

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS (Boston)

No. 1:23-cv-12002-WGY

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

vs.

SABA UNIVERSITY SCHOOL OF MEDICINE, et al,  
Defendants

\*\*\*\*\*

For Hearing Before:  
Judge William G. Young

Motion to Certify a Class

United States District Court  
District of Massachusetts (Boston)  
One Courthouse Way  
Boston, Massachusetts 02210  
Tuesday, September 17, 2024

\*\*\*\*\*

REPORTER: RICHARD H. ROMANOW, RPR  
Official Court Reporter  
United States District Court  
One Courthouse Way, Room 5510, Boston, MA 02210  
rhr3tubas@aol.com

## A P P E A R A N C E S

1  
2  
3 MARGARET SILLER, ESQ.  
CHRISTINA FITZGERALD, ESQ.  
4 Maynard Nexsen, P.C.  
1131 4th Avenue S, Suite 320  
5 Nashville, TN 37210  
(629) 258-2253  
6 Email: Msiller@maynardnexsen.com

and

7 PATRICK T. EGAN, ESQ.  
Berman Tabacco  
8 One Liberty Square  
Boston, MA 02109  
9 (617) 542-8300  
Email: Pegan@bermantabacco.com  
10 For Plaintiff and class

11  
12 MICHAEL J. McMORROW, ESQ.  
DARYL J. LAPP, ESQ.  
13 DALE EVANS, ESQ.  
Locke Lord, LLP  
14 111 South Wacker Drive, Suite 4100  
Chicago, IL 60606  
15 (312) 443-0700  
Email: michael.mcmorrow@lockelord.com  
16 For Defendants

17  
18  
19  
20  
21  
22  
23  
24  
25

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.)  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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