COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2484CV01099-BLS2

MELISSA SCANLON and
SEAN HARRIS[1]

vs.

DRAFTKINGS, INC.

DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Melissa Scanlon (Scanlon) and Sean Harris (Harris), filed this class action lawsuit against DraftKings, Inc. (DraftKings), asserting claims of unfair and deceptive practices, and untrue and misleading advertising in violation of G. L. c. 93A (Count I) and G. L. c. 266, § 91 (Count II) respectively. Before me is DraftKings' Motion for Summary Judgment as to both counts. After hearing and review, and for the following reasons, DraftKings' Motion is **Allowed-in-part** and **Denied-in-part**.

FACTUAL BACKGROUND[2]

In 2022, Massachusetts enacted the Sports Wagering Act, legalizing sports betting in the Commonwealth. St. 2022, c. 173, codified as G. L. c. 23N. On March 10, 2023, DraftKings launched its online and mobile sportsbook platform (DK Sportsbook) in the Commonwealth, which enabled Massachusetts customers to bet on sporting events through the DK Sportsbook mobile application (app) and website.

---

[1] On behalf of themselves and others similarly situated

[2] The following is drawn from the record and the parties' Consolidated Statement of Material Facts. Some facts are reserved for discussion below. Not all facts are discussed, only those material and necessary for my decision.

In connection with the Massachusetts launch of DK Sportsbook, DraftKings advertised a "Deposit Bonus" to new Massachusetts customers who opened a DK Sportsbook account, deposited funds with the platform, and met certain wagering thresholds. DraftKings paid the Deposit Bonus in "DK Dollars," which were not withdrawable or the equivalent of cash, but rather credits that customers could use to place wagers on the DK Sportsbook platform. Pursuant to the terms and conditions, each customer's Deposit Bonus amount was capped at twenty percent of their initial deposit, up to $1,000, and was subject to a "play-through requirement" wherein the customer would earn one dollar in DK Dollars for every twenty-five dollars wagered in the first ninety days.[3] Thus, to obtain the full $1,000 Deposit Bonus, a customer was required to make an initial deposit of $5,000, and then place $25,000 in wagers over the next ninety days. Conversely, a customer who initially deposited the minimum amount of five dollars was only eligible for a one-dollar Deposit Bonus credit, and only after placing twenty-five dollars in bets.

DraftKings advertised the Deposit Bonus offer nationally before it launched the DK Sportsbook in Massachusetts and continued such advertising in Massachusetts and elsewhere during the Massachusetts promotion, which ran from March 10 to July 31, 2023. DraftKings' advertisements appeared in various forms and media, including television and digital advertising, programmatic marketing and targeted partnerships, and automated digital advertising through other apps / platforms, such as Ticketmaster. The summary judgment record includes examples of these advertisements, promoting the Deposit Bonus as follows:

---

[3] Additionally, only wagers in which the customer's odds were no better than (-300) were counted toward the play-through requirement. This effectively prevented a customer from meeting the play-through requirement by wagering on heavy favorites.

"GET A PLAY-THROUGH BONUS UP TO $1,000 IN SITE CREDITS WITH FIRST DEPOSIT" (Joint Appendix (J.A.), Ex. 7.)

"Download & bet with DraftKings today to unlock a $1000 play-through bonus" (J.A., Ex. 14.)

"Get a $1000 play-through bonus on DraftKings" (J.A., Ex. 31.)

"GET A DEPOSIT BONUS OF UP TO $1000 IN SITE CREDITS WITH YOUR FIRST DEPOSIT" (J.A., Ex. 34.)

"$1000 DEPOSIT BONUS!" (J.A., Ex. 43.)

Some of the advertisements displayed a hyperlink to "Terms & Conditions" or an asterisk directing the customer to "*View Promotion Terms." (See J.A., Exs. 31, 43.) Others, including certain television / video advertisements, included fine print terms and conditions which appeared on the screen for a few seconds beneath large, bold text promoting the Deposit Bonus.

DraftKings employed several versions of the terms and conditions for the Deposit Bonus during the promotion and kept records of each.[4] DraftKings assigns each customer an identification number and maintains records of when the customer opened a DK Sportsbook account, and when he or she used the platform to deposit funds, place bets, and withdraw amounts. DraftKings asserts that, based on this stored information, it can identify when any new Massachusetts customer created an account and initially deposited funds with DK Sportsbook, and retrieve the corresponding terms and conditions for the Deposit Bonus in effect at that time from what DraftKings refers to as a Bonus Offer Legal Text Display Audit (BOLTDA).

To open an account and deposit funds with the DK Sportsbook platform, a customer enters personal data and payment information through a step-by-step process known as a "userflow." DraftKings attests that it presents the applicable terms and

[4] DraftKings employed version one from March 10 to May 3, 2023; version two from May 3 to May 31, 2023; and version three from May 31 to July 31, 2023.

conditions to customers during the initial deposit userflow. These terms and conditions were limited to Massachusetts DK Sportsbook promotions for which the customer was eligible. As such, only new, eligible Massachusetts customers were presented with the terms and conditions for the Deposit Bonus during the initial deposit userflow. DraftKings asserts that any eligible customer was required to scroll through the Deposit Bonus terms and conditions prior to clicking the deposit button.

However, DraftKings does not, in its usual course of business, maintain screenshots, screen recordings, or other images capturing the sign-up or initial deposit userflows of DK Sportsbook customers. In support of its Motion for Summary Judgment, DraftKings has produced "recreations" which it claims depict the sign-up and initial deposit userflows that eligible Massachusetts customers would have encountered during the relevant period, including terms and conditions of the Deposit Bonus. The manner in which DraftKings created these exhibits is discussed *infra.* Plaintiffs maintain that these recreations are unreliable, inadmissible, and do not accurately reflect the initial deposit userflows or the information DraftKings provided or failed to provide to Massachusetts customers. Plaintiffs also deny that DraftKings provided the terms and conditions of the Deposit Bonus to them during their initial deposit userflows.

On April 9, 2023, Scanlon opened a DK Sportsbook account. That same day, she made an initial deposit of twenty-five dollars and placed a wager in that amount. Scanlon testified that she was motivated to open a DK Sportsbook account based on advertisements she had previously seen for the Deposit Bonus across various media, including television, radio, billboards, social media, and within the DK Sportsbook app. She could not recall the specific text or the full content of the advertisements but asserted that she saw advertisements for a "$1,000 Deposit Bonus!", a $1,000 cash bonus for creating an account and making a deposit on DK Sportsbook and promising a customer that "you could get a thousand dollars if you made a deposit." (J.A. Ex. 10 at

p. 60; Ex. 49, pp. 48-52, 60.) Scanlon did not visit the DK Sportsbook website or app before she created her account. She also denied being shown the terms and conditions of the Deposit Bonus prior to depositing funds.

After Scanlon wagered twenty-five dollars, she was credited with one dollar in DK Dollars pursuant to the terms and conditions of the Deposit Bonus. Scanlon called DraftKings to complain that she did not receive a $1,000 bonus. She was told that she would never receive the maximum bonus amount because she "only made a $25 deposit," thus capping the maximum bonus she could receive, at most, five DK Dollars. Scanlon did not place any additional wagers with DK Sportsbook thereafter.

Harris created a DK Sportsbook account on March 10, 2023, the day the platform launched in Massachusetts, and deposited twenty-five dollars. Before creating his account, Harris saw numerous advertisements for the Deposit Bonus, including phrases such as "GET A $1,000 DEPOSIT BONUS!" (J.A., Ex. 40 at p. 5.) Based on these advertisements, Harris believed that opening the account would entitle him to 1,000 in either withdrawable U.S. dollars or betting credits. However, Harris had previously created and deposited funds in a DraftKings Daily Fantasy Sports account in September 2015. Based on his prior Daily Fantasy Sports account, DraftKings did not deem Harris to be a "new customer" eligible for the DK Sportsbook Deposit Bonus. As a result, DraftKings did ***not*** provide Harris with the terms and conditions of the Deposit Bonus when he opened his DK Sportsbook account and made a deposit. After Harris did not receive any bonus / credits upon depositing funds or placing initial wager(s), he consulted with friends and fellow DK Sportsbook users who advised him of the play-through requirement and that he should keep wagering to obtain the Deposit Bonus. Harris ultimately placed $1,059 in wagers by or about May 2023, but did not receive any bonus or credits because, as noted, DraftKings did not consider Harris eligible for the promotion.

PROCEDURAL HISTORY

Plaintiffs filed suit on April 24, 2024, alleging claims against DraftKings for unfair and deceptive practices and untrue and misleading advertising in violation of G. L. c. 93A, §§ 2, 9 and G. L. c. 266, § 91. DraftKings moved to dismiss the Complaint pursuant to Mass. R. Civ. P. 12(b)(6). I denied DraftKings' Motion, stating as follows:

> "[W]hether the [DK Sportsbook] mobile application landing pages and/or the website would or would not deceive a reasonable consumer is not a decision that can be made based on the record before me . . . . While, based on my review of the small print provided with the Complaint, the terms and conditions disclosed to Plaintiffs accurately describe the very conditions about which Plaintiffs now complain, the overall deceptiveness of the mobile app and website, sign up process, and terms and conditions cannot be resolved without additional information. The questions of deception and causation are ones that must be developed in discovery, as the 'analysis of what constitutes an unfair or deceptive act or practice requires a case-by-case analysis . . . and is neither dependent on traditional concepts nor limited by preexisting rights or remedies.' Exxon Mobil Corp. [v. Attorney Gen.], 479 Mass. [312,] 316 [(2018)], citing Kattar v. Demoulas, 433 Mass. 1, 14 (2000), and Travis v. McDonald, 397 Mass. 230, 232 (1986)."[5]

(Memo. of Decision & Order on Def.'s Mot. Dismiss, Dkt. No. 27, at 8-9.) Further, and contrary to DraftKings' argument, I concluded that Plaintiffs had sufficiently alleged a cognizable injury because they alleged that they would not have deposited funds and placed wagers with DraftKings but for the misleading promotion. (Id. at 6-7.)

---

[5] In connection its Motion to Dismiss, DraftKings submitted (1) an affidavit of its Vice President of Product, Gary Wimbridge, averring that all eligible customers were required to view the terms and conditions before depositing funds; and (2) "representative" copies of the terms and conditions the customers would have seen on the DraftKings website and app. I concluded that I could not consider such documents without converting DraftKings' Motion to Dismiss to a motion for summary judgment pursuant to Mass. R. Civ. P. 56, which I declined to do as it was not apparent that Plaintiffs had notice of such materials. (See Memo. of Decision & Order on Def.'s Mot. Dismiss, Dkt, No. 27, at 7-8.)

On December 10, 2024, I entered a case management order providing for an initial phase of discovery, followed by Rule 56 motions, focused on (1) DraftKings' promotions for the Deposit Bonus in Massachusetts; (2) the content and manner in which the terms and conditions of the promotion were disclosed to Plaintiffs; (3) the extent of any records of Plaintiffs' agreement to the terms and conditions; and (4) evidence related to the Deposit Bonus offer, including the reasons for any particular terms and conditions. (Dkt. No. 36.)

DISCUSSION

"Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Helfman v. Northeastern Univ., 485 Mass. 308, 314 (2020), quoting Godfrey v. Globe Newspaper Co., 457 Mass. 113, 118-119 (2010). "The moving party bears the burden of demonstrating the absence of a triable issue of fact on every relevant issue," Scholz v. Delp, 473 Mass. 242, 249 (2015), and may satisfy this burden by submitting affirmative evidence negating an essential element of the opposing party's case, or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. Flesner v. Technical Commc'ns Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, "the nonmoving party must respond" with "specific allegations sufficient to establish a genuine issue of material fact." Barron Chiropractic & Rehab., P.C. v. Norfolk & Dedham Grp., 469 Mass. 800, 804 (2014). "Bare assertions made in the nonmoving party's opposition will not defeat a motion for summary judgment." Id. Accord Mass. R. Civ. P. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of his pleading."). In considering the motion, I review the evidence in the light most favorable to the nonmoving party, but do not weigh evidence, assess credibility, or find facts. Psychemedics Corp. v. Boston, 486 Mass. 724, 731 (2021).

I. Chapter 93A (Count I)

To establish a claim under G. L. c. 93A, § 9, Plaintiffs must demonstrate that they suffered injury as a result of DraftKings' unfair or deceptive act or practice. Bellermann v. Fitchburg Gas & Elec. Light Co., 470 Mass. 43, 52 (2014). A defendant "may violate G. L. c. 93A through false or misleading advertising." Exxon Mobil, 479 Mass. at 320. The "advertising need not be totally false [ ] to be deemed deceptive . . . . [It] may consist of a half-truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information." Id., quoting Aspinall v. Philip Morris Cos., Inc., 442 Mass. 381, 394-395 (2004). Accord Federal Trade Comm'n v. Cyberspace.Com LLC, 453 F.3d 1196, 1200 (9th Cir. 2006) ("A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures.").[6] "[A]n advertisement is deceptive when it has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product)." Aspinall, 442 Mass. at 396. Put plainly, "conduct is deceptive if it possesses 'a tendency to deceive.'" Id. at 394, quoting Leardi v. Brown, 394 Mass. 151, 156 (1985). A successful claim "does not require proof that a plaintiff relied on the representation . . . , or that the defendant intended to deceive the plaintiff . . . , or even knowledge on the part of the defendant that the representation was false." Aspinall, 442 Mass. at 394. The question is one of fact, to be answered on an objective basis. Id.

While a consumer "may not be expected to read every word during a commercial transaction," he or she cannot "decline to read clear and easily

---

[6] "The Legislature, in G.L. c. 93A, § 2(b), has mandated that Massachusetts courts, in construing which acts are deceptive, must be guided by interpretations of that term as found in the analogous Federal Trade Commission Act [ ], 15 U.S.C. § 45(a)(1)." Aspinall, 442 Mass. at 395.

understandable terms that are provided on the same webpage in close proximity to the location where the consumer indicates his agreement to those terms and then claim that the webpage, which the consumer has failed to read, is deceptive." Hager v. Vertrue, Inc., No. Civ.A. 09-11245-GAO, 2011 WL 4501046, at *5 (D. Mass. Sept. 28, 2011) (citations omitted) (applying G. L. c. 93A, § 9). However, disclaimers and other terms and conditions must be presented in a sufficiently conspicuous fashion to draw the attention of a reasonable consumer. Commonwealth v. AmCan Enters., Inc., 47 Mass. App. Ct. 330, 337 (1999); Cyberspace.Com, 453 F.3d at 1201.

Here, the record reflects that DraftKings advertised the Deposit Bonus variously as "up to $1,000 in site credits", a "$1,000 play-through bonus", and a "$1,000 bonus." Scanlon and Harris have attested that but for these advertisements, they would not have opened DK Sportsbook accounts, deposited funds, and wagered on the platform. DraftKings responds that its advertisements could not have materially misled a reasonable consumer because "[a]ll new customers *eligible* for the [Deposit Bonus] promotion at issue in this lawsuit were presented with its terms and conditions before they deposited a single dollar on DraftKings Sportsbook." (Def.'s Memo. at 1 [emphasis added].) I am not persuaded.

There is no genuine dispute that the Deposit Bonus terms and conditions were set in language that a reasonable consumer would comprehend. Nonetheless, in denying DraftKings' Motion to Dismiss, I noted that additional evidence was required before DraftKings could establish, and I could conclude as a matter of law, that consumers were given reasonable notice of the applicable terms. I endorsed the parties' request for phased discovery specifically to afford DraftKings the opportunity, at the outset of the litigation, to present such evidence and move for summary judgment accordingly, as warranted. DraftKings, however, has failed to present admissible evidence that would entitle it to judgment as a matter of law.

A. Notice of Terms and Conditions to Plaintiff Harris

As to Harris, DraftKings' reliance on the terms and conditions is unavailing because it admits that no such terms were provided to him during the sign up or initial deposit userflows. During the initial deposit userflows, DraftKings only presented the Deposit Bonus terms and conditions to eligible customers. Harris did not receive this disclosure because DraftKings did not deem him a new customer based on his prior Daily Fantasy Sports account. Notably, however, DK Sportsbook was not available to Massachusetts customers until the Commonwealth legalized online sports betting and the platform launched on March 10, 2023. Harris opened a DK Sportsbook account and first deposited funds that same day. A genuine issue of fact exists as to whether Harris and other customers similarly situated, without being provided with the Deposit Bonus terms and conditions during their userflows, should have reasonably deduced that they were not eligible, "new" customers to DK Sportsbook based on Daily Fantasy Sports accounts created years before DK Sportsbook was even available in Massachusetts.

Moreover, even if Harris had reasonable notice of the Deposit Bonus terms and conditions, they do not clearly convey that he was ineligible. The terms and conditions set forth the relevant eligibility requirements as follows:

> "To be eligible for the promotion, new *Sportsbook* customers must (1) have never had a *DraftKings Sportsbook* account, (2) have never made a deposit to *DraftKings Sportsbook* . . . ."

(J.A., Exs. 24-25 [emphasis added].)

All references are to being a new *Sportsbook* customer, none appear to indicate ineligibility based on a prior Daily Fantasy Sports account. Based on the foregoing, a reasonable jury could conclude that DraftKings' advertisements could mislead a reasonable consumer in Harris's position, causing him to believe that he was eligible for the Deposit Bonus and place wagers on the DS Sportsbook he would not have otherwise. I am unaware of caselaw supporting DraftKings' argument that Harris lacks

standing based on eligibility conditions which DraftKings admittedly did not disclose to him and which, by their own terms, do not clearly communicate that he was ineligible.

B. Notice of Terms and Conditions to Plaintiff Scanlon

As to Scanlon, DraftKings argues that it is entitled to summary judgment because all "eligible" customers "were required to scroll through the entire Promotional Terms [and Conditions] before reaching the 'Deposit' button." Def.'s Memo. at 11. To support this claim, DraftKings relies on "recreations" which purport to depict the userflows that eligible Massachusetts customers of DK Sportsbook would have encountered when they initially deposited funds with the platform. These include "Deposit Pages" which display the applicable terms and conditions in block print about the button which a customer would click to deposit funds.

I begin by reviewing the evolutionary history of these exhibits. DraftKings produced the first userflow recreations in January 2024, which were attached as exhibits to the Motion to Dismiss. To do so, DraftKings' Associate Director of Product, Andrew Gondek, created a test account for the DK Sportsbook. DraftKings then retrieved the Deposit Bonus terms and conditions from its BOLTDA database and assigned them to Gondek's test account. Gondek used the test account to navigate through the initial deposit userflow and video recorded this process. DraftKings then took screenshots from Gondek's recording to document the visual presentation at each stage of the test account's initial deposit userflow.

In or about March 2024, DraftKings produced other userflow recreations for use in other litigation.

In August 2025, DraftKings produced revised versions of the userflow recreations in this case, purportedly to reflect the accurate end date for the Deposit Bonus promotion, July 31, 2023. However, the August 2025 recreations contained additional differences from the January 2024 versions including additional language that the

Deposit Bonus was "in DK Dollars." Gondek / DraftKings ultimately determined and disclosed that the August 2025 recreations were made by a DraftKings employee who (1) overlaid the Deposit Bonus terms and conditions on the userflow recreations which DraftKings produced for other litigation, and (2) then manually edited portions of the text.

In September 2025, DraftKings produced a third version of the userflow recreations which no longer contained the "in DK Dollars" reference but included a "Refer-a-Friend" bonus which had appeared in the January 2024 versions but not the August 2025 versions. DraftKings relies on this third iteration in support of the instant Motion.

Plaintiffs argue that DraftKings' recreations are inadmissible and thus, cannot support summary judgment in DraftKings' favor. In the context of the present motion and based on the present record, I agree that DraftKings has failed to establish that the recreations are admissible.

A motion for summary judgment must be based on admissible evidence, and inadmissible evidence must be disregarded. Mass. R. Civ. P. 56(e); TLT Constr. Corp. v. A. Anthony Tappe & Assocs., Inc., 48 Mass. App. Ct. 1, 11 (1999). "[A]uthentication of digital evidence such as an e-mail, an electronic message using a social media platform, a screenshot from a website, or a videotape recording 'is a condition precedent to its admissibility.'" Commonwealth v. Meola, 95 Mass. App. Ct. 303, 307 (2019) (quotation omitted). "[E]vidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims." Id. (citations and quotation omitted). There must be sufficient evidence "to support a finding that the matter in question is what its proponent claims" it to be. Commonwealth v. Purdy, 459 Mass. 442, 447 (2011), quoting Mass. G. Evid. § 901(a).

DraftKings acknowledges that it did not maintain records of customers' initial deposit userflows during the Deposit Bonus promotion – hence its efforts to recreate or reverse engineer them. These efforts, however, apparently rested on the presumption that by opening a test account and assigning to that account the appropriate terms and conditions of the Deposit Bonus, the DS Sportsbook platform would generate the same userflows the proposed class members encountered. But this core presumption is belied by DraftKings' need to produce and manually edit successive versions of these exhibits which differed in terminology and appearance. DraftKings has offered little or no explanation as to the basis for the manual edits or why the adjustments were necessary. Indeed, it appears that DraftKings' recreations, at least in some respects, are based on assumptions about how the Initial Deposit userflows *should* have looked, rather than on evidence of how they actually appeared to Scanlon. For instance, merely because the Deposit Bonus promotion ended on July 31, 2023, it does not follow that customers' Initial Deposit userflows displayed that date accurately.

The Appeals Court's decision in Commonwealth v. Connolly, 91 Mass. App. Ct. 580 (2017) is instructive. There, a video recording of the incident at issue, like the userflows at issue here, was lost (or not retained) and the Commonwealth sought to introduce testimony of a police officer, who had viewed the recording, regarding its contents. Id. at 581-582. The Appeals Court held that the unavailability of the video did not relieve the Commonwealth of the obligation to establish that what the officer watched (and sought to testify about) was a fair and accurate depiction of the events in question. Id. at 586. Specifically, the Commonwealth could have authenticated the video by having an eyewitness testify that it was fair and accurate representation, or having a witness testify about the surveillance procedures and the methods used to store and reproduce the video material. Id.

DraftKings does not offer any analogous authentication here. DraftKings did not maintain records of the actual Initial Deposit userflows and has not indicated that any

of the employees involved in producing the recreations had personal knowledge of the appearance of those userflows during the relevant period. Thus, DraftKings has failed to authenticate the recreations based on any firsthand knowledge of the customers' Initial Deposit userflows in 2023.[7] Rather, DraftKings rests on the assumption that by entering the Deposit Bonus terms and conditions into a test account, its platform will generate a facsimile of what the customers saw. But, for the reasons set forth above, DraftKings has not authenticated "the generative process that created the records." Commonwealth v. Souza, 494 Mass. 705, 718 (2024), quoting Commonwealth v. Thissell, 457 Mass. 191, 197 n.13 (2010).

The federal district court's holding in Monper v. Boeing Co., No. C13-1569 RSM, 2016 WL 1703839 (W.D. Wash. Apr. 28, 2016) also is persuasive and more directly on point. There, the plaintiffs claimed that Boeing misled them as to the transferability of their pension benefits. Id. at *1. Boeing argued that the plaintiffs, based on communications and website information Boeing provided, had actual notice of their claims beyond the applicable statute of limitations period. Id. at *2-3. Boeing did not retain records of the original communications or screen shots of the website and thus sought to submit "recreations" prepared to support its motion for summary judgment. Id. at *3. The plaintiffs objected on hearsay and authenticity grounds, to which Boeing responded that, although the exhibits were created for the purposes of the litigation, they were based on data retained in the ordinary course of business. Id. The court held that the exhibits were not properly authenticated and inadmissible. Id. at *4. The court reasoned:

---

[7] Cf. O'Connor v. Newport Hosp., 111 A.3d 317, 324 (R.I. 2015), quoting Christopher B. Mueller and Laird C. Kirkpatrick, 5 Fed. Evid. § 9:9 (4th ed.) (May 2014) ("To authenticate a printout of a web page, the proponent must [first] offer evidence that [ ] the printout accurately reflects the computer image of the web page as of a specified date . . . ."); Estate of Konell v. Allied Prop. & Cas. Ins. Co., No. 3:10-CV-955-ST, 2014 WL 11072219, at *1 (D. Or. Jan. 28, 2014) (same).

> The key factual questions in this case concern communication, not data. The Court must determine *what* was communicated to Plaintiffs, when it was communicated, *how* was it communicated, and possibly *why* it was communicated. Boeing glosses over the fact that, although its evidence may contain accurate data kept in the ordinary course of business, it does not necessarily constitute an authentic representation of the *communication* of that data. Furthermore, Boeing has not convinced the Court that this evidence was regularly generated in the course of business and not solely for this litigation.

Id. (emphasis added).

Here as well, "[t]he key factual questions . . . concern [the] communication, not [the] data." Id. At issue is not the language of the terms and conditions – which DraftKings retained as business records and as to which there is no dispte – but if, when, and how DraftKings communicated those terms to Scanlon. DraftKings has not adequately set forth why their exhibits are "truthful recreations," see id. at *3, or fair and accurate representations of the userflows. See Connolly, 91 Mass. App. Ct. at 588.

DraftKings' recreations also present hearsay concerns. Absent an applicable exception, "the rule against hearsay prohibits the admission of out-of-court statements offered to prove the truth of the matter asserted." Commonwealth v. Wardsworth, 482 Mass. 454, 462 (2019). Such out-of-court statements may include "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Commonwealth v. Davis, 487 Mass. 448, 464-465 (2021), citing Mass. G. Evid. § 801(a) (quotations omitted). See Fed. R. Evid. 801(a) (same). "Creating an illustration is a form of 'nonverbal conduct' that can be hearsay if it is intended by the illustrator as an assertion and is later offered to prove the fact asserted." United States v. Fuller, 761 F. Supp. 3d 125, 133 (D.D.C. 2025), citing United States v. Moskowitz, 581 F.2d 14, 21 (2d Cir. 1978).

Here, DraftKings' recreations are effectively illustrations offered to prove what they assert – namely, the look, feel, and manner in which the Deposit Bonus terms and conditions were presented to eligible customers. As such, they constitute hearsay.

That DraftKings' recreations are, *in part*, computer generated does not alter this conclusion. To be sure, our courts have distinguished between "computer-generated" and "computer-stored" records. Commonwealth v. Royal, 89 Mass. App. Ct. 168, 171 (2016) (citing cases). "[C]omputer-generated records" refers to "self-generated record of a computer's operations resulting from the computer's programming." Id. (internal quotations omitted). "Because computer-generated records, by definition, do not contain a statement from a person, they do not necessarily implicate hearsay concerns." Id. (quotation omitted). "Computer-stored records, by contrast, constitute hearsay because they merely store or maintain the statements and assertions of a human being." Id. "The distinction . . . depends on the manner in which the content was created—by a person or by a machine. Computer-generated records are the result of computer programs that follow designated algorithms when processing input and do not require human participation." Id.

Plainly, DraftKings recreations are not purely computer generated. They were not "the result of computer programs that follow designated algorithms when processing input" without "human participation." Id. at 171-172, citing United States v. Lizarraga-Tirado, 789 F.3d 1107, 1110 (9th Cir. 2015) (distinguishing assertions made by a machine "without human intervention"). To create these exhibits, DraftKings' employees created a test account, assigned specific terms and conditions to that account, and then manually adjusted the results. At best, the recreations are "[h]ybrid documents present[ing] both hearsay and authentication concerns." Royal, 89 Mass. App. Ct. at 172.

The cases DraftKings relies upon are inapposite. See Def.'s Reply at 3. Those concerned screenshots of historic webpages which were authenticated by individuals who accessed those pages and offered for nonhearsay purposes – i.e., as records that the webpages appeared in that fashion on a specific date. See Marten Transp., Ltd. v. Plattform Advert., Inc., 184 F. Supp. 3d 1006, 1010-1011 (D. Kan. 2016); Camowraps,

LLC v. Quantum Dig. Ventures LLC, 74 F. Supp. 3d 730, 736-737 (E.D. La. 2015). By contrast, DraftKings' recreations are post-hoc attempts to illustrate how the initial deposit userflows would have looked.[8] The are not mere copies of historic records but affirmative assertions about what customers saw in 2023. Cf. Commonwealth v. Kozubal, 488 Mass. 575, 589 (2021) (verbatim, unaltered copy of business record was not new document created for purpose of litigation or subject to separate hearsay analysis); Commonwealth v. Andre, 484 Mass. 403, 410 (2020) (same). Nor can DraftKings rely on the business records exception to the hearsay rule. See Beal Bank, SSB v. Eurich, 444 Mass. 813, 815 (2005). While based on business records, the recreations themselves were generated for this and other litigation, not in the regular course of business.[9] See id.

---

[8] For similar reasons, Aminov v. DraftKings, Inc., No. 24-CV-8472 (MKB), 2025 WL 2108543 (E.D.N.Y. July 28, 2025) is not persuasive. That decision did not address the admissibility of DraftKings' userflow exhibits, and it is not evident that the issue was even raised or that the court was aware that the exhibits where recreations rather than screenshots of a once existing webpage / user interface. See id. at *2-6.

[9] Whether DraftKings may ultimately be able to present the Initial Deposit userflows in some other, properly authenticated and admissible form, is an issue that may be addressed through a motion in limine or at trial. At this stage, any close question of admissibility must be decided in Plaintiffs' favor, as the nonmoving party, in accordance with the standard for reviewing all disputed facts in the summary judgment record. Zaleskas v. Brigham & Women's Hosp., 97 Mass. App. Ct. 55, 61 & 65 n.14 (2020).

Additionally, having concluded that DraftKings' recreations may not be considered as part of the summary judgment record, I need not address Plaintiffs' alternative argument they constitute ineffectual, "after-the-fact disclosures" under 940 Code Mass. Regs § 3.02(2). See Pls.' Opp. at 11. See Federal Trade Comm'n v. DIRECTV, Inc., No. 15-CV-01129-HSG, 2018 WL 3911196 at *15 (N.D. Cal. Aug. 16, 2018) (whether an advertisement constitutes a "deceptive door opener" requires case-by-case assessment, including nature of transaction, overall impression of advertisement, and manner in which additional terms are disclosed).

As such, I decline to consider the userflow recreations in assessing DraftKings' Motion.[10]

DraftKings maintains that it is nonetheless entitled to summary judgment where its Senior Director of Product has attested that "all new DraftKings customers eligible for the Promotion were presented with the Promotional Terms on the deposit page itself before completing their first deposit." (Aff. of Jeremy McCauley, Dkt. No. 114, at ¶ 8.) But this affidavit does not address the visual display of those terms and conditions and, at best, raises a genuine dispute of fact. Scanlon testified that the terms and conditions were not provided to her prior to her initial deposit and Plaintiffs have presented some additional evidence suggesting that, depending on a customer's deposit method, DraftKings did not disclose the terms and conditions to all customers at that stage. See Federal Trade Comm'n v. Washington Data Res., 856 F. Supp. 2d 1247, 1274 (M.D. Fla. 2012), aff'd, 704 F.3d 1323 (11th Cir. 2013) (holding disclaimer was received "far too late" to cure the misleading net impression of marketing). Nor has DraftKings presented evidence that eligible customers were required to affirm that they reviewed the terms and conditions – e.g., by checking a box during the userflow – or that DraftKings kept records of such affirmations. Cf. Hager, 2011 WL 4501046 at *6.[11]

---

[10] Even if I were to consider them, however, the discrepancies in the recreations alone give rise to questions of fact – about what was displayed to Scanlon – such that summary judgment may not enter.

[11] Further, while requiring a consumer to scroll through terms and conditions and manifest assent may be sufficient to create a binding contract with the consumer, see Good v. Uber Techs., Inc., 494 Mass. 116, 135-136 (2024); Kauders v. Uber Techs., Inc., 486 Mass. 557, 572 & 576 (2021), mere notice of a disclaimer does not, per se, defeat a claim of false advertising. See Federal Trade Comm'n v. E.M.A. Nationwide, Inc., 767 F.3d 611, 631 (6th Cir. 2014) ("[I]t is the overall net impression [of the advertisement] that counts. Fine print . . . do[es] not change the message conveyed if the overall net impression is different." [quotation omitted]).

Based on this record, I cannot conclude from the text of the terms and conditions and the placement of certain hyperlinks that, as a matter of law, the terms and conditions were sufficiently prominent and provided reasonable notice to the consumer. See, supra, AmCan Enters., Inc., 47 Mass. App. Ct. at 337; Cyberspace.Com, 453 F.3d at 1201. Accord Federal Trade Comm'n v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 12 (1st Cir. 2010).

The foregoing is sufficient to create fact questions for the jury as to whether DraftKings provided Scanlon with reasonable notice terms and conditions, so as to defeat any misleading aspects of the Deposit Bonus advertisements.

C. Whether Advertisements were Deceptive / Misleading

DraftKings argues as well that its advertisements were not misleading and that no consumer could reasonably believe that the Deposit Bonus came without terms and conditions or that the consumer would be entitled to a $1,000 deposit, withdrawable as U.S. currency, by simply opening a DK Sportsbook account or making an initial deposit.

As set forth above, the record indicates that DraftKings advertised the Deposit Bonus to "new customers" in differing media with differing terminology, at times referring to it as a "play-through bonus" or $1,000 "in site credits" or "in DK Dollars." Elsewhere, DraftKings advertised the promotion simply as a "$1000 DEPOSIT BONUS" or "$1000 play-through bonus." While I am receptive to DraftKings' assertion, as far as it goes, that no reasonable consumer could expect to receive the equivalent of 1,000 in U.S. currency by doing nothing more than opening a DK Sportsbook account and making a deposit. (Certainly, and proverbially, there is no such thing as a free lunch.) But the question is whether DraftKings' advertisements had "the capacity to mislead [reasonable] consumers . . . to act differently . . . (i.e., to entice a reasonable consumer to purchase the product)." Aspinall, 442 Mass. at 396. And this question is one of fact, generally reserved for the jury. Id. at 394. In particular, I cannot conclude as a matter of law, that the foregoing advertisements could not have misled a reasonable consumer to

place successive wagers on the DK Sportsbook platform in pursuit of 1,000 in credits or cash equivalent when, in fact, DraftKings capped Scanlon's potential bonus at one dollar and Harris's at zero. See Federal Trade Comm'n v. Corpay, Inc., No. 23-12539, 2026 WL 35708, at *15 (11th Cir. Jan. 6, 2026) (advertisements of savings "up to" an amount did not insulate defendant from liability where "caveats . . . effectively negated much, if not all, of the advertised savings.").

Genuine disputes of fact exist as to whether the Deposit Bonus advertisements were misleading.

D. **Cognizable Injury**

In an action for damages under G. L. c. 93A, § 9, a plaintiff must "prove that she has . . . suffered a distinct injury or harm that arises from the claimed unfair or deceptive act[.]" Tyler v. Michaels Stores, Inc., 464 Mass. 492, 503 (2013). Plaintiffs are "not required to show a quantifiable amount of actual damages as an element of [their] claim" but must demonstrate that they "suffered some [ascertainable] loss caused by the defendant's allegedly unlawful conduct." Chery v. Metropolitan Prop. & Cas. Ins. Co., 79 Mass. App. Ct. 697, 700 (2011). DraftKings argues that voluntary gambling losses do not constitute cognizable injuries, see Antar v. BetMGM, LLC, No. 24-1364, 2025 WL 1219316 (3d Cir. Apr. 28, 2025), and Plaintiffs "got exactly what [they were] entitled to receive" under the terms of the Deposit Bonus. Def.'s Memo. at 19-20. I do not agree.

DraftKings' reliance on Antar is not persuasive. There, the plaintiff, "a self-described problem gambler," alleged that several casinos and online gambling platforms violated the New Jersey Consumer Fraud Act by enticing him to gamble with bonuses, credits and other incentives, despite knowing he was a compulsive gambler. Id. at *1. The Third Circuit affirmed the dismissal of the claim, holding that the plaintiff had failed to allege how any offer or incentive was misleading. Id. at *2. Additionally, the court held the plaintiff failed to identify an ascertainable loss or "explain how the

court would be able to differentiate the losses he suffered as a result of the defendants' alleged conduct versus those losses he suffered as a natural result of playing a game where the odds are stacked against the player." Id. at *3. Moreover, "he received exactly what he thought he was purchasing – a gambling experience where winning was not guaranteed." Id. The court concluded that, "[e]ach time [plaintiff] placed a bet through the defendants' platforms, what he received in return was not 'worthless,' rather, he received exactly what he thought he was purchasing—a gambling experience where winning was not guaranteed." Id.

First, I do not read Antar as holding that gambling losses may never constitute a cognizable harm – for instance, if "the house" induced consumers, even problem gamblers, to wager by misrepresenting the odds of success or return on a winning bet. Next, the record before me is readily distinguishable from the allegations in Antar. Most notably, Plaintiffs have raised genuine issues as to whether DraftKings' promotion was deceptive and misleading rather than truthful, non-deceptive incentives or promotions. Finally, Plaintiffs have identified specific sums they wagered and lost through the DK Sportsbook platform; bets which they attest they would not have placed but for the offer of the Deposit Bonus. This is not a case in which the factfinder is asked to discern the extent to which a compulsive gambler would have placed bets with or without a casino or gambling website's straightforward solicitations. Nor is it evident that Plaintiffs "received exactly what [they] thought [they were] purchasing," see id., where the record indicates that the object of their wagers was not merely a gambling experience but also the receipt of additional money or credits.[12]

Certainly, after some number of wagers, the customer can no longer claim to be reasonably pursuing a promotional reward which he or she has not received, such that

[12] While the credits merely allow the customer to place additional wagers, a reasonable jury could conclude they hold some ascertainable value.

bets thereafter can no longer be causally attributed to any misleading advertising. But where that point lies is a question of fact for the jury based on its evaluation of the evidence, the credibility of the witnesses, and the actions of a reasonable consumer under the circumstances. See, supra, Psychemedics, 486 Mass. at 731; Aspinall, 442 Mass. at 394. On the record before me, Plaintiffs' alleged losses are not so elusive or unascertainable as to defeat their claims under c. 93A.[13]

I do, however, agree with DraftKings that Plaintiffs have failed to identify cognizable harm with regard to any purported use or misuse of Plaintiffs' personal information. Plaintiffs appear to have first raised such allegations after DraftKings moved for summary judgment and the record is devoid of facts suggesting that DraftKings unlawfully collected Plaintiffs' personal identification information for its own business purposes or sold such information for profit. See Tyler, 464 Mass. at 503-504. As such, DraftKings is entitled to summary judgment on Count I to the extent it relates to the use or misuse of Plaintiffs' personal information.

As to the remainder of Plaintiffs' c. 93 A claim, because genuine factual disputes exist as to whether DraftKings' Deposit Bonus promotion and associated advertising was misleading, failed to adequately disclose limiting terms and conditions to Massachusetts consumers, and caused Plaintiffs harm as a result, DraftKings' Motion for Summary Judgment shall be denied.

II. Chapter 266, § 91 (Count II)

DraftKings also moves for summary judgment as to Plaintiffs' claims under G. L. c. 266, § 91 arguing, *inter alia*, that the statute only provides for injunctive relief. See G.

---

[13] Again, whether expressed as lack of harm or lack of standing, I do not accept DraftKings' argument that Plaintiffs' claim fails because they received what the terms and conditions promised (or, as to Harris, what DraftKings interpreted those terms of promise). Under such reasoning, a defendant could defeat a deceptive advertising claim based on disclaimers or conditions which were never adequately presented to the consumer. That is not the law.

L. c. 266, § 91 ("Whoever violates the provisions of this section may be enjoined therefrom by a petition in equity brought by the attorney general or any aggrieved party."); Cincinnati Ins. Co. v. KT Health Holdings, LLC, No. CV 16-11722-FDS, 2017 WL 1147450, at *4 (D. Mass. Mar. 27, 2017) ("Th[e] statute authorizes only injunctive relief, not money damages."). There is no dispute that DraftKings discontinued the Deposit Bonus promotion for Massachusetts customers in 2023. Plaintiffs have not presented evidence or argument of an ongoing violation of the statute. As such, Count II is moot and DraftKings is entitled to judgment as a matter of law. See Sonicsolutions Algae Control, LLC v. Diversified Power Int'l, LLC, No. CV 21-30068-MGM, 2021 WL 9096701, at *4 (D. Mass. Sept. 9, 2021).

ORDER

For the foregoing reasons, Defendant DraftKings Inc.'s Motion for Summary Judgment is **ALLOWED-in-part** and **DENIED-in-part**.

As to **Count I**, violation of G. L. c. 93A, DraftKings' Motion for Summary Judgment is **Allowed** to the extent Plaintiff's claims are based on DraftKings' alleged use or misuse of Plaintiffs' personal identification information, and is otherwise **Denied**.

As to **Count II**, violation of G. L. c. 266, § 91, DraftKings' Motion is **Allowed**.

Debra A. Squires-Lee
Justice of the Superior Court

February 17, 2026