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\_\_\_\_\_  
MARK CASAVANT and )  
TARA CASAVANT, )  
 )  
Plaintiffs- )  
Appellants, )  
 )  
v. )  
 )  
NORWEGIAN CRUISE LINE )  
LTD., )  
 )  
Defendant-Appellee. )  
\_\_\_\_\_)

A.C. 2008-P-2102

APPLICATION FOR FURTHER APPELLATE REVIEW  
PURSUANT TO RULE 27.1 OF THE RULES OF  
APPELLATE PROCEDURE

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(i)

**Request for Further Appellate Review**

Defendant-Appellee, Norwegian Cruise Line Ltd., d/b/a Norwegian Cruise Line ("NCL"), respectfully requests further appellate review by the full Supreme Judicial Court of the December 31, 2009 decision of the Appeals Court of Massachusetts, *see Appendix at Exhibit A*, which found that NCL was liable as a matter of law under consumer protection statute, M.G.L.A. §93A.

(ii)

**Statement of Prior Proceedings**

On October 3, 2002, Plaintiffs sued NCL in Worcester Superior Court seeking a \$2,017.50 refund for the cost a round trip cruise from Boston to Bermuda and M.G.L.A. §93A damages. The court then granted NCL's motion to dismiss based upon a forum selection clause in the ticket contract and Plaintiffs appealed. The Appeals Court reversed and remanded the case for a determination as to whether Plaintiffs were entitled to a refund and whether NCL was liable under 93A. NCL then consented to judgment on the refund claim and the trial proceeded

on the §93A claim. After trial, the Superior Court ruled in favor of NCL. See *Appendix at Exhibit B*. Plaintiffs thereafter appealed, and in a decision dated December 31, 2009, the Appeals Court reversed and held that NCL was liable under §93A as a matter of law. This application ensued.

(iii)

**Statement of Facts Relevant to Appeal**

The trial court made the following factual findings:

On or about October 25, 2000, the Casavants booked reservations for a Norwegian cruise to Bermuda, scheduled to depart on September 16, 2001 from Boston. They paid a deposit of \$628.00 at the time of booking. They received a "Passenger Invoice and Confirmation" (Exhibit 1), which included a section headed "Cancellation Fees." That section indicated that cancellation 0-14 days before departure would mean a 100% cancellation fee. Mr. Casavant indicated at trial that he was aware of that information. As part of the materials they also received a "Travel Information and Service Agreement" sheet which warned of the possibility of cancellation fees. That sheet also recommended that travelers purchase trip insurance to protect against cancellation fees "in the event of a medical emergency." On or about June 27, 2001, the Casavants received a "Payment Reminder" (Exhibit 2), which included the same information regarding Norwegian's cancellation fees. On or about July 10, 2001, the Casavants paid the full balance of the ticket price, \$2,017.50 for the two tickets. They also purchased trip insurance costing

\$118.00. They received another "Passenger Invoice and Confirmation" form (Exhibit 4) dated July 12, 2001, which again included the information regarding Norwegian's cancellation fees.

Plaintiff Mark Casavant testified that although he received NCL's cruise ticket "around the first of September," 2001, he never read it prior to making the decision not to sail on the scheduled cruise:.

Q. So when you made the decision to cancel on September 11, 2001, or-I should rephrase that. I don't want to put words in your mouth. When you made the decision to reschedule on September 11, 2001, there was nothing in this contract that informed the decision, because you hadn't read the contract as of September 11, 2001; correct?

A. Right. We were pretty confident the insurance was going to do-you know, cover it, after our conversations.

*See Appendix at Exhibit C, Trial Transcript at 44.*

On August 20, 2002, Plaintiffs entered into a retainer agreement with their attorney, John D. Deacon Jr. His fee arrangement was on a contingency basis set at 50% of any amounts recovered plus 100% of any attorneys fees awarded by the court. Two

days later, on August 22, 2002, he sent NCL a demand letter under "ch. 93A, §9(3) M.G.L.A." Although he had been representing the Plaintiffs' for less than 48 hours, his demand included \$2,600.00 in counsel fees, which exceeded the cost of the underlying claim by almost 20%. *Exhibit C, Trial Transcript at 54.*

The demand letter did not include a claim that NCL violated M.G.L.A. §93A by failing to inform Plaintiffs of a refund policy pursuant to 940 CMR §15.01, *et seq.* Thereafter, On October 3, 2002, Plaintiffs sued NCL in Worcester Superior Court seeking a \$2,017.50 refund for the cost a round trip cruise from Boston to Bermuda and M.G.L.A. §93A damages. The complaint also did not contain a claim that NCL violated M.G.L.A. §93A by failing to inform Plaintiffs of a refund policy, but merely reiterated the claims set forth in the demand letter.

The trial court made the following factual findings:

The Casavants sent a letter dated September 17, 2001 (Exhibit 7), to Norwegian setting forth their request to reschedule the

cruise. In response, the Casavants received a letter dated October 11, 2001 (Exhibit 8), from Norwegian indicating that Norwegian was "sorry to learn that you elected to cancel you scheduled voyage..." and that it was unable to honor their request for a refund or a credit of the price paid. The letter also indicated that Norwegian recommended that passengers obtain trip insurance through BerkleyCare, Ltd. Although the Casavants had done so, their request for coverage or indemnification of the purchase price was denied by that insurer. The Casavants continued their efforts to obtain a refund or to reschedule the trip, to no avail.

1. The Casavants retained Attorney John Deacon to represent them in their effort to obtain a refund. On August 22, 2002, Attorney Deacon sent a demand letter (Exhibit 9) in accordance with G.L.c. 93A, setting forth the Casavants' demand and the bases for it. The demand letter raised five bases for the claim of unfair or deceptive acts or practices: 1) the plaintiffs never accepted the contract, 2) there was no consideration because Norwegian's fare was fully earned before the sailing, 3) the plaintiffs had the right to use their tickets for another cruise for any reason, 4) Norwegian failed to file its fare with the appropriate Massachusetts agency, and 5) the ticket contract's limitation of liability for personal injury or death was illegal. Subsequently, in June of 2006, the plaintiffs asserted another basis for their claim of a c. 93A violation: that Norwegian violated 940 CMR § 15.01 et seq. by deceiving them with regard to the cancellation policy within the passenger ticket contract.

\*3 By letter dated September 26, 2002 (Exhibit 10), Norwegian responded to the

93A demand letter, but made no offer of settlement. In that response, Norwegian indicated that its policy was to provide passengers with a 100% refund if they had an objection to a provision in the Passenger Ticket Contract. That policy was not made known to the plaintiffs before the letter of September 26, 2002. The Casavants did not object to any provision of the Passenger Ticket Contract-they simply did not want to take the cruise when it was scheduled. Mr. Casavant indicated that there was nothing which would have induced them to sail at that time.

*Appendix at Exhibit B.*

As noted by the trial court, Plaintiffs did not assert that NCL violated 940 CMR §15.01, et seq., by deceiving them with regard to a cancellation policy in its passenger ticket contract until June 2006. The trial court further denied all of Plaintiffs' other claims asserted as a basis for §93A liability, and the Appeals Court did not reverse with regard to those findings. *Therefore, the only claim upon which the Appeals Court found §93A liability against NCL was the claim which was not included in Plaintiffs' demand letter or in their complaint.*

The trial court made the following factual findings of fact and conclusions of law after

hearing all the evidence at trial:

The Casavants assert that there were unfair or deceptive acts or practices committed by the defendant in violation of various regulations of 940 CMR §15.01 et. seq. I do not find such violations. As noted above, the terms of the cancellation policy were provided to the Casavants nearly a year before the events which led to their desire to cancel or postpone the trip. While the ability to obtain a refund if they disagreed with a provision of the Passenger Ticket Contract was not relayed to the Casavants until the defendant responded to the 93A demand letter, that failure was not a cause of any loss by the Casavants. They did not disagree with a provision of the Passenger Ticket Contract, they simply decided that under the circumstances then present they did not wish to sail.

*See Appendix at Exhibit B.*

As NCL explained in its response to the demand letter: "The policy of NCL is to provide passengers with a 100% refund if they have an objection to a provision in the Passenger Ticket Contract." In the case of *Lurie v. Norwegian Cruise Line, Ltd.*, the court analyzed NCL's refund policy at issue here as follows:

The refund provision in the Luries' passenger ticket contract is substantially the same as that addressed in *Shute*...Under

Shute, and on its face, this clause does not preclude a passenger from **rejecting the terms of the passenger ticket contract without penalty.**

*Lurie v. Norwegian Cruise Line, Ltd.*, 305 F.Supp.2d 352, 362 (S.D.N.Y. 2004) (emphasis supplied).

NCL's policy of providing passengers with a 100% refund if they objected to any terms or conditions in the ticket contract was nothing more than its acknowledgment that it was bound by a rule of law established by the United States Supreme Court in *Carnival Cruise Lines, Inc. v. Shute*. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S.Ct. 1522, 1528 (1991).

(iv)

**Statement of Points to Which  
Further Appellate Review Is Sought**

1) Whether the Appeals Court erred in holding that NCL was liable under §93A for failing to disclose a general refund policy, even though Plaintiffs did not assert that claim until four years after the lawsuit was commenced and did not include it in either their complaint or in their §93A demand

letter as required by the statute.

2) Whether the Appeals Court improperly expanded §93A liability by holding that a business defendant's failure to disclose that it had a general policy of complying with controlling law was a material omission which relieves a plaintiff of the burden of proving causation between the alleged §93A violation and the loss sustained.

3) Whether the Appeals Court usurped the fact finding role of the trial court by holding that NCL was liable for failing to disclose a general refund policy, even though the trial court found that NCL's specific refund policy had been disclosed and its general policy of providing refunds to those who objected to a provision in the ticket contract was inapplicable because Plaintiffs only requested to re-schedule their cruise, and never objected to any contractual provision having never read the contract before deciding not to sail.

4) Whether the Appeals Court erred in awarding Plaintiffs §93A damages for appellate fees and costs, without limiting the award to the second appeal, even

though the first appeal had nothing to do with their §93A claims and was decided before Plaintiffs asserted the only §93A claim upon which they ultimately prevailed on appeal.

(iv)

**Why Further Appellate Review Is Appropriate**

The decision below improperly expanded the scope of liability under §93A, and so, further appellate review is strongly in the public interest. Moreover, since NCL was found liable under §93A for a claim which was neither asserted in Plaintiffs' complaint nor in their §93A demand letter, this appeal should be heard in the interest of justice.

A) *The Appeals Court imposed liability upon NCL for a claim which was not contained in Plaintiffs' complaint nor their §93A demand letter*

The Appeals Court found NCL liable under §93A for failing to disclose a general refund policy to Plaintiffs when they paid for their ticket, in violation of Attorney General Regulation 940 CMR §15.01, et seq. However, Plaintiffs did not include the §15.01 claim in their complaint, nor did they

include it in the written demand letter they sent to NCL. Pursuant to M.G.L.A. 93A §9(3), "(a)t least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and *reasonably describing the unfair or deceptive act or practice relied upon* and the injury suffered, shall be mailed or delivered to any prospective respondent." (Emphasis supplied). See *In re Anderson*, 2006 WL 2786974 (Bkrtcy. D.Mass. 2006).

Although Plaintiffs' attorney mailed NCL a "written demand letter" containing five separate §93A claims, he did not remotely make any claim under 940 CMR §15.01, *et seq.* Plaintiffs attempted to excuse this omission by claiming that the general refund policy was not disclosed until after NCL responded to their demand letter. However, this excuse ignored the fact that Plaintiffs also failed to include the §15.01 claim in their complaint filed three months *after* they learned of NCL's general refund policy. Finally although Plaintiffs claimed that they had no obligation to send a §93A demand letter because NCL allegedly had no assets or businesses in

Massachusetts, they presented no evidence of that at trial. On the contrary, the trial record indicated that NCL's cruise ships made calls at Black Falcon Pier in Boston, and so maintained considerable assets in Massachusetts. *In re Anderson*, 2006 WL 2786974, 1 (Bkrtcy. D.Mass. 2006).

In addition, since it was undisputed that Plaintiffs did in fact send NCL a §93A demand letter, they clearly had to comply with the statute's requirement that it identify the proposed basis of §93A liability. §93A requires such identification in order to give the target defendant the opportunity to reduce its potential liability by settling the claim. *Logan v. Arbella Mut. Ins. Co.*, 1998 WL 324204, at \*1-2 (Mass.Super., 1998); *Bressel v. Julicoeur*, 34 Mass. App. Ct. 205, 211, 609 N.E.2d 94 (1993) (demand letter must set forth the particular acts that are claimed to constitute the offense). See *Thorpe v. Mutual of Omaha Ins. Co.*, 984 F.2d 541, 544 (1st Cir. 1993). Since Plaintiffs did not put NCL on notice of the claim until four years after the lawsuit was commenced, they did not comply with §93A.

B) *The Appeals Court usurped the fact finding role of the trial court, and in so doing, dramatically and improperly expanded the scope of liability under §93A*

Despite the trial court's findings of fact, the Appeals Court held that NCL's failure to disclose its general policy of providing refunds to customers who object to a specific provision of the passenger ticket contract was a material omission which excused proof of causation under §93A. This is a dangerous expansion of §93A liability.

As noted above, NCL's policy of providing passengers with a 100% refund if they objected to any terms or conditions in the ticket contract was nothing more than its acknowledgment that it was bound by a rule of law established by the United States Supreme Court in *Carnival Cruise Lines, Inc. v. Shute*. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S.Ct. 1522, 1528 (1991).

In holding that this general policy was required to be disclosed to the Plaintiffs, the Appeals Court set a dangerous precedent of exposing businesses to §93A liability simply because they did not disclose a general policy of complying with controlling legal

precedent. Moreover, the decision below exposes defendants to such liability without any proof of causation between the alleged violation and the plaintiff's loss. This is a heretofore unrecognized expansion of §93A liability which distorts the statute beyond all recognition.

Furthermore, assuming *arguendo* that NCL did commit a statutory violation, there was still no proof of causation under §93A. As stated in *Hershenow v. Enterprise Rent-A-Car Company Of Boston, Inc.*:

A misrepresentation of legal rights in a consumer contract may indeed be per se "unfair" or "deceptive" under § 2 of G.L. c. 93A. See 940 Code Mass. Regs. § 3.16(3).FN17 But a plaintiff seeking a remedy under G.L. c. 93A, § 9, must demonstrate that even a per se deception caused a loss. *Leardi* \*799 is not to the contrary, as we shall explain.FN18

*Hershenow v. Enterprise Rent-A-Car*, 445 Mass. 790, 840 N.E.2d. 526. The trial court here found no causation between the non-disclosure and the Plaintiffs' alleged loss.

C) *The appeal costs on the initial appeal are not recoverable.*

An award of attorney fees in §93A cases is limited to provable hours attributed directly to the

§93A claim and no other matters. *McDonough v. Ferrari Pool "N Patio, Inc.*, 2000 WL 420621, at \*2 -3 (Mass. App. Div. 2000). The first appeal only addressed the issue of whether the forum selection clause in Plaintiffs' passenger ticket contract was enforceable.

Moreover, the first appeal was decided before Plaintiffs even asserted their successful §93A claim under Attorney General Regulation 940 CMR §15.01, *et seq.* Therefore, it is obvious that the appellate fees on the first appeal were not attributable to their successful claim.

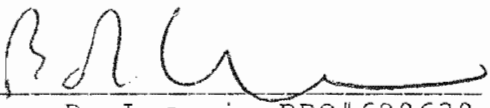
Since The Appeals Court decision did not limit the damage award to the second appeal, the award is in error.

#### **CONCLUSION**

For the foregoing reasons, it is respectfully submitted that further appellate review is appropriate and this application should therefore be granted.

Dated: January 19, 2010

Respectfully submitted,

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# Appendix

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Mark CASAVANT & another [FN1] vs. NORWEGIAN CRUISE LINE, LTD.

No. 08-P-2102.

September 16, 2009. - December 31, 2009.

Consumer Protection Act, Unfair or deceptive act, Damages. Administrative Law, Regulations. Attorney General. Practice, Civil, Attorney's fees, Costs.

CIVIL ACTION commenced in the Superior Court Department on October 3, 2002.

Following review by this court, 63 Mass.App.Ct. 785 (2005), the case was heard by Bruce R. Henry, J.

John D. Deacon, Jr., for the plaintiffs.

Armand P. Mele, of New York, for the defendant.

Present: Duffly, Mills, & Meade, JJ.

MILLS, J.

In the first round of this action brought by the plaintiffs, Mark and Tara Casavant, seeking a refund for their tickets and G.L. c. 93A damages against Norwegian Cruise Line, Ltd. (Norwegian), a judge entered judgment for Norwegian dismissing the Casavants' complaint on the grounds of a forum selection clause set forth in the "Contract of Passage." This court reversed in *Casavant v. Norwegian Cruise Line, Ltd.*, 63 Mass.App.Ct. 785 (2005) (*Casavant I*), holding that the forum selection clause was unenforceable because the Casavants had not accepted the terms of the contract of passage. The case was remanded for trial on whether the Casavants were entitled to a full refund as well as for determination of their c. 93A claim. After trial on remand, a different judge found that Norwegian had not committed an unfair or deceptive act or practice within the meaning of c. 93A. He further found that even if there had been an unfair or deceptive act, the Casavants had not suffered any loss as a result of such act. The judge accordingly entered judgment for Norwegian on the c. 93A claim, and ordered Norwegian to tender a full refund to the Casavants for the purchase price of their tickets, plus statutory interest and costs. [FN2] The Casavants appeal from the c. 93A judgment against them. Because we conclude that the

Casavants have, as matter of law, demonstrated a c. 93A violation and that this violation caused them a loss, we reverse and remand.

Background. [FN3] In October, 2000, the Casavants booked a round-trip ocean cruise between Boston and Bermuda. The booking took place at a travel agency operating within the discount department store, BJ's. The departure was scheduled for September 16, 2001 (five days after the terrorist attacks on the World Trade Center in New York City). The price for the tickets was \$2,017.50. At the time of booking, the Casavants paid a deposit of \$628. Subsequently, they tendered the remaining balance such that the tickets and fees were fully paid by July 18, 2001.

When they booked the cruise, the Casavants received a "Passenger Invoice and Confirmation," which stated, in a section entitled "Cancellation Fees," that a fifty percent forfeiture would be imposed for cancellation fifteen to twenty-nine days prior to departure, and a one hundred percent forfeiture would be imposed for cancellation from zero to fourteen days prior to departure.

[FN4] The Casavants also received documents entitled "Travel Information and Service Agreement" detailing refund policies that were completely separate from anything discussed by the parties.

On or about August 27, 2001, Norwegian sent "Passenger Ticket Contracts" to the Casavants, who received them in early September, 2001. The passenger ticket contracts included the tickets and a contract of passage containing twenty-eight numbered paragraphs. Paragraph two provides, in relevant part:

"[Norwegian] shall not be liable to make any refund to passenger in respect of lost tickets or in respect of tickets wholly or partly not used by a passenger."

Another paragraph sought to limit Norwegian's liability for injury or loss due to "terrorist[ ] actions or threats [or] hijacking."

At all relevant times, Norwegian had an additional refund/cancellation policy in force that was not included in any of the initial materials the Casavants received when purchasing their tickets at BJ's, nor was it contained in the twenty-eight paragraphs of fine print in the contract of passage. That policy appears to have been first disclosed in Norwegian's response to the Casavants' G.L. c. 93A demand letter. [FN5] In Norwegian's response letter, dated September 26, 2002, Norwegian's attorney referred to a policy that provides "passengers with a 100% refund if they have an objection to a provision in the Passenger Ticket Contract." This policy was reiterated in the affidavit of Jane E. Kilgour, manager of the passenger and crew claims department for Norwegian, dated October 29, 2002 (Kilgour affidavit), and filed by Norwegian in support of its motion to dismiss the Casavants' initial complaint. [FN6] Paragraph ten of the Kilgour affidavit provides, in relevant part:

"At all times relevant, it was, and remains, the policy of [Norwegian] to refund in full the fare paid by a passenger, without penalty, if that passenger wishes to cancel a cruise because of an objection to a provision contained in the Contract of Passage before the cruise in question begins."

After the tragic events of September 11, 2001, the Casavants cancelled their cruise. Prior to the scheduled departure date of the cruise, they made three separate requests for a refund of their ticket prices. Norwegian declined to issue a refund.

Discussion. The issue before us is whether the nondisclosure of the complete terms of the refund policy, as articulated by Norwegian's response to the Casavants' G.L. c. 93A demand letter and the Kilgour affidavit, constituted an unfair or deceptive act or practice within the meaning of c. 93A, and, if so, whether that nondisclosure caused the Casavants any loss.

Section 9 of G.L. c. 93A provides a private cause of action for individual consumers who suffer an injury as a result of unfair or deceptive acts or practices. See *Hershenow v. Enterprise Rent-a-Car Co. of Boston, Inc.*, 445 Mass. 790, 796 (2006) (*Hershenow*). The purpose of c. 93A is to provide "proper disclosure of information and a more equitable balance in the relationship of consumers to persons conducting business activities." *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 776 (1980) (*Purity Supreme*), quoting from *Lowell Gas. Co. v. Attorney Gen.*, 377 Mass. 37, 51 (1979). A successful claim under this section thus requires, at a minimum, a showing of (1) a deceptive act or practice on the part of the seller; (2) an injury or loss suffered by the consumer; and (3) a causal connection between the seller's deceptive act or practice and the consumer's injury. See G.L. c. 93A, § 9. See also *Hershenow*, *supra* at 797.

1. Unfair or deceptive act or practice. Although G.L. c. 93A does not define what acts and practices are unfair or deceptive, § 2(c) of c. 93A specifically authorizes the Attorney General to promulgate regulations making these determinations. See *Purity Supreme*, *supra* at 775. The relevant Attorney General's regulations prohibited Norwegian from accepting any payment until after disclosure to the Casavants of "the complete terms of any cancellation or refund policy of [Norwegian] that may apply to the consumer's purchase of travel services." 940 Code Mass. Regs. § 15.04(2)(e) (1996). In this case, the unambiguous refund policy referred to in Norwegian's response to the Casavants' c. 93A demand letter, as well as in the Kilgour affidavit, was not disclosed until the fall of 2002, more than one year after the scheduled date of the cruise, and more than two years after Norwegian accepted initial payment from the Casavants. That is, contrary to the Attorney General's regulations, Norwegian did not disclose its true refund policy until approximately two years after accepting payment from the Casavants.

The trial judge found that Norwegian's refund policy described above did not apply because "[t]he Casavants had no objection to the terms of the Passenger Ticket Contract; they simply did not feel comfortable taking a cruise at that time," and that Norwegian "did not commit an unfair or deceptive act by not refunding the ticket price to the Casavants under this policy." This reasoning is incorrect. The proper inquiry is whether Norwegian violated the Attorney General's regulations, which required Norwegian to furnish its refund policy to the Casavants prior to accepting payment. As discussed above, Norwegian failed to do so, and thus its conduct violated

the Attorney General's regulations which, in turn, constituted an unfair or deceptive practice within the meaning of c. 93A. See 940 Code Mass. Regs. § 15.01(1) (1996) ("[v]iolation of any provision of 940 CMR 15.00 shall be an unfair or deceptive act or practice under [G.L. c. 93A, § 2(a)]").

2. Causation. "To warrant an award of damages under G.L. c. 93A, there must be a 'casual connection between the seller's deception and the buyer's loss.' " Hershenow, *supra* at 797, quoting from *Kohl v. Silver Lake Motors, Inc.*, 369 Mass. 795, 801 (1976). Causation is established if the deception "could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted." [FN7] Hershenow, *supra* at 801, quoting from *Purity Supreme*, *supra* at 777.

Causation can also be established by determining whether the nondisclosure was of a material fact. In the context of c. 93A claims based on nondisclosure, "[m]ateriality ... is in a sense a proxy for causation." Gilleran, *The Law of Chapter 93A* § 4.16, at 185-186 (2d ed.2007) (noting that this view is supported by the court's definition of deception in *Lowell Gas Co. v. Attorney Gen.*, 377 Mass. at 51). See *Sheehy v. Lipton Indus., Inc.*, 24 Mass.App.Ct. 188, 195 (1987). To determine if the nondisclosure was of a material fact, we ask whether the plaintiff likely would have acted differently but for the nondisclosure. See *Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc.*, 68 Mass.App.Ct. 582, 607 n. 57 (2007) ("[f]ailure to disclose a material fact that causes a party to act differently with respect to a transaction than it otherwise would have has been held sufficient to support a finding of c. 93A liability").

In this case, instead of deciding whether the Casavants would have behaved differently if Norwegian had timely disclosed its true refund policy, the trial judge simply concluded, incorrectly, that there was an absence of causation because "there was never an objection by the Casavants to [the] cancellation policies."

While a remand is often necessary when a judge applies the improper legal standard, we conclude that in the circumstances presented here, a remand on this issue is neither practical nor necessary. The Casavants' three separate requests for a refund, which were made prior to the departure date of the cruise, demonstrate that they would have objected to a provision in the contract of passage in order to obtain a full refund pursuant to Norwegian's undisclosed refund policy. [FN8] To find otherwise would be clearly erroneous. See *Casavant I*, *supra* at 798 (Norwegian's argument that the Casavants failed to object to the contract of passage was "unavailing and, indeed, borders on the ephemeral--the Casavants' repeated requests to reschedule the cruise and their reasons set forth in [an earlier letter to Norwegian] were sufficient objection"). [FN9]

3. Damages. In order for an individual plaintiff to recover under G.L. c. 93A, § 9, he or she need not demonstrate loss of money or property. Hershenow, *supra* at 797-800. Severe emotional distress, or invasion of a legally protected interest, can constitute an "injury" under G.L. c. 93A, § 9. *Id.* at 798-800. In this case, Norwegian did not agree to refund the ticket price until at least four years after the departure date of the cruise. During this time, the Casavants endured litigation that required them to expend considerable time, money, and effort. The case is

remanded for a determination of the Casavants' c. 93A damages, reasonable attorney's fees, and costs. See G.L. c. 93A, § 9(4).

Appellate fees and costs. The Casavants have requested, and are entitled to, their reasonable appellate attorney's fees and costs. See *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, 445 Mass. 411, 433 (2005). The Casavants may seek such fees and costs under the procedures established in *Fabre v. Walton*, 441 Mass. 9, 10-11 (2004).

Conclusion. As matters of law, Norwegian committed an unfair or deceptive act in violation of G.L. c. 93A, the Casavants suffered actual losses, and Norwegian's acts caused those losses. The judgment on the Casavants' c. 93A claim is reversed and the case is remanded for further proceedings. The remainder of the judgment is affirmed.

So ordered.

FN1. Tara Casavant.

FN2. In the joint pretrial memorandum filed by the parties in June, 2006, Norwegian offered a full refund of the price of the tickets to the Casavants.

FN3. We incorporate by reference the comprehensive narrative of facts in *Casavant I*, *supra* at 785-788. We highlight facts that are pertinent to our discussion.

FN4. We need not resolve whether Norwegian authorized this cancellation policy.

FN5. The Casavants' attorney made a written demand for damages under c. 93A in a letter dated August 22, 2002.

FN6. The motion to dismiss and the Kilgour affidavit were filed on December 3, 2002.

FN7. The court in *Hershenow*, *supra* at 801, quoting from *Purity Supreme*, *supra* at 777, concluded that "causation was established" in its earlier decision in *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 394 (2006), because "deceptive [cigarette] advertising 'could reasonably be

found to have caused a person to act differently from the way he [or she] otherwise would have acted.' "

FN8. We do not suggest that ticket holders may make disingenuous objections, or manufacture objections in bad faith, in order to vitiate a binding contract. The contract in this case has been deemed unenforceable, see *Casavant I*, supra at 799, and the record consistently reflects good faith on

the part of the Casavants.

FN9. Additionally, it would be clearly erroneous to find, had the Casavants been aware of Norwegian's true refund policy, that they would not have objected to the purported contract term limiting Norwegian's liability for "terrorist [ ] actions or threats." The trial judge found that the Casavants cancelled the cruise due to their legitimate fears following the events of September 11, 2001.

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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT  
CIVIL ACTION NO. 02-2096

MARK CASAVANT and TARA CASAVANT

vs.

NORWEGIAN CRUISE LINE, LTD

MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT  
FOLLOWING JURY-WAIVED TRIAL

This matter is before the Court for a trial without a jury of the plaintiffs' claim of a violation of G.L. c. 93A in the defendant's refusal to refund the price paid by the plaintiffs for a cruise which they declined to take in the aftermath of the terrorist attacks of September 11, 2001. In their complaint the plaintiffs had also sought a refund under a breach of contract theory. The defendant, Norwegian Cruise Line, Ltd. (Norwegian) has agreed to provide the plaintiffs with a refund of the purchase price of the cruise tickets, plus interest; hence I will not address that contractual claim.

Prior Proceedings

The Casavants commenced this litigation on October 3, 2002. In addition to an answer and counterclaims, Norwegian filed a motion to dismiss the complaint based on the forum selection clause contained in the ticketing contract. That clause required that litigation be commenced in Florida. The motion to dismiss was supported by an affidavit of a Norwegian manager. Before the plaintiffs opposition was received, another judge of this Court allowed the motion to dismiss and, later, denied the plaintiffs' motion for reconsideration. The plaintiffs appealed the dismissal. Finding both procedural and substantive errors, the Appeals Court reversed the judgment in favor of Norwegian. Casavant v. Norwegian Cruise Line, Ltd., 63 Mass.App.Ct. 785 (2005).

The Appeals Court found that the forum selection clause was unenforceable "where the course of conduct of Norwegian was unreasonable and unjust . . . the ticket purchasers took no affirmative action to accept the contract, but rather expressly rejected the services offered in the

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EXHIBIT B  
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contract . . . In these circumstances, as there was not, under Federal maritime law, the allowance of an opportunity for the Casavants to reject the ticketing contract 'with impunity,' nor, under State contract law, did the Casavants' actions give rise to an accepted contract, we conclude that the forum selection clause is unenforceable." Id. at 799.

### **Findings of Fact**

Based on the evidence submitted by the parties at trial, I make the following findings of fact:

On or about October 25, 2000, the Casavants booked reservations for a Norwegian cruise to Bermuda, scheduled to depart on September 16, 2001, from Boston. They paid a deposit of \$628.00 at the time of booking. They received a "Passenger Invoice and Confirmation" (Exhibit 1), which included a section headed "Cancellation Fees". That section indicated that cancellation 0-14 days before departure would mean a 100% cancellation fee. Mr. Casavant indicated at trial that he was aware of that information. As part of the materials they also received a "Travel Information and Service Agreement" sheet which warned of the possibility of cancellation fees. That sheet also recommended that travelers purchase trip insurance to protect against cancellation fees "in the event of a medical emergency." On or about June 27, 2001, the Casavants received a "Payment Reminder" (Exhibit 2), which included the same information regarding Norwegian's cancellation fees. On or about July 10, 2001, the Casavants paid the full balance of the ticket price, \$2,017.50 for the two tickets. They also purchased trip insurance costing \$118.00. They received another "Passenger Invoice and Confirmation" form (Exhibit 4) dated July 12, 2001, which again included the information regarding Norwegian's cancellation fees.

On or about August 27, 2001, Norwegian issued two passenger tickets and a Passenger Ticket Contract consisting of twenty-eight numbered paragraphs of terms on a form integrated with the tickets. The Casavants received those materials around September 1, 2001. The Casavants did not communicate their acceptance of the contract terms to Norwegian and the Appeals Court found that the Casavants had not accepted the ticket as a binding contract under either Federal maritime law or Massachusetts contractual law.

On September 11, 2001, terrorist attacks occurred in New York City, Washington, D.C., and Pennsylvania.

In the aftermath of those attacks, the Casavants were fearful of going on the cruise which was scheduled to depart from Boston Harbor. On September 11, 2001, Mark Casavant spoke to a Norwegian representative about not wanting to go on the cruise and about desiring to reschedule or obtain a refund, and was told he should not simply not show up for the cruise but should cancel it, and that after the sailing date something could be worked out. Mr. Casavant had a second conversation with a Norwegian representative, a day or two after the first conversation, in which the same advice was given to him and in which the representative indicated that they would not put that advice in writing. The representative indicated that if the Casavants wanted any consideration of their request to reschedule or obtain a refund, they would have to cancel the trip. In another conversation, a male representative of Norwegian indicated that they would not be able to reschedule and they would have to deal with the requests after the boat left.

The Casavants sent a letter dated September 17, 2001 (Exhibit 7), to Norwegian setting forth their request to reschedule the cruise. In response, the Casavants received a letter dated October 11, 2001 (Exhibit 8), from Norwegian indicating that Norwegian was "sorry to learn that you elected to cancel you scheduled voyage . . ." and that it was unable to honor their request for a refund or a credit of the price paid. The letter also indicated that Norwegian recommended that passengers obtain trip insurance through BerkleyCare, Ltd. Although the Casavants had done so, their request for coverage or indemnification of the purchase price was denied by that insurer. The Casavants continued their efforts to obtain a refund or to reschedule the trip, to no avail.

The Casavants retained Attorney John Deacon to represent them in their effort to obtain a refund. On August 22, 2002, Attorney Deacon sent a demand letter (Exhibit 9) in accordance with G.L. C. 93A, setting forth the Casavants' demand and the bases for it. The demand letter raised five bases for the claim of unfair or deceptive acts or practices: 1) the plaintiffs never accepted the contract, 2) there was no consideration because Norwegian's fare was fully earned before the sailing, 3) the plaintiffs had the right to use their tickets for another cruise for any reason, 4) Norwegian failed to file its fare with the appropriate Massachusetts agency, and 5) the ticket contract's limitation of liability for personal injury or death was illegal. Subsequently, in June of 2006, the plaintiffs asserted another basis for their claim of a c. 93A violation: that Norwegian violated 940 CMR §15.01 et seq. by deceiving them with regard to the cancellation policy within the passenger ticket

contract.

By letter dated September 26, 2002 (Exhibit 10), Norwegian responded to the 93A demand letter, but made no offer of settlement. In that response, Norwegian indicated that its policy was to provide passengers with a 100% refund if they had an objection to a provision in the Passenger Ticket Contract. That policy was not made known to the plaintiffs before the letter of September 26, 2002. The Casavants did not object to any provision of the Passenger Ticket Contract – they simply did not want to take the cruise when it was scheduled. Mr. Casavant indicated that there was nothing which would have induced them to sail at that time.

### Applicable Law

. Massachusetts General Laws, Chapter 93A, § 2(a) makes unlawful "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." "Courts have deliberately avoided setting down a clear definition of conduct constituting a violation of G.L.c. 93A." Spence v. Boston Edison Co., 390 Mass. 604, 616 (1983). "It has been held, generally, that for conduct to violate the standard of § 2(a), (1) it must fall within at least the penumbra of some common-law, statutory, or other established concept of fairness, (2) it must be unethical or unscrupulous, and (3) it must cause substantial injury to a consumer or another businessman." Wasserman v. Agnastopoulos, 22 Mass.App.Ct. 672, 679 (1986), quoting PMP Associates, Inc. v. Globe Newspaper Co., 366 Mass. 593, 596 (1975). The focus for determining unfairness is "on the nature of the challenged conduct and on the purpose and effect of that conduct." Massachusetts Employers Ins. Exchange v. Propac Mass, Inc., 420 Mass. 39, 43 (1995).

"Conduct in disregard of known contractual arrangements and intended to secure benefits for the breaching party constitutes an unfair act or practice for c. 93A purposes." Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. 451, 474 (1991). Accordingly, "conduct undertaken as leverage to destroy the rights of another party to the agreement," particularly "unilateral, self-serving conduct ... during the course of a dispute," based on a position lacking "substantive merit," has been found to violate c. 93A. See Massachusetts Employers Ins. Exchange v. Propac Mass, Inc., 420 Mass. at 43. However, "a mere breach of contract, without more, does not amount to a c. 93A violation." Madan v. Royal Indemnity Co., 26 Mass.App.Ct. 756, 762 (1989), citing Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 100-01 (1979). Even a breach accompanied by "sham justifications" has

been held not to violate c. 93A, where the conduct lacks an "extortionate quality" arising from use of the breach "as a lever to obtain advantage for the party committing the breach in relation to the other party." Atkinson v. Rosenthal, 33 Mass.App.Ct. 219, 226-27 (1992).

Not every consumer contract, oral or written, that is noncompliant with any statute, rule, regulation, or court decision, automatically constitutes an "injury" under G.L. c. 93A entitling the plaintiff to recover statutory damages, attorney's fees, and costs. If, however, any person or entity invades a consumer's legally protected interests, and if that invasion causes the consumer a loss—whether that loss be economic or noneconomic—the consumer is entitled to redress under the consumer protection statute. A consumer is not, however, entitled to redress under G.L. c. 93A, where no loss has occurred. Hershenow v. Enterprise Rent-A-Car Company of Boston, Inc., 445 Mass. 790, 801-802 (2006).

#### Discussion

I find no unfair or deceptive act or practice on the part of Norwegian. While the Casavants' desire to postpone or to cancel their cruise so soon after the events of September 11, 2001, is perfectly understandable, Norwegian's cancellation fees were clearly spelled out in documents received nearly a year before those events occurred. Mr. Casavant indicated that he was aware of the cancellation fees as stated in several of the documents which the Casavants had received. In the year between the booking and the cancellation, there was never an objection by the Casavants to those cancellation policies and there was never an indication by Norwegian that it would not enforce those policies. No one that Mr. Casavant spoke to at Norwegian made any promise that the cancellation fees would not be charged or promised that the trip could be rescheduled. While the refusal to waive the cancellation fees or to permit the Casavants to reschedule the cruise may have been poor business judgment, it was not an unfair or deceptive act or practice.<sup>1</sup> I find that the dispute between the parties over whether the Casavants were entitled to a refund under the circumstances was a legitimate dispute. The position taken by Norwegian did not lack substantive

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<sup>1</sup>The determination of the Appeals Court that the Casavants had rejected the passenger ticket contract, see Casavant v. Norwegian Cruise Line, Ltd., 63 Mass.App.Ct. 785, 799 (2005), does not mandate a different result. The Court noted that the issues of whether the Casavants were entitled to a full refund of the ticket price and whether there was an unfair or deceptive act or practice on the part of Norwegian were open issues.

merit and was not a sham justification. There was a legitimate dispute over whether Norwegian owed the Casavants a refund under the circumstances. While Norwegian's decision may have exhibited insensitivity to the Casavants' legitimate concerns about traveling at that time, and while it may have exhibited poor business judgment, it was not an unfair or deceptive act.

The refund policy noted in the defendant's response to the c. 93A demand letter does not apply here. That policy provides that in the event of an objection to a provision of the ticket contract, the passengers would be entitled to a full refund. The Casavants had no objection to the terms of the Passenger Ticket Contract; they simply did not feel comfortable taking a cruise at that time. The defendant did not commit an unfair or deceptive act by not refunding the ticket price to the Casavants under this policy as it did not apply under the circumstances.

The Casavants assert that there were unfair or deceptive acts or practices committed by the defendant in violation of various regulations of 940 CMR §15.01 et seq. I do not find such violations. As noted above, the terms of the cancellation policy were provided to the Casavants nearly a year before the events which led to their desire to cancel or postpone the trip.<sup>2</sup> While the ability to obtain a refund if they disagreed with a provision of the Passenger Ticket Contract was not relayed to the Casavants until the defendant responded to the 93A demand letter, that failure was not a cause of any loss by the Casavants. They did not disagree with a provision of the Passenger Ticket Contract, they simply decided that under the circumstances then present they did not wish to sail. Similarly, the failure by Norwegian to file its fares with the appropriate Massachusetts administrative agency does not give rise to liability under c. 93A. Even assuming such a filing requirement and a violation of that requirement, the plaintiffs have not shown that they suffered any loss as a result of the violation. See Hershenow, *supra*. Similarly, the claim that the ticket's limitation of liability for personal injury or death was illegal and, therefore, a violation of c. 93A is to no avail. The plaintiffs cannot show an injury or loss caused by that provision.

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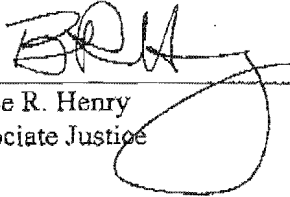
<sup>2</sup>In finding that the forum selection clause within the Passenger Ticket Contract was not enforceable because the Casavants had not been given sufficient time to reject the contract with impunity, the Appeal Court noted that there was a "blackout of any prior information" regarding the refund/cancellation policies. It does not appear that the Appeals Court was provided with information regarding the notices of the applicable cancellation fees contained in Exhibits 1, 2, and 4.

For all of the foregoing reasons, I find that the plaintiffs have not established a violation of G.L. c. 93A.

**ORDER**

Judgment shall enter for the plaintiffs on their claim for a refund in the amount of \$2,135.50, plus statutory interest and costs. Judgment shall enter for the defendant on the claim brought pursuant to G.L. c. 93A.

Dated: February 13, 2008

  
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Bruce R. Henry  
Associate Justice

Commonwealth of Massachusetts  
County of Worcester  
The Superior Court

CIVIL DOCKET# WOCV2002-02096C

Mark Casavant and Tara Casavant,  
Plaintiff(s)

vs.

Norwegian Cruise Line, LTD,  
Defendant(s)

**JUDGMENT ON FINDING OF THE COURT**

This action came on for trial before the Court, Bruce R. Henry, Justice, presiding, and the issues having been duly tried, and finding having been rendered,

It is **ORDERED** and **ADJUDGED**:

That the plaintiffs, Mark Casavant and Tara Casavant, recover of the defendant, Norwegian Cruise Line, LTD, their refund in the sum of **\$2,135.50** with interest from 10/03/2002 to 03/03/2008 in the amount of **\$1,388.73** and its costs of action, as provided by law.

As to the 93A claim of the Complaint, Judgment is hereby entered for the defendant, Norwegian Cruise Line, LTD.

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Dated at Worcester, Massachusetts this 3rd day of March, 2008.

By: Alexander Rodriguez III  
Assistant Clerk

Entered and Copies Mailed 3/3/08

Commonwealth of Massachusetts  
County of Worcester  
The Superior Court

CIVIL DOCKET#: WOCV2002-02096-C

RE: Casavant et al v Norwegian Cruise Line LTD

TO: Barbara P Lazaris, Esquire  
Lambos & Junge  
50 Congress Street  
Suite 318  
Boston, MA 02109

NOTICE OF DOCKET ENTRY

You are hereby notified that on 02/13/2008 the following entry was made on the above referenced docket:

**MEMORANDUM OF DECISION AND ORDER for JUDGMENT following Jury - Waived Trial - Judgment shall enter for the plaintiffs on their claim for a refund in the amount of \$2,135.50, plus statutory interest & costs. Judgment shall enter for the defendant on the claim brought pursuant to G L c 93A. (Bruce R, Henry , Justice). Copies mailed 3/3/08.**

Dated at Worcester, Massachusetts this 3rd day of March, 2008.

Dennis P. McManus, Esq.,  
Clerk of the Courts

BY: Alexander Rodriguez, III  
Assistant Clerk

Telephone: 508-831-2358 (Session Clerk) or 508-831-2347

Disabled individuals who need handicap accommodations should contact the Administrative Office of the Superior Court at (617) 788-8130

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.  
No. WOCV02-2096

Superior Court  
Henry, J.

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MARK AND TARA CASAVANT \*  
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-vs.- \*  
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NORWEGIAN CRUISE LINE, LTD. \*  
\* \* \* \* \*

EVIDENTIARY HEARING RE: Ch.93A

APPEARANCES:

Attorney John D. Deacon, Jr., Esquire, on behalf of the Plaintiffs Mark and Tara Casavant.

Attorneys Armand Mele, Esquire, and Barbara P. Lazaris, Esquire, on behalf of the Defendant Norwegian Cruise Line, Ltd.

Worcester County Courthouse  
Worcester, Massachusetts  
Wednesday, October 17, 2007

David Roseboom  
Official Court Reporter  
Commonwealth of Massachusetts

1           you received them on September 1, or is that  
2           your best estimate?

3       A           It's the best estimate.

4       Q           Okay; now, when you got it on September 1,  
5           you didn't sit down and read all this fine  
6           print, did you?

7       A           My eyes, you know -- at this point, it's  
8           very tough to read, even with cheaters.

9       Q           Yes, but you got the ticket, you were  
10          looking forward to your cruise, and you didn't  
11          sit down to read the terms and conditions of  
12          the travel; is that correct?

13      A           No, we did not.

14      Q           So when you made the decision to cancel on  
15          September 11, 2001, or -- I should rephrase  
16          that. I don't want to put words in your mouth.  
17          When you made the decision to reschedule on  
18          September 11, 2001, there was nothing in this  
19          contract that informed the decision, because  
20          you hadn't read the contract as of September  
21          11, 2001; correct?

22      A           Right. We were pretty confident the  
23          insurance was going to do -- you know, cover  
24          it, after our conversations.

1           agreed to pay him 50 percent of whatever you  
2           recovered in this lawsuit; correct?

3           A           That's correct.

4           Q           And so, you have no obligation to pay Mr.  
5           Deacon any money by the hour; correct?

6           A           That is also correct -- well, yes. I don't  
7           pay him by the hour. That's correct.

8           Q           Okay. On the last page of Exhibit 9, Mr.  
9           Deacon's letter, it says -- and I'm just  
10          reading from the prior page -- "The relief  
11          requested by the Casavants is a refund in the  
12          amount of \$2017.50, plus \$128 for reimbursement  
13          of the cost of travel insurance and fees, plus  
14          interest at the statutory rate of twelve  
15          percent per year, running from September 12,  
16          2001, for a total of \$2400; plus attorneys'  
17          fees actually incurred by the Casavants to  
18          date, in the amount of \$2600 -- correct?

19          A           That's correct.

20          Q           You had not actually incurred attorneys'  
21          fees in the amount of \$2600 at that point, had  
22          you?

23          A           Personally, no.

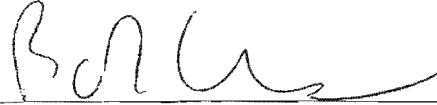
24          Q           And you're aware, are you not, sir, that in

## DECLARATION OF SERVICE

On the 19th day of January, 2010, I, Barbara Lazaris, Esquire, served via first-class mail, a copy of the within Application for Further Appellate Review, to the following counsel of record at the addresses indicated:

John D. Deacon, Esquire  
*Attorney for Plaintiff-Appellant*  
72 Pine Street  
Providence, RI 02903

*I declare under penalty of perjury that the foregoing is true and correct.*



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Barbara P. Lazaris, Esq. – BBO#628638

Dated: January 19, 2010