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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

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[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.