for a manufacturer to fail to cancel any purchase

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[8] Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/fail. Accessed 19 Nov. 2021

[9]The Court was interpreting the Antiterrorism and Effective Death Penalty Act of 1996.

-20-

order for a motor vehicle and refund all amounts received for such vehicle at the request of the dealer, if the manufacturer fails to deliver the vehicle to the dealer within eight weeks after the date of the purchase order unless: … [t]he delay is caused by acts beyond the control of the manufacturer" (emphasis added). "Fail" as used in Section 5.03 necessarily includes circumstances where the failure was not the fault of the manufacturer, necessitating the carve-out for failures that were beyond its control. Similarly, 940 CMR 3.15 (3) (b), a regulation relating to the sale of goods, states that "[i]t is an unfair and deceptive act or practice: … [t]o fail to deliver merchandise ordered by mail or otherwise on which payment has been made or undertaken, in the form of a deposit, down payment or total payment where a definite delivery date has been set unless the seller can show circumstances beyond his control and not within his knowledge at the time the order was accepted which prevented the seller from meeting the delivery date" (emphasis added). See also 940 CMR 33.06 (11) ("If an employee fails without cause to follow policies in such circumstances, an employer may discipline an employee for misuse of sick leave.") (emphasis added).[10] Cf. 940 CMR 29.06 (2) ("If the subject of the investigation fails to voluntarily provide the necessary or relevant information within 30 days of receiving notice of the investigation, the Attorney General may issue one or more civil investigative demands to obtain the information in accordance with M.G.L. c. 30A, § 24(a) …"). There would be no need to make special provision for no fault failures if "fail" did not already incorporate them. More generally, engrafting an element of fault onto the term "fail" as used

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[10] Similarly, some regulations use the phraseology "fail or refuse" to distinguish between faultless and faulted failures. For instance, the regulations make it a Chapter 93A violation for long term care facilities "to fail or refuse to assure a resident privacy during medical examination or treatment or during care for his/her personal needs such as bathing, dressing and toileting," 940 CMR 4.06 (1), or "to fail or refuse to permit a resident, after receipt of his/her records for inspection, to purchase at a cost not to exceed the community standard, photocopies of the records or any portions thereof." 940 CMR 4.08 (6). See also 940 CMR 5.02 (6) (with respect to advertising of motor vehicles, "[i]t is an unfair or deceptive act or practice for a motor vehicle dealer to fail or refuse to sell a motor vehicle in accordance with any terms or conditions, including price or warranty, which the dealer has advertised or otherwise represented.").

-21-

throughout Title 940 would substantially weaken a host of regulations contained within Title 940 designed to protect consumers, in contravention of the purpose of Chapter 93A.[11]
In a letter submitted after the argument, EF argued that a decision of the Supreme Judicial Court, Nei v. Burley, 388 Mass. 307, 315-317 (1983), read 940 CMR § 3.16 (2) to require fault. That regulation makes it a violation of Chapter 93A where "[a]ny person or other legal entity subject to this act fails to disclose to a buyer or prospective buyer any fact, the disclosure of

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[11] See, e.g., 940 CMR 3.12 (1) (with respect to merchants using lay away plans, it violates

Chapter 93A "[t]o fail to disclose … the store's policy with reference to a 'lay away' plan"); 940 CMR 3.08 (1) (c) (with respect to repair services, it violates Chapter 93A to "(c) [f]ail to disclose, in the case of an in-home service call where the consumer has initially contacted the repairman, that a service charge will be imposed even though no repairs are effected, before the repairman goes to the consumer's home"); 940 CMR 5.04 (1) (with respect to motor vehicle sales, "[i]t is an unfair or deceptive act or practice for a dealer to fail to prepare a written contract for a sale of each motor vehicle and to provide a copy of such contract to the purchaser at the time the purchaser signs the contract"); 940 CMR 6.11 (3) (with respect to lease-to-own transactions, "[i]f a seller advertises the lease or rental of any product and also advertises an option to purchase the product, then it is an unfair or deceptive act for the seller to fail to disclose clearly and conspicuously in each advertisement that the product is used, if such is the case"); 940 CMR 3.13 (1) (with respect to pricing, "[i]t is an unfair and deceptive act or practice … to fail to disclose to a buyer prior to any agreement the price or cost of any services to be provided, or … to fail to affix to any goods offered for sale to consumers the price at which the goods are to be sold"); 940 CMR 6.10 ("It is an unfair or deceptive act for a seller who advertises any finance terms to fail to comply with state and federal Truth-in-Lending laws, M.G.L. c. 140D, § 1 and 15 U.S.C. § 1601."); 940 CMR 31.07 (3) (with respect to for-profit schools, "[i]t is an unfair or deceptive act or practice for any school that recommends specific Lending Institutions to prospective or current students to fail to disclose … that the Lending Institution is affiliated with the school or … is providing something of value in the form of a payment or in-kind service to the school"); 940 CMR 3.17 (1) (h) (prohibiting a landlord from "[f]ail[ing] to reimburse an occupant for reasonable sums expended to correct violations of law in a dwelling unit if the owner failed to make such corrections pursuant to the provisions of M.G.L. c. 111, § 127L, or after notice prescribed by an applicable law"); 940 CMR 8.05 (1) ("It is an unfair or deceptive act or practice for a mortgage broker or mortgage lender to fail to make any disclosure, or fail to provide any document, to a consumer required by and at the time specified by any applicable state or federal law, regulation or directive."); 940 CMR 10.09 (1) (with respect to manufactured housing communities, "[i]t shall be an unfair or deceptive act or practice in violation of M.G.L. c. 93A for an operator to fail … to give notice of any intention to sell or lease all or part of the manufactured housing community [or] … of an offer for such a sale or lease that the operator intends to accept [or] … to unreasonably refuse to enter into, or to unreasonably delay the execution or closing on, a purchase and sale agreement or lease with residents who have exercised their right of first refusal to purchase or lease the community"); 940 CMR 22.05 (2) (b), (d) (making it "an unfair or deceptive act or practice" for sellers of cigars to"[f]ail[ ] to verify by means of valid government-issued photographic identification" a purchaser's age," or to "[f]ail[ ]" to place products out of consumer's reach); 940 CMR 7.08 (1) (with respect to debt collection, "[i]t shall constitute an unfair or deceptive act or practice for a creditor to fail to provide to a debtor or an attorney for a debtor the following [information] within five business days after the initial communication with a debtor in connection with the collection of a debt, unless the following information is contained in the initial communication or the debtor has paid the debt…"); 940 CMR 6.14 (2) (with respect to retail advertising, "[i]t is an unfair or deceptive act for a seller to fail to maintain records"); 940 CMR 8.06 (8), (11) (with respect to mortgage transactions, "[i]t is an unfair or deceptive act or practice for a lender to fail to disburse funds in accordance with any commitment or agreement with the borrower" or "to fail to give to the borrower or his or her attorney the time and reasonable opportunity to review every document signed by the borrower and every document which is required pursuant to 940 CMR 8.00, prior to the disbursement of the mortgage funds").

-22-

which may have influenced the buyer or prospective buyer not to enter into the transaction." The Nei Court found that a judge properly determined that a real estate broker had not violated the regulation by failing to disclose to a buyer or prospective buyer facts regarding a parcel of real property of which the broker had no knowledge such that there was "no affirmative misrepresentation and no showing that the broker knew or should have known about the problems …" 388 Mass. at 317. But Nei is a deception case, not an unfairness case; for there to be deception, the prospective defendant must know the relevant undisclosed facts or have negligently misrepresented them. See Glickman v. Brown, 21 Mass.

App. Ct. 229, 235 (1985), abrogated on other grounds by Cigal v. Leader Dev. Corp., 408 Mass. 212 (1990) (citations, internal punctuation marks omitted) ("sellers should not be allowed to misrepresent the truth simply because they have not made reasonable efforts to ascertain it. We hold (if there were any doubt about it) that a negligent misrepresentation of fact the truth of which is reasonably capable of ascertainment is an unfair and deceptive act or practice within the meaning of c. 93A, § 2(a)."). Such concerns are absent in an unfairness case. Even if they were, there was underlying fault here – as discussed above, EF is held to comply with the requirements imposed under Section 15.06 to ensure travel contracts are fair under Chapter 93A and simply did not comply with them.

EF also argues that the history of Section 15.06 supports its reading, and offers in support a single paragraph from the Report of the Attorney General for the Year Ending June 30, 1996.12 That Report notes that in April, 1996, the Attorney General "issued a set of regulations to deal with common problems in the purchase of travel services … [which] draw clear lines of accountability for travel plans that fall through, because of some failure on the part of the seller

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[12] Available at https://archives.lib.state.ma.us/bitstream/handle/2452/43686/ocm40944902-1996.pdf

of travel services." Report at 201, citing 940 CMR 15.000 et seq. EF reads "because of some failure on the part of the seller of travel services" to mean "the fault of the seller of travel services." This reading is in error. The fundamental choice made in Section 15.06 is whether a consumer or the tour operator bears the cost of a cancelled tour. The regulation puts the burden of that cost on the tour operator, which has the ability to offer consumers alternative trips or refunds, as described in the regulation – and even then, refunds are of the fair market value of the trip, capped by the tour cost. In light of this structure, and the structure of Title 940, the Report's mere repetition of "failure" does not connote fault because "fail" as used in Section 15.06 does not, as discussed above. Further, the Report's use of the phrase "draw clear lines of accountability" to modify "some failure on the part of the seller of travel services" shows that the regulation was intended to distinguish between a tour cancellation driven by the consumer's choice from one resulting, for whatever reason, by the failure of the tour operator to deliver the trip. Indeed, while it conflicts with the specific requirements of Section 15.06, the Contract recognizes this core logic – it states that when an Extraordinary Event occurs, which in EF's view occurs without its fault, EF is still required to deliver a travel voucher for another trip.

EF's complaint that this reading of Section 15.06 transforms it into an "insurer" of the Tour is an overstatement on several levels; at its most basic, Section 15.06 does not demand full reimbursement of damages, as might be demanded of an insurer. Instead, it only requires a refund, and even then, consumers selecting a refund receive only the fair market value of the tour up to the total amount the consumer paid. Further, EF's argument that a traveler could have purchased travel insurance is another misguided effort to shift costs to consumers; the reality that travel insurance may have been available simply does not change the requirement imposed under

Section 15.06 that tour operators promptly refund payments made for failed trips or offer specific substitutes, as described in the regulation, at no further cost to consumers.

Godines has thus alleged an actionable Chapter 93A theory. As noted above, Godines has also alleged causation and loss. As was the case in Douglas, this is sufficient to state a claim under Chapter 93A. See Douglas, 2021 WL 4311822, at *6. "There is no unfairness in this result. A[n] … enterprise engaged in the travel service business … is held to have had knowledge of its obligations under the Attorney General's regulations specifically directed to that industry." Casavant, 460 Mass. at 504. EF was on notice of its obligations under Section 15.06 so that it could have prepared to make refunds or offered substitute trips if it failed to deliver purchased travel services.

EF's motion to dismiss Count IV is denied.

ORDER

For the reasons expressed above, EF's motion to dismiss is ALLOWED AS TO

COUNTS I, II and III, AND DENIED AS TO COUNT IV.
In light of the pendency of Douglas v. EF Educ. First Int'l, Ltd., No. 20-CV-11740-DJC, the parties are ORDERED to confer and jointly report by January 28, 2022 regarding any proposals to harmonize this litigation with that case.
SO ORDERED.

/s/MICHAEL D. RICCIUTI Justice of the Superior Court

-25-