NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2484CV01099-BLS2

MELISSA SCANLON and
SHANE HARRIS[1]

vs.

DRAFTKINGS, INC.

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

Melissa Scanlon (Scanlon) and Shane Harris (Harris) (together, Plaintiffs) bring this class action lawsuit against DraftKings, Inc. (DraftKings) asserting two claims: unfair and deceptive acts and practices in violation of G. L. c. 93A, §§ 2 and 9 (Count I), and untrue and misleading advertising in violation of G. L. c. 266, § 91 (Count II). Plaintiffs allege that DraftKings advertised a promotion offering a bonus of up to $1,000 (Bonus) for new customers that was false, unfair, and deceptive because, among other reasons, to get the bonus, customers would have to deposit "up to five times that amount," place $25,000 worth of bets, and would receive the bonus only in "DK Dollars." Plaintiffs allege that, had they "understood the cost or the odds of winning the Bonus, they would not have acted upon the promotion."

DraftKings moves to dismiss arguing: (i) Plaintiffs have not alleged a specific, "distinct" injury required to assert a claim for violation of G. L. c. 93A; (ii) the advertising of the promotion was not misleading as a matter of law where disclosures in the sign-up process accurately described the terms and conditions Plaintiffs now

[1] On behalf of themselves and all others similarly situated

claim were hidden; and (iii) Harris must be dismissed as a named plaintiff because he did not send the statutorily required pre-suit demand letter.

After hearing and review, and for the following reasons, DraftKings' Motion to Dismiss is **DENIED**.

BACKGROUND

I recite the relevant facts asserted in the Complaint, "taking them as true for purposes of evaluating the motion to dismiss." Edwards v. Commonwealth, 477 Mass. 254, 255 (2017). I do not accept as true legal conclusions. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 632-633 (2008). Further, I may consider documents upon which the Complaint relies and matters susceptible to judicial notice. See Polay v. McMahon, 468 Mass. 379, 381 n.3 (2014), and cases cited.

Sports betting was legalized in Massachusetts in 2022. DraftKings began advertising its "newly licensed" Sportsbook gambling service in 2023. DraftKings promoted the Bonus to encourage new customers to sign up, deposit funds, and bet. DraftKings advertised the Bonus through social media, on websites, billboards, flyers, and television and radio broadcasts. It used local sports heroes in its campaign.

DraftKings advertised the Bonus on its website with the following banner:

> JOIN DRAFTSKINGS SPORTSBOOK
> NEW CUSTOMERS GET A $1,000 DEPOSIT
> BONUS IN DK DOLLARS!

Below this text was a link to "View Terms" and to the right of the banner were two clickable boxes, one to "Log In" and one to "Sign Up."

DraftKings also advertised on its mobile app landing page which, after the DraftKings logo, stated "GET A $1,000 DEPOSIT BONUS!" Below that advertisement was a clickable box labelled "Sign up" and another labelled "Log in with your DraftKings Account." Below those boxes was a link labelled "View Promotion Terms."

Plaintiffs allege that those and other advertisements were false and misleading because no new customer would receive $1,000 in exchange for signing up, "as the ad[s] implied." Instead to receive that amount, a user would have to "deposit $5,000 up front," "bet $25,000 within 90 days," and their bets would have to have odds of "-300 or longer."[2] A new customer would have to deposit $5,000 because the bonus was calculated as twenty percent of the initial deposit. A new customer would have to wager $25,000 because the customer would earn $1 for every $25 wagered.

Plaintiffs allege that those three terms were explained to consumers only in small, unreadable font. They also claim not to have understood the above terms or that the Bonus would be awarded not in money that could be withdrawn but in DraftKings money to be used for further gambling. Plaintiffs allege further that DraftKings "knowingly and unfairly designed its promotion to maximize the number of consumers that would sign up for its sports gambling platform, the number of bets that would be placed through the platform, and the amount of money that would be placed on bets through its platform[ ]."

In reliance on the advertising, Plaintiffs created new accounts, and deposited funds through DraftKings' gambling platform.[3] Scanlon made an initial deposit, of an

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[2] "Moneyline odds (aka 'American odds' or 'U.S. odds') are popular in the United States. The odds for favorites are accompanied by a minus (-) sign and indicate the amount you need to stake to win $100. Conversely, the odds for the underdogs are accompanied by a positive (+) sign and indicate the amount you might win for every $100 you stake." https://www.investopedia.com/articles/investing/042115/betting-basics-fractional-decimal-american-moneyline-odds.asp (last visited Aug. 6, 2024).

[3] Plaintiffs also allege that gambling is not a typical consumer product because it is highly addictive. Plaintiffs allege as well that "[m]arketers of a known addictive product should take special precautions to minimize addictive risk" and not "require $25,000 of gambling to qualify for a promotional offer to new customers who are likely to be gambling-naïve." While I accept as true the factual allegation that gambling is addictive, I do not accept the legal conclusions ostensibly flowing therefrom. Moreover,

undisclosed amount, on April 9, 2023. Harris made an initial deposit of an undisclosed amount in March of 2023. According to Plaintiffs, if "they had understood the cost or the odds of winning the Bonus, they would not have acted upon the promotion."

Attached to the Complaint are two exhibits. The first, Exhibit A, purports to be the Bonus requirements posted on DraftKings' website as of June 1, 2023. The single-spaced text, as reproduced, is quite small and barely legible. Exhibit A reads, in relevant part:

> A customer's first deposit (min. $5) qualifies the user to receive up to $1,000 in bonus funds, in the form of site credits that can only be used on DraftKings. Bonus amount is equal to 20% of that deposit amount, not to exceed $1,000 (the customer must deposit $5,000 to be eligible to receive the maximum possible bonus amount of $1,000). Bonus funds will be awarded to the user according to the following play-through requirement: for every $25 played on DraftKings in DFS/Sportsbook/Casino, the user will receive $1 in bonus funds released into their customer account (e.g., a $5,000 deposit requires a customer to play through a cumulative total of $25,000 in daily fantasy contests, sportsbook (-300 odds or longer) casino products or any combination thereof, to receive the maximum possible bonus amount of $1,000). The play-through requirement must be met 90 days from the date of first deposit to receive maximum bonus. After such date, you are ineligible to earn any additional bonus funds as part of this promotion.

Exhibit B to the Complaint purports to contain the bonus requirements downloaded from DraftKings' website on December 7, 2023. Like Exhibit A, the text in Exhibit B is single-spaced and very small, but it is slightly more readable than the text in Exhibit A. It provides the same relevant disclosures as in Exhibit A, except that the play-through requirement provides that the user will receive $1 for every $15 played and that it must be met within 30 days. Moreover, the disclosures are included in a paragraph that is

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that gambling may be addictive is not relevant to the issues before me on the instant motion.

dense with other information related to the promotion.[4]

DISCUSSION

DraftKings moves to dismiss on three grounds. I discuss each in turn, applying the well-known standard, which is that, in deciding a motion to dismiss pursuant to Rule 12(b)(6), I must "look beyond the conclusory allegations in the complaint," Curtis v. Herb Chambers I-95 Inc., 458 Mass. 674, 676 (2011), and determine if the nonmoving party has pleaded "factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief" (quotation and citation omitted). Iannacchino, 451 Mass. at 636. In doing so, I must accept as true all facts pleaded in the Complaint as true. Edwards, 477 Mass. at 255. I also accept as true "such inferences as may be drawn [from those facts] in the plaintiff's favor[.]" Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404, 407 (1995).

I. Distinct Cognizable Injury Under G. L. c. 93A

To bring a claim under G. L. c. 93A, § 9, a plaintiff must have "been injured by another person's use or employment of an unfair or deceptive act or practice (quotation omitted)." Iannacchino, 451 Mass. at 629. Put elsewise, a consumer is not "entitled to redress under G. L. c. 93A, where no loss has occurred." Hershenow v. Enterprise Rent-A-Car Co. of Bos., Inc., 445 Mass. 790, 802 (2006). Thus, in a consumer protection case alleging statutory or regulatory noncompliance as the basis of a violation of G .L. c. 93A, noncompliance alone is not sufficient to establish injury. As the Supreme Judicial Court (SJC) held in Tyler v. Michael's Stores, Inc.:

> 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

[4] I am unable to conclude, from the materials before me, the actual size and legibility of the text displayed to the Plaintiffs or any other customer. Therefore, I accept as true, as I must, that the text was "unreadable" as alleged in the Complaint.

> 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. . . . [A] plaintiff bringing an action for damages under c. 93A, § 9, must allege and ultimately prove that she has, as a result, suffered a distinct injury or harm that arises from the claimed unfair or deceptive act itself.

464 Mass. 492, 503 (2013). See Bellermann v. Fitchburg Gas & Elec. Light Co., 475 Mass. 67, 72 (2016) ("The requirement of showing that a plaintiff suffered an injury may be met by showing either an economic or a noneconomic injury."). This injury or loss requirement – especially in the context of purported class action cases – "guard[s] against vicarious suits by self-constituted attorneys general who see a wrong but have not actually been harmed by the wrong (citation omitted)." Auto Flat Car Crushers, Inc. v. Hanover Ins. Co., 469 Mass. 813, 823 (2014).

Here, DraftKings argues that Plaintiffs have not articulated the requisite adverse consequence of injury or loss.[5] I disagree. Although many of Plaintiffs' allegations are conclusory – "Plaintiffs, and the members of the Class, have suffered damages as a result of DraftKings' unfair and deceptive marketing promotion" and "Plaintiffs, and the Members of the Class, have suffered damages as a result of DraftKings' violations of G. L. c. 266, § 91" – Plaintiffs also allege that, in reliance on the promotion, i.e., believing they would receive the $1,000 bonus, they opened accounts with DraftKings and deposited money. In addition, Plaintiffs allege that they would not have paid DraftKings at all, but for the false and misleading promotion. Taking those facts to be true, and applying all reasonable inferences in Plaintiffs' favor, these allegations

[5] DraftKings relies heavily on the assertion in the Complaint that "Plaintiffs need not prove that any consumer was actually harmed or that DraftKings'[ ] acts caused any quantifiable economic injury, but instead need only prove that DraftKings' unfair and/or deceptive acts took place in trade or commerce." That statement is not the law, but it does not prohibit me from reviewing the remainder of the Complaint to discern whether the factual allegations otherwise satisfy the injury requirement.

plausibly suggest that they were harmed because they bought into a service worth less than they believed based on the promotion. On those facts, at this stage of the case, and applying the requisite standard, I cannot conclude that Plaintiffs have failed to allege an injury distinct from DraftKings alleged wrongdoing.[6]

II. False and Misleading Advertising

DraftKings argues next that Plaintiffs have not stated a claim for unfair or deceptive advertising because disclosures identified the conditions and terms that Plaintiffs now claim were hidden. To support this argument, DraftKings relies in part on the Affidavit of Gary Wimbridge (Wimbridge) a Vice President of Product at DraftKings. Wimbridge avers that, before any customers would have been able to deposit funds or enter the promotion, they would have been required to "view[] the full terms and conditions" which were the same in all material respects whether a customer signed up via the DraftKings website or mobile application. Wimbridge attached "representative" copies of the terms and conditions a consumer would have encountered on the website and / or on the mobile app.

According to DraftKings, I can rely on that material, without converting the case to one for summary judgment, because Plaintiffs "cherry-picked" portions of the promotion's advertising and sign-up process to reference in the Complaint. I am not persuaded that I am permitted to or should rely on the material contained in and attached to the Wimbridge affidavit without converting the motion to one for summary judgment. See Mass. R. Civ. P. 12 (b) ("If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief

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[6] Draft Kings also argued that Plaintiffs have failed to properly plead causation. On those same allegations, Plaintiffs have alleged facts that would establish causation. See Hershenow, 445 Mass. at 801 (deceptive advertising that "could reasonably be found to have caused a person to act differently from the way he [or she[otherwise would have acted," establishes causation), quoting Aspinall v. Philip Morris Companies, Inc., 442 Mass. 381, 394 (2004).

can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."). DraftKings is correct that conversion is not required, and I may consider material outside the Complaint, where "the plaintiff had notice of [the extrinsic] documents and relied on them in framing the complaint (citation omitted)." Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 224 (2011). But here it is not at all evident that Plaintiffs were aware of the information contained in the Wimbridge affidavit, namely, that all qualifying customers would have been required to view the full terms and conditions of the promotion before depositing money, or that Plaintiffs had notice of the exhibits to the Wimbridge affidavit. Indeed, even the exhibits attached to the Complaint show that the terms and conditions of the Bonus promotion changed over time as did their layout.

Alternatively, Defendants argue that the landing pages included in Exhibits A and B to the Complaint make clear that the terms and conditions of the promotion were available to the Plaintiffs and that no reasonable consumer could be misled by them. At this stage of the case, this argument is unavailing.

The law in the Commonwealth is clear that advertising need not be "totally false in order to be deemed deceptive in the context of G. L. c. 93A. . . . The criticized advertising may consist of a half-truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information." Exxon Mobil Corp. v. Attorney Gen., 479 Mass. 312, 320 (2018), quoting Aspinall, 442 Mass. at 394–395. Here, whether the mobile application landing pages and / or the website would or would not deceive a reasonable consumer is not a decision that can be made based on the record before me and applying the standard that I must. While, based on my review of the small print provided with the Complaint, the terms and conditions disclosed to Plaintiffs accurately describe the very

conditions about which Plaintiffs now complain, the overall deceptiveness of the mobile app and website, sign up process, and terms and conditions cannot be resolved without additional information. The questions of deception and causation are ones that must be developed in discovery, as the "analysis of what constitutes an unfair or deceptive act or practice requires a case-by-case analysis . . . and is neither dependent on traditional concepts nor limited by preexisting rights or remedies." Exxon Mobil Corp., 479 Mass. at 316, citing Kattar v. Demoulas, 433 Mass. 1, 14 (2000), and Travis v. McDonald, 397 Mass. 230, 232 (1986). See Nei v. Burley, 388 Mass. 307, 313 (1983) ("This flexible set of guidelines as to what should be considered lawful or unlawful under c. 93A suggests that the Legislature intended the terms 'unfair and deceptive' to grow and change with the times.").

The two cases relied upon by Draft Kings do not persuade me otherwise. The first, Hager v. Vertrue, Inc., was decided on summary judgment. 2011 WL 4501046, at *8 (D. Mass. Sept. 28, 2011). There, the plaintiff did not read offer details clearly visible on the webpage plaintiff viewed when signing up for free credit reports. Id. at *5. The Court entered summary judgment for the defendant, concluding that "[h]aving failed to read the materials the defendants provided (even fairly casually), [plaintiff] cannot now show the necessary connection between the allegedly deceptive materials and her mistaken enrollment such that the defendants would be responsible for the asserted harm." Id. at *6. The Court also found that the offer details were not deceptive based on the enrollment process as a whole and the language of the offer, which it concluded was clear and easily understandable. Id. at *6-7. Hager does not persuade me to dismiss Plaintiffs' claims, in no small part because of its different procedural posture.

DraftKings relies as well on In re Vistaprint Corp Mktg. & Sales Pracs. Litig., 2009 WL 2884727 (S.D. Tex. Aug. 31, 2009), aff'd sub nom. Bott v. Vistaprint USA Inc., 392 F. App'x 327 (5th Cir. 2010). Although that case was decided on a motion to dismiss, the facts far more clearly established that there was no deception as a matter of

law. The plaintiffs purchased business cards online and alleged that "they were deceived by [the d]efendants' webpages and believed they could not complete their online purchases unless and until they completed a 'survey' and provided their email address." Id. at *4. The Court found, however, that the website pages at issue offering the membership programs appeared only *after* the check-out process. Id. at *4. Thus, plaintiffs' assertion "regarding the deceptive nature of the webpages at issue [wa]s *clearly and unequivocally* refuted by the website pages themselves, which [were] attached to VistaPrint's Motion to Dismiss." Id. (Emphasis added). Importantly, the plaintiffs in that case, unlike here, did not contest that the website pages on which the defendants relied were the website pages they saw when they purchased their cards. Id. at 4 n.5.

III. Pre-Suit Demand Letter

Although it concedes that each putative class member in a 93A class action is not required to send a separate demand letter, DraftKings also argues that Harris cannot serve as a named Plaintiff because he did not send a separate 93A letter which is a prerequisite to suit. DraftKings is incorrect.[7]

In Baldassari v. Public Fin Tr., the defendants argued that one group of plaintiffs, the "Mayos," could not "sue in their own names or as representatives" of the class because they had not sent an individual demand letter. 369 Mass. 33, 41–42 (1975). The SJC did not "agree," stating that, if "no reasonable tender of settlement is made in response to the first demand, further demands are not likely to serve any useful purpose and are not required." Id. at 42. The Court noted that "[t]he modern class action is designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions (quotation and citation omitted)." Id.

[7] In a footnote, DraftKings further argues that Scanlon's demand letter was legally insufficient. I am unpersuaded.

Such a conclusion makes ample sense where the principal functions of the required 93A demand letter are to "encourage negotiation and settlement by notifying prospective defendants of claims arising from allegedly unlawful conduct" and "to operate as a control on the amount of damages which the complainant can ultimately recover if he proves his case." Slaney v. Westwood Auto, Inc., 366 Mass. 688, 704 (1975). See Bosque v. Wells Fargo Bank, N.A., 762 F. Supp. 2d 342, 354 (D. Mass. 2011) ("The claims of the remaining five named plaintiffs in this case share the same features and grievances as other members of the putative class, and it is difficult to see how the notice function of the demand letter would be better served by requiring those plaintiffs to send individualized demand letters, but not other members of the putative class.").

ORDER

For the foregoing reasons, Defendant DraftKings Inc.'s Motion to Dismiss Plaintiffs' Complaint is **DENIED**.

Debra A. Squires-Lee
Justice of the Superior Court

August 19, 2023