

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:23-cv-12002-WGY

4
5 NATALIA ORTIZ, on behalf of herself and a
6 class of similarly-situated persons,
Plaintiff

7 vs.

8
9 SABA UNIVERSITY SCHOOL OF MEDICINE, et al,
10 Defendants

11 *****

12
13 For Hearing Before:
14 Judge William G. Young

15 Motion to Certify a Class

16
17 United States District Court
18 District of Massachusetts (Boston)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Tuesday, September 17, 2024

22 *****

23 REPORTER: RICHARD H. ROMANOW, RPR
24 Official Court Reporter
25 United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
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1 P R O C E E D I N G S

2 (Begins, 2:50 p.m.)

3 THE CLERK: Now hearing Civil Matter 23-12002,
4 Ortiz vs. Saba University School of Medicine.

5 THE COURT: And would counsel identify themselves.

6 MS. SILLER: Good afternoon, your Honor, Margaret
7 Siller on behalf of Ms. Ortiz and the putative class.

8 MR. EGAN: Patrick Egan, from Berman Tabacco, on
9 behalf of the plaintiff.

10 MS. FITZGERALD: Christina Fitzgerald on behalf of
11 the plaintiff.

12 THE COURT: Thank you.

13 MR. McMORROW: Good afternoon, your Honor, Mike
14 McMorrow, Locke Lord, on behalf of the defendants Saba
15 University and R3 Education Inc., and with me today are
16 Dale Evans and Daryl Lapp of the same firm.

17 THE COURT: And good afternoon to you all. Let me
18 take, um -- let me address some preliminary matters.

19 There's a discovery issue which I have resolved,
20 that's it for document discovery. There's a motion to
21 strike. The motion to strike is denied. All right,
22 those are the preliminary matters.

23 This is the -- when is this case on for trial?

24 MS. SILLER: February 9th, your Honor, 2025.

25 THE COURT: All right. So tell me what class you

1 want -- describe the class as you would have me order
2 it.

3 MS. SILLER: The class is everyone that went to
4 Saba.

5 THE COURT: Starting when?

6 MS. SILLER: Starting from September 1st, 2017 to
7 the present, that has not taken the USMLE.

8 THE COURT: All right. Now, um -- 2017.

9 One of the curious things -- but this may well be
10 my own ignorance. When you read these papers, it
11 doesn't look like Ms. Ortiz, your named representative
12 here, doesn't look like she relied on this deceptive
13 advertisement at all.

14 You don't have to prove reliance in this case?

15 MS. SILLER: Correct, your Honor, we don't have to
16 prove reliance under 93A.

17 THE COURT: And what -- I see. Okay. Under 93A.
18 And so the deceptive, um -- the deceptive advertising
19 alone will do it for you?

20 MS. SILLER: Well the causation standard under
21 Rule 23 is that it's an objective test, so would it
22 reasonably have affected a student's decision-making in
23 attending the school?

24 THE COURT: "Would it have"?

25 MS. SILLER: Yes. And so -- and as we pointed out

1 here, this is an orchestrated campaign that was across
2 Saba's and R3 Education's digital footprint, it was sent
3 to prospective students, it was on their website, it was
4 on their --

5 THE COURT: I understand, I've read the papers,
6 and for that I, um -- that's the only reason I interrupt
7 here.

8 Let me ask this. And then your theory of damages
9 is because you have to pass this test that -- so people
10 who attended and never even sat for that test in order
11 to pursue and ultimately become a licensed physician,
12 your theory is those who attended didn't even sit for
13 the test and your, um, measure of damages is what they
14 paid?

15 MS. SILLER: Correct, it's the refund of their
16 tuition fees and costs.

17 THE COURT: All right. How -- what about those,
18 if any there be, who, um, transferred credits and
19 credits were accepted by other medical schools, were
20 there any such people?

21 MS. SILLER: Well, your Honor, I think we would
22 point to the **Figgy** model and its progeny in terms of the
23 fraud in the selling here, they made material
24 misstatements about the kinds of --

25 THE COURT: No, no, but this is damages. Damages.

1 So when you -- your measure of damages is everything,
2 and I follow it. But if you transferred some credits,
3 you got something?

4 MS. SILLER: We would disagree. We don't --
5 there's no value to the transfer of credits. Under
6 **Figgy**, you should receive a full refund with no value
7 offsets. That being said, the ability of these students
8 to actually transfer to other schools is nearly
9 impossible, they can only transfer to another Caribbean
10 school, many of which are also operated by R3 Education.

11 THE COURT: But did it happen?

12 MS. SILLER: Your Honor, I don't think we have
13 sufficient discovery to know how many people made --

14 THE COURT: Suppose you win but I exclude the, um,
15 anyone who transferred credits, that they can bring
16 their own actions, is that all right?

17 MS. SILLER: I mean we would -- we would disagree
18 with that under the case law, but, um -- because there
19 should not be any sort of value offset for any of their
20 transferred credits.

21 THE COURT: Okay. All right.

22 MS. SILLER: And Dr. --

23 THE COURT: All right. Then how -- since you want
24 -- in essence you want a nationwide class, um, and
25 that's a real issue here. They take issue with that.

1 Now the deceptive advertising, if there was deceptive
2 advertising, that originated in Massachusetts, but it
3 went far beyond the borders of Massachusetts.

4 Why -- in 93A, why should I, um, resolve that
5 nationwide class arguably can get recovery under the
6 laws of Massachusetts?

7 MS. SILLER: Of course, your Honor.

8 The defendants contend that the place of reliance
9 is the only factor that should be considered in choice
10 of law, but this is incorrect. First of all, if that
11 were the case, no out-of-state plaintiff could ever
12 bring a case under 93A here, and we know that
13 contradicts the case law in **Geis** and **Cristostomo**.

14 In addition, they fail to acknowledge that the
15 Massachusetts Supreme Judicial Court has adopted more of
16 a functional approach to choice of law, it's not a rigid
17 categorical rule. And under that principle -- and under
18 that functional test, you should look to the state with
19 the most significant relationship. And as your Honor
20 pointed out, all of the ads are submitted from here, all
21 of the, um, higher executives that approve those ads
22 reside here or are employed here. It was a widely-
23 disseminated campaign.

24 And so we would say that Massachusetts has the
25 most significant relationship with the class here. And

1 there is evidence, contrary to what defendant said, in a
2 contested class motion where 93A has been used to
3 certify the nationwide class.

4 THE COURT: Thank you.

5 Other matters that you want to specifically bring
6 to my attention?

7 MS. SILLER: No, your Honor, but we're happy to
8 address any questions. I think the choice of law and
9 the damages are the two primary issues that the
10 plaintiffs raise.

11 THE COURT: Thank you. And I'll hear the
12 defendant.

13 MR. McMORROW: Thank you, your Honor. May it
14 please the Court, Mike McMorrow on behalf of the
15 defendants.

16 Your Honor, um, 4.3, as this Court has itself
17 stated, it requires a rigorous analysis of the factors
18 of 23(a) and 23(b)(3). And the plaintiff simply hasn't
19 given the Court the tools to engage in that analysis.

20 The plaintiff failed to demonstrate that she meets
21 any of the factors of 23(a). She failed to demonstrate
22 that she meets any of the factors of 23(b)(3). She's
23 failed to demonstrate that subsequent Massachusetts law
24 should apply to the claims of these students.

25 THE COURT: Well that's conclusory, tell me why?

1 MR. McMORROW: The simple reason why, your Honor,
2 is that you have to go through the Section 148 of the
3 Restatement analysis of choice of law. We are in a
4 court in Massachusetts, the Massachusetts choice-of-law
5 analysis relies. I've cited five different cases in my
6 opposition brief, **Faherty, In Re Pharmaceutical Industry**
7 **Average Wholesale Price Litigation, Southern States**
8 **Police Beneficial Association, In Re Celexa,** and **Lexapro**
9 **Marketing Sales Litigation,** all of which went through
10 this analysis, came to the conclusion that, um,
11 Massachusetts choice of law -- Massachusetts choice-of-
12 law principles dictate that you cannot certify a
13 nationwide class under 93A.

14 And the reason behind all of those is something
15 that your Honor has said in the **In Re Relafen** case.
16 This Court said, "Because the primary aim of consumer
17 protection law is generally compensating consumers and
18 not policing corporate conduct, the more significant
19 contact -- not the only contact, not the only meaningful
20 contact, but the most significant one is the location of
21 the injury, that is the location of the sales of the
22 impaired plaintiffs." Plaintiff cites to this best to
23 spark the idea that uniform application of 93A would be
24 appropriate, but it points in exactly the opposite
25 direction. There are huge factors here that --

1 THE COURT: Well is it -- or does it rather, where
2 the deceptive actions and statements all took place here
3 in Massachusetts, isn't a purpose of the Massachusetts,
4 um, Consumer Protection Act, which is -- which is to be
5 broadly construed, is to protect against fraudsters?

6 MR. McMORROW: That's part of it, but the main
7 purpose of the Consumer Protection Act of Massachusetts,
8 and all of the other states, is the protection of the
9 consumers who live in those states. And the few cases
10 that the plaintiff cited that have certified a
11 nationwide class under 93A only did it in the context of
12 the settlement.

13 ***Cristostomo vs. New Balance Athletics***, which she
14 cites, she relies on it to say that 93A provides a
15 sufficient basis for a nationwide claim. It was not a
16 class certification decision, it was a motion to
17 dismiss. As you've said five times already in this
18 court today, you have to indulge the plaintiff on a
19 motion to dismiss. You don't have to indulge the
20 plaintiff on a Rule 23 decision. It's her -- it was the
21 plaintiff's job to bring the Court the evidence to make
22 this choice of law analysis and the plaintiff simply
23 hasn't done it.

24 ***Geis vs. Nestle Waters***, the same thing, it was
25 also a motion to dismiss, um, not a contested motion.

1 **Conway vs. Planet Fitness Holdings**, she cited as
2 supporting her, um, that case itself is squarely on
3 point and it demonstrates conclusively that
4 Massachusetts law cannot apply to the plaintiffs' claim.
5 The Court applied the same Restatement analysis that we
6 talk about here, Section 148, and found that
7 Massachusetts law applied because the plaintiff lived
8 there.

9 The Court stated that the plaintiff's residency is
10 a contact of particular concern. It's not the only
11 contact, it's not the only factor, but in every case
12 that has analyzed this under Section 148 of the
13 Restatement, whether it's in Massachusetts or other
14 states that follow Section 148 of the Restatement,
15 they've all come out the same.

16 THE COURT: Thank you. All right.

17 MR. McMORROW: If your Honor would like to hear
18 about damages, um, I think we've made the point in our
19 brief. They simply don't have a damages theory. And
20 under --

21 THE COURT: Well it's a rather simplistic theory,
22 but they have a theory, it doesn't deal with those
23 people who may have, if any there be, um, had credits
24 accepted by some other medical school, but, um -- it's a
25 simplistic theory, but it is a theory.

1 MR. McMORROW: Right, but it's also a theory that
2 doesn't comport with, um, **Shaulis**.

3 **Shaulis**, which is First Circuit precedent, says
4 that under 93A -- even if you assume that 93A is the law
5 that applies to everyone's claims, okay, **Shaulis** says
6 that there has to be a causal connection between the
7 act, i.e. the advertisement, and the plaintiffs'
8 damages. Okay? It's not -- the theory that we were
9 deceived and therefore the fact that we were deceived
10 and bought the product is our damages, that is exactly
11 what was rejected by **Shaulis**.

12 **Shaulis** says that there has to be a causal
13 connection here, and she hasn't demonstrated it, she
14 hasn't given the Court the tools to show that she will
15 be able to show a causal connection between any class
16 member and these ads. She hasn't shown any class member
17 that saw any of the ads, she hasn't shown any class
18 member that --

19 THE COURT: But she's right though, under 93A
20 reliance is not an element?

21 MR. McMORROW: Reliance is not, but causal
22 connection is a -- there can be no causal connection
23 between the ads and the damages, if the class member
24 never saw the ad. Not to mention that there's two years
25 of education and what each class member did during those

1 two years that goes into that analysis as well.

2 Plaintiff herself was not a very good student,
3 okay? How she did in school is part of that causal
4 connection between the ad and her damages. She said
5 herself that if she had passed her classes she wouldn't
6 have been damaged.

7 THE COURT: All right. Thank you.

8 MS. SILLER: Your Honor, if I may be heard in
9 response?

10 THE COURT: No, I don't think that's necessary
11 based on that argument.

12 Here's what we're going to do. This is a very
13 close question here, one that I find particularly
14 difficult, and I'll make no bones about it, but I'm
15 going to allow your motion for class certification, I'm
16 going to allow it in the language that you -- you,
17 plaintiffs, propose, with a modification that the class
18 will exclude anyone who, um, (1) transferred credit to
19 another school, or (2) failed to pass a majority of the
20 classes that they took, or enrolled, otherwise I will
21 allow this.

22 This ruling is subject to, um, a written opinion.
23 The discipline of writing is an appropriate discipline
24 and I'm going to have to write this up, and I will, but
25 your time is very short here, so you're going to have to

1 undertake notification of the class, as I've defined it,
2 um, at once. That's the ruling of the Court.

3 Subject to the risk that when I, um -- when I
4 write my opinion, I, um, conclude, on further review,
5 that it just won't work and I decertify the class. But
6 for now, because time is of the essence, that's the
7 order of the Court, subject to the Court's written
8 opinion.

9 All right, that's the order.

10 (Pause.)

11 MR. McMORROW: Your Honor?

12 THE COURT: Yes?

13 MR. McMORROW: There's a procedure under Rule
14 23(f) for the, um -- for us to seek review of that
15 order.

16 THE COURT: I deny it.

17 MR. McMORROW: Okay, thank you.

18 THE COURT: Which of course does not preclude you,
19 but -- well real world you people ought to be talking
20 about resolving this case, but I'm sure you are.
21 Secondary, I haven't done you out of your appeal by
22 denying it. If you don't like the written opinion, if
23 I -- if I stick to what I have said from the bench
24 today, they'll be time to appeal and you'll have
25 something that you can pick apart. It just seems more

1 logical.

2 Am I missing anything when I say that? If you
3 want to appeal, go right ahead and appeal, but for now
4 it's denied.

5 Am I making sense?

6 MR. McMORROW: I understand what you're saying,
7 your Honor.

8 May I ask another question?

9 THE COURT: Of course.

10 MR. McMORROW: Okay, so you have changed the class
11 definition here, you've said that --

12 THE COURT: I have.

13 MR. McMORROW: -- what needs to be excluded are
14 people who, um, have transferred or had failed more than
15 half of their classes?

16 THE COURT: That's fair.

17 MR. McMORROW: Okay. There are also a number of
18 students -- first of all, you would be dismissed from
19 the school if you failed significantly fewer than half
20 of your classes, this is medical school. I think that
21 setting it at half is a little arbitrary, your Honor.

22 The second thing I would say is, um, there are a
23 number of students who simply dropped out of school for
24 a variety of reasons, um, financial, or they simply
25 didn't want to go.

1 THE COURT: But then they've paid less, haven't
2 they? And, um, so that's a difficulty that I have.

3 You know the very first sentence in Judge Keeton's
4 really seminal work, and I hold him as a hero judging in
5 the American legal sentence, is this sentence: "Judging
6 is choice, a judge has to do that." That's what I'm
7 doing.

8 MR. McMORROW: I understand that.

9 THE COURT: What we're about is really the highest
10 calling of the attorney. Arguments have been made.
11 Good briefs have been filed. I've now dealt with it.
12 Obviously we're not sitting still, it's a dynamic. So
13 if you have something to say, I'm writing the thing up,
14 so feel free.

15 MR. McMORROW: Thank you, your Honor.

16 THE COURT: Does that address what you're
17 concerned with?

18 MR. McMORROW: Um, that partially addresses it.

19 THE COURT: The rest of it you can put in writing.

20 MR. McMORROW: Thank you, your Honor.

21 THE COURT: Thank you. Thank you all.

22 (Ends, 2:15 p.m.)
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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes,
before Judge William G. Young, on Tuesday, September 17,
2024, to the best of my skill and ability.

/s/ Richard H. Romanow 09-23-24

RICHARD H. ROMANOW Date