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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court's finding that Appellee did not commit unfair or deceptive acts in violation of G.L. c. 93A was "clearly erroneous," where the evidence at trial showed that there was a legitimate dispute as to whether Appellants were entitled to a refund of the cost of their cruise tickets, and there was no evidence that the alleged acts underlying the 93A claim caused Appellants to suffer any injury or loss whatsoever.

2. Whether the prior decision of the Appeals Court of Worcester somehow constituted "law of the case" concerning Appellants' G.L. c. 93A claims, where the Appeals Court never rendered a decision on the 93A claims, and specifically remanded the case to the Superior Court for the purpose of deciding the 93A claims.

STATEMENT OF THE CASE

A) *Background summary*

Appellants purchased passenger tickets from Appellee, Norwegian Cruise Line Ltd. ("NCL") for a

cruise from Boston to Bermuda on the *Norwegian Majesty* departing on September 16, 2001. They alleged that after the terrorist attacks of September 11, 2001, they decided not to take the cruise and either cancelled or sought to reschedule. They first made a written request to reschedule on September 17, 2001. Appellants conceded that the *Norwegian Majesty* sailed from Boston Harbor to Bermuda with passengers on September 16, 2001, as scheduled, and there is no evidence that the passengers who sailed experienced any difficulty or danger arising from terrorism or any other event. *Appendix at 148-149 (hereafter "App. at")*. NCL denied their request to reschedule and Plaintiffs sued.

NCL then moved to dismiss the complaint in the Superior Court based upon a forum selection clause in the ticket contract, which motion was granted. Plaintiffs appealed the dismissal and the Appellate Court reversed, holding that Plaintiffs had not accepted the ticket contract under Massachusetts law. The Appellate Court then

remanded the case to the Superior Court to determine whether Appellants were entitled to a refund and to decide their claims of unfair or deceptive business practices under G.L. c. 93A. Plaintiffs' counsel sought at trial to prove that NCL engaged in deceptive or unfair acts which would entitle *him* to counsel fees worth almost 20 times the cost of the tickets at issue. The Superior Court found in favor of NCL.

B) The Superior Court's findings of fact

On remand, the Superior Court (Justice Henry) held a bench trial to decide the 93A claims. Following the trial, Justice Henry issued a Memorandum of Decision and Order for Judgment which held, *inter alia*, the following:

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.

App at 32.

C) *The underlying transaction*

In or about October, 2000, Appellants booked two tickets for a pleasure cruise scheduled for September 16, 2001 from Boston to Bermuda aboard the vessel *Norwegian Majesty*, which was owned and/or operated by NCL. *App. at 110.* The cruise was not booked through NCL, but through Appellants' travel agent, BJ's Travel Club, located in Woburn, MA. *App. at 133.* In October, 2000, Appellants received a Passenger Invoice and Confirmation ("Invoice") from BJ's Travel Club indicating that they had paid a \$628.00 down-payment against a total invoice price of \$2,135.50, and that the balance of the ticket price was due by July 18, 2001. *App. at 133, 164* The Invoice further contained information indicating, *inter alia*, that there would be a 50% fee for cancellations made 15-29 days before departure, and a 100% cancellation fee for cancellations made 0-14 days prior to departure. *Id.* Appellants reviewed the Invoice when they

received it, and were aware that there could be fees assessed for cancelling the cruise. *App. at 134-135.*

Appended to the Invoice sent to Appellants was a "Travel Information and Service Agreement" from BJ's Travel which stated the following at paragraph 4: "Once you have purchased your vacation, you may be subject to certain cancellation fees. These cancellation fees vary depending upon the nature of your vacation and the amount of time prior to departure that you cancel your vacation." *App. at 167.* The Invoice further notified Appellants at paragraph 5 that "Trip Cancellation/Travel Insurance safeguards you against vendor cancellation fees *in the event of a medical emergency.*" (Emphasis supplied). *Id.* In or about July 12, 2001, BJ's Travel Club sent Appellants "Confirmation" that they had paid the balance due on the cruise tickets and that they had purchased travel insurance from Berkely Leisure Care. *App. at 173- 175.* This confirmation also reiterated the cancellation fee

schedule described above. *Id.*

At trial, Appellant Mark Casavant testified that although he received NCL's cruise ticket "around the first of September, 2001," he did not read it. *App. at 141.* Mr. Casavant testified that after the terrorist attacks of September 11, 2001, he and his wife decided not to take the cruise because they did not feel safe doing so. He testified that he believed he called NCL's customer service on the evening of September 11th and that a representative advised him that if he intended not to take the cruise, he should cancel rather than simply be "a no-show." *App. at 119-121.* He further testified that he made a request to reschedule the cruise, hopefully for a year later "when everything had calmed down," but that the representative said in order to do that he would have to cancel the trip. *Id.* After he got off the telephone with the customer service representative, Mr. Casavant testified that he told his wife of the conversation and she said "did you get it in writing." *App. at 121.*

Mr. Casavant testified that he called NCL customer service again, either on September 12th or the 13th, at which time a representative repeated the sum and substance of the advice he had been given on September 11th, and further that the trip insurance would work "in our favor, and would help us along." *App. at 122-123.* Mr. Casavant testified that he called NCL several more times, but could not recall the conversations, as they were "insignificant." *App. at 124.* He claimed he did remember a third conversation with NCL, wherein he spoke to a man who told him they would not be able to reschedule because they had canceled the cruise. *App. at 126.*

Mr. Casavant could not remember the name of any NCL representative that he had spoken to. Appellants did not introduce any written evidence of these alleged conversations with NCL, even though Mr. Casavant testified that "I think they're written on some paper, someplace around here. We have some of the people we've talked to." *App. at 137.*

Mr. Casavant specifically testified that nothing in NCL's passenger ticket contract influenced his decision to try to cancel or reschedule the cruise, because he hadn't read the contract as of September 11, 2001, and that he was "pretty confident the insurance was going to do-you know, cover it, after our conversations." *App. at 141.*

Appellants introduced their trip insurance policy into evidence at trial, which Mr. Casavant obviously had in his files. *App. at 193.* Mr. Casavant conceded that nothing in the policy indicated it would cover trip cancellation fees resulting from fear of a terrorist attack. *App. at 136-137.* Moreover, it is undisputed that the confirmations sent to them almost one year before the scheduled cruise stated only that trip insurance would cover "cancellation fees in the event of medical emergency." *App. at 167.* Simply put, had Appellants wanted to know whether their cancellation would fall within the coverage scope of the policy, they needed only to look at the

documents in their file. There is no evidence they ever did.

Regardless of whether Appellants did or did not call NCL prior to their scheduled sailing date, what is undisputed is that they did not rely upon any representations from NCL personnel in canceling their cruise. As Mr. Casavant testified:

Q. Was there anything that anyone could have told you after the events of September 11 that would have induced you to sail on September 16, or had you made your decision that you were not sailing on September 16?

A. I don't think we were going to sail.

App. at 138-139.

Mr. Casavant testified that he knew that because he paid the full cruise ticket price, NCL was obliged to keep a room for him on the *Norwegian Majesty*: an obligation that can only be characterized as *contractual*. *Tr. 49.* He testified as follows:

Q. Is it fair to say, Mr. Casavant, that you believed that Norwegian

Cruise Line had contractual obligations to you, and you paid them for those obligations; correct?

A. That's correct.

App. at 146.

The potential consequences of Appellants' last minute cancellation was not lost on even Mr. Casavant. He conceded that as a result of his trying to reschedule his cruise, there could be a room that was reserved for him on the *Norwegian Majesty* which would be vacant upon sailing:

Q. Okay. So you knew when you were looking to cancel or reschedule your cruise, that there would be a room that was reserved for you, that would now be empty, correct?

A. Well, yes, you're right, but I also in my thought process believed, you know, that as people up and go travel that last-minute deals-I thought maybe that we would go that way.

Id.

The first written indication that the Appellants wanted to cancel or reschedule their cruise was their letter to NCL dated September 17, 2001, the day after the vessel departed. *App. at*

183. However, that letter did not state that NCL representatives had allegedly advised Plaintiffs to cancel their cruise or that their trip insurance would facilitate a rescheduling of their vacation. *Id.* Moreover, although Appellants requested a rescheduling of their cruise, they could not state with any certainty when, if ever, they would be willing to take another cruise: an undeniable impediment to NCL's ability to reschedule their trip. *App. at 144.* On October 11, 2001, NCL denied Plaintiffs' request to reschedule the cruise. *App. at 184.*

D) The Litigation

On August 20, 2002, Appellants entered into a retainer agreement with their attorney, John D. Deacon Jr. The retainer was introduced into evidence at trial as Exhibit "12." Mr. Deacon inexplicably decided to exclude his retainer agreement from the Appendix submitted herewith. Nevertheless, the testimony at trial showed that 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. *App. at 150-151, 153-154.* Two days after entering into a retainer agreement with Appellants, Mr. Deacon sent NCL a demand letter, dated August 22, 2002, under "ch. 93A, §9(3) M.G.L.A." *App. at 185-188.*

Although he had been representing Appellants 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%.

Appellants' August 22, 2002 demand letter asserted the following claims of deceptive or unfair acts or practices: 1) Plaintiffs never accepted the contract, 2) there was no consideration because NCL's fare was "fully earned" before sailing, 3) they had the right to use their tickets for another cruise for any reason, 4) NCL failed to file its fare with the Massachusetts administrative agency under M.G.L.A §12(a), and 5) the passenger ticket contract's limitation of liability for personal injury or death was illegal under 28 U.S.C. 183-c. *Id.*

On September 26, 2002, counsel for NCL

responded to the demand letter point by point, setting forth in detail why NCL was not legally required to refund or reschedule Appellants' cruise. NCL's response additionally pointed out that a forum selection clause in the ticket contract, which had been upheld by the courts of Massachusetts, required that suit be brought only in Dade County Florida. *App. at 191-192.*

Appellants filed suit in Worcester Superior Court on October 3, 2002. NCL answered the complaint and thereafter moved to dismiss based upon the Dade County, Florida forum selection clause. On December 9, 2002, NCL's motion to dismiss was granted by the Honorable James P. Donohue. On December 23, 2002, Appellants moved for reconsideration, which motion was denied. *App. at 1-4.*

Appellants appealed to the Appeals Court of Massachusetts, which reversed the lower court and vacated the order denying Plaintiffs' motion for reconsideration. The Appeals Court held that the forum selection clause was unenforceable because

the Appellants had not accepted the contract under state law. *Casavant v. Norwegian Cruise Line, Ltd.*, 63 Mass.App.Ct. 785, 829 N.E.2d 1171 (2005). The case was remanded for determination of whether Appellants were entitled to a full refund and to litigate Plaintiffs' claims under M.G.L.A. §93A.

In June 2006 the parties filed the Joint Pre-Trial Memorandum. *App.* at 36-51. Appellants included for the first time as part of their §93A claim an allegation that NCL violated 940 CMR §15.01 *et. seq.* by deceiving them with regard to a cancellation policy in its passenger ticket contract. This additional claim had not been asserted either in Appellants' demand letter of August 22, 2002 nor in its complaint. *App.* at 5-11. NCL also noted in its input to the Joint Pre-Trial Memorandum that although the action had then been pending for four years, Appellants' counsel had only raised the claim three days before the pre-trial conference, and had not raised the issue in its initial draft of that very document. *App.* at 46-47.

Further, in the Joint Pre-Trial Memorandum, NCL agreed to refund Plaintiffs' ticket price of \$2,017.50 based upon the decision of the Appeals Court of Massachusetts. *App.* at 46. Appellants did not accept the offer until trial. *App.* at 100-102. NCL has since paid the refund in full, with interests and cost. As such, this case is now only an effort by Appellants' counsel to recover an egregiously exaggerated attorney's fee claim of approximately \$40,000.

STANDARD OF REVIEW

In reviewing a matter wherein the trial judge was the finder of fact, the judge's findings of fact are accepted as true unless they are clearly erroneous. *Howard v. Daniels*, Slip Copy, 2009 WL 412994 (Mass.App.Ct. 2009).

LEGAL ARGUMENT

1. The Superior Court's finding that NCL did not commit unfair or deceptive business practices cannot remotely be characterized as "clearly erroneous," given that it was supported by undisputed evidence and controlling legal precedent.

This case boiled down to a good faith disagreement over whether Appellants were entitled to a refund of the cost of their cruise tickets, and whether they were entitled to a refund upon deciding to cancel their trip. As such, it comes squarely within the principle that a mere breach of a legal obligation, without more, does not amount to an unfair or deceptive act under §93A. *Framingham Auto Sales v. Worker's Credit Union*, 41 Mass.App.Ct. 416, 671 N.E.2d 963 (Appeals Court of Massachusetts, Middlesex 1996).

There was not the slightest suggestion in any of the trial testimony that NCL had an ulterior motive, or a coercive or extortionate objective. *Id.* On the contrary, Mr. Casavant admitted that he believed that NCL was contractually obligated to reserve the Plaintiffs' room aboard the vessel

and to sail he and his wife from Boston to Bermuda. Given Mr. Casavant's admission that contractual obligations existed between these parties, it cannot be said that NCL was either deceptive or unfair in electing to hold Appellants to their bargain. See *Jasty v. Wright Medical Technology, Inc.*, 2006 WL 961456 (D. Mass) ("a good faith dispute over billing or a simple breach of contract are each an insufficient basis for 93A liability."). It has been held that in agreeing to sail on a cruise, and prior to boarding, a passenger had entered into a binding ticket contract. *Vega v. Norwegian Cruise Lines*, 2007 WL 1791624 (S.D.N.Y). Moreover, there has been no suggestion that NCL engaged in active misrepresentation or deceit. *Plastics Color & Compounding, Inc. v. Coz*, 20 Mas.L.Rtpr. 453 (Sup. Ct. Mass., 2006).

As the Superior Court held in its Decision and Order following the trial:

I find that the dispute between the parties over whether the Casavants were entitled to a refund under the circumstances was a legitimate business

dispute. The position taken by Norwegian did not lack merit and was not a sham justification. There was a legitimate dispute over whether Norwegian owed the Casavants a refund under the circumstances.

App at 32-33.

It must also be remembered that despite the ultimate decision of the Appeals Court, the Superior Court (J. Donohue) initially dismissed the case, holding that Appellants had accepted the contract and were bound by its terms and conditions. Given the legion of case law that NCL submitted in support of its position, Justice Donohue's decision was on sound legal footing, as was NCL's good faith belief that Appellants were legally bound by their contract. NCL's passenger ticket has been upheld repeatedly in Massachusetts and elsewhere. See *Keikian v. Norwegian Cruise Line, Ltd.*, 204 Mass. App. Div. 91, 2004 WL 1293262 (Mass App. Div.); *Croce v. Norwegian Cruise line, et al.*, No. 99-4524-G, May 30, 2000 (Sup. Ct. Suffolk Cty.); *Ralli v. Norwegian Cruise Line, Ltd.*, No. 261837, September 17, 1999 (Bos.

Mun. Ct. Suffolk Cty.); *Harry & Dawn Brooks v. Norwegian Cruise Lines*. 0064 SC 0049, June 19, 2000 (Dist Ct. Worcester); *Richard & Patricia Brooks v. Norwegian Cruise Lines*, No. 0064 SC 0120, June 19, 2000 (Dist Ct. Worcester); *LaPierre v. Norwegian Cruise Line Ltd.*, No. 0023 SC 1759, June 26, 2000 (Dist Ct. Springfield); See also, *Lurie v Norwegian Cruise Lines, Ltd.* 305 F.Supp. 2d 352 (SDNY 2004); *Reynolds-Naughton v. Norwegian Cruise Line Limited*, 386 F.3d 1 (1st Cir. 2004); *Siegel v. Norwegian Cruise Line, Ltd.*, 2001 WL 1905983.

While the Appeals Court of Massachusetts may have held that the Appellants did not accept the contract under these particular circumstances, there is no evidence of a deceptive or unfair practice under §93A. Furthermore, an analysis of Appellants' proffered examples of NCL's alleged "deceptive or unfair" acts reveals that they are largely based upon legally incorrect interpretations of statutes which had nothing whatsoever to do with Plaintiffs' involvement with

NCL.

a) Allegation- NCL violated 940 CMR 15:01

Appellants based their §93A claim in part upon 940 CMR §15.01 et. seq., alleging that NCL deceived them with regard to a cancellation or refund policy in its passenger ticket contract. However, Appellants' counsel did not include the §15.01 claim in his complaint. He also failed to include it in the written demand letter he sent NCL under ch. 93A. M.G.L.A. 93A §9(3) states that "(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). Appellants' counsel mailed such a "written demand" to NCL on or about August 22, 2002, but did not remotely make any claim under 940 CMR §15.01, et. seq.

Appellants' counsel attempts to excuse this omission by claiming that NCL's refund policy was

not disclosed until after NCL responded to his demand letter. This excuse is clearly disingenuous given that he also failed to include the claim in his complaint filed three months after receiving NCL's response to the demand letter. Additionally, although Mr. Deacon asserted that he was not obligated to send such a letter to NCL, he never explained why he did so.

More importantly, even if this claim were properly asserted, it would still be patently without merit. First, there was no testimony at trial that NCL's cancellation policy was not conveyed to the Appellants. On the contrary, Appellants admitted receiving NCL's cancellation policy from their travel agent almost one year prior to their scheduled departure date.

Moreover, Appellants confuse NCL's policy of providing passengers with a 100% refund if they object to any terms or conditions of the ticket contract, with the general cancellation policy which BJ's Travel Club conveyed to Appellants in their confirmation documents. As NCL's counsel

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.”

Exhibit 10. In *Lurie v. Norwegian Cruise Line,
Ltd.*, the court explained NCL’s refund policy as
follows:

The refund provision in the Luries’
passenger ticket contract is
substantially the same as that addressed
in *Shute*. It states, in relevant part,
“The fare paid hereunder...shall be
considered fully earned at the time of
payment...Carrier 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...(Kilgour Decl. Ex. A). 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.Supp2d
352, 362 (S.D.N.Y.2004). In *Shute*, the Supreme
Court held that a cruise passenger is entitled
only to “reject the contract” with impunity within
a reasonable period of time after receiving the
ticket if the passenger objects to terms and

provisions in the contract. *Carnival Cruise Lines Inc. v. Shute*, 499 U.S. 585, 593-595, 11 S.Ct. 1522, 113 L.Ed. 2d 622 (1991). Here, Appellants never objected to a provision of the contract, but only sought to delay their departure date indefinitely until NCL could somehow assure them that they would be completely safe from terrorism.

At trial, Mr. Casavant admitted that he did not read his contract before deciding not take the cruise, and as such, his decision to cancel was not based upon an objection to a term in the ticket contract. Therefore, Appellants' cancellation did not fall within NCL's refund policy. It was neither unfair nor deceptive for NCL to believe that Appellants' decision to cancel the cruise due to a fear of terrorism was not a rejection of the terms of the ticket contract, and did not entitle them to a refund. *Loreal USA Inc. v. PM Hotel Associates*, 816 N.Y.S.2d 696 ("a party's subjective fear of a terrorist attack did not constitute a legally cognizable excuse for non-performance of contractual obligations.")

Again, it must also be remembered that Justice Donohue came to the same conclusion as NCL after reviewing its motion to dismiss. Clearly, NCL had a good faith belief in its position. See *Reynolds Naughton v. Norwegian Cruise Line Limited*, 386 F.3d 1 (1st Cir. 2004).

Finally, there is no evidence of causation between 940 CMR §15.01, *et seq.*, and the Appellants' damage claims. Mr. Casavant testified unequivocally that after the attacks of September 11, 2001, he would not take the cruise no matter what was offered to him. Assuming *arguendo* that there was a statutory violation here, in the absence of causation, it could not form a predicate under §93A. *Hershenow v. Enterprise Rent-A-Car*, 445 Mass. 790, 840 N.E.2d. 526; *T.W. Nickerson Inc. v. Fleet National Bank*, 2006 WL 4119652, (Sup. Ct. Mass., Barnstable County, 2006) (...“the facts and circumstances presented do not support a finding that Fleet’s conduct amounted to an unfair and deceptive business practice. Nor do the facts and circumstances support a finding that

any losses occasioned by the plaintiff were caused by the conduct of Fleet").

Given the above, the Superior Court was correct in holding the following:

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.

App. at 33.

It should also be noted that the Superior Court's decision did not in any way conflict with the prior decision of the Appeals Court. As Justice Henry noted: it "does not appear that the Appeals Court was provided with information regarding notices of the applicable cancellation

fees contained in Exhibits 1, 2, and 4." *Id.*

b) Allegation- NCL failed to meet filing requirements

Appellants argue that NCL was required to file its fare with the Massachusetts administrative agency under M.G.L.A §12(a), and that the failure to do so gives rise to 93A liability. Appellants presented no evidence or legal argument of a single national cruise ship operator which filed its fares with the Massachusetts administrative agency. Moreover, this statute applies only to carriers that transport people "between points within the commonwealth." Here the cruise was between Boston and Bermuda. In addition, since there is no evidence that the failure to file its fare with the Massachusetts administrative agency caused Appellants' damages or is related to Appellants' claims, it could not form a predicate under §93A. *Hershenow v. Enterprise Rent-A-Car*, 445 Mass. 790, 840 N.E.2d. 526; *T.W. Nickerson Inc. v. Fleet National Bank*, 2006 WL 4119652 (Sup. Ct. Mass., Barnstable County, 2006). As the

Superior Court cited: "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 the violation."

c) Allegation- *NCL's contract was illegal under 28 U.S.C. 183(c)*

The ticket contract's limitation of liability for personal injury or death was not illegal under 28 U.S.C. 183(c), but only unenforceable for voyages to or from a United States port. See *Shultz v. Florida Keys Dive Center*, 224 F.3d 1269 (11th Cir. 2000); *Wallis v. Princess Cruises, Inc.* 306 F.3d 827 (9th Cir. 2002); *Reynolds Naughton v. Norwegian Cruise Line Limited*, 386 F.3d 1 (1st Cir. 2004). NCL's ticket contract and the proscriptions of Sec. 183-c were specifically analyzed in *Reynolds-Naughton*, a federal case in Massachusetts, and not only was the contract found to be legal, but the forum selection clause was enforced. *Id.*

Additionally, since NCL conducts voyages outside the United States, it is perfectly

acceptable for it to include provisions in its contracts which may only be enforceable outside the United States, and under par. 21 of the ticket contract, any invalid or unenforceable provisions are severable from the balance of the contract.

Finally, assuming *arguendo* that the ticket contract did violate Sec. 183-c, in the absence of causation, it could not form a predicate under §93A. *Hershenow v. Enterprise Rent-A-Car*, 445 Mass. 790, 840 N.E.2d. 526; *T.W. Nickerson Inc. v. Fleet National Bank*, 2006 WL 4119652 (Sup. Ct. Mass., Barnstable County, 2006). There was no testimony at trial that Plaintiffs were even aware that this limitation of liability existed.

As the Superior Court noted: "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."

d) The additional bases for Appellants' §93A claim are equally invalid

None of the remaining bases for Appellants' §93A claim are valid. They argue that NCL committed an unfair or deceptive act by not refunding their ticket fare because 1) they never accepted the contract, 2) there was no consideration because NCL's fare was "fully earned" before sailing, and 3) they allegedly had the right to use their tickets on another cruise. However, at worst, the refusal to issue a refund would have been a simple commercial disagreement for which there is no §93A liability. As stated extensively above, "a good faith dispute as to whether money is owed or performance of some kind is due, is not the stuff of which a c. 93A claim is made." *Jasty v. Wright Medical Technology, Inc.*, 2006 WL 961456 (D. Mass.).

Additionally, these claims of deceptive or unfair practices are nonsensical. The fact that the fare was considered "fully earned" means only that NCL was entitled to the fare upon reserving a space for the Appellants on the vessel. This practice is no different than any other

transportation company, from airlines to rail carriers to bus companies, which are entitled to their fare upon issuance of a ticket and do not have to wait for their money until after the voyage is complete. See *Siegel v. Norwegian Cruise Line, Ltd.*, 2001 WL 1905983 (D.N.J.) (The fact that the NCL ticket contained a provision indicating that the fare is "fully earned at the time of payment" did not constitute economic duress which would thereby render the forum selection clause unenforceable.); see also *Lurie v. Norwegian Cruise Line, Ltd.*, 305 F.Supp2d 352, 362 (S.D.N.Y. 2004)

As for the allegation that Appellants were indisputably entitled to reschedule their cruise, such a provision is not contained anywhere in the contract. Moreover, Mr. Casavant admitted at trial that he did not believe that he could reschedule his cruise for any reason, and did not agree with his attorney's August 22, 2002 demand letter which made that assertion.

Q. ...You didn't believe you could

cancel for any reason and just go
schedule another cruise at another
time?

A. No-for any reason, no.

Tr. at 51.

e) *Plaintiffs' demand for roughly \$40,000.00
in counsel fees and multiple damages is
outrageous*

A party is entitled only to fees that were
necessary for the advancement of a successful 93A
claim. *Sorensen v. H & R Block*, 2005 WL 2323196
(D.Mass). Additionally, attorneys' fees should
not be granted for work in raising arguments which
border on the frivolous and which were apparently
performed for the sole purpose of making a record
to support a 93A claim for damages. *Id.*, citing
Kramer v. Marine Midland Bank, 577 F.Supp. 999
(S.D.N.Y. 1984).

As described extensively above, Appellants'
counsel advanced arguments concerning alleged
statutory violations which were simply incorrect
and which in no way were causatively linked to
Appellants' underlying claim for a refund. In

doing so, Appellants' counsel claims he expended roughly \$41,000 in legal time to recover on a claim for roughly \$2,100.00. In fact, in just the two day period after he was retained, he claimed to be owed \$2,600.00 in legal time and demanded payment of that excessive figure in his letter to NCL as a condition of settling the underlying \$2,100.00 claim.

This case did not involve document discovery or any depositions. Appellants opposed a single motion to dismiss and then progressed right to trial. Appellants' counsel concedes that his time appealing the order dismissing the case was not compensable. It is therefore unfathomable that his fees could reach this level without a concerted effort to maximize them with an eye toward the 93A claim, and without any regard for proportion or propriety. Appellants were made whole by virtue of the fact that NCL refunded their ticket price, with interest and costs, a payment which was offered to them when the Joint Pre-Trial Memorandum was filed.

Appellants further seek multiple damages of the unexpired refund price. However, multiple damages are reserved for particularly egregious conduct. "Those defendants who have committed a 'relatively innocent violation' of the statute are not liable for multiple damages, while a second class of defendants who have committed willful or knowing violations are." *DataComm Interface v. ComputerWorld, Inc., et al*, 396 Mass. 760 (1986), as cited in *Plastics Color & Compounding Inc. v. Coz*, 20 Mass.L.Rptr. 453 (Sup. Ct. Mass. 2006). A "willful or knowing" violation is one where either the defendant affirmatively knew that a material representation was false or that the defendant made the representation with reckless disregard for its truth or falsity. *Id.* There is nothing in the evidentiary record to remotely suggest such a degree of culpability on the part of NCL. On the contrary, NCL conducted itself at all times consistent with legal precedent as laid down in numerous cases which specifically analyzed and enforced its own passenger ticket contract and

its own refund policy.

As stated by the court in *Framingham Auto Sales, Inc. v. Worker's Credit Union*, "It is quite possible that the plaintiff's attorneys fees and expenses will exceed the amount of its recovery, even with legal costs and interest, but this is true of much meritorious litigation leading to small recoveries under the American rule on litigation expenses. We are required to follow that rule in cases not governed by a contrary statute. *Framingham Auto Sales, Inc. v. Worker's Credit Union*, 41 Mass.App.Ct. 416 (1996).

2) The prior decision of the Appeals Court did not constitute law of the case on Appellants' 93A claims

This Court need not detain itself for long with Appellants' preposterous assertion that the prior decision of the Appeals Court somehow constituted "law of the case" and required a finding of liability on their 93A claims. The Appeals Court specifically remanded the case to the Superior Court *for the purpose of deciding the 93A claims*, holding as follows: "remaining for

trial in the Casavants' claim against Norwegian for unfair or deceptive business practices, pursuant to G.L. c. 93A." In its decision following the trial, the Superior Court specifically noted the following:


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.

App. at 32.

CONCLUSION

The Superior Court's finding that NCL did not commit any PIA violations was absolutely correct, and did not remotely approach the "clearly erroneous" standard required to overturn the decision. The Superior Court's decision should be affirmed in its entirety.

Respectfully submitted,
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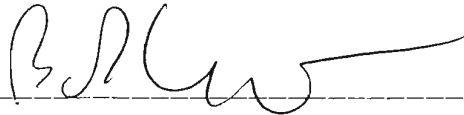
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DECLARATION OF SERVICE

In the fifth day of February 2009, I, Barbara P. Lazaris, Esq., served by First Class U.S. Mail, postage prepaid, two copies of the within Brief of Appellee to:

John D. Deacon, Jr.
72 Pine Street
Providence, RI 02903

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



Barbara P. Lazaris, Esq.- BBO#628638

Dated: February 25, 2009

MASS. R. A. P. 16(k) CERTIFICATE OF COMPLIANCE

I, Barbara P. Lazaris, hereby certify that

the foregoing brief complies with the rules of court that pertain to the filing of briefs, including,
but not limited to:

Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision);

Mass. R. A. P. 16(e) (references to the record);

Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations);

Mass. R. A. P. 16(h) (length of briefs);

Mass. R. A. P. 18 (appendix to the briefs); and

Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

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