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United States Court of Appeals
For the First Circuit

No. 21-_______

**United States Court of Appeals
For the First Circuit**

MATTHEW DOWNING, individually and on behalf of proposed classes and all others similarly situated,

Plaintiff-Petitioner

v.

KEURIG GREEN MOUNTAIN, INC.

Defendant-Respondent.

Appeal from Order of the United States District Court for the District of Massachusetts, C.A. No. 1:20-cv-11673-IT

PETITION BY PLAINTIFF PURSUANT TO FED. R. CIV. P. 23(f) FOR PERMISSION TO APPEAL FROM ORDER STRIKING CLASS ALLEGATIONS

Edward F. Haber (BBO# 215620)
ehaber@shulaw.com
Ian J. McLoughlin (BBO# 647203)
imcloughlin@shulaw.com
Patrick J. Vallely (BBO# 663866)
pvallely@shulaw.com
SHAPIRO HABER & URMY LLP
Two Seaport Lane, Sixth Floor
Boston, MA 02210
Telephone: (617) 439-3939
Facsimile: (617) 439-0134

Counsel for Plaintiff-Petitioner

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I. SUMMARY OF ARGUMENT

Plaintiff is a consumer who purchased single-serve plastic coffee pods ("Pods") made by Defendant Keurig Green Mountain, Inc. ("Keurig"). Keurig markets and labels the Pods as recyclable, but the Pods are not, in fact, recyclable as that term is defined under applicable Federal Trade Commission ("FTC") guidance. Keurig's wrongful conduct giving rise to Plaintiff's claim occurred almost entirely in Massachusetts, where Keurig's employees responsible for corporate strategy, product design, and marketing perform those functions.

Plaintiff asserts a single consumer claim under M.G.L. c. 93A § 9 ("Chapter 93A") on behalf of a proposed national class of consumers who were deceived by Keurig's deceptive labeling that Keurig orchestrated from its headquarters in Massachusetts.

This petition concerns the district court's erroneous decision to strike Plaintiff's nationwide class allegations, concluding that no such nationwide class could be certified under Rule 23 because Chapter 93A's remedies do not extend to consumers who purchased the Pods outside of Massachusetts. The district court reached this conclusion based on the legally incorrect premise that Chapter 93A's consumer remedies under Section 9 reach only transactions that occurred primarily and substantially within the Commonwealth. This is a fundamental legal error that disregards the substantive law under Chapter 93A. Specifically, the Massachusetts legislature consciously decided ***not*** to limit Chapter 93A's remedies for ***consumers under Section 9*** to transactions that

occurred primarily and substantially within the Commonwealth. Section 9 contrasts with claims by non-consumers under Section 11, for which the legislature did impose such a geographic limitation.

The district court's decision raises a fundamental question, yet to be resolved in this circuit, regarding the interaction among Fed. R. Civ. Proc. 23, conflicts of law principles, and substantive state law. Specifically, the core question is whether a district court may strike class allegations if doing so would contradict substantive principles of state law, which provide a remedy to nonresidents harmed by a resident business. This pure question of law is ripe for resolution in this Court.

In this proposed appeal, the scope of Chapter 93A's remedies is an important predicate legal issue. As Plaintiff explains below, the statute's text and case law construing it confirm that Chapter 93A's consumer remedies extend to consumers who purchased products outside Massachusetts. The Massachusetts Supreme Judicial Court, however, has not expressly resolved this issue. This Court should, therefore, upon granting this petition, certify to the Massachusetts Supreme Judicial Court the question of whether the remedies of M.G.L. c. 93A § 9 extend to consumers who purchase products outside of Massachusetts based on deceptive statements disseminated from the Commonwealth by a Massachusetts business. The answer to this question may be important to this Court's resolution of whether the district court correctly concluded that any class under M.G.L. c. 93A § 9 must be limited solely to Massachusetts residents.

For the reasons set forth below, the Court should grant the petition.

II. QUESTION PRESENTED AND RELIEF SOUGHT

The question presented in this proposed appeal is whether the district court erred in striking Plaintiff's class allegations on behalf of out-of-state consumers even though the state law at issue provides a remedy for such out-of-state consumers.

The relief sought is permission to appeal pursuant to Fed. R. Civ. Proc. 23(f).

III. FACTS NECESSARY TO UNDERSTAND THE PETITION

A. *Plaintiff's Claims*

On each package of Pods Keurig sold from June 2016 on, Keurig represented that the Pods were recyclable, a message communicated through prominent recycling symbols and text statements including "Peel · Empty · Recycle," and "Have your cup and recycle it, too." ¶¶ 27–33.[1] Per FTC guidance, "recycling" claims are deceptive if a product is not capable of being collected, separated, recovered, and converted to new products in a substantial majority of communities in which the product is sold. ¶¶ 45–47. That is, to determine whether a product is recyclable, the question is not whether a product is made of recyclable material or whether a particular Pod is ultimately recycled. Instead, "recyclable" product claims are deceptive if the products are not capable of being recycled in most communities. ¶¶ 35, 43–49.

Keurig's labels and marketing were deceptive because the Pods cannot be recycled in most communities due to a combination of factors, known fully to Keurig

[1] "¶ __" refers to paragraphs of Plaintiff's Complaint, ECF No. 1.

at all relevant times. These factors include product design characteristics such as the product's small size, its tendency to be crushed, the attached foil lid, and contamination with food waste—design factors that make it uneconomical for most recycling centers to recycle the Pods. ¶¶ 37–40. In short, Keurig has known all along that the Pods were not truly recyclable. ¶¶ 51–56.

Keurig's wrongful conduct giving rise to Plaintiff's claim, i.e. the dissemination of its misleading labels and marketing materials for the Pods, occurred almost entirely from its headquarters in Massachusetts, where Keurig's employees responsible for corporate strategy, product design, and marketing perform those functions. ¶¶ 57–66.

Plaintiff asserts a single claim under Section 9 of Chapter 93A. ¶¶ 81–94. Specifically, Plaintiff alleges that Keurig's statements on product labels were deceptive because the Pods were not truly "recyclable" as promised. Plaintiff asserts this Chapter 93A claim on behalf of a national class of consumers who purchased the Pods during the relevant period. ¶¶ 70–71.

B. *The District Court's Decision.*

On December 17, 2020, Keurig moved to dismiss Plaintiff's complaint. ECF 14, 15. Keurig, among other arguments, challenged Plaintiff's standing to sue and to pursue injunctive relief, and the adequacy of Plaintiff's allegations under Chapter 93A. ECF 15 at 5–18. In its June 11, 2021 order on Keurig's motion to dismiss, the district court rejected each of these arguments. ECF 34 (the "Order," attached hereto as Exhibit 1).

Additionally, and pertinent to this petition, Keurig moved to strike Plaintiff's nationwide class allegations, arguing that Plaintiff's allegations should be stricken "to the extent" Plaintiff asserts a Chapter 93A claim "on behalf of persons outside of Massachusetts." *Id.* at 18–20. This argument embedded two legal premises: first, that conflicts of law principles require a court to narrow a class such that only one state's law will apply to a particular transaction, and second, that Chapter 93A cannot apply to purchases made by consumers located outside Massachusetts because Chapter 93A applies only to "'actions and transactions' that 'occurred primarily and substantially in the Commonwealth.'" ECF 15 at 18–19.

Plaintiff opposed Keurig's motion to strike the national class, arguing that

(i) Chapter 93A's consumer remedies extend to consumers who purchase products in other states who are harmed by deceptive conduct or other wrongdoing perpetrated by a Massachusetts business;

(ii) the law of multiple sovereigns may apply to a single course of wrongdoing, without any "conflict," and a plaintiff may elect which remedy to pursue; and

(iii) even if it were proper to apply conflicts-of-law principles, the doctrine of false conflicts of law applies here and permits class members outside of Massachusetts to invoke the remedies afforded by Chapter 93A.

ECF 28 at 16–20.

On this aspect of Keurig's motion, the district court ruled in Keurig's favor, striking Plaintiff's nationwide class allegations and thus limiting Plaintiff to a Massachusetts class. *Id.* at 13–15. The district court recognized that Chapter 93A's remedies are not limited to Massachusetts residents. *Id.* at 14. However, the district court then proceeded to invoke conflicts-of-law principles in a manner that effectively negated the expansive scope of Chapter 93A's consumer remedies, which the court had just recognized. Specifically, the district court held that "Massachusetts courts often consider the Restatement Second of Conflicts § 148 (Am. L. Inst. 1971) to determine whether the deceptive conduct occurred primarily and substantially in Massachusetts when deciding whether a plaintiff can proceed under Chapter 93A." *Id.* at 14. Applying those conflicts-of-law principles, the district court held that "the injury occurred where [the] consumer purchased Pods in reliance on [the] advertising" at issue. From this premise, the court concluded that non-Massachusetts members of the proposed national class do not have claims under Section 9 of Chapter 93A and may assert claims only under their home states' consumer protection laws. Order 14–15.

The district court did not engage, at all, Plaintiff's arguments that (i) Chapter 93A's consumer remedies under Section 9 are not limited to transactions that occurred within the Commonwealth; (ii) consumers are not limited to asserting remedies provided solely by their home state; or (iii) under a conflicts-of-law analysis, the purported conflict is a false conflict.

Plaintiff timely filed this petition on June 25, 2021.

IV. ARGUMENT

A. *Plaintiff Satisfies the Standard for a Petition to Appeal Under Rule 23(f).*

This Court has established criteria that guide its discretion in granting petitions under Rule 23(f). The criterion relevant here is whether "an appeal …will lead to clarification of a fundamental of issue of law." *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000).

Here, the petition raises a fundamental question of Rule 23 jurisprudence, for which clarification is needed not only for this case but also for future state law class actions. That question is whether district courts should apply conflicts-of-law principles to preclude a plaintiff from asserting state law claims on behalf of nonresidents of that state, even where the state law provides remedies for such nonresidents. In more general terms, the question is whether courts should invoke Rule 23 and conflicts of law principles to negate the substantive decisions states have made about the scope of remedies provided under state law. Plaintiff respectfully submits the proper answer to that question is "no"; district courts should not invoke procedural rules to negate the substantive reach of state law.

Importantly, this petition presents a pure question of law, which makes this petition much different from the typical Rule 23(f) petition, arising after discovery and full class certification briefing and raising fact-bound questions such as predominance. Appellate courts are sometimes hesitant to wade into such fact-intensive disputes, given

the discretion district courts enjoy to resolve factual matters. *See, e.g., Prado-Steiman v. Bush,* 221 F.3d 1266, 1275–76 (11th Cir. 2000) ("[A] class certification decision which turns on case-specific matters of fact and district court discretion…generally will not be appropriate for interlocutory review.") (quotations omitted). Here, in contrast, the petition raises a pure question of law. The district court elected to strike Plaintiff's class allegations on the pleadings, underscoring that this petition does not implicate the district court's discretion in weighing evidence.

The fact that this petition comes to the Court upon a motion to strike under Rule 12(f) rather than a class certification decision under Rule 23 makes no difference as to either the Court's jurisdiction under Rule 23(f) or the propriety of interlocutory review. A Rule 23(f) appeal is permissible from an order striking class allegations because such an order "'is functionally equivalent to an order denying class certification.'" *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 444 (7th Cir. 2020) (quoting *Microsoft v. Baker*, 137 S. Ct. 1702 (2017)); *Herrera v. JFK Med. Ctr. LP*, 648 Fed. Appx. 930, 933 n.1 (11th Cir. 2016) ("We reject Defendants' narrow reading of Rule 23(f) because the district court's order striking Plaintiffs' class allegations 'is the functional equivalent of denying a motion to certify the case as a class action.'") (quoting *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 110 n.2 (4th Cir. 2013)). The equivalency of a motion to strike class allegations and a denial of class certification is apparent here, given that the district court's decision turns upon a pure question of law, the outcome of which would be the same whether decided now or later.

Plaintiff explains below the legal issues raised in this petition, how the district court erred, and why this Court should therefore grant the petition.

B. *Chapter 93A's Consumer Remedies Extend to Non-Residents Injured by Wrongdoing Perpetrated by a Massachusetts Business from Massachusetts.*

Section 9 of Chapter 93A provides a remedy for violations of Section 2 of Chapter 93A to "***[a]ny person***…who had been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two." M.G.L. c. 93A § 9. Unlike Section 11, Section 9 imposes no geographical requirement on the location of the injury. *Compare id.*, *with* M.G.L. c. 93A § 11. And neither Section 9 nor Section 11 require the plaintiff to reside in Massachusetts.

Although the district court acknowledged initially that "Chapter 93A does not require that a plaintiff reside in Massachusetts to bring a claim," it then proceeded to craft a legal rule that had the practical effect of negating that correct observation. That is, the district court's holding improperly limits Chapter 93A's consumer remedies to consumers who purchased products in Massachusetts.

The district court's analysis is flawed. As a threshold matter, the district court assumes consumers may invoke only a single state's consumer protection law, and therefore, a court must identify the law of only one state to apply to the exclusion of all other states' laws. This is not the law. There is no principle precluding a plaintiff from asserting the law of one sovereign even though the law of anohter sovereing may apply. For example, the Supreme Court has held that when Congress and the states enact laws

that overlap, the laws of ***both*** sovereigns are complementary and apply concurrently to the same conduct. *See, e.g., California v. ARC America Corp.*, 490 U.S. 93, 101 (1989).

The principle permitting a plaintiff to assert claims under both state and federal law applies equally to permit a plaintiff to assert claims under two states' laws when both states have a governmental interest in regulating a single transaction. Courts permit claims at the pleading stage under multiple states' laws if each state's statutory text and policies permit. For example, states' "blue sky" laws (*i.e.*, state securities laws) are considered to be "additive rather than exclusive," and "[i]f a transaction touches multiple states, it follows that multiple Blue-Sky Laws may apply simultaneously." *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 2012 U.S. Dist. LEXIS 59620, at *1012 (C.D. Cal. Apr. 16, 2012) (collecting authorities). As one court explained:

> Overlapping state securities laws do not present a classic conflict of laws question. Blue Sky laws protect ***two distinct public policies***.... [One state may be] interested in protecting its defrauded citizen [while another state] is interested in eliminating a base of fraudulent operations located within its borders. Each state's interest is vindicated by permitting a plaintiff to pursue multiple theories, as long as he is limited to a single recovery based on a finding of liability.

Simms Inv. Co. v. E.F. Hutton & Co., 699 F. Supp. 543, 545–46 (M.D.N.C. 1988); *Chrysler Capital Corp. v. Century Power Corp.*, 1992 U.S. Dist. LEXIS 9187, at *5–6 (S.D.N.Y. June 24, 1992) (where "more than one state [has] an interest in regulating a single securities transaction, overlapping state securities laws" can apply concurrently); *Barnebey v. E.F. Hutton & Co.*, 715 F. Supp. 1512, 1534–36 (M.D. Fl. 1989) (same).

These same dual policy considerations apply to consumer deception laws. Of course, one purpose of consumer protection laws is to compensate injured consumers. Chapter 93A has the additional purpose to "encourage more equitable behavior in the marketplace," *In re Pharm Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 194 (1st Cir. 2009) (quotations omitted), and, more specifically, "***to deter business entities from committing unfair and deceptive acts.***" *Int'l Bhd. of Police Officers, Local 433 v. Mem'l Press, Inc.*, 31 Mass. App. Ct. 138, 141 (App. Ct. 1991) (emphasis added). This latter policy—the deterrence of misconduct by Massachusetts business—comes into play when Massachusetts businesses perpetrate fraudulent schemes from Massachusetts, even when the harm from such schemes extends beyond the state's borders.

Put another way, where the law of two sovereigns may apply concurrently to a single transaction, then there is no "conflict" between the laws for a court to resolve. In such circumstances, a conflicts-of-law analysis is inappropriate because it disregards the concurrent nature of legal remedies. Of course, here, Plaintiff did not assert claims in the alternative under two states' laws; he instead asserted a single claim under Chapter 93A. But, if a plaintiff may plead alternative claims under two states' laws, subject to the plaintiff's later election of remedies, it necessarily follows that a plaintiff may also make that election in his complaint, without a court overruling that election under the guise of a conflicts-of-law analysis.

The decision in *Geis v. Nestle Waters N. Am., Inc.* demonstrates this point. The court there held that non-Massachusetts residents may assert Chapter 93A claims when

a company's wrongful conduct in Massachusetts caused them harm outside of Massachusetts. 321 F. Supp. 3d 230, 241 (D. Mass. 2018). There, a Massachusetts company promised water purchasers a one-year locked-in price but then secretly raised the prices. The court rejected the argument that an injured Florida consumer could invoke only her own state's consumer protection law. It held that although the plaintiff "was physically located in Florida, her injury was allegedly caused by the fraudulent representation [the defendant] made from its Massachusetts call center." *Id.* The court reasoned: "***On its face, Chapter 93A does not require that a plaintiff reside in Massachusetts to bring a claim," and "courts in this District and the Commonwealth have allowed chapter 93A suits by out-of-state plaintiffs to go forward***." *Id.* at 241–42 (collecting cases; emphasis added); *Fruitstone v. Spartan Race Inc.*, 464 F. Supp. 3d 1268 (S.D. Fl. 2020) (permitting nonresidents to assert Chapter 93A claim); *Bezdek v. Vibram USA, Inc.*, 2013 U.S. Dist. LEXIS 22939, at *26, *32–33 (D. Mass. Feb. 20, 2013) (same).

Chapter 93A, which permits "***any person…injured***" to assert a claim, M.G.L. c. 93A § 9 (emphasis added), contrasts with other states' consumer protection laws, which expressly limit remedies to residents of the states or injuries occurring in the state, Mich. Comp. Laws § 445.911(4) (limiting class remedies to "persons residing or injured in this state").

In short, the structure and text of the statute are clear: Chapter 93A's remedies for consumers under Section 9 extend to out-of-state consumers harmed by deceptive or unfair conduct perpetrated by a Massachusetts business.

C. *The District Court Erred by Limiting Chapter 93A's Remedies for Consumers under Section 9 to Transactions that Occurred "Primarily and Substantially in Massachusetts."*

The district court, even though it recognized that Chapter 93A's remedies are available to nonresidents, observed that "Massachusetts courts often consider the Restatement…to determine whether conduct occurred primarily and substantially in Massachusetts when deciding whether a plaintiff can proceed under Chapter 93A." Order at 14. The court's reference to whether "conduct occurred primarily and substantially in Massachusetts" refers to language found in ***Section 11*** of Chapter 93A, which provides remedies for injured parties ***other than consumers***. *Compare* M.G.L. c. 93A § 11 (remedy for "[a]ny person who engages in the conduct of any trade or commerce," i.e., non-consumers), *with* M.G.L. c. 93A § 9 (providing remedy for "[a]ny person, other than a person entitled to bring [an] action under section eleven of this chapter"). However, Plaintiff does not bring his claim under Section 11; his claim comes under Section 9. The two provisions have distinct requirements. Most importantly, Section 11 contains the following unique limitation on the remedies under that section:

> No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the Commonwealth.

M.G.L. c. 93A § 11. Section 9, however, contains no such limitation. M.G.L. c. 93A § 9. By engaging in a conflicts-of-law analysis to decide "whether [the] conduct occurred primarily and substantially in Massachusetts," Order at 14, the district court imposed a territorial limitation that simply does not apply to Plaintiff's Section 9 claim.

Consistent with the express statutory text, Massachusetts courts have repeatedly recognized that Section 11's territorial limitations do not apply to consumer claims under Section 9. The court in *Geis*, for example, in holding that a Florida consumer could invoke Chapter 93A's remedies, observed that "to bring an action under § 9" of Chapter 93A, "there is no requirement that the allegedly deceptive activity had to occur 'primarily and substantially' in Massachusetts." 321 F. Supp. at 241. Similarly, the court in *Daley v. Twin Disc., Inc.* explained that Chapter 93A's geographic restriction to "conduct occurring 'primarily and substantially' within the Commonwealth" does not "apply to actions…under § 9, which is available to any person 'injured by…any…act or practice declared…unlawful by section two.'" 440 F. Supp. 2d 48, 52–53 (D. Mass. 2006). The Massachusetts Superior Court has repeatedly reached the same conclusion construing the statue's plain text:

> Superior's reliance on the standard requiring that the unfair or deceptive act or practice occur "primarily and substantially" within the Commonwealth is misplaced. That standard, which is specifically enumerated in G.L.c. 93A, 11, applies only to business to business sales and transactions. However, G.L.c. 93A, 9, which applies to the consumer plaintiffs in this case, does not require that the sale or transaction occur "primarily and substantially" within Massachusetts. Rather, jurisdiction under 9 is determined under the Massachusetts Longarm Statute.

Snyder v. Ads Aviation Maint., 2000 Mass. Super. LEXIS 5, at *20 (Super. Ct. Jan. 5, 2000); *see also Buckley v. JR Builders, Inc.*, 2003 Mass. Super. LEXIS 56 (Jan. 17, 2003) ("Unlike section 11, which limits actions thereunder to those arising from violations that 'occurred primarily and substantially within the commonwealth,' section 9 does not impose any express territorial limit on the conduct within the statute's reach.").

Before the district court's decision below, Massachusetts courts were unanimous in holding that the territorial limitations found in Section 11 should not be grafted onto consumer claims under Section 9.[2] The district court's decision thus creates an intra-circuit split that calls for clarification.

The two cases upon which the district court relied do not provide otherwise. One of those cases, *Sonoran Scanners, Inc. v. Perkinelmer, Inc.*, involved a Section 11 claim involving an asset purchase agreement between businesses, not a Section 9 consumer

[2] Plaintiff is aware of one case applying a conflicts-of-law anaylsis to preclude a national class under Section 9. That decision, highlighted by Keurig below, described a purported "unbroken string of opinions in which the federal courts have refused to allow multi-state classes to pursue claims under the Massachusetts Consumer Prorection Act." *Camey v. Factor*, 2016 U.S. Dist. LEXIS 200795 (D. Mass. May 16, 2016). In the sole case *Camey* cites for this proposition, however, it was "undisputed" by the parties "that…the Court will need to apply the laws of the eight different states" where the plaintiffs resided. *S. States Police Benevlolent Assoc. v. First Choice Armor & Equip., Inc.*, 241 F.R.D. 85, 93 (D. Mass. 2007). Neither *Camey* nor *Police Benevelent* grappled with the structure, express terms, and legislative history of Chapter 93A, which establishes that consumer remedies under Section 9 may be invoked by nonresidents. Even if *Camey* and *Police Benevellent* could be construed to have implicitly rejected this point, that would merely create an intra-circuit conflict with decisions such as *Geis* and *Daley*, which held, based on a more careful textual analysis, that Chapter 93A's consumer remedies may be invokved by nonresidents. Such a conflict would support appellate review.

claim. 585 F.3d 535, 538–39 (1st Cir. 2009). The other, *Bushkin Associates v. Raytheon Co.*, far from supporting the district court's analysis, underscores how the legislative history of Chapter 93A actually contradicts the conclusions the district court reached. Specifically, *Bushkin* concerned a prior version of Chapter 93A in which Section 3 of the statute provided an affirmative defense limiting any claim under any section of Chapter 93A to "transactions and actions which occur[red] primarily and substantially within the commonwealth." 393 Mass. 622, 637 (1985). However, the Supreme Judicial Court noted in *Bushkin* that the legislature in 1983 amended Section 3 of Chapter 93A, and "the exemption provided by § 3…was eliminated." *Id.* at n.10; *see also* M.G.L. c. 93A § 3 (current version of Section 3 contains no such provision). The *Bushkin* court applied the prior version of Section 3 only because the events at issue occurred in 1975, years before the 1983 amendment. 393 Mass. at 637 n.10.

In 1986, three years after the Massachusetts legislature remove the territorial limitation from Section 3, it amended Section 11 to reintroduce that territorial limitation, ***but only for claims under Section 11 and not for claims under Section 9***. *See* M.G.L. c. 93A § 11 (amendment notes describing "[t]he 1986 amendment" as adding "a requirement that the actions and transactions constituting the alleged unfair method of competition occur primarily and substantially within the Commonwealth"). This history confirms a clear legislative intent to apply the "primarily and substantially in the commonwealth" defense ***only*** to Section 11 business-to-business claims, ***not*** to Section 9 consumer claims, as the district court did here.

In short, the district court's imposition of a "primarily and substantially in the commonwealth" requirement for Plaintiff's Section 9 claim contravened substantive Massachusetts law. The district court erred by striking Plaintiff's national class.

D. *The "False Conflicts" Doctrine Further Demonstrates How the District Court's Analysis Was Flawed.*

As noted, the district court erred when it applied a choice-of-law analysis to preclude nonresident absent class members from invoking Chapter 93A's remedies—a decision that contradicts the structure, text, and legislative history of Chapter 93A. Even if a conflicts-of-law analysis were appropriate, the district court's analysis was flawed because it failed to consider the doctrine of false conflicts of law.

The doctrine of false conflicts is closely related to the legal principle discussed above—that a plaintiff may have claims under the laws of multiple states, and the plaintiff is free to elect which claim to assert. The false conflicts doctrine derives from the consideration of governmental interests as part of a conflicts-of-law analysis. Specifically, "[a] false conflict exists if only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's law." *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 187 (3d Cir. 1991). The Third Circuit's decision in *Reyno v. Piper Aircraft Co.*, 630 F.2d 149 (3d Cir. 1980) explains how this principle operates in practice. There, the plaintiffs were representatives of Scottish residents who died in a plane crash in Scotland in a plane manufactured by a Pennsylvania company. *Id.* at 154. The plaintiffs sought to invoke Pennsylvania law, which imposed strict liability on

companies such as the defendant, instead of the plaintiffs' home Scottish law, which did not. The court found any conflict between Scottish and Pennsylvania law was a "false conflict," reasoning:

> Applying Pennsylvania's strict liability standard to its resident manufacturer would serve that state's interest in the regulation of manufacturing. Scotland's interest in encouraging industry within its borders [a more industry-friendly legal standard] would not be impaired, however, by applying a stricter standard of care on a foreign corporation which has no operations in Scotland. Furthermore, Scotland would have no interest in denying compensation to its [own] residents for the purpose of benefiting a foreign corporation.

Id. at 168. That is, considering the governmental interests in play, the Third Circuit permitted Scottish plaintiffs injured in Scotland to invoke the defendant's home state's law, which provided the plaintiffs a more favorable remedy.

The same principles apply to consumer protection law. In *Fin. Software Sys. v. First Union Nat'l Bank*, 1999 U.S. Dist. LEXIS 19479 (E.D. Pa. Dec. 16, 1999), the plaintiff, a business, sued a company for deceptive trade practices relating to the sale of a computer system. The consumer protection law of the plaintiff's home state—Pennsylvania—did not allow businesses to assert consumer protection claims, limiting the statute to household consumers, while the defendant's home state—North Carolina—permitted such claims by businesses. The court found a false conflict and applied North Carolina law:

> [A]pplication of Pennsylvania's law of deceptive trade practices would impair North Carolina's interest in ensuring ethical conduct by North Carolina businesses…. Application of North Carolina's law would not impair any interest protected by Pennsylvania's deceptive trade practices

> act. To the extent that the laws of North Carolina and Pennsylvania differ, the interests of North Carolina are subject to injury [if Pennsylvania law is applied] while those of Pennsylvania are not implicated [if North Carolina law is applied].

Id. at 20; *see also Garcia v. Plaza Oldsmobile Ltd.*, 421 F.3d 216, 222 (3d Cir. 2005) (applying New York vehicle owner law against New York defendant instead of less favorable law of plaintiff's home state because "it is difficult to conceive of any case in which a person injured in Pennsylvania…would be better off by the application of local law as opposed to New York law," and Pennsylvania has no interest in protecting New York corporations from liability to Pennsylvania residents).

Although Massachusetts courts do not use the phrase "false conflicts," the doctrine is simply an application of the governmental interest approach to conflicts of law, *Reyno*, 630 F.2d at 187, which Massachusetts law follows. The Supreme Judicial Court has affirmed the primacy of governmental interests to conflicts of law analyses, holding that where disputes involve "laws whose policies are readily identifiable and reflect strong governmental interests, those interests may determine the choice-of-law analysis." *Melia v. Zenhire, Inc.*, 462 Mass. 164, 179 (2012) (quotation omitted).

Here, in determining whether a false conflict exists, it is important that "the protections provided by…Mass. Gen. Laws ch. 93A, § 9, are quite robust and arguably more consumer-friendly than any other state consumer protection provision." *Bezdek*, 79 F. Supp. 3d at 341. And, as noted above, a core purpose of Chapter 93A's consumer remedies is "***to deter business entities from committing unfair and deceptive***

acts." *Int'l Bhd. of Police Officers,* 31 Mass. App. Ct. at 141 (emphasis added). That is, Chapter 93A reflects the Massachusetts legislature's decision to hold Massachusetts businesses to a high standard, not only in their dealings with Massachusetts residents but also with those outside of the state.

In light of these governmental interests, the asserted "conflict" between Chapter 93A and consumer protection laws of other states is a false conflict. Although other states may have an interest in protecting their local businesses by enacting weaker, less consumer-friendly consumer protection laws, such interests are not impaired by permitting residents of those states to bring Chapter 93A claims against a Massachusetts business. In contrast, Massachusetts's interest in "deter[ring]" Massachusetts companies "from committing unfair and deceptive acts," *id.*, and its decision to extend Chapter 93A's remedies to nonresidents, is impaired by limiting Chapter 93A's remedies to Massachusetts residents, as the district court did here.

In short, conflicts of law principles should present no barrier to applying the express terms of Chapter 93A, which permit nonresidents to invoke the statute's remedies.

V. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's petition for permission to appeal, and upon appellate briefing, certify to the Massachusetts Supreme Judicial Court the question of whether the remedies of M.G.L. c. 93A § 9 extend to

consumers who purchase products outside of Massachusetts based on deceptive statements disseminated from the Commonwealth by a Massachusetts business.

Dated: June 25, 2021

/s/ Edward F. Haber
Edward F. Haber (BBO #215620)
Ian J. McLoughlin (BBO #647203)
Patrick J. Vallely (BBO #663866)
SHAPIRO HABER & URMY LLP
2 Seaport Lane
Boston, MA 02210
Telephone: (617) 439-3939
Facsimile: (617) 439-0134
ehaber@shulaw.com
imcloughlin@shulaw.com
pvallely@shulaw.com

Counsel for Plaintiff-Petitioner

CERTIFICATE OF COMPLIANCE WITH PETITION TYPE-VOLUME SET BY FED. R. APP. PROC. 5(c)(1)

The undersigned counsel hereby certifies that this petition conforms to the type-volume limitation of 5,200 words set by Fed. R. App. Proc. 5(c)(1). This petition was produced with Microsoft Word, and excluding the portions of the petition that pursuant to Fed. R. App. Proc. 32(f) do not count against the type-volume limitation, the total word count of this petition is 5,191 words.

Dated: June 25, 2021

/s/ Edward F. Haber
Edward F. Haber

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2021, this petition to appeal was served on counsel for defendant Keurig Green Mountain, Inc. by both U.S. mail and electronic mail.

Dated: June 25, 2021

/s/ Edward F. Haber
Edward F. Haber (BBO #215620)

Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MATTHEW DOWNING, Individually and on Behalf of All Other Persons Similarly Situated,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No. 1:20-cv-11673-IT
	*	
KEURIG GREEN MOUNTAIN, INC.,	*	
	*	
Defendant.	*	
	*	

MEMORANDUM & ORDER

June 11, 2021

TALWANI, D.J.

Plaintiff Matthew Downing, on behalf of himself and all other persons similarly situated, brings this case against Keurig Green Mountain, Inc. ("Keurig"). His Complaint [#1] alleges that Keurig deceptively advertised its plastic single-serving pods as recyclable when those pods were not recyclable according to federal regulations. Pending before the court is Keurig's Motion to Dismiss [#16] based on lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Keurig moves in the alternative to strike Downing's nationwide-class allegations or to dismiss his claim to the extent he asserts it on behalf of anyone outside of Massachusetts. For the following reasons, the motion to dismiss is DENIED but to the extent that Downing alleges injury on behalf of a nationwide class, those claims are struck under Federal Rule of Civil Procedure 12(f).

I. Factual Background

As alleged in the Complaint [#1], the facts are as follows. Keurig is a Delaware corporation with a principal place of business in Burlington, Massachusetts. Compl. ¶ 10 [#1].

Keurig manufactures coffee machines that brew single servings of coffee and other hot beverages using Keurig's own K-Cup Pods ("Pods"). Pods are plastic containers covered in foil. Compl. ¶¶ 2, 39 [#1]. In June of 2016, Keurig released Pods that were manufactured from #5 plastic (which is recyclable) instead of #7 plastic (which is not). Id. at ¶¶ 17, 29. The decision to switch to Pods made from recyclable plastic came after a backlash to the use of nonrecyclable plastic. Id. at ¶¶ 18-22.

Keurig's product design staff is based in Massachusetts. Id. at ¶ 59. The decision to market and label Pods as recyclable was made at Keurig headquarters in Massachusetts. Id. at ¶¶ 24-26. The logo for these new Pods, designed at the same headquarters, id. at ¶¶ 58-66, featured a three-arrow recycling symbol and the catch phrase "Peel, Empty, Recycle," although the word "Recycle" was followed by an asterisk that advised buyers to "Check Locally." Id. at ¶ 29. The box also informed customers that they could "Have your cup and recycle it, too," although again the advertisement stated that customers should "Check locally to recycle empty cup." Id. at ¶ 31. Those promises were significant and material to consumers, who purchased and received Pods that Keurig promised were recyclable. Id. at ¶ 7. The advertisements have remained substantively and materially similar since June 2016. Id. at ¶ 33.

During the period from June 2016 to the present, however, many recycling centers could not accept the Pods as a recyclable product. Id. at ¶ 42. In an internal investigation completed prior to releasing the product, Keurig discovered that even at recycling centers which will accept the Pods only 30% of the Pods were successfully recycled. Id. at ¶ 53. A majority of the rejected Pods were not selected for recycling based on their size, their tendency to become crushed by the recycling machines, and residue from the foil tops, filters or other contaminants. Id. at ¶¶ 6, 37-40. Thus, Downing complains that he was tricked into buying a product that was less valuable

than the one he bargained for and that Keurig knowingly sold Pods with deceptive advertisements. Id. at ¶¶ 42, 55, 67, 89.

II. Procedural Background

On or around June 18, 2020, Downing sent Keurig written demand for relief pursuant to Chapter 93A, Section 9, describing the allegedly deceptive practice and identifying the claimant and his injury. Id. at ¶ 90. On July 30, 2020, Keurig responded but no resolution was reached. After his demand, Downing filed the Complaint [#1] in federal court based on diversity jurisdiction under 28 U.S.C. § 1332(d), asserting that he is in a class of purchasers consisting of more than 100 class members who live across multiple states and that the claims on behalf of the class would exceed five million dollars. Compl. ¶ 11 [#1]. His complaint also asserts that venue is proper in the District of Massachusetts because Keurig's conduct (including its marketing development and sustainability decisions) occurred at its headquarters and principal place of business in Burlington, Massachusetts. Compl. ¶¶ 10, 12, 57-66 [#1]. Keurig then filed the pending Motion to Dismiss [#16], seeking dismissal of all claims based on lack of standing and failure to state a claim. Keurig also moves to strike the nationwide class as a matter of law.

III. Standard of Review

A motion to dismiss for lack of constitutional standing is properly brought as a challenge to the court's subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). See Katz v. Pershing, LLC, 672 F.3d 64, 70 (1st Cir. 2012). Federal courts are courts of limited jurisdiction, so federal jurisdiction is never presumed. Viqueira v. First Bank, 140 F.3d 12, 16 (1st Cir. 1998). The party asserting jurisdiction has the burden of demonstrating the existence of federal jurisdiction. Id. A court should treat all well-pleaded facts as true and provide the plaintiff the benefit of all reasonable inferences. Fothergill v. United States, 566 F.3d 248, 251

(1st Cir. 2009). Dismissal is appropriate only when the facts alleged in the complaint, taken as true, do not support a finding of federal subject matter jurisdiction. Id. A challenge to the court's subject matter jurisdiction must be addressed before addressing the merits of a case. See Acosta-Ramirez v. Banco Popular de Puerto Rico, 712 F.3d 14, 18 (1st Cir. 2013) ("Federal courts are obliged to resolve questions pertaining to subject-matter jurisdiction before addressing the merits of a case").

In evaluating a motion to dismiss, this court assumes "the truth of all well-pleaded facts" and draws "all reasonable inferences in the plaintiff's favor." Nisselson v. Lernout, 469 F.3d 143, 150 (1st Cir. 2006). To survive dismissal, a complaint must contain sufficient factual material to "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . [f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." Id. at 555 (internal citations omitted). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009).

IV. Discussion

A. Standing

The doctrine of standing is rooted in Article III of the Constitution, which confines federal courts to the adjudication of actual "cases" and "controversies." See U.S. Const. Art. III, § 2, cl. 1; Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992). Standing consists of three elements: "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, as revised (May 24, 2016) (quoting

Lujan, 504 U.S. at 560-61). "The party invoking federal jurisdiction bears the burden of establishing each of the three elements required for standing." Van Wagner Boston, LLC v. Davey, 770 F.3d 33 (1st Cir. 2014) (citing Lujan, 504 U.S. at 561). Where, as here, the question of standing is based on the pleadings, "the plaintiff bears the burden of establishing sufficient factual matter to plausibly demonstrate his standing to bring the action," Hochendoner v. Genzyme Corp., 823 F.3d 724, 731 (1st Cir. 2016), taking all of the facts (and any inferences that follow) in the plaintiff's favor, Gustavsen v. Alcon Labs., Inc., 903 F.3d 1, 7 (1st Cir. 2018) (quoting Katz, 672 F.3d at 70-71).

To establish injury in fact, a plaintiff must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560. "The particularization element of the injury-in-fact inquiry reflects the commonsense notion that the party asserting standing must not only allege injurious conduct attributable to the defendant but also must allege that he, himself, is among the persons injured by that conduct." Hochendoner, 823 F.3d at 731–32.

Downing argues that he has a legally protected interest in not being subject to deceptive advertising under Chapter 93A of Massachusetts General Law. See Mass. Gen. Laws ch. 93A, § 2(a) (1978). Keurig argues that Downing did not provide the court with the necessary facts to establish standing because he did not include the specific advertisement he saw that induced him to buy the Pods, and did not state whether he was a prior purchaser of Keurig's Pods, whether the Pods he bought were recyclable in his community and what the difference in value between a recyclable and a non-recyclable Pod would be. Def's Mem. 6-7 [#17]. However, Downing attached photographs of Keurig's advertisements for recyclable pods and stated that Keurig's advertising has been substantially and materially the same since June of 2016. Compl. ¶ 8-9 [#1].

Accepting that fact as true, as the court is bound, Downing has sufficiently described the advertisements in effect when he purchased the Pods. See Bezdek v. Vibram USA Inc., 2013 U.S. Dist. LEXIS 22939, at *14 (D. Mass. 2013) ("[T]he complaint is replete with the sort of representations defendants made…throughout the relevant period. Precisely which statement or particular benefit influenced [the plaintiff's] decision is irrelevant, given that [he] is not required to prove actual reliance.").

The remaining "missing facts" do not matter for the purposes of establishing Downing's injury: Downing has adequately pled that (1) he saw an advertisement of the type in circulation since June 2016 that touted the Pods recyclability; (2) enticed by the promise of recyclability, he purchased Pods; (3) the Pods are not recyclable according to the Federal Trade Commission's "Green Guides," 16 C.F.R. § 260.12(b)(1), incorporated by Section 2(b) of Chapter 93A; and (4) Downing was deprived of value that he thought he had paid for on account of Keurig's deceptive advertising, an actual economic loss that is a "prototypical concrete harm." Gustavsen v. Alcon Labs., Inc., 903 F.3d 1, 8 (1st Cir. 2018); see also Lee v. Conagra Brands, Inc., 958 F.3d 70, 80-81 (1st Cir. 2020).[1]

Next, Keurig contends that the Pods are made from recyclable plastic, and that any failure of the Pods to be recycled are the fault of the recycling centers (and thus not traceable to Keurig). Def's Mem. 8-9 [#17]. The "traceability" element "requires the plaintiff to show a sufficiently

[1] The Supreme Judicial Court has stated that deceptive advertising is not a *per se* injury. See Rule v. Fort Dodge Animal Health, Inc., 607 F.3d 250, 254-55 (1st Cir. 2010). Rather, for there to be a cognizable injury, '"the person who was the target of the misrepresentation [must have] actually acquired something in a transaction that is of less value than he was led to believe it was worth when he bargained for it."' Passatempo v. McMenimen, 461 Mass. 279, 299 (2012). Unlike the case where a consumer sees a shirt on sale with a deceptive "comparison price" but can actually examine the shirt and decide whether it is worth the amount it is being sold for, see, e.g., Shaulis v. Nordstrom, Inc., 865 F.3d 1, 9-11 (1st Cir. 2017), Downing could not have known when he purchased the Pods that they were not, in fact, as advertised.

direct causal connection between the challenged action and the identified harm." Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc., 958 F.3d 38, 47 (1st Cir. 2020) (quoting Katz, 672 F.3d at 71). Although "causation is absent if the injury stems from the independent action of a third party," Katz, 672 at 71-72, Downing's injury is traceable to Keurig, not to individual recycling centers, where Keurig's advertisement may be understood as making representations regarding the recycling process. "Causation is established where the deceptive act or practice 'could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted.'" Estrada v. Progressive Dir. Ins. Co., 53 F. Supp. 3d 484, 501 (D. Mass. 2014) (quoting Hershenow, 445 Mass. 790, 801 (2006) (alterations in original). Had Keurig not claimed that its products were recyclable when they were allegedly not entitled to do so, Downing would not have purchased the pods believing that they were recyclable. Compl. ¶ 8-9 [#1]. Keurig's advertising was thus adequately pled as the direct and foreseeable cause of Downing's injury. See also Smith v. Keurig Green Mt., Inc., 393 F. Supp. 3d 837, 844-45 (N.D. Cal. 2019).

Finally, Keurig argues that Downing does not have standing to pursue injunctive relief because he stopped buying Pods after discovering that they were not recyclable. Def's Mem. 10-11. In other words, because Downing now understands that the Pods are only recyclable in certain communities and may not be identified by commercial recycling machines, an injunction ordering Keurig to change its labeling would not redress his injury. O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.").

"The fact that changes in future . . . marketing will not remedy past harm to consumers does not make such relief meaningless to those consumers." Bezdek v. Vibram USA, Inc., 809 F.3d 78, 84 (1st Cir. 2015). A "previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an 'actual and imminent, not conjectural or hypothetical' threat of future harm." Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 969 (9th Cir. 2018) (quoting Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009)); see also Smith, 393 F. Supp. 3d at 845. In Davidson, this threat of future harm was shown by "the consumer's plausible allegations that she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to." 889 F.3d at 969–70. Here, although Plaintiff has alleged that he stopped buying the Pods after learning that they were not recyclable, he was also alleged that he originally purchased the Pods in reliance upon Keurig's representations on product labeling that the Pods were recyclable. Compl. ¶¶ 8-9 [#1].

A plaintiff who has been injured by past advertising and who could be exposed to future marketing has standing to press for an injunction so that they can rely on future statements from the company. Any other rule leaves purchasers on uncertain footing when viewing future advertisements, not knowing whether a company has changed its product to conform to the advertisement or whether the advertisement remains false. The court finds plausible that Plaintiff would purchase Pods again if he had confidence that they were recyclable, and that his alleged present inability to rely on the product's labeling satisfies the requirement of an "actual and imminent, not conjectural or hypothetical" threat of future harm sufficient to establish his "'personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court

jurisdiction." Summers, 555 U.S. at 493. Thus, Downing's request for injunctive relief can continue.

B. Unfair and Deceptive Advertising Claims

1. Chapter 93A Claims

Chapter 93A makes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" unlawful. Mass. Gen. Laws ch. 93A, § 2(a). "It provides for a private cause of action to any 'person' who, *inter alia*, 'has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two . . . .'" In re Pharm. Indus. Average Wholesale Price Litig., 582 F.3d 156, 184 (1st Cir. 2009) (quoting Mass. Gen. Laws ch. 93A, § 9). In determining whether Downing has sufficiently pled a violation of Chapter 93A, the court applies the substantive law of Massachusetts. See Mulder v. Kohl's Dep't Stores, Inc., 865 F.3d 17, 20 (1st Cir. 2017).

"To plausibly state a Chapter 93A claim premised on a deceptive act, the plaintiff must allege '(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.'" Tomasella v. Nestlé USA, Inc., 962 F.3d 60, 71 (1st Cir. 2020) (quoting Casavant v. Norwegian Cruise Line, Ltd., 919 N.E.2d 165, 169 (Mass. App. Ct. 2009)). For an act to be deceptive, "(1) there must be a representation, practice, or omission likely to mislead consumers; (2) the consumers must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be 'material,' that is likely to affect consumers' conduct or decision with regard to a product." Tomasella, 962 F.3d at 72 (internal citation omitted). Additionally, because a claim of deception involves fraud, "Rule 9(b) requires that plaintiff 'to specifically plead the time, place, and content of [the] alleged false representation[s]' underlying the intentional misrepresentation and Chapter 93A claims." O'Hara

v. Diageo-Guinness, USA, Inc., 306 F. Supp. 3d 441, 462 (D. Mass. 2018) (quoting Mulder, 865 F.3d at 22).

a) Deception

First, Mr. Downing has plausibly shown that calling the Pods recyclable was a deceptive act. Chapter 93A is informed by Federal Trade Commission regulations. See Mass. Gen. Laws ch. 93A, § 2(b) (telling interpreting courts to be "guided by the interpretations given by the Federal Trade Commission"). The Federal Trade Commission has published guidance for companies deciding whether they can advertise products as "recyclable." 16 C.F.R. § 260.12(b) states that "When recycling facilities are available to less than a substantial majority of consumers or communities where the item is sold, marketers should qualify all recyclable claims." 16 C.F.R. § 260.12(b)(2); see also 16 C.F.R. § 260.12(b)(1) (defining substantial majority as "at least 60 percent"). Specifically, the regulations state that "If any component significantly limits the ability to recycle the item, any recyclable claim would be deceptive. An item that is made from recyclable material, but, because of its shape, size, or some other attribute, is not accepted in recycling programs, should not be marketed as recyclable." 16 C.F.R. § 260.12(d). That prohibition is followed by an example, in which

> [a] paperboard package is marketed nationally and labeled either 'Recyclable where facilities exist' or 'Recyclable B Check to see if recycling facilities exist in your area.' Recycling programs for these packages are available to some consumers, but not available to a substantial majority of consumers nationwide. Both claims are deceptive because they do not adequately disclose the limited availability of recycling programs.

Id. Where Downing alleges that most recycling centers do not accept Pods and only 30% of Keurig's Pods were recyclable at the facilities that accepted them, and Keurig's statement to "check locally" may not be sufficient to avoid deceptive marketing under the example to the

FTC regulation, Downing has plausibly alleged that misled Keurig consumers.[2]

Second, Downing has plausibly asserted that a reasonable consumer viewing the recycling claim on the Pods would have believed that the Pods were recyclable. In O'Hara, customers who purchased Guinness, believing it had been brewed in Ireland because of representations on the label referencing "St. James Gate, Dublin" and stating the beer was "traditionally brewed," were found to have reasonably trusted the label despite the disclosure next to the ingredients list that the beer was, in fact, brewed in Canada: '"[R]easonable consumers [are not] expected to look beyond misleading representations on the front of the [container] to discover the truth from the ingredient list in small print on the side' of it." 306 F. Supp. 3d 441, 462 (D. Mass. 2018). Similarly, reasonable customers viewing the Keurig's claims that the Pods were recyclable were not expected to do research to see if the Pods were actually recyclable, either in their own communities or across the United States. The warning "check locally" did not make those customers unreasonable in assuming the Pods were recyclable. See 16 C.F.R. § 260.12(d).

[2] Additionally, Section 2(c) of Chapter 93A states that "The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter." Some of the regulations that have been promulgated by the Massachusetts Attorney General include the prohibition that "No claim or representation shall be made by any means concerning a product which directly, or by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect. This prohibition includes, but is not limited to, representations or claims relating to the construction, durability, reliability, manner or time of performance, safety, strength, condition, or life expectancy of such product, or financing relating to such product, or the utility of such product or any part thereof, or the ease with which such product may be operated, repaired, or maintained or the benefit to be derived from the use thereof," 940 C.M.R. 3.05(1), as well as a more general prohibition that "Sellers shall not use advertisements which are untrue, misleading, deceptive, fraudulent, falsely disparaging of competitors, or insincere offers to sell," 940 C.M.R. 6.03(2). Therefore, Massachusetts regulations, as well as federal regulations, provide a legal basis to plausibly state that the advertisements were deceptive.

Third, Downing avers that he relied on Keurig's representations that the Pods were recyclable in deciding to purchase the Pods. Compl. ¶ 8-9 [#1]. Although Keurig calls the statement "threadbare," Def's Mem. 17, Downing did not have to say more to plausibly show that the advertisement caused him to purchase the Pods.

Finally, Downing's Complaint includes enough detail to satisfy the time, place, and content requirements of Federal Rule of Civil Procedure 9(b). Downing alleges that the false advertisements were on Keurig boxes (the place) and those advertisements contained claims of recyclability (the content). Downing also alleges that were repeated and substantially similar throughout the time period alleged (the time) and that he purchased the Pods after seeing the advertisement. Those details provide enough factual matter for Downing's Complaint to survive a motion to dismiss. See, e.g., Dumont v. Reily Foods Co., 934 F.3d 35, 39 (1st Cir. 2019).

b) Injury

An injury for Chapter 93A purposes must be separate from the deceptive conduct. See Shaulis v. Nordstrom, Inc., 865 F.3d 1, 10 (1st Cir. 2017) (quoting Tyler v. Michaels Stores, Inc., 464 Mass. 492, 503 (2013)) ("To state a viable claim, the plaintiff must allege that [he] has suffered an 'identifiable harm' caused by the unfair or deceptive act that is separate from the violation itself."). By tying the injury to the difference in the market value between recyclable Pods and non-recyclable Pods, Downing has plausibly stated an injury that is separate from Keurig's allegedly false recyclability claim. The economic harm caused by buying a product that is allegedly misrepresented to be a higher quality than it is viably makes the claim that Downing has been injured. "Whether the label was actually false, whether the product was actually inferior, and whether any resulting injury is measurable are issues for another day that cannot be

resolved on a motion to dismiss." Crane v. Sexy Hair Concepts, LLC, 2017 U.S. Dist. LEXIS 220112, at *12 (D. Mass. 2017).

c) Causation

"[P]roving a causal connection between a deceptive act and a loss to the consumer is an essential predicate for recovery under" Chapter 93A. Hershenow v. Enter. Rent-A-Car Co. of Boston, Inc., 445 Mass. 790, 791 (2006). By reporting that Keurig's advertising was the reason for his purchase of the Pods and his resulting loss, Downing has straightforwardly alleged but-for causation. Additionally, advertisements for consumer goods are intended to induce people to buy the product on the advertised basis. When a purchaser sees an advertisement that promises a benefit that the purchaser does not in fact receive, the advertisement has foreseeably created an economic loss. See International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 850 (1983) (citing Kohl v. Silver Lake Motors, Inc., 369 Mass. 795, 800-801 (1976)) (defining causation as both "a causal connection between the deception and the loss and [a loss that] was foreseeable as a result of the deception"). Therefore, Downing has plausibly alleged both but-for and proximate cause.

V. Motion to Strike the Putative Nationwide Class

"If it is obvious from the pleadings that [a] proceeding cannot possibly move forward on a classwide basis, district courts use their authority under Federal Rule of Civil Procedure 12(f) to delete the complaint's class allegations." Manning v. Boston Med. Ctr. Corp., 725 F.3d 34, 59 (1st Cir. 2013). "Nonetheless, courts should exercise caution when striking class action allegations based solely on the pleadings . . . ." Id. In Downing's Complaint, he proposes two different class sizes, one consisting of persons who purchased Pods in Massachusetts and one consisting of all Pod purchasers nationwide. Compl. ¶ 70-71. He supports his claims for a nationwide class by providing questions that would be common to the class and alleging that all

of Keurig's business decisions, including its decision to market its Pods as recyclable and the graphic design of the recyclability logo took place in Massachusetts. Id. at ¶ 58-66. Keurig argues that Chapter 93A was passed to protect Massachusetts consumers rather than to regulate Massachusetts businesses, Def's Mem. 19, and therefore that the court should use its discretion under Rule 12(f) to strike the claims of non-Massachusetts purchasers and the putative nationwide class.

Chapter 93A does not require that a plaintiff reside in Massachusetts to bring a claim. Instead of a residency requirement, Massachusetts courts often consider the Restatement (Second) of Conflict of Laws § 148 (Am. L. Inst. 1971) to determine whether the deceptive conduct occurred primarily and substantially in Massachusetts when deciding whether a plaintiff can proceed under Chapter 93A. See, e.g., Sonoran Scanners, Inc. v. Perkinelmer, Inc., 585 F.3d 535, 546 (1st Cir. 2009). Section 148 of the Restatement puts forward six different factors for determining whether Massachusetts laws apply, including four relevant here:

> (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations, (b) the place where the plaintiff received the representations, (c) the place where the defendant made the representations, (d) the domicil, residence, nationality, place of incorporation and place of business of the parties. . . .

Restatement (Second) of Conflict of Laws § 148(2) (Am. L. Inst. 1971). The commentary to Section 148 states that, in weighing these factors, the place where the plaintiff received the deceptive representations "constitutes approximately as important a contact as does the place where the defendant made the representations" but not as important a contact as "the place where the plaintiff acted in reliance on the defendant's representations." Id. at § 148 cmt. g.

Massachusetts case law also prioritizes the place where potential plaintiffs acted in reliance on a defendant's deceptive advertising. See Bushkin Assoc., Inc. v. Raytheon Co., 393

Mass. 622 (1985) (determining that deceptive phone calls, placed from headquarters in Massachusetts but received and acted upon in New York, to have taken place in New York). Here, as in Bushkin, the injury occurred where consumer purchased Pods in reliance on advertising that the Pods were recyclable, not where the advertising strategy was initiated. Using the "place of reliance" factor, entitled to greater respect than a defendant's principal place of business, and considering the fact that Keurig made its representations on the boxes of its Pods (likely the same place that the purchasers relied on the advertisements and certainly the same place that the plaintiff received the representations), the court strikes Downing's putative nationwide class because plaintiffs who saw Keurig advertisements and acted in reliance on them outside of Massachusetts are not covered by Chapter 93A.

VI. Conclusion

For the foregoing reasons, Keurig's Motion to Dismiss [#16] is DENIED. To the extent that Downing alleges injury on behalf of a nationwide class, those claims are struck under Federal Rule of Civil Procedure 12(f).

IT IS SO ORDERED.

June 11, 2021

/s/ Indira Talwani
United States District Judge

United States Court of Appeals
For the First Circuit

No. 21-8023

MATTHEW DOWNING, Individually and on Behalf of All Other Persons Similarly Situated,

Plaintiff - Petitioner,

v.

KEURIG GREEN MOUNTAIN, INC.,

Defendant - Respondent.

CASE OPENING NOTICE

Issued: June 25, 2021

A petition for permission to appeal pursuant to Fed. R. Civ. P. 23(f) was received and docketed today by the clerk of the court of appeals in compliance with Fed. R. App. P. 5.

Any answer in opposition or cross-petition must be filed within the time set by Fed. R. App. P. 5(b)(2).

An appearance form should be completed and returned immediately by any attorney who wishes to file pleadings in this court. 1st Cir. R. 12.0(a) and 46.0(a)(2). Petitioner must file an appearance form by **July 12, 2021** in order for it to be deemed timely filed. Any attorney who has not been admitted to practice before the First Circuit Court of Appeals must submit an application and fee for admission using the court's Case Management/Electronic Case Files ("CM/ECF") system prior to filing an appearance form. 1st Cir. R. 46.0(a). *Pro se* parties are not required to file an appearance form.

Dockets, opinions, rules, forms, attorney admission applications, the court calendar and general notices can be obtained from the court's website at www.ca1.uscourts.gov. Your attention is called specifically to the notice(s) listed below:

- Notice to Counsel and Pro Se Litigants

If you wish to inquire about your case by telephone, please contact the case manager at the direct extension listed below.

Maria R. Hamilton, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
John Joseph Moakley
United States Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210
Case Manager: Joseph Kelley - (617) 748-9051

United States Court of Appeals
For the First Circuit

NOTICE OF ELECTRONIC AVAILABILITY OF CASE INFORMATION

The First Circuit has implemented the Federal Judiciary's Case Management/Electronic Case Files System ("CM/ECF") which permits documents to be filed electronically. In addition, most documents filed in paper are scanned and attached to the docket. In social security and immigration cases, members of the general public have remote electronic access through PACER only to opinions, orders, judgments or other dispositions of the court. Otherwise, public filings on the court's docket are remotely available to the general public through PACER. Accordingly, parties should not include in their public filings (including attachments or appendices) information that is too private or sensitive to be posted on the internet.

Specifically, Fed. R. App. P. 25(a)(5), Fed. R. Bank. P. 9037, Fed. R. Civ. P. 5.2 and Fed. R. Cr. P. 49.1 require that parties not include, or partially redact where inclusion is necessary, the following personal data identifiers from documents filed with the court unless an exemption applies:

- **Social Security or Taxpayer Identification Numbers.** If an individual's social security or taxpayer identification number must be included, only the last four digits of that number should be used.
- **Names of Minor Children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.
- **Dates of Birth.** If an individual's date of birth must be included, only the year should be used.
- **Financial Account Numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.
- **Home Addresses in Criminal Cases.** If a home address must be included, only the city and state should be listed.

See also 1st Cir. R. 25.0(m).

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend caption to redact the identifier.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, national security information, and sensitive security information as described in 49 U.S.C. § 114.

Attorneys are urged to share this notice with their clients so that an informed decision can be made about inclusion of sensitive information. The clerk will not review filings for redaction.

Filers are advised that it is the experience of this court that failure to comply with redaction requirements is most apt to occur in attachments, addenda, or appendices, and, thus, special attention should be given to them. For further information, including a list of exemptions from the redaction requirement, see http://www.privacy.uscourts.gov/.

United States Court of Appeals
For the First Circuit

NOTICE TO COUNSEL REGARDING
MANDATORY REGISTRATION AND TRAINING
FOR ELECTRONIC FILING (CM/ECF)

On August 21, 2017, the U.S. Court of Appeals for the First Circuit upgraded its CM/ECF system to NextGen CM/ECF, the latest iteration of the electronic case filing system. Use of the electronic filing system is mandatory for attorneys. If you intend to file documents and/or receive notice of docket activity in this case, please ensure you have completed the following steps:

- **Obtain a NextGen account.** Attorneys who had an e-filing account in this court prior to August 21, 2017 are required to update their legacy account in order to file documents in the NextGen system. Attorneys who have never had an e-filing account in this court must register for an account at www.pacer.gov. For information on updating your legacy account or registering for a new account, go to the court's website at www.ca1.uscourts.gov and select *E-Filing (Information)*.

- **Apply for admission to the bar of this court.** Attorneys who wish to e-file must be a member of the bar of this court. For information on attorney admissions, go to the court's website at www.ca1.uscourts.gov and select *Attorney Admissions* under the *Attorney & Litigants* tab. Bar admission is not required for attorneys who wish to receive notice of docket activity, but do not intend to e-file.

- **Review Local Rule 25.** For information on Loc. R. 25.0, which sets forth the rules governing electronic filing, go to the court's website at www.ca1.uscourts.gov and select *First Circuit Rulebook* under the *Rules & Procedures* tab.

United States Court of Appeals
For the First Circuit

ORDER OF COURT

Entered: February 9, 2021

In response to recent disclosures of wide-spread breaches of both private sector and government computer systems, the Court has adopted new security procedures to protect any highly sensitive document (HSD) filed with the Court that, if improperly disclosed, could cause harm to the United States, the Federal Judiciary, litigants, or others.

HSDs are documents containing information that is likely to be of interest to the intelligence service of a foreign government and the use or disclosure of such information by a hostile foreign government would likely cause significant harm to the United States or its interests. Examples of HSDs include unclassified sealed documents involving national security, foreign sovereign interests, criminal activity related to cybersecurity or terrorism, investigation of public officials, and extremely sensitive commercial information likely to be of interest to foreign powers.

The following types of sealed documents, if they do not fall into one of the categories above, typically will not qualify as HSDs: (1) presentence reports and related documents; (2) pleadings related to cooperation in criminal cases; (3) Social Security records; (4) administrative immigration records; and (5) most sealed documents in civil cases.

The designation of a document as highly sensitive is typically made by the district court or originating agency. Documents that have previously been designated by the district court or an agency as highly sensitive will ordinarily be treated in the same manner by this court. See 1st Cir. R. 11.0(c)(1).

If a document qualifies as an HSD as that term is described above, a filer is required to file a motion to treat that document as an HSD. The movant must serve the motion and the proposed HSD on all other parties by mail with proof of service under Fed. R. App. P. 25(d)(1). The motion and each proposed HSD should be conspicuously marked as a "HIGHLY SENSITIVE DOCUMENT" and placed inside an envelope marked "HIGHLY SENSITIVE." The motion to treat a document as an HSD should be filed contemporaneously with the filing of a motion to seal the document and should be filed in paper format only under the procedures and requirements of 1st Cir. R. 11.0(c). The motion must set forth in detail why the proposed document constitutes a highly sensitive document under the criteria set out in this order, including the specific grounds for asserting that the document contains information that is likely to be of interest to the intelligence service of a foreign government and the use or disclosure of such information by a hostile foreign government would likely cause significant harm to the United States or its interests. Conclusory assertions will not be deemed a sufficient basis for filing a motion to treat a sealed document as an HSD. If a filer believes that a previously filed document in an ongoing case before

the court qualifies as an HSD, a motion to treat the sealed document as an HSD may be filed. There is no need to file such a motion in a closed case.

/s/ Jeffrey R. Howard
Jeffrey R. Howard
Chief Judge

cc:
Edward F. Haber
Bradley Hamburger
Ian J. McLoughlin
James L. Tuxbury
Patrick J. Vallely
Robert Walters

United States Court of Appeals
For the First Circuit

NOTICE TO ALL CM/ECF USERS REGARDING "NATIVE" PDF REQUIREMENT

All documents filed electronically with the court must be submitted as "native" Portable Document ("PDF") files. See 1st Cir R. 25.0. A **native PDF file** is created by electronically converting a word processing document to PDF using Adobe Acrobat or similar software. A **scanned PDF file** is created by putting a paper document through an optical scanner. Use a scanner ONLY if you do not have access to an electronic version of the document that would enable you to prepare a native PDF file. If you fail to file a document in the correct format, you will be asked to resubmit it.

General Information

Case Name	Downing v. Keurig Green Mountain, Inc.
Court	U.S. Court of Appeals for the First Circuit
Date Filed	Fri Jun 25 00:00:00 EDT 2021
Docket Number	21-08023
Status	Open
Parties	MATTHEW K. DOWNING, Individually and on Behalf of All Other Persons Similarly Situated; KEURIG GREEN MOUNTAIN, INC.

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