COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 2084CV2713-BLS1

COMMONWEALTH OF MASSACHUSETTS

vs.

TOWN SPORTS INTERNATIONAL, LLC d/b/a Boston Sports Club and others[1]

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FOR JUDGMENT

The Commonwealth brought claims under G.L. c. 93A, § 2 against Town Sports International Holdings, Inc. ("TSI Holdings"), Town Sports International, LLC ("TSI LLC"), New TSI Holdings, Inc., V Fitness Group LLC, One Fitness Group LLC, Patrick Walsh ("Walsh"), and Michael Poirier. As of the beginning of 2020, TSI Holdings was a publicly traded company, operating health clubs in the Commonwealth of Massachusetts under the brand name "Boston Sports Club" or "BSC." TSI LLC was the largest operating subsidiary of TSI Holdings (TSI LLC and TSI Holdings collectively referred to hereafter as "TSI"). At all relevant times to this lawsuit, Walsh was the Chief Executive Officer ("CEO") and Chairman of the Board of Directors of TSI Holdings and the CEO of TSI LLC.

The Commonwealth's claims arise out of the defendants' response to the COVID-19 pandemic. The case proceeded to trial in December 2024. The only remaining defendant at the

[1] Town Sports International Holdings, Inc., New TSI Holdings Inc. d/b/a Boston Sports Club, V Fitness Group, LLC, One Fitness Group, LLC d/b/a Work Out World, Patrick Walsh, and Michael Poirier

time of trial was Patrick Walsh.[2] The Commonwealth alleged at trial that Walsh orchestrated unfair and deceptive practices while he was CEO and Chairman of the Board of TSI by approving and directing a plan to charge Massachusetts consumers for TSI membership dues for April 2020 (the "April Billing") with full knowledge that TSI would not be providing any club services that month due to closures associated with the COVID-19 pandemic. It was further alleged that Walsh frustrated consumers' ability to cancel their recurring charge memberships before and after the April Billing and failed to provide promised credits.

After consideration of the parties' submissions, the court now enters its findings of fact and rulings of law.

FINDINGS OF FACT

These Findings of Fact are based on the testimony, exhibits introduced at trial, the agreed statement of facts, and the deposition designations of Monica Smith, Anthony Messina, Gregg Holden, Nitin Ajmera, John DiDonato, and Stuart Steinberg.[3, 4]

Prior to the COVID-19 pandemic, there were approximately thirty clubs operating under the brand name Boston Sports Club or BSC.[5] If someone wanted to join one of the TSI clubs, they would sign-up online or go to the club location and sign-up in person. Members signed a

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[2] TSI filed for bankruptcy protection (Docket #4); Town Sports International Holdings, Inc. was defaulted in January 2022; and New TSI, V Fitness Group LLC, One Fitness Group, LLC, and Michael Poirier agreed to the entry of final judgments by consent (Docket ##42, 43, 80, 213, 242).

[3] The court only considered the admissible portions of the parties' deposition designations, which is reflected in these findings of fact.

[4] Any issue of privilege as to Stuart Steinberg is moot. The court does not find that Walsh is insulated from liability because of any advice he received from Stuart Steinberg in his capacity as TSI's general counsel. Further, nothing was provided to the court in camera or referred to in depositions that suggests that additional documents should have been produced to the Commonwealth because the privilege was waived.

[5] TSI operated approximately 200 fitness clubs under various brand names, such as Boston Sports Club, New York Sports Club, and Washington Sports Club.

membership agreement when they signed-up. Members selected the type of membership they wanted when they signed the agreement. A "regional passport" membership gave the member access to a single site, which was also referred to as their "home club." A "global passport" granted the member access to all locations. Members were typically billed at the beginning of every month for the upcoming month.

TSI's business relied heavily on the fact that its memberships continued on a month-to-month basis after the completion of any initial term requirements. As of December 31, 2019, approximately 86% of TSI total members were on a month-to-month basis, and approximately 99% of TSI members paid their membership dues through monthly electronic fund transfers ("EFT"), with EFT membership revenue constituting approximately 75% of total consolidated revenue for the year ending December 31, 2019.

Members were allowed to freeze their membership for a period of time through their individual clubs. Freezes based on medical reasons were free. Freezes for other reasons would sometimes require a nominal monthly payment, depending upon the terms of the member's membership agreement.

The cancellation terms differed depending upon the particular membership agreement. Typically, to cancel a membership, the member was required to appear in person at his or her club, or send a certified letter to either the corporate office or their home club. Some of the membership agreements charged a cancellation fee and/or required 30- or 45-days' notice. Some of the membership agreements also required that the member turn in their membership cards and make payment on any unpaid dues or indebtedness in order to cancel. Some memberships had a commitment period (e.g., 12 months) before the member could cancel.

Additional rights to cancel were allowed for medical reasons, death, or if the member relocated their work or home more than twenty-five miles from their club. If a member canceled because of a medical reason, the effective date of cancellation was the date they made the request. If a member died, their membership would be canceled on the date of their passing. Members could also cancel if the health club services to be provided under the membership agreement were not available because TSI failed "to open a planned health club or location, permanently discontinue[ed] operation of a health club or location, or substantially chang[ed] the operation of the health club or location." (Ex. 225, 267).

If a club closed, billing would cease on the date of closure, but memberships were not automatically canceled per the membership contracts. Members of the closed club might get a 30-day free trial at another club. If the member did not want to go to the new club, their membership would be immediately canceled.

Patrick Walsh's Background

Patrick Walsh owns and manages an investment firm called PW Partners. He first became involved with TSI as an investor through PW Partners, and as a member of the board of directors. He agreed to become the CEO of TSI on September 20, 2016, in part to save his investors' money because the company was struggling financially. Over the years Walsh acquired stock in TSI individually and through his fund. As of December 31, 2019, Walsh and PW Partners and its affiliates owned approximately 29.6% of TSI stock. Walsh's personal share was approximately 10%.

Walsh was paid an annual salary of $690,000 each year from the time he became CEO until his termination in October 2020. He was entitled to a bonus based upon company performance against certain targets as outlined or approved by the board.

In 2018 Walsh received $690,000 in salary and fees, $80,000 in stock awards from TSI, and a cash bonus of $1,380,000. In 2019, Walsh received $2,866,939 in stock awards from TSI. He did not receive a bonus in 2019 because the company did not hit its targets.

Walsh signed a retention agreement with TSI on September 8, 2020, whereby he received a $1.5 million payment.

As CEO, Walsh had the authority to direct that members' accounts be frozen, upgraded, or credited and to issue refunds. In making these decisions he understood that he had to answer to the TSI board of directors and abide by all legal contracts.

Walsh testified that his authority to run the company gradually diminished in the summer of 2020 into the fall of 2020 as TSI moved towards bankruptcy and the potential sale of TSI's debt to Tacit, a private equity firm. However, there was no evidence that he was overruled or disregarded as to any particular matters.

Walsh was terminated on October 12, 2020, and had no control over TSI's operations thereafter. Also on October 12, 2020, full decision-making authority was given to John DiDonato, the company's Chief Restructuring Officer and Laura Marcero, the company's Deputy Chief Restructuring Officer.

TSI's financial difficulties

TSI suffered losses totaling $18,490,000 in calendar year 2019. TSI was in financial distress before the onset of the COVID-19 pandemic because it had $177.8 million of debt that was coming due on November 15, 2020, and only had $18.8 million of cash on hand. TSI also experienced membership declines in 2019. Several clubs, including three Massachusetts clubs, had been identified for permanent closure prior and unrelated to the COVID-19 pandemic.

The COVID-19 pandemic put a further serious strain on its financial condition and ability to survive as a going concern.

At an April 14, 2020, board meeting, the board deemed the company insolvent. TSI filed for bankruptcy on September 14, 2020.

Motionsoft

At all relevant times, TSI maintained its membership and billing information electronically using a software called Motionsoft, a fitness-based application. Motionsoft was used to keep track of a member's check-ins, billing data such as credits or refunds, personal identification information, and membership status. Michael Fabrico and Gregg Holden were the top people in TSI's IT Department who worked with Motionsoft.

In 2020, Leah Molino ("Molino")[6] was a Senior Director of Sales and Operations, reporting to Anthony Messina, who was a Vice President, reporting to Patrick Walsh. She worked in that role until she left TSI in December 2020. Over the years in her sales and club services roles, she supported all 200 TSI clubs, including those in Boston. She worked extensively with Motionsoft, helping to launch the program for the company and running training sessions for other employees.

Molino claimed that she was familiar with the process for initiating bulk actions with Motionsoft, such as freezing all members, but she had never requested a bulk membership freeze herself.

[6] Molino started working at TSI in 2006 when she was in high school. She started at one of the TSI clubs in New York working at the front desk and as a babysitter. She continued to work for TSI in various roles through college. After college, she began working part-time for TSI as an assistant program manager for the sports club for kids program in New Jersey. She continued with the company in various positions over the years, working primarily in New Jersey and New York.

Before enacting a bulk freeze of memberships, Walsh testified that he would consult with members of the board of directors and company counsel.

COVID-19 Pandemic and the April Billing

In March 2020, the COVID-19 pandemic reached a serious level, upending daily life in the United States. On March 15, 2020, then Massachusetts Governor Charles D. Baker issued an order prohibiting gatherings of over twenty-five people, which included fitness centers. The order was effective as of March 17, 2020, and provided that it was to remain in effect through April 5, 2020.

There was no formal TSI board meeting held in March. Rather, there were multiple informal phone calls and e-mails exchanged between various members throughout the months of March and April. The TSI executive team, which was comprised of Walsh, Nitin Ajmera, Anthony Messina, Michael Poirier, Stuart Steinberg, Lisa Debiasi, Matt Higgins, and several other division heads, communicated daily during this period of time.

As of March 16th, TSI was aware that all clubs would be closed the next day. A decision had not been made about whether to freeze memberships for free during the upcoming closure. Walsh was aware that other health clubs in Massachusetts had notified members that their memberships would be put on freeze at no cost until they reopened.

At 2:08 pm on March 16th, Steven Davis of TSI sent an e-mail to Michael Poirier ("Poirier"),[7] Walsh, and others asking if they were going to freeze memberships for free. Poirier responded that that was a decision for Walsh.

All Boston Sports Clubs closed on March 17, 2020, and remained closed until July 2020.

[7] Poirier worked for TSI in various capacities for approximately 10 years, until November 2020. In March 2020, he was Vice President to Operations.

Prior to the pandemic, TSI had over 9000 employees. In 2019, payroll and related expenses accounted for 38.8 % of TSI's operation expenses. On March 17th, the vast majority of the 9000 employees were laid off, including all of the operational staff in the clubs. Only a skeletal staff remained. Walsh participated in the decision to lay off the majority of TSI employees. Regional directors occasionally checked in on the club locations but 75% of the time no one was working at the clubs. During this time, members could not cancel by going physically to the clubs because no one was allowed to go in.

On and after March 17th, TSI received numerous inquiries from members through e-mails and telephone calls. Because TSI had laid off so many employees, and in particular all club-level employees, it could not keep up with answering and responding to these inquiries. Some members tried to communicate with club managers or other supervisors through e-mail, if the member already had the e-mail address of the employee.

On March 18th, Tony Hotten ("Hotten") from Motionsoft sent an e-mail to Michael Fabrico ("Fabrico") and Nitin Ajmera ("Ajmera"), TSI's Chief Accounting Officer, entitled "TSI's action plan for 4/1 billing," offering assistance in freezing membership accounts. Hotten indicated that Motionsoft had a team of people prepared to help and would be responsive day-to-day as circumstances unfolded. Hotten did not impose a deadline for initiating a freeze in that e-mail. The e-mail was forwarded to Walsh that same day.

Walsh received an e-mail from Fabrico on the morning of March 19th indicating that TSI had to let Motionsoft know its decision about April billings by the next day, March 20th. Members of the executive team had multiple discussions with Walsh about whether to bill members on April 1st.

While Walsh claims that as of March 20th, he thought the clubs would be reopened in two

weeks, in a March 20, 2020, SEC filing, TSI stated: "We cannot predict with certainty when we may be permitted to re-open our locations and we may face significant obstacles to re-opening our clubs. Our need to hire, train and retain new staff may delay re-opening of our temporarily closed locations and inhibit profitability. The suspension of operations mandated in response to COVID-19 and the consequent loss of revenue and cash flow during this period may make it difficult for us to obtain capital necessary to fund the re-opening and maintenance of our clubs." (Ex. 53). Walsh signed this filing as CEO, and he signed the Certification, also as CEO, stating that he had reviewed the filing and that it did "not contain any untrue statement of a material fact or omit to state a material fact . . . ." (*Id.*).

By March 22nd, TSI had decided to bill members for April. Walsh made that decision after consulting with other board members and with company counsel

On March 22nd, at 12:24 pm, TSI board member Martin Annese sent an e-mail to Walsh asking: "What is our plan regarding dues going forward? Will we still collect dues and add months in to [sic] the end or other equivalent free service options (PT session, SGT, Flywheel class etc)?" (Ex. 66). Walsh responded at 12:26 pm, "We are going to provide credits through extended time, ancillary, PT etc." (Ex. 66).

On March 22nd, at 4:34 pm, Poirier communicated to Walsh, Phillip Juhan, the Chief Financial Officer, and Anthony Messina ("Messina"), in an e-mail: "billing 4.1 isn't going to do us any favors. We have to understand this will occur as we have basically gone dark to allow 4.1 billing and have tried to avoid most interaction. Our reputation will hit a new low so we have to prepare for this." (Ex. 67).

Walsh believed that TSI had a contractual right to bill members for April. He based this belief, in part, on advice he claims he received from counsel. Walsh assumed that the 45-day

notice period for cancellations would apply and thus, even if a member wanted to cancel on April 1st, they would be billed for 45 additional days following the cancellation request.

Governor Baker issued a subsequent order on March 23rd, prohibiting gatherings of over 10 people, which included fitness centers. The order was effective as of March 24th, and provided that it was to remain in effect through April 7th.

Walsh recalls that on March 24th, President Donald Trump announced that things would be open by Easter.[8] However, on Sunday, March 29th, President Trump extended the national shutdown through the end of April.

On March 28th, Walsh sent an e-mail to Messina and others stating that he wanted to freeze the accounts of members who asked for their accounts to be frozen before April 1st.[9]

On March 30th at 12:51 pm, a March 27th communication from American Express to Ajmera was forwarded to Phillip Juhan and Walsh, for a response. American Express was asking whether TSI would be billing on April 1st or freezing memberships. Walsh responded on March 30th at 12:56 pm:

> We have processed all the freeze and cancel requests. (Cancel requests have been frozen and will be canceled as of date requested when the club reopens).
>
> We are also providing free upgraded credits to all our members giving them Passport and Elite access to all of our clubs. In addition, we are providing a premium service to all our members while the gyms are closed so they can continue to work out in their homes.
>
> This will be detailed in communication to members in the next day.

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[8] Easter in 2020 was on April 12th.

[9] Messina testified in his deposition that they did not know whether the clubs would reopen in April until after April 1st, that at the end of March they still believed the clubs would open in a few days, and that he did not recall any conversations before April 1st about freezing everyone's memberships until the clubs reopened. He further stated that "[w]e woke up on the morning of April 1st not knowing if we were even going to open that day." (Messina Dep. 100). It was his memory that they were still thinking they would open any day up until April 4th. The court does not find Messina's testimony credible because it is strikingly inconsistent with the other evidence, and will not consider it unless it is otherwise corroborated.

(Ex. 77).

Ajmera had a telephone conversation with Walsh after receiving this e-mail, during which Walsh told Ajmera that members would be billed on April 1st.

There was no evidence that either Walsh or anyone else at TSI did anything on Monday, March 30th, or Tuesday, March 31st, to freeze billings on members' accounts for April. Walsh claims he had no idea at this point when the clubs would reopen, but he was clearly aware that the national shutdown had been extended to the end of April, and that TSI had fired all its operational employees.

Walsh testified that it was his understanding at the time the decision was made to bill for April, that most clubs in Massachusetts were billing for April. However, in late March and April, Walsh was told by members of TSI staff what other health clubs were doing, and that certain clubs were freezing memberships.[10]

On March 31, 2020, at 3:18 pm, TSI board member Martin Annese sent an e-mail to Walsh stating:

> We need a plan so this doesn't make us look different than the bulk of the rest of the industry and I think we need to allow members to cancel online at least as long as the clubs remain closed. Your thoughts?

At 3:36 pm that same day, Walsh responded to Martin Annese, and copied TSI's General Counsel Stuart Steinberg and board member Spencer Wells, describing the plan for processing cancellations. He wrote:

> We are accepting cancels and freezes. The articles in the press are not accurate. It's [sic] source is a fraudulent lawsuit.

[10] Evidence of information Walsh had about how other gyms and health clubs were handling billing was introduced for the sole purpose of establishing what Walsh understood at the time, and not to prove what the other clubs actually did.

> Cancel requests are being honored as of the requested date when we reopen.
>
> We have a 45 day notice period. Anyone who cancels now will still be charged for April per the notice period. We will give them the 45 day gym time when we reopen and backdate the cancel.

(Ex. 82).

Molino was responsible for creating and manning a membership mailbox to receive inquiries. She could not recall exactly when she set-up the mailbox but after it was done, a notification went out to members. The first mention of a company-wide mailbox appears in the March 31st communication described below. In the first 24 to 48 hours of setting up the e-mail box TSI received over 50,000 communications. Molino was responsible for forwarding these communications to the appropriate club directors.

Members were billed for the month of April on April 1st. No one at TSI, including Walsh communicated to members that they would be billed for April prior to the billing.

TSI imposed a waiting period of 30-45 days on members seeking to cancel based on the member contracts.

Gregg Holden testified at his deposition that Messina told everybody that they were not going to take action on members' accounts while the clubs were closed. Because of the limited staffing TSI was not able to handle the number of requests for cancellation.

March and April 2020 Communications with Members

Various communications went out to TSI members in late March and early April. TSI worked with an outside vendor, Monica Smith ("Smith"), the CEO of Marketsmith, to draft these communications. Several of the communications went out under Walsh's name.

Walsh provided edits to the first communication that ultimately went out on March 26, 2020. During this time, Smith was communicating directly with Walsh a few times a week,

usually by cell phone. All communications she worked on for TSI had to be approved by Walsh. Smith did not add Walsh's name to communications without his approval.

At 11:01 pm on March 25th, Smith sent an e-mail to Walsh and others at TSI stating: "The goal is not to wake any sleeping babies. We need to make sure that when using Communication Week 2 Strategy, it is to ensure consistency and only to those that reach out to TSI and escalation." (Ex. 71).

On or about March 26th, TSI sent a communication from Walsh to members that provided as follows:

> Dear TSI members,
>
> We want to make sure our members, staff and their loved ones are safe and take the necessary precautions to stay healthy during this unsettling time. We would like to thank you for your outpouring of support and patience. Our community is truly amazing, and we are grateful for all of you.
>
> Many of you have messaged us on social media, by phone, and by email asking about the status of your memberships and our expected reopen date. We apologize for any delay in responding. Rest assured, once we're up and functionally running our clubs we will handle all of your concerns, including credits to your memberships, and personal training sessions.
>
> We support our government officials' request for everyone to remain at home and follow the mandates and guidelines set forth for our collective wellbeing. We look forward to getting back together in the gym as soon as possible. Until then, be well and take care of one another.
>
> We are in this together.
>
> Sincerely,
> Patrick Walsh

(Ex. 73).[11] This communication did not make mention of TSI's plan to bill for April.

[11] While Exhibit 73 is dated March 25, 2020, from the testimony of individual consumers and other evidence, it appears that this e-mail went to members on March 26th and the date on the communication was changed to the 26th.

Walsh's intention was to credit members for the time the clubs were closed, not to issue refunds. Walsh testified that the phrase "up and functionally running" meant to him that all the employees had been hired back, and all the clubs were open.

A credit is additional time to use the club in the future. Credits are distinct from refunds, which is when money previously paid to TSI is given back to the member. Gregg Holden acknowledged at his deposition that there is no sense in issuing a credit to a member who was never going to be able to use that credit.

On March 30th, at 6:16 pm, Walsh asked Monica Smith to send him a Word version of a communication to members that was being drafted. He sent an edited version of a document entitled 3.30 communication, back to her later that night. Walsh approved the final version of this communication which TSI sent out on March 31, 2020. The March 31st communication from Walsh to members provided as follows:

> Dear Valued Member,
>
> We hope you and your family are staying healthy and doing well. I am reaching out to address the concerns members have expressed regarding membership dues. I want to reassure you that, as previously promised, we will issue credits to your accounts and address all membership-related concerns once our gyms are operating.
>
> As of last Sunday, President Trump extended the national "shutdown" to April 30th. We want to ensure that we do all we can in order to keep our members healthy during this time. Therefore, as of April 1st, we will begin to offer a free, premium, exercise streaming service to all our members via the Plankk app. The app includes more than 30 live classes per week including HIIT, Strength, Sculpt and Yoga classes. In addition, the app will allow us to feature your favorite trainers in streaming sessions.
>
> In addition, we will be upgrading all members that stay active during the corona crisis closure to Passport-Elite memberships through the end of 2020, a value of $600-$700. This means unlimited access to all club locations including our luxury Elite brands at your current membership rate! Members will be able to access more than 150 clubs when the economy reopens and we all get back to business.

If you want to pass up this opportunity to be upgraded, please reach out to MemberHelp@tsiclubs.com where a Customer Service Representative will freeze your membership.[12]

The Town Sports team is working hard to navigate uncharted territory while we continue to plan for what may be a challenging future. We have made some extremely difficult decisions, but they are decisions that should ultimately benefit the Town Sports family, our members and our gyms.

We are working diligently behind the scenes to ensure we're ready to accommodate our amazing staff and members when we reopen. It is our promise to you, that you'll be welcomed back with a spectacular club experience. This promise, this goal, and our dedication to you and our staff inspires us to keep moving forward.

I have spoken to many of you personally over the past few weeks and want to thank you for your support and understanding. We are looking forward to the day our doors open again and excited to see you back in the gym.

Until that time, be well, stay strong and be safe

Sincerely,
Patrick Walsh
Chairman & CEO

(Ex. 85) (emphasis added).

On April 8, 2020, the following communication went out to members:

Dear Valued Member:

We hope you and your loved ones are staying safe and healthy. We have adjusted our policies to align with your needs and industry best practices: As a result, your membership will be put on freeze — at no cost to you — going forward while we are temporarily closed. There is no action required on your part to enact the freeze.

Please note, as previously communicated, members will receive additional days of membership access equal to the number of days paid for while the clubs were closed in your area. In addition, all members will be provided with Passport Elite status for one year. Elite members will receive a free three-month guest membership for a friend when all our clubs reopen.

[12] Exhibit 78, a letter dated March 30, 2020, is identical to Exhibit 85 apart from this paragraph. The court finds that Exhibit 78 is a draft version of Exhibit 85 that TSI did not send to members.

> If you haven't already, we encourage you to sign up for free unlimited access to the Plankk Studio streaming workout app — our way of helping you stay strong and healthy at home. Please click or tap here https://plankkstudio.com/town-sports to create your account.
>
> If you wish to cancel your membership, please visit your club-specific website and click on "contact us" to send your cancel request to your local club. You will receive an email confirmation of your cancel request.
>
> We appreciate your patience, support and understanding as we work together through this difficult time.
>
> Please understand we are doing everything in our power to survive the crisis so that we can rehire our 8,000 team members back when the government provides clearance to reopen and conditions are safe.
>
> We look forward to welcoming you back in the club in the months ahead.
>
> Best Regards,
>
> The Town Sports Team

(Ex. 187).

Other benefits offered

As is reflected in the communications sent to members in March 2020, TSI offered its members the use of "Plankk". Plankk was a virtual streaming service for exercise-based classes. TSI also offered members Elite upgrades and guest passes without additional cost.

July Opening

BSC clubs reopened on July 6, 2020, and members were billed for the month of July. Walsh participated in TSI's decision to bill all members for July, including the clubs in the city of Boston that did not open until weeks later. Bulk credits were not issued when the clubs opened in July. The re-opening plan called for handling credits on a member-by-member basis. If a member did not complain, they were not issued a credit.

Even though many of the TSI clubs opened in early July, the hours were modified and there were certain restrictions in place, such as the pools and showers were closed, there were no exercise classes, the childcare facilities were closed, and everyone was required to wear masks. There were capacity limits as well which were monitored on Motionsoft. Many of these restrictions were implemented because of guidelines the state and federal governments issued. The clubs were not able to staff group exercise classes sufficiently when the clubs first opened since all club level employees had been laid off. All of these services were not restored even by November 30, 2020.

In Walsh's view, despite the opening of the Massachusetts clubs in July, the company was not up and functionally running until September because the headquarters in New York did not open until August, and the New York clubs did not open until September. The IT teams that processed credits were located in New York. In addition, while the clubs in the Commonwealth opened on July 6th, all of the staff did not come back to work until September.

Walsh testified that "[t]he whole staff came back around August. We had to do the analysis, figure out the numbers, and then it was around September [when credits were given]." (Tr. 1354). In September 2020, Walsh instructed Messina to issue credits. While credits were announced in September 2020, they were issued to active members only, and not until October or November 2020. Credits could not be issued to anyone who had already canceled their membership.

Members' efforts to cancel memberships

Ron Morgese

Ron Morgese ("Morgese") testified at trial that he and his wife first became members of the Lynnfield BSC in 2015. They never used any other BSC locations. The Lynnfield club

never reopened after the March 2020 closure. Prior to the closure, TSI billed Morgese and his wife monthly. Payments were made automatically from one of Morgese's credit cards. In April 2020, Morgese intended to cancel his membership after the clubs were closed. He was not interested in TSI's offer of the Plankk app or in upgrading his membership. He was billed the regular fee for April 2020. In April or early May, he tried to cancel his membership. He tried canceling by going to the club, but no one was there. He was unable to cancel on the TSI website because he did not recall his membership number. No one answered the telephone at the Lynnfield location when he tried to cancel by phone. Finally, he tried calling another TSI location, but they were unable to help him.

In July, August, and September 2020, TSI charged Morgese his membership fees but he was not interested in continuing his membership. Because he was unable to cancel his membership directly with TSI, Morgese contacted his credit card company and filed a dispute. TSI did not respond to the dispute, so Morgese canceled his credit card, but TSI was able to bill the new number. Ultimately, Morgese received a refund on his credit card in September or October 2020 for the July, August, and September fees.

Michael Krasner

Michael Krasner ("Dr. Krasner") testified that he and his wife were members of the Watertown club in 2020. They were billed $44.99 each for the month of March 2020, which was their regular membership fee. Dr. Krasner and his wife were not interested in the Plankk app or the Elite membership upgrade. Dr. Krasner and his wife were billed on April 1st for the month of April. They were next billed for September despite the fact that the Watertown club was not open and they had been promised credits for the days the club was closed in March and April. Dr. Krasner sent in a complaint through the website. He also contacted his credit card company

and disputed the September charge and instructed them not to honor any more charges from TSI. He did not receive any response to his complaint in September or October. Even though Dr. Krasner had sent in a cancellation request, he continued to receive communications from TSI directing him and his wife to other Massachusetts clubs such as BSC in Waltham, and Work Out World in Waltham and Allston. The Krasners never received a refund for the amounts they paid in March and April when the clubs were closed

Kimberly Frawley

Kimberly Frawley ("Frawley") testified that she became a member of the South Station Boston Sports Club in 2013. Her credit card was charged for March and April 2020. She did not use the club after it closed on March 17th. She was not interested in the Passport Elite status, the three-month guest membership for a friend, or the Plankk app. In early July, Frawley notified TSI through the website that she wanted to cancel her membership. Despite receiving a confirmation e-mail on July 6, 2020, TSI continued to charge her the monthly fee through September. She called the South Station BSC and complained. She received a chargeback for July. *See* note 14, *infra*. She declined, through her credit card company, the August and September charges.

Lori Doughty

Lori Doughty became a member of the Woburn Boston Sports Club in 2008 or 2009. Her credit card was charged for her March 2020 dues. TSI charged her for April 2020. She was not interested in using the Plankk app, or the Passport Elite membership. She tried to cancel her membership by calling the Woburn club. She was told she could not cancel over the phone, so she went in person to the Woburn club in July. She was told to submit her cancellation request in writing. Doughty sent two e-mails on July 7th and July 28th, notifying TSI that she wanted to

cancel her membership. She also tried to cancel her membership through the website. In her website cancellation message, she stated: "I noticed that my credit card was charged for a prorated amount for July, but there were no classes being offered. I was not given any notification or communication about the club opening, any guidelines, and what services are or are not being offered. If there will not be any classes in the near future, please cancel my membership, refund my charge for July and for the weeks the club was closed." (Tr. 599).

Despite these efforts to cancel her membership, Doughty was billed for August. She called and visited the Woburn club but was still unable to cancel her membership. On August 6th, Doughty hand-delivered a letter requesting that her membership be canceled and asking to be refunded for her April and August dues and a prorated amount for July. She did not get a response to this letter. Doughty also contacted her credit card company to put a stop on any TSI billings but was unsuccessful at stopping them. In August, she visited the club several times but was told that she had to speak with a manager and that the manager was not there.

TSI charged Doughty for September. In September, Doughty sent a certified letter to the Woburn club and the TSI Boston headquarters. Doughty was not charged for October 2020. She did not use the club after it closed in March 2020. She was not refunded for any part of March, April, July, August, or September.

Fiona Anderson

Fiona Anderson ("Anderson") became a member of the Wellington BSC in March 2019. She typically used the club a couple times a week for fitness classes and the pool, and occasionally she would use the cardio machines. She did not use any other TSI clubs. Her credit card was billed $34 automatically once a month. She was billed in March 2020. After the club closed in March, she was charged $69 again in March 2020. On March 29, 2020, Anderson sent

an e-mail to Kerri Deroche ("Deroche"), a general manager for the Wellington club, requesting that TSI cancel her membership. In that e-mail she referenced the fact that her membership fee appeared to have been doubled.

Anderson was charged $15 on April 1st. On April 3rd, she sent another e-mail to memberhelp@tsiclubs.com, again requesting that they cancel her membership. They did not cancel her membership or respond to her e-mail.

On April 21st, Anderson went to the website and submitted her cancellation request. On April 22nd, she received an e-mail from Deroche which said:

> Hello,
>
> Hopefully this message finds you and your loved ones safe and healthy.
>
> I am reaching out to be of assistance regarding to your BSC membership. Please let us know if [sic] have any questions or concerns that we can help you resolve.
>
> Be well during this challenging time. We look forward to seeing you in the clubs soon.

(Ex. 133).

Anderson responded to Deroche that day:

> Hi Kerri,
>
> I submitted a request to cancel my membership. I've had 2 charges recently that don't make sense given my monthly plan and the gym closures.
>
> I was charged 69.99 on 3/25 and then $15 on 4/02. Given this I'd like to cancel my monthly membership.

(*Id.*).

On April 23rd, Anderson received another e-mail from Deroche, acknowledging her cancellation request and stating:

> We just want to make sure you are aware of all the options available to you at this time.

> Currently, ALL memberships for ALL of our members are frozen. They will remain frozen until all clubs reopen. You won't be charged a fee for the freeze, and you'll be credited for all the days your local club was closed leading up to this freeze.
>
> Should you choose to remain a member – again, at no cost – you will:
> • Have free, unlimited access to the Plankk Studio streaming workout app https://plankkstudio.com/town-sports
> • Receive a 90 day guest pass for friend, co-worker, loved one if elite or/ Receive elite upgrade for 12 months- amazing value!
> • Receive a credit for time in which local club was closed
>
> **Please let us know how you would like to proceed.**

(*Id.*).

Anderson did not want to remain a member and was not interested in the additional offers. Anderson responded on April 24th and April 26th that she wanted her membership canceled. On April 27th Deroche responded: "Your cancellation request has been processed as requested. You will not be billed any further. When the club reopens, your membership will be cancelled with the required 45 day's notice **with no further billing.** The reason for waiting until the clubs reopen is so that you will be able to use the gym during you cancel notice [sic]." Anderson did not use the BSC clubs any further. She did not receive any refund for any part of March or April.

Pamela Kerensky

Pamela Kerensky ("Kerensky") became a member of the Lexington club in 2014. She chose this facility because it had a tennis program. She was charged a membership fee of $39.99 when she joined. That fee increased twice up to $59.99. Kerensky was billed $59.99 for March 2020. After receiving notification from the tennis program that the clubs would be closing, she sent an e-mail on March 16, 2020, to TSI member services, canceling her membership. She was aware that the methods for cancellation provided in her contract with TSI were by delivering

either in person or by certified mail, a written request to cancel. However, since the clubs were closed, she did not try to go in person. She sent a certified letter on March 16th requesting that her membership be canceled.

Kerensky was charged for April. On April 3rd, she received an e-mail from membership services acknowledging that they had received her cancellation request and indicating that her membership would be put on freeze. The e-mail also mentioned the Plankk app and the membership upgrade that were being offered. She was not interested in either of these offers.

Kerensky responded the same day, detailing her efforts to cancel her membership and expressing her frustrations with TSI billing for April and for making the cancellation process so difficult. On April 15th, she received the following response from member services:

> Dear Pam:
>
> Your cancellation request has been processed as requested. You will not be billed any further and there is no cancellation fee. At this time, we are not offering any refunds for the time you were billed. That time is equal to our standard notice period. We have worked with local government entities to confirm this contractually meets our terms and conditions. If you wish to have access to the clubs for the time you were billed we can provide that when we reopen our clubs.

(Ex. 171).

Kerensky was charged four more times up through February 2021 when the billings finally stopped.

Communications with Massachusetts Attorney General

TSI members complained to the Attorney General's Office ("AGO") in March and April 2020. Between April 3 and April 9, 2020, Walsh had several conversations with then Attorney General Maura Healey ("Attorney General Healey") and members of her staff. During this timeframe, other TSI employees spoke to individuals at the AGO as well, and there were exchanges of text messages and e-mails. The Commonwealth stipulates that during this period

of time, April 2-9, Walsh acted in good faith in his discussions with the Attorney General Healey and her staff.

On April 3rd, at 1:26 pm, Walsh reached out to Assistant Attorney General Max Weinstein ("AAG Weinstein") and asked to speak with Attorney General Healey before she spoke with the press. AAG Weinstein requested Walsh's phone number, which he provided. Attorney General Healey and Walsh spoke that day and discussed various issues relating to the closures. Either on this first call, or on a subsequent call, Attorney General Healey told Walsh that the AGO had received complaints about BSC and that she wanted to make sure that the people who had complained were taken care of. Attorney General Healey told Walsh that she had a list of over 600 complaints that she wanted resolved. Specifically, she asked him to cancel or refund membership dues for the people on the list without regard to TSI's contractual cancellation/notice policy. Attorney General Healey also wanted BSC to allow members to cancel immediately for the next 30 days. In response to that request, TSI set up a website link for cancellation requests.

On April 8, 2020, Walsh instructed Fabrico to freeze all memberships though May 5, 2020.

On April 9, 2020, Walsh e-mailed AAG Weinstein the following:

Max, attached is the communication we sent to our members. As you can see:

1. The company has ceased all billing going forward until the clubs reopen.
2. *"As a result, your membership will be put on freeze – at no cost to you – going forward while we are temporarily closed. There is no action required on your part to enact the freeze."*
3. No fee will be charged for the freeze (usually $10).
4. All members will receive additional membership access equal to the number of days paid while the clubs were closed.
5. All members will be upgraded to Passport Elite status for one year ($700+ in value). Elite members will receive a free 3 month guest membership for a friend ($360 in value).

6. All members receive a premium streaming workout App.
7. Members can cancel by sending an email request on the club website.

(Ex. 207). Walsh further stated: "To recap our conversation and agreement between TSI and the Massachusetts Attorney General's Office", (1) TSI requested that the AGO send Walsh the list of the 600 complaints they had received; and (2) TSI indicated that it would reach out to these members and try to resolve their complaints, including honoring any cancellation requests immediately, and that it would waive the $10 cancellation fee for any cancellation requests received by April 30th. (Ex. 207).

On April 10, 2020, the AGO issued a press release which stated:

> BOSTON - Attorney General Maura Healey today announced that after conversations with her office, Boston Sports Club (BSC) has committed to immediately stop billing their members while their gyms are closed due to the COVID-19 pandemic and to allow their members to cancel their contracts without paying a fee.
>
> BSC's commitment is the result of a demand letter[13] the AG's office sent to Town Sports International Holdings Inc., the parent company of BSC, last week. In the letter, AG Healey says BSC misled its members about their right to cancel their membership and continue to charge members who tried to cancel in violation of Massachusetts consumer protection laws.
>
> Since BSC closed all its locations on March 16, the AG's office has received more than 920 complaints from members who have tried and failed to cancel their contracts with the company. These consumers report that they have called, emailed and sent social media messages to BSC in an effort to cancel their contracts, all without receiving any response. Consumers also alleged BSC continued to charge consumers for memberships they can't use even after these consumers gave notice of their wish to cancel.
>
> In its commitment to the AG's office, BSC has stated that it will cease all billing until its clubs reopened by placing a no-cost freeze on all member accounts, provide additional membership access equal to the number of days paid while clubs are closed, allow members to cancel by sending a request through their club's website, and waive all cancellation fees through April 30, 2020. BSC is also offering online streaming workouts for members who wish to remain active and has offered to provide upgrades for BSC members once their clubs open. Current BSC members may want to consider whether maintaining or freezing

[13] The press release linked to the demand letter.

> their membership is a better option for them than cancelling their contracts. BSC members who rejoin their club at a later date may have to enter a new contract with BSC and pay a new membership fee.
>
> Under Massachusetts law consumers have a right to cancel a contract with a health club when the club "substantially changes the operation of the health club or location." The indefinite closure of all BSC clubs as a result of the COVID-19 epidemic qualifies as a substantial change and gives BSC's members the right to cancel their contracts.

(Ex. 213).

Walsh asked the AGO for a written agreement and the AGO declined to give it. No formal written agreement was executed. There is nothing in the documents suggesting that Attorney General Healey or anyone in her office discussed the April Billing with Walsh. Moreover, the plain meaning of the April 9th e-mail (Ex. 207) suggests that the only two things that were agreed to were listed as (1) and (2).

Stuart Steinberg ("Steinberg") recalls that the AGO was concerned about members' ability to cancel their memberships since all the clubs were closed. Steinberg did not believe there was any settlement with the AGO but that TSI had resolved certain issues.

Starting in mid-April, the AGO provided Walsh with several spreadsheets that contained the names of the individuals who had filed complaints. Walsh claims that Attorney General Healey indicated that if TSI addressed the concerns of the people on the spreadsheet, TSI would not be sued. However, Walsh's testimony in this regard was not credible in light of Steinberg's testimony and the other evidence.

FINDINGS OF FACT AS TO DAMAGES

A. Michael Petron

The Commonwealth called Michael Petron ("Petron") as an expert on damages. Petron has an undergraduate degree with a double major in economics and statistics. He has a master's

degree in statistics and a master's degree in accounting. He has spent his career in litigation support services doing forensic accounting and data analysis. He is a certified public accountant and a certified fraud examiner. Petron has vast experience in complex data analysis, statistical analysis, and forensic accounting.

Petron was asked to analyze a variety of data sets related to certain financial issues with TSI, and to calculate payments made when the clubs were closed, after certain cancellation requests, and when members were transferred to other clubs. He was also asked to look at refunds and credits and to calculate net charges on a member-by-member basis. "Net charges" are payments made by members minus credits and refunds they received.

Petron used the TSI raw payment data set. This data set included TSI transactions from March 2020 through November 2020. He classified the data as "recurring" and "nonrecurring." Recurring transactions include members' monthly membership fee, while nonrecurring transactions are single purchases, such as water bottles. There were five transaction types he considered: payments, refunds, chargebacks, declines, and on account.[14] He primarily looked at the first three. The data included over 1.8 million total transactions, approximately 1.6 million of which were recurring.

Petron also identified cancellation requests from TSI's cancellation data. His method for identifying cancellation requests was conservative. He excluded conversions and rewrites, which is where a member converts their membership, thereby technically canceling the previous membership. He also did not include non-monthly charges, any cancellation requests where a member went to a club after making the request, and any cancellation request by a member who

[14] A chargeback is when a member disputes a charge on their credit card and TSI agrees to forgo the money. Mr. Petron defined "decline" as "when a transaction was declined by the credit card company." He did not define "on account."

rejoined later. Finally, he excluded cancellation requests that came before the March 17th closure.

Petron also looked at bankruptcy data maintained by Huron, a firm involved in TSI's bankruptcy proceedings, because it included certain refunds and credits that were outside the other data sets. Petron also looked at account credits, last check-in, and closure data.

Petron performed nine separate analyses, which are described below. After his initial report, Petron became aware of an additional $24,000 in credits and refunds of which he had not previously been aware. His testimony included that data.

1. Analysis One

For Analysis One, Petron calculated charges that pre-pandemic members (members as of March 16, 2020) incurred when their BSC club or clubs were closed. He limited his analysis to clubs in Massachusetts and for the period of time those clubs were closed. He pro-rated payments made between March 1 and 16, 2020, and only included recurring payments. He factored in declines and chargebacks as offsets. Based on this analysis, 103,230 members incurred a total of $7,196,893 in recurring payments, net chargebacks and declines.

2. Analysis Two

For Analysis Two, Petron determined the charges that were incurred after a member requested cancellation but did not include any transaction included in Analysis One. Based on this analysis, Petron concluded that 14,852 members incurred a total of $747,497 in recurring payments and annual fees, net chargebacks and declines. He did not include in his analysis any request to cancel that he could not match to a member identification.

3. Analysis Three

For Analysis Three, Petron calculated charges that were incurred after a member was

transferred to another club without their consent. He determined this number by including members who had a monthly membership charge, followed by their club's closure in the following month, and a credit the following month.[15] He excluded any member who used any TSI location after the transfer. As with the other analyses, Petron looked only at recurring payments and annual fees incurred by pre-pandemic members of Massachusetts clubs, and he factored in declines and chargebacks as offsets. Finally, he did not include any transactions identified in Analyses One and Two. Based on this analysis, Petron concluded that 4,117 members incurred $251,272 in recurring payments and annual fees.

4. Analysis Four

In Analysis Four, Petron calculated charges for cancellation fees, looking only at recurring payments and annual fees incurred by pre-pandemic members of Massachusetts clubs, and factoring in declines and chargebacks as offsets. He did not include any payments that were identified in Analyses One, Two, and Three. Based on this analysis, Petron concluded that 8,392 members incurred $92,782 in cancellation fees.

5. Analysis Five

Petron calculated refunds that pre-pandemic members received from March 1, 2020 on from TSI as well as from Huron in connection with the bankruptcy. Based on this analysis, Petron concluded that 11,502 members received $922,651 in refunds.

6. Analysis Six

Petron next calculated "utilized credits," which he defined as a credit that benefited the member. If the member received the credit after the member had requested cancellation or was transferred without consent, Petron did not consider that credit utilized. There were a large

[15] TSI issued credits only when someone was transferred involuntarily.

number of credits issued on September 18, 2020. He separated out the non-September 18th credits from the September 18th credits. With regard to the non-September 18th credits, he assumed that the credits were utilized if the member was issued the credit before they made a cancellation request or was transferred without their consent. He also considered the credit utilized if the member re-joined the club. The September 18th credits on the other hand, were issued to make-up for the weeks in March and April when the clubs were closed. If the credit was issued after a cancellation request, he considered the credit unutilized. If the cancellation request came after the credit, he considered the credit utilized. Depending upon the timing, in some instances he prorated the amount of the credit to be utilized. In sum, Petron determined that 69,058 members were associated with utilized credit, equaling $6,007,536.

7. Analysis Seven

Petron then added the charges calculated in Analyses One through Four and deducted refunds and utilized credits calculated in Analyses Five and Six. He did these calculations member-by-member. Members who had negative net charges were not included in the total calculation so as not to offset the other members' positive net charges. Of the 103,000 total pre-pandemic members, 47,658 members had total net charges of $3,850,048. Petron did an alternative calculation which excluded all charges from March 2020. The result was that 37,836 members accumulated $2,337,264. Petron did not include in his analysis other benefits that TSI offered, such as the Plankk app or upgraded memberships. He also did not take into account cancellation notification periods.

8. Analysis Eight

Petron adjusted his Analyses One through Four to include only transactions up to and including April 1, 2020. He adjusted his Analyses Five and Six to consider only transactions up

to and including July 5, 2020. The result of this analysis was that 103,219 members had transactions for health club services from March 1, 2020 through April 1, 2020, and 88,887 of those members did not receive compensation at least equal to the amount they paid as of July 5, 2020, when TSI resumed billing.

9. Analysis Nine

In Analysis Nine, Petron calculated the net amounts charged to members in April 2020. He determined that 83,682 members paid in April 2020, and 83,028 paid specifically on April 1, 2020.

B. Charles Douglas Cowan

The defense called Charles Douglas Cowan ("Dr. Cowan") as an expert on damages. Dr. Cowan has a doctorate degree in mathematical statistics from George Washington University, and master's and bachelor's degrees in economics from University of Michigan. He completed his doctorate in 1984.

For the last twenty years Dr. Cowan has been CEO of Analytic Focus. Before that he was Director of Quantitative Methods at Price Waterhouse, and before that served as the Chief Statistician for various companies, including the Federal Deposit Insurance Corporation.

Dr. Cowan has expertise in the areas of complex data analysis and designing consumer surveys. He has written two books on the analysis of surveys. Dr. Cowan testified that he wrote the standards on how to conduct surveys, and these standards are generally accepted in the field of conducting surveys.

He has conducted surveys in many different areas, including health, transportation, and banking and finance. Dr. Cowan has appeared in court to testify about surveys and data analysis 20-25 times. He has given testimony in other cases about alleged deceptive sales practices and

has conducted surveys and testified about the value of certain products or component parts of a product. He has not testified about the value of services offered to consumers except indirectly when services were bundled with a product.

In this case, Dr. Cowan was asked to review Petron's work and to conduct a survey regarding claims made in the Complaint.

1. Critique of Petron's Analysis

Dr. Cowan reviewed the complaint, Petron's report, and eight TSI data files listing payments, credits, and chargebacks. In contrast to Petron, Dr. Cowan included the contractual termination periods, amounts members owed to TSI, and the value of the Plankk app and membership upgrades in his calculations.

Since the contractual cancellation periods differed depending upon the individual member's membership contract, and some members had no cancellation period, Dr. Cowan applied a 30-day cancellation period to all members. He considered the date of the cancellation request to be the date cancellation should have become effective in light of a 30-day cancellation period, and not the date the request was made.

To identify members with past due amounts, Dr. Cowan tabulated payments as they came in; if there was a charge and no payment, which appeared as a "chargeback" in the records, he considered that payment to be a past due amount. Chargebacks are disputes that a consumer has filed with their credit card company. Dr. Cowan also incorrectly considered a credit as an amount that could be used to offset amounts due, rather than as amounts members could only apply to future months. He could not recall if he considered cancellation requests that did not come through the website.

Dr. Cowan's compared his analysis to Petron's analysis. As an initial matter, he found that 36,976 people were owed money for a total amount of $2,531,649. These numbers contrast Petron's findings that 47,822 members were owed money in the total amount of $3,880.443. In making this calculation Dr. Cowan factored in the cancellation periods and fees. He did not calculate a loss for individuals who were involuntarily transferred to other clubs because he understood that to be a practice in the industry.

Dr. Cowan subtracted the total amount owed by all members from the total amount due by all members, resulting in a total of $981,027 owed to TSI. The court finds this last calculation to be irrelevant. The proper basis is a member-by-member analysis as he did in the previous calculations and as was done by Petron.

Dr. Cowan included the Plankk app as an offset by calculating a value for the Plankk app of $14.99 per month. Dr. Cowan counted the Plank app benefit for three months that the clubs were closed even though the Plankk app was provided free for the entire year. He did not review any data as to how many TSI members actually signed-up for the Plankk app; he applied the Plankk app benefit to all TSI members even if they did not ever sign-up for, or use the app.

Dr. Cowan also considered the upgrade to Elite membership status as an offset. TSI typically charged a range of prices for the Elite membership. The median value of the Elite membership over the non-Elite membership was $17. He discounted this amount by the likelihood that members would use the upgrade, which was the average check-in rate plus the awareness rate,[16] or 3.5%.

After factoring in the offsets for unpaid balances, the value of the Plankk app for three months, the Elite membership upgrades, and additional refunds that were a result of his review of

[16] The awareness rate is the percentage of members who were aware of the upgrade based on Dr. Cowan's survey.

the data from Petron, he concluded that the net loss of individuals was $1,697,605 in contrast to $3,850,048 calculated by Petron.[17]

2. Survey

Dr. Cowan took the alleged misleading statements contained in the complaint and attempted to measure whether consumers believed those statements were true. He also reviewed e-mails sent to members, a sample member contract, and information on the website that existed in 2020.

To prepare the survey, Dr. Cowan first determined if there were statements that could be tested and designed questions that would get at the allegations. Secondly, he determined how to sample the relevant population, including sample size. Dr. Cowan testified that he attempted to contact around 5000 TSI members.[18] Only 473 respondents completed survey, which was just under 10% response rate. He did not – and was unable to – analyze the reasons for the nonresponse rate to determine if there was a nonresponse bias, but he did not believe it was necessary to perform this analysis.

Dr. Cowan assigned a random number to all TSI members included on the list he got from Huron. He wrote to everyone who was in the sample and gave them a link to the survey. Some people completed the survey through the link. He then trained people to call and conduct the survey over the phone with members who had not responded electronically. The interviewers were given a script to follow, which contained the same questions that were on the webpage survey. Eighty percent of the survey responses were conducted by telephone calls. Interviewers recorded the responses on the computer.

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[17] Slide 14 (Ex. 282) came into evidence as a summary exhibit.

[18] Dr. Cowan, however, had 6000 names. Additionally, throughout his report, Dr. Cowan stated that he contacted a random sample of 6000 TSI members.

The following are the allegations in the complaint that Dr. Cowan identified, and the corresponding survey questions:[19]

Allegation 1

The Commonwealth of Massachusetts alleged that

"[i]n other instances, TSI informed members that cancellations could only be done in person or by certified or registered mail, despite the fact that clubs' physical locations were closed and TSI employees were not in the clubs to accept in-person or mailed cancellations requests."

and that TSI, Patrick Walsh, and Michael Poirier

"gave false impression that consumers could cancel by visiting health clubs in person when the clubs were closed with no employees available to cancel."

Survey question to test Allegation 1

Boston Sports Clubs contracts state that cancellations of membership need to be done in person or by certified or registered mail. In an email dated April 8, 2020, Boston Sports Clubs said, "If you wish to cancel your membership, please visit your club-specific website and click on 'contact us' to send cancel request to your local club. You will receive an email confirmation of your cancel request."

Based on this statement, would you expect that cancellation requests could be submitted via the "contact us" form on the Boston Sports Clubs website?

Responses: 75% answered "yes"
11% answered "no" and
14% answered "I don't know"

Allegation 2a:[20]

The Commonwealth of Massachusetts alleges that TSI, Patrick Walsh, and Michael Poirier

"[g]ave the false impression that consumers could cancel their memberships by email when in fact TSI did not cancel consumer memberships."

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[19] The survey was admitted as Ex. 195. The survey asked what people *currently* thought, not what they thought at the time.

[20] Dr. Cowan testified about this allegation during cross-examination, not on direct. It was also presented to the court as a slide.

Survey question to test Allegation 2a

Boston Sports Club contracts state that cancellation of membership needed to be done in person or by certified or registered mail. In an email dated April 8, 2020,[21] Boston Sports Club said, "If you wish to cancel your membership, please visit your club-specific website and click on 'contact us' to send cancel request to your local club. You will receive an email confirmation of your cancel request." Based on this statement, would you expect that cancellation requests could be submitted via the "contact us" form on the Boston Sports Clubs website?

Responses: 75% answered "yes"
11% answered "no"
14% answered that they did not know or were not sure

Allegation 2b:

The Commonwealth of Massachusetts alleges that TSI

"notified members that cancellations would only be honored if members made them according to TSI's cancellation policy, which required 30-45 days notice of cancellation and a cancellation fee between $10 and $25."

Survey question to test Allegation 2b

Were you aware that the Boston Sports Clubs contract stated that, if you canceled your membership, your cancellation would be effective at least 30 days after you provided notice of cancellation if you had a Month-to-Month membership contract?[22]

Responses: 46% answered they were aware of the policy
28% answered they were not aware of the policy
2% answered that the contract did not say this
25% answered that they did not know or remember

Allegation 3:

The Commonwealth alleges that TSI, Patrick Walsh, and Michael Poirier

[21] Dr. Cowan testified on cross-examination that the responses to this survey question could not provide any relevant information about the time period prior to April 8, 2020.

[22] This question does not address the fee issue raised in the allegation. Additionally, the "Month-to-Month" factor does not appear in the allegation.

"[g]ave the false impression that consumers would receive credits for membership dues paid in April when in fact TSI did not provide or apply any credits when they resumed billing."

Survey question to test Allegation 3

Did Boston Sports Clubs provide you any refund or credit to pay you for charges Boston Sports Clubs collected from you while it was closed between March and July?[23]

Responses: 65.1% answered "no" – 57.7% actually received credits and 7.4% did not
15.9% answered "yes" – 14.1% actually received credits and 1.4% did not
19.0% answered "I don't know" or "I don't remember" – 16.9% actually received credits, 2.1% did not[24]

Allegation 4

The Commonwealth alleges that TSI, Patrick Walsh, and Michael Poirier

"did not immediately apply credit to all members who paid while the clubs were closed. Instead, TSI waited for members to inquire about the credit, usually while visiting a re-opened club."

Survey question to test Allegation 4

The former CEO of Boston Sports Club sent an email on March 25, 2020 which stated that, "rest assured, once we're up and functionally running our clubs we will handle all of your concerns, including credits to your membership, and personal training sessions."

Based on this statement, was there a date that you would have expected to receive credits or refunds to your membership?[25]

Responses: The responses reflected a wide variety of expectations from March 2020 to March 2021. Approximately 1/3 of respondents expected to get either a credit or refund when the club was closed.[26]

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[23] This question equates credits and refunds. Also, Dr. Cowan testified that the data on which he based this question was not limited to March through July.

[24] A respondent who had already canceled would not necessarily know if they had a credit.

[25] Again, this question did not differentiate between credits and refunds.

[26] In his direct testimony, Dr. Cowan explained that, with this information, he was "trying to get across the idea that a certain proportion of people expected to get something during the time that the club was actually closed." (Tr. 1468).

Allegation 5

The Commonwealth alleges that

"[t]he communication did not inform consumers that TSI could unfreeze their accounts and begin automatically debiting them at any time. As a result, many consumers reasonably believed given the uncertainty of the ongoing pandemic that their memberships would remain frozen until and unless the consumers took some action."

and that TSI, Patrick Walsh, and Michael Poirier

"[g]ave the false impression that accounts would be frozen without telling consumers TSI could unilaterally unfreeze their memberships."

Survey question to test Allegation 5

Boston Sports Club sent an e-mail on April 8, 2020 which stated that, "We have adjusted our policies to align with your needs and industry best practices: As a result, your membership will be put on freeze – at no cost to you – going forward while we are temporarily closed."

Based on this statement, would you expect your membership to remain frozen or to be unfrozen after the gyms reopened in July?

Responses: 33% answered that they expected that their membership would remain frozen after the gyms reopened
49% expected that their memberships would be unfrozen after the gyms reopened
18% did not know

Dr. Cowan concluded that as to the statements he tested with the survey, the responses were mixed, with some showing that consumers, after being read the statement, were not confused or for the most part were not confused, and in other cases they were confused but he was not sure it was because of the statements made by Walsh "as opposed to scatter-gun expectations."[27] (Tr. 1478).

[27] Notably, Dr. Cowan testified to the results of his survey without offering any opinions. For example, he did not opine as to whether the results suggested that members had or had not been misled.

RULINGS OF LAW

I. Admissibility of Communications between the Commonwealth and Walsh

An outstanding issue from trial is whether the communications between the AGO and TSI, including Walsh, from April 2 through April 9, 2020, are relevant to the Commonwealth's G.L. c. 93A allegations.[28] Walsh contends that he reached an agreement with the AGO which should exonerate him. The Commonwealth contends that there was no agreement reached. The trial evidence supports the Commonwealth's position.

After receiving complaints from consumers relating to the April Billing, the AGO asked TSI to take three steps: (1) to freeze billing going forward; (2) to fix cancellation procedures so that members could cancel online and without a fee; and (3) to address complaints of individuals who had contacted the AGO.[29] In response, Walsh directed Michael Fabrico to freeze memberships; TSI set up a website link to enable members to cancel online; and Walsh requested the list of people who had specifically complained to the AGO so that TSI could address their concerns.

Walsh testified that the AGO said that if Walsh and TSI complied with the AGO's demands, the AGO would not sue TSI for the April Billing. The court does not credit this statement. First, it is inconsistent with Stuart Steinberg's testimony that TSI agreed to resolve certain issues, but that TSI did not enter into a settlement agreement with the AGO. Second, the undisputed evidence is that no formal agreement was signed. Third, the AGO's press release announced that in response to a demand letter from the AGO, TSI committed to taking certain

[28] Also contested at trial were their communications between Fall 2020 after the bankruptcy and when New TSI was taking over. The court already ruled that the communications during this timeframe were settlement discussions and not admissible. This lawsuit followed those failed settlement discussions.

[29] The parties might also have discussed refunds generally, but Stuart Steinberg indicated that they were not able to resolve that issue.

actions going forward; significantly, the press release did not state that the AGO settled claims or reached an agreement with TSI.

Finally, as the Commonwealth points out, in lieu of bringing an action under G.L. c. 93A, § 4, the Attorney General may accept an "assurance of discontinuance of any method, act or practice in violation of this chapter from any person alleged to be engaged or to have been engaged in such method, act or practice." G.L. c. 93A, § 5. That assurance of discontinuance must "be in writing and filed with the superior court of Suffolk county." *Id.* No such assurance of discontinuance between these parties was filed.

Accordingly, the court rules that the conversations that Walsh had with the AGO and with Attorney General Healey herself – including any text messages they exchanged – are not relevant to the Commonwealth's G.L. c. 93A allegations.

II. **Violations of G.L. c. 93A**

General Laws c. 93A, § 2, renders unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ." "In an action alleging violations of G.L. c. 93A, 'whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact.' . . . But whether conduct found to be unfair or deceptive 'rises to the level of a chapter 93A violation is a question of law.'" *Hl Lincoln, Inc. v. South Washington St., LLC*, 489 Mass. 1, 13-14 (2022) (citations omitted). "Whenever the attorney general has reason to believe that any person is using or is about to use any method, act, or practice declared by section two to be unlawful, and that proceedings would be in the public interest, [s]he may bring an action in the name of the commonwealth against such person . . . ." G.L. c. 93A, § 4. "The very purpose of the Attorney General's involvement is to provide an

efficient, inexpensive, prompt and broad solution to the alleged wrong." *Commonwealth v. DeCotis*, 366 Mass. 234, 245 (1974).

Here, the Commonwealth contends that certain aspects of Walsh's responses to the COVID-19 pandemic as CEO of TSI were unfair or deceptive in violation of G.L. c. 93A. Specifically, the Commonwealth points to the April Billing (Count III), the deceptive communications to TSI members (Count II), and the violations of the Health Club Act (Count I). For the following reasons, the court concludes that these actions constitute unfair or deceptive acts or practices in the conduct of trade or commerce[30] in violation of G.L. c. 93A, § 2, and that the Commonwealth is entitled to judgment on all counts of its complaint against Walsh.

A. Walsh's Liability under G.L. c. 93A

Walsh disputes that the court can hold him personally liable for the corporate decisions of a publicly traded company. The court disagrees.

"It is settled that corporate officers may be held liable under c. 93A for their personal participation in conduct invoking its sanctions." *Community Builders, Inc. v. Indian Motocycle Assocs., Inc.*, 44 Mass. App. Ct. 537, 560 (1998). A corporate officer who personally participated in the actionable conduct is liable "whether or not he was acting within the scope of his authority." *LaClair v. Silberline Mfg. Co., Inc.*, 379 Mass. 21, 29 (1979). Personal participation arises "by, for example, directing, controlling, approving, or ratifying the act that injured the aggrieved party." *Townsends, Inc. v. Beaupre*, 47 Mass. App. Ct. 747, 751 (1999). *See, e.g., Community Builders, Inc.*, 44 Mass. App. Ct. at 559-60 (holding that individual

[30] Section 1 of G.L. c. 93A includes in the definition of "'[t]rade' and 'commerce' . . . the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services . . . ." Health clubs offer a service to their members. Indeed, certain violations of the Health Club Act, discussed below, are "declared to be an unfair and deceptive *trade* practice in violation of" G.L. c. 93A. G.L. c. 93, § 84 (emphasis added).

defendants personally participated in "in orchestrating [their corporation's] violation of the covenant of good faith and fair dealing and the pattern of unfair and coercive conduct towards" plaintiff, to which defendants owed money, where individual defendants "could have made the payments as called for by the agreement, if necessary from their own resources" and where "their foot dragging was intended to put pressure on [plaintiff] to compromise its claim"); *Standard Register Co. v. Bolton-Emerson, Inc.*, 38 Mass. App. Ct. 545, 551 (1995) (holding officials of defendant corporation were "personally liable" under G.L. c. 93A because they "took an active role in the dealings with [the plaintiff] for the duration of the business relationship" by "fraudulently negotiat[ing] and induc[ing] the . . . contract with [the plaintiff] and orchestrat[ing] the misrepresentation regarding the progress of the project").

As set out in more detail below, the Commonwealth has proven that Walsh, at the very least, approved or ratified the conduct at issue in this case in his capacity as CEO of TSI. He is therefore personally liable under G.L. c. 93A.

B. April Billing – Count III

Generally, TSI billed its members for the upcoming month at the beginning of the month, and TSI members paid their membership dues through monthly electronic fund transfers. The Commonwealth alleges that Walsh engaged in unfair billing practices in violation of G.L. c. 93A by charging for membership dues for April 2020 when he knew that the clubs could not reopen in April. In other words, Walsh approved of a plan to charge members' credit cards and to take money from their bank accounts for April 2020 despite knowing that members would not receive services in exchange for their membership dues.

"'[A] practice or act [is] unfair under G.L. c. 93A, § 2, if it is (1) within the penumbra of a common law, statutory, or other established concept of unfairness; (2) immoral, unethical,

oppressive, or unscrupulous; or (3) causes substantial injury to competitors or other business people[.]'" *Governo Law Firm LLC v. Bergeron*, 487 Mass. 188, 195 n.13 (2021) (final alteration added; citation omitted); *Connor v. Marriott Int'l, Inc.*, 103 Mass. App. Ct. 828, 834-35 (2024). *See Commonwealth v. Fremont Inv. & Loan*, 452 Mass. 733, 742-43 (2008) (holding that, as G.L. c. 93A "does not define unfairness, ... [w]hat is significant is the particular circumstances and context in which the term is applied. . . . [and noting that] [i]t is well established that a practice may be deemed unfair if it is 'within at least the penumbra of some common-law, statutory, or other established concept of unfairness'" (citation omitted)). *See also Herman v. Admit One Ticket Agency LLC*, 454 Mass. 611, 616 (2009) ("The unfairness of an act or practice is determined from all the circumstances."). "Overcharging has repeatedly been found to be an unfair or deceptive act or practice." *Beauchesne v. New England Neurological Assocs., P.C.*, 98 Mass. App. Ct. 716, 724-25 (2020) (collecting cases). The court agrees that the April Billing was an unfair act of overcharging in violation of G.L. c. 93A.

Walsh counters that his actions were not unfair, and the thrust of his argument is that the pandemic created a chaotic situation. There can be no dispute that the COVID-19 pandemic "created enormous challenges for every aspect of our communities." *See Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 484 Mass. 431, 433 (2020). The unprecedented uncertainty that the pandemic created, however, does not protect Walsh from liability on these facts because the unfairness of Walsh's conduct does not arise from that uncertainty but rather from his awareness that the clubs would not be able reopen in April, regardless of the government's orders. A consideration of the timeline leading up to the April Billing decision makes this conclusion clear. *See Massachusetts Employers Ins. Exch. v. Propac-Mass, Inc.*, 420 Mass. 39, 42-43 (1995) ("focus[ing] on the nature of challenged conduct

and on the purpose and effect of that conduct as the crucial factors in making a G.L. c. 93A fairness determination").

- On March 17, 2020, TSI laid off the majority of its 9000 employees, including all of its operational staff. Walsh participated in this decision, the result of which was that TSI could not answer or respond to member inquiries about club closures or cancellations.

- In an e-mail dated March 19, 2020, Michael Fabrico informed Walsh that TSI had to let Motionsoft know by March 20th whether to bill members for April.[31]

- TSI's SEC filing dated March 20, 2020, stated: "We cannot predict with certainty when we may be permitted to re-open our locations . . . . *Our need to hire, train and retain new staff may delay re-opening of our temporarily closed locations* . . . ." (Emphasis added).

- Rather than implement a bulk freeze, Walsh, in consultation with other board members and with company counsel, decided to bill members for April 2020. Walsh made this April Billing decision by March 22, 2020.

When Walsh made the April Billing decision, he knew that clubs would be unable to reopen in April because he had fired the majority of TSI staff, and his claims to the contrary are not credible. First, TSI's March 20th SEC filing, which Walsh electronically signed as CEO and certified as truthful and complete, acknowledged that having to hire and train staff would delay reopening. As of that date, then, Walsh knew that the clubs were unable to reopen in two weeks – i.e., in April. Second, Walsh's claim that he believed that the clubs would be able to reopen by Easter, April 12th is also not credible. He based this belief on President Trump's March 24th announcement, which was after Walsh had decided to bill members for April.[32]

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[31] There is no evidence that Motionsoft set this deadline, or that Motionsoft required eleven days to implement a bulk freeze, although notably absent from trial was any evidence from the Commonwealth about how much advance notice Motionsoft required to implement a bulk freeze. That notwithstanding, there was no evidence that Walsh – who, as CEO, had the authority to issue refunds and to direct the freezing, upgrading, and crediting of member accounts – inquired as to whether a bulk freeze could be done after March 20, 2020.

[32] Regardless, by March 29th, President Trump extended the national shutdown to the end of April. Between those dates, in an e-mail to part of the executive team on March 28th, Walsh expressed interest in freezing the accounts of members who had made that request. Thereafter, in a March 30th e-mail to American Express, Walsh alleged that

Finally, the court does not accept Walsh's argument that he reasonably believed that the 30-to-45-day cancellation period in the member contracts gave TSI a contractual right to bill for April. The purpose of that cancellation period was to enable a canceling member to continue to use their club for that period of time after giving notice. Walsh knew by March 20th, at the latest, that the clubs would be unable to reopen in April because of lack of staff, thus TSI could not fairly enforce this notice period. His belief that he could enforce the cancellation period when the clubs would not reopen in April and, importantly, when the clubs did not have staff to process the cancellations was therefore unreasonable. *See, e.g., DeCotis*, 366 Mass. at 243 (holding that defendants engaged in unfair act or practice under G.L. c. 93A, § 2, when they collected fees from tenants who "were in a position in which they had no reasonable alternative but to pay" and "furnished no goods or services in exchange"). The court is also mindful that Walsh made these decisions against a backdrop of financial difficulties that existed even before the pandemic: in 2019, TSI experienced membership declines and losses of over $18 million; at a board meeting in April 2020, the board deemed TSI insolvent; and TSI had a debt of $177.8 million due in November 2020.

The April Billing was therefore an unfair act in violation of G.L. c. 93A, not because the pandemic caused TSI's clubs to close, but because Walsh charged members for April despite knowing that laying off the majority of operational staff on March 17th would prevent the clubs from reopening in April. Walsh therefore knowingly charged members for services he knew that TSI was not going to provide. *See Beauchesne*, 98 Mass. App. Ct. at 724-25. Compounding this unfairness is the fact that, as members paid through electronic fund transfers, they were charged

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TSI had in fact processed freeze requests. There is no evidence, however, that Walsh or anyone else at TSI implemented any freezes at that time for April.

on April 1st for April 2020 without the opportunity to opt out or otherwise to avoid the charge.[33] *See, e.g., DeCotis*, 366 Mass. at 243 (holding that fact that tenants paid defendants' fees "does not make the collection of such a fee fair. It merely demonstrates the extent to which the defendants had their tenants at their mercy").

Accordingly, the April Billing was an unfair act, and the Commonwealth is entitled to judgment on its claim that Walsh violated G.L. c. 93A by unfairly charging membership dues for April 2020.

B. Deceptive letters (Count II)

The Commonwealth alleges that Walsh made deceptive statements about credits in his letters that TSI members received by e-mail on March 26 and March 31, 2020 ("March letters").[34] Walsh argues that the March letters contained forward-looking statements that are not actionable. Contrary to Walsh's arguments,[35] the statements are actionable, and they are deceptive in violation of G.L. c. 93A.

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[33] Not only did TSI not inform members that they would be billed for April 2020, but also TSI was unable to respond to member inquiries because of the lay offs.

[34] The Commonwealth also contends that a letter dated March 30, 2020 (Ex. 78), is deceptive. The court does not include this letter in its analysis because, as found above, TSI members did not receive the March 30th letter, which is a nearly identical draft version of the March 31st letter. Therefore, in the absence of any evidence that TSI disseminated the March 30th letter, it does not violate G.L. c. 93A. In his proposed rulings submitted prior to trial, Walsh argues that the letter that TSI sent to members on April 8, 2020 (Ex. 187), is not deceptive. The Commonwealth has stipulated that Walsh acted in good faith between April 2nd and 9th, therefore the court also does not include this letter in its analysis.

[35] In his proposed rulings, submitted prior to trial, Walsh cites to two cases as support for the proposition that forward-looking statements cannot form the basis for a G.L. c. 93A claim. Those two cases are inapposite. First, *Neuro-Rehab Assocs., Inc. v. Amresco Commercial Fin., LLC*, 2009 WL 649584 (D. Mass. 2009), was not a G.L. c. 93A case, and was applying Idaho law when holding, "[s]tatements of opinion or predictions about future events ordinarily cannot be the basis for a claim of fraud or intentional misrepresentation." *Id.* at *22. Second, *Doe v. Cultural Care, Inc.*, 2011 WL 4738558 (D. Mass. 2011), although purporting to apply Massachusetts law, relied on the above-quoted sentence from *Neuro-Rehab Assocs., Inc.* to characterize a defendant's statement as one of "belief or opinion that does not constitute a statement of fact for purposes of fraud." *Cultural Care, Inc.*, 2011 WL 4738558 at *8. That case did accurately state Massachusetts law in acknowledging that "under certain circumstances 'statements of opinion [or] belief . . . may be actionable' where the speaker knows such statement is false when it is made . . . ." *Id.* (alteration and first ellipses in original; citation omitted). *See Briggs v. Carol Cars, Inc.*, 407 Mass. 391, 396 (1990) ("A statement that, in form, is one of opinion, in some circumstances may

Monica Smith of Marketsmith drafted the March letters with Walsh's input, and TSI sent out the March letters under Walsh's name and with Walsh's approval. The challenged portions of the March 26th and March 31st letters, respectively, state:

> Rest assured, once we're up and functionally running our clubs we will handle all of your concerns, including credits to your memberships, and personal training sessions.
>
> I want to reassure you that, as previously promised, we will issue credits to your accounts and address all membership-related concerns once our gyms are operating.

Conspicuously absent from the March letters is any mention of the April Billing. Instead, the March letters clearly informed members that, once the clubs reopened, members would receive credits to their accounts.

When clubs reopened in July 2020, however, members did not receive credits. In fact, the reopening plan dealt with credits on a member-by-member basis, issuing credits only to those members who complained. Moreover, the clubs that did reopen offered scaled-down services, partly because of pandemic-related governmental guidelines, and partly because the clubs were

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reasonably be interpreted by the recipient to imply that the maker of the statement knows facts that justify the opinion."). The Commonwealth has not alleged fraud against Walsh, nor are Walsh's statements about credits in the March letters opinions. Even if they were opinions, however, Walsh sent the March letters in his name, identifying himself as CEO, thereby enabling recipients reasonably to infer that he knew facts to justify the opinion.

Further contrary to Walsh's argument, "Massachusetts law clearly states that statements of present intention as to future conduct may be the basis for a fraud action if . . . the statements misrepresent the actual intention of the speaker and were relied upon by the recipient to his damage." *McEvoy Travel Bureau, Inc. v. Norton Co.*, 408 Mass. 704, 709 (1990). While, again, the Commonwealth has not alleged a claim of fraud against Walsh, the facts in this case satisfy these requirements. *Compare Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc.*, 68 Mass. App. Ct. 582, 605 (2006) ("[T]he finding of intentional misrepresentation (or common law fraud or deceit) . . . is sufficient foundation for a finding of a c. 93A violation in a business context."), *with Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 703 (1975) (noting that among distinctions between deceptive act under G.L. c. 93A and common law action for fraud and deceit are that "in the statutory action proof of actual reliance by the plaintiff on a representation is not required, . . . and it is not necessary to establish that the defendant knew that the representation was false"). Specifically, Walsh's claimed intention was to issue credits after all of the employees had been hired back and all of the clubs were open. He could not have accomplished that magnitude of hiring by opening day. Therefore, even though clubs opened to the public in July 2020, albeit to a modified extent, the clubs were not "open" in Walsh's opinion until September. Further, as noted above, Walsh made his decisions against the backdrop of TSI's financial distress, supporting the inference that his motivation was to retain as many members as possible.

not adequately staffed until September. Once TSI issued credits in October or November 2020, only active members received them; members who had canceled their memberships were not eligible to receive credits and were never compensated for the period of time in March and April when the clubs were closed.

"Whether conduct is deceptive is . . . a question of fact, to be answered on an objective basis . . . . A successful G.L. c. 93A action based on deceptive acts or practices 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 v. Philip Morris Cos., Inc.*, 442 Mass. 381, 394 (2004) (citations omitted). To determine whether an act or practice is deceptive, courts must consider "'the effect which [the act or practice] might reasonably be expected to have upon the general public.'" *Id.* (alteration in original; citations and internal quotation marks omitted). Conduct is deceptive "'if it could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted'" or "if it possesses 'a tendency to deceive.'" *Id.* (alteration in original; citations and internal quotation marks omitted). *See, e.g., Hogan v. Riemer*, 35 Mass. App. Ct. 360, 365 (1993) ("Statements of expectation, such as, 'We'll work with you,' do not support an action for common law fraud[,]" but they may "be unfair or deceptive, within the meaning of G.L. c. 93A, § 2, if [the statements] may reasonably be found to have caused a person to act differently than she otherwise might have.").

The March letters explicitly informed TSI members that they would receive credits when the clubs reopened. These assurances of credits had a tendency to deceive TSI members into believing that TSI would compensate them for the period that the clubs were closed. *See, e.g., Aspinall*, 442 Mass. at 395 ("The criticized advertising 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."). Further, it would be a reasonable reaction for members, who otherwise would have attempted to cancel, to have maintained their memberships based on the expectation of receiving credits for the period of closure. *See Aspinall*, 442 Mass. at 394; *Hogan*, 35 Mass. App. Ct. at 365.

Accordingly, the March letters were deceptive acts, and the Commonwealth is entitled to judgment on its claim that Walsh violated G.L. c. 93A by making deceptive statements to TSI members.

C. Health Club Act (Count I)

The Commonwealth alleges that Walsh violated the Health Club Act ("HCA") by thwarting members' ability to cancel their memberships, failing to honor members' cancellation requests, and wrongly enforcing the 30-to-45-day cancellation period. The Commonwealth is entitled to judgment on this count as well.

"Every contract for health club services shall . . . . provide that the buyer may cancel . . . if the health club services or facilities are not available to the buyer because the seller . . . substantially changes the operation of the health club or location." G.L. c. 93, § 82. The closure of the Boston Sports Clubs on March 17, 2020, was a "substantial change" to the clubs' operation under the HCA as the clubs' services and facilities were not available to club members, i.e., the buyers.[36] *Cf. Committee for Pub. Counsel Servs.*, 484 Mass. at 435 ("conclud[ing] that the risks inherent in the COVID-19 pandemic constitute a changed circumstance within the meaning of G.L. c. 276, § 58, tenth par., and the provisions of G.L. c. 276, § 57"). Walsh is

[36] In its press release, the AGO also characterized "[t]he indefinite closure of all BSC clubs as a result of the COVID-19 epidemic . . . as a substantial change . . . ."

correct that Governor Baker's March 2020 orders prohibiting fitness clubs from operating precipitated the closures, but merely because the clubs could not legally open does not change the fact that TSI closed the clubs, resulting in a substantial change to operations.[37]

This substantial change to the clubs' operations triggered members' statutory right to cancel their membership. *See* G.L. c. 93, § 82. Once the members canceled, "[a]ll monies" they paid under their canceled contracts were required to be "refunded to the buyer or his estate within fifteen days of the seller's receipt of such notice of cancellation; provided, however, that the seller may retain the portion of the total contract price representing the amount of time that the services or facilities were used by the buyer prior to cancellation . . . ." *Id.* Walsh did not comply with these requirements. Instead, he participated in the decisions not only to bill members for April 2020 and to enforce the 30-to-45-day cancellation period set forth in members' contracts, but also to lay off the majority of TSI employees. As a consequence of this latter decision, members were actually incapable of canceling. Even those members who attempted to follow the old procedures or who followed the new procedures that TSI implemented in April 2020, such as Kimberly Frawley, Lori Doughty, and Pamela Kerensky, were unsuccessful in canceling their memberships. By billing for April 2020, enforcing the contractual cancellation process, and laying off the majority of TSI workers which effectively prevented members from canceling, Walsh violated G.L. c. 93, § 82.

"[V]iolat[ing] or fail[ing] to comply with" G.L. c. 93, § 82, is "an unfair or deceptive trade practice in violation of" G.L. c. 93A. G.L. c. 93, § 84(8). Thus, Walsh's conduct in

[37] Even if the court accepted Walsh's argument that the "seller" did not close the clubs in March 2020, but rather Governor Baker's March 2020 orders prohibiting fitness clubs from operating caused the closures, the analysis does not end there. Walsh decided to lay off the majority of TSI employees. This imprudent decision effected a substantial change to the operation of the clubs because, notwithstanding Governor Baker's orders, the clubs were unable to open and, importantly, were unable to process the members' cancellation requests.

violation of G.L. c. 93, § 82, is also a violation of G.L. c. 93A.[38]

III. **Damages**

"If the court finds that a person has employed any method, act or practice which he knew or should have known to be in violation of said section two, the court may require such person to pay to the commonwealth a civil penalty of not more than five thousand dollars for each such violation" and may also "make such other orders or judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of such unlawful method, act or practice any moneys or property, real or personal, which may have been acquired by means of such method, act, or practice." *Id.*

Relying on Michael Petron's analysis of TSI member charges, the Commonwealth seeks restitution in the amount of $3,850,048 for members' "ascertainable loss[es] by reason" of Walsh's April Billing, deceptive communications, and violations of G.L. c. 93, § 82;[39] civil penalties in the amount of $8.5 million for the April Billing of 83,682 TSI members and for the deceptive communications sent out to 100,000 TSI members; and disgorgement of the $1.5 million Walsh received pursuant to his September 2020 retention agreement with TSI. Walsh, in turn, relies on Dr. Charles Cowan's purported explanation of the deficiencies in Petron's analysis and argues that there is no basis for civil penalties.

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[38] Walsh's argument that he is not a "seller" under the HCA fails. A "seller" is "any person, firm, corporation, partnership, unincorporated association, franchise, franchisor, or other business enterprise which operates a health club or which offers or enters into contracts for health club services." G.L. c. 93, § 78. As CEO of TSI, Walsh had decision-making authority over TSI, a company that operated health clubs in Massachusetts. Walsh was therefore a "seller" under the HCA. Regardless, the court agrees with the Commonwealth that, even if Walsh is not a "seller" under the HCA, he personally participated in and is personally liable for TSI's actions that violated G.L. c. 93A, including those actions that violated G.L. c. 93, § 82.

[39] The HCA also provides for restitution: "All monies paid by the buyer pursuant to a contract for health club services which has been cancelled for one of the reasons contained in this section shall be refunded to the buyer or his estate within fifteen days of the seller's receipt of such notice of cancellation; provided, however, that the seller may retain the portion of the total contract price representing the amount of time that the services or facilities were used by the buyer prior to cancellation . . . ." G.L. c. 93, § 82.

The court first considers the parties' experts, then sets out the award of damages.

A. Admissibility of Survey Evidence

As an initial matter, the court addresses Dr. Cowan's survey which the Commonwealth sought to exclude in a motion in limine (Docket #143). Dr. Cowan conducted a survey of 5000 TSI members to determine whether consumers believed alleged misleading statements in the Commonwealth's complaint were true. The court permitted Dr. Cowan to testify at trial for purposes of deciding the admissibility of his survey. For the following reasons, Dr. Cowan's survey is not admissible.

1. *Relevance*

"'Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action.'" *Laramie v. Philip Morris USA Inc.*, 488 Mass. 399, 412 (2021) (quoting Mass. G. Evid. § 401 (2021)). "'To be relevant, [e]vidence need not establish directly the proposition sought; it must only provide a link in the chain of proof.'" *Id.* at 412-13 (alteration in original; citations and internal quotation marks omitted). "Relevant evidence is admissible unless" the United States Constitution, the Massachusetts Constitution, a statute, or other provisions of the Massachusetts common law of evidence provide otherwise. Mass. G. Evid. § 402(a)-(d). "'A judge has broad discretion to make evidentiary rulings,' . . . and 'substantial discretion' to determine whether evidence is relevant . . . ." *Laramie*, 488 Mass. at 413 (citations omitted). The court concludes that neither the questions nor the responses in Dr. Cowan's survey are relevant to this case.

First, the survey asked the responders what they thought about certain allegations in 2023, not what they thought in 2020. These responses are therefore not "'a link in the chain of proof'" demonstrating that Walsh's statements were misleading when he made them. *See*

Laramie, 488 Mass. at 413. Second, responders' beliefs about whether they received credits or refunds (Survey question to test Allegation 3) or when they "would have expected to receive credits or refunds" (Survey question to test Allegation 4) are not "of consequence in determining the action" because the actual data concerning credits and refunds is in evidence (Ex. 13).[40] *See Laramie*, 488 Mass. at 412.

Dr. Cowan's survey is, therefore, not admissible. *See Laramie*, 488 Mass. at 412-13; Mass. G. Evid. §§ 401, 402.

2. *Hearsay*

Relying on *Laramie*, 488 Mass. at 414, 416, the Commonwealth argues that the survey results contain inadmissible hearsay. In *Laramie*, the Supreme Judicial Court held that the trial court erred in "allowing the plaintiff's expert to read and display to the jury excerpts from two Federal Trade Commission . . . reports summarizing the results of a number of surveys on the effect of warning labels on cigarette packaging and advertising" where "the statements in the reports constitute hearsay within hearsay because the statements came not from the [Federal Trade Commission] itself but rather from third-party responses to consumer surveys". The Commonwealth argues that Dr. Cowin's survey report should be similarly excluded.

Dr. Cowan's survey report includes the responses of TSI members to certain allegations the Commonwealth made in its complaint, and his analysis of those responses. Walsh contends that those responses show that consumers were not deceived.

Walsh argues that the responses are not offered for the truth of the responders' assertions, but to demonstrate the responders' states of mind. The court disagrees. It is the truth of the

[42] Compounding this lack of helpfulness, Dr. Cowan equated credits and refunds in both of these survey questions, two different things with two different implications.

responses to the survey questions that is relevant to the fact sought to be proved; that is, whether the statements were deceptive.

Walsh further argues that even if the survey report contains hearsay, the responses are what people thought in 2023, not what they thought in 2020, and are therefore, admissible as present sense impressions. Massachusetts has not yet recognize the "present sense impression" exception to hearsay. Mass. G. Evid. § 803(1). *Accord Commonwealth v. Mandeville*, 386 Mass. 393, 398 n.3 (1982) (acknowledging that "present sense impressions" exception has not "been recognized in Massachusetts law"); *Commonwealth v. Sanders*, 102 Mass. App. Ct. 1107, 2023 WL 192535 at *3 n.5 (2023) (Rule 23.0 decision) ("To the extent that the defendant's brief refers to the 'present sense impression' exception to the hearsay rule, Massachusetts does not recognize that exception."). However, even if the Court were inclined to adopt the present sense impression exception, the survey responses do not clearly fit within that exception. The questions were directed to individuals who had previously seen the same representations back in 2020. Thus, it is not clear whether they were giving their present or past impressions of those statements. "Statements of memory or belief to prove the fact remembered or believed" are not admissible. Mass. G. Evid. § 803(3)(B)(ii). *See Commonwealth v. Pope*, 397 Mass. 275, 281 (1986) (holding that state of mind "exception applies only to the declarant's present intent to act, not to past conduct").

3. *Response Rate*

Of the 5000 TSI members that Dr. Cowan attempted to contact to complete the survey, only 473 members, or under 10% of those contacted, responded. Dr. Cowan did not analyze the reasons for this high nonresponse rate in order to determine whether there was a nonresponse bias. This omission, the Commonwealth argues, renders the survey unreliable under *Daubert v.*

Merrell Dow Pharms., Inc., 509 U.S. 579, 592-95 (1993), and *Commonwealth v. Lanigan*, 419 Mass. 15, 25-26 (1994). *See Commonwealth v. Hinds*, 487 Mass. 212, 220 (2021) (explaining that, "[u]nder the *Daubert-Lanigan* standard, 'the touchstone of admissibility is reliability'" and "[t]o this end, the proponent of the expert testimony must establish, among other factors, that the testimony is 'based on facts or data of a type reasonably relied on by experts to form opinions in the relevant field,' that the testimony is based on a reliable methodology, and that the methodology 'is applied to the particular facts of the case in a reliable manner'" (citations omitted)); *Canavan's Case*, 432 Mass. 302, 313 (2000) ("The gatekeeping function . . . is the same regardless of the nature of the methodology used: to determine whether 'the process or theory underlying a scientific expert's opinion lacks reliability [such] that [the] opinion should not reach the trier of fact.'" (alterations in original; citation omitted)).

Nonresponsiveness in a survey may "raise questions about the representativeness of the sample . . . ." *Albert v. Zabin*, 74 Mass. App. Ct. 1124, 2009 WL 2013821 at *4 (2009) (Rule 1:28 decision). If such questions are raised, the issue becomes "whether any evidence has been presented to demonstrate that nonresponse did not bias the results of the study." *Id.* As for "'tolerable levels of non-response in a probability sample[,]'" the Appeals Court in an unpublished opinion relied on a reference manual, Seidman Diamond, Federal Judicial Center, Reference Guide on Survey Research, in Reference Manual on Scientific Evidence 229 (2d ed. 2000) ("Diamond"), which provided:

> response rates of 90% or more are reliable and generally can be treated as random samples of the overall population. Response rates between 75% and 90% usually yield reliable results, but the researcher should conduct some check on the representativeness of the sample. Potential bias should receive greater scrutiny when the response rate drops below 75%. If the response rate drops below 50%, the survey should be regarded with significant caution as a basis for precise quantitative statements about the population from which the sample was drawn.

Albert, 2009 WL 2013821 at *4 (quoting Diamond, at 245). This court accepts these response rate levels as well for purposes of determining the reliability of Dr. Cowan's survey. *See id.*

Here, the response rate was under 10%, well below the 50% response rate that Diamond suggests should trigger "'significant caution'" – though not necessarily exclusion – when considering the survey's results. *See id.* at *4-5. Unlike in *Albert* where the court held the survey's exclusion was improper, Dr. Cowan did not "present[] uncontested data that the nonresponder population did not significantly differ from the responder population and that no significant bias was found among the nonresponders . . . ." *Id.* at *5.

In the absence of such data, and given the conclusions above, that the survey evidence is irrelevant and contains inadmissible hearsay, the court excludes Dr. Cowan's survey on this basis as well.

B. The Two Experts

Walsh contends that Dr. Cowan's analysis established that Petron overstated the potential damages of TSI members by undercounting credits, not accounting for past-due amounts, and ignoring members' contracts. The court disagrees.

Petron did a very thorough and logical analysis. This court credits his assessment and accepts his damages valuation. Petron's calculations are persuasive because his nine separate analyses included only recurring transactions; he considered the cancellation date to be the date on which the member requested cancellation; and, significantly, he conducted a member-by-member analysis to deduct refunds and "utilized credits." The court considers Petron's calculations in more detail, below.

The court rejects Dr. Cowan's independent analysis. The first and most significant reason is that, unlike Petron, Dr. Cowan failed to conduct a member-by-member analysis,

rendering his conclusions unpersuasive. For example, he subtracted the total amount due to all members ($7,653,520, by his calculations) from the total amount owed by all members ($8,634,548, by his calculations), and concluded that *TSI* was owed $981,027, an irrelevant – and, likely, inaccurate – calculation that did not take into consideration, for example, members whose negative net charges offset other members' positive net charges. Dr. Cowan also failed to conduct a member-by-member analysis when he gave value to the Plankk app[41] and Elite membership upgrade and included these benefits as an offset for all members, regardless of whether they took advantage of them.

Second, also unlike Petron, Dr. Cowan factored in cancellation periods despite the fact that members could not take advantage of the cancellation periods because the clubs were closed when they canceled. Third, Dr. Cowan confused credits and refunds by failing to treat credits as an amount that members could only apply to future months, instead considering them as offsetting amounts due. Finally, Dr. Cowan did not consider that credits were worthless to members who had canceled.

The court next considers the Commonwealth's damages requests in the context of Petron's analysis.

[41] With respect to the Plankk app, Dr. Cowan calculated its value as $14.99 per month for the period the clubs were closed. This amount is consistent with the price an individual would have paid to sign-up for Plankk in 2019. The court accepts that the price is accurate for purposes of Dr. Cowan's calculation as Exhibit 194, a published article from 2019 that was admitted into evidence without objection, indicates that the price of the Plankk app in 2019 was $14.99. Additionally, the court heard the foundation and testimony as to Dr. Cowan's experience in valuing products by conducting a comparable analysis. He testified specifically about the comparable analysis he did of similar products to determine the reasonableness of the $14.99 monthly price for the Plankk app. He determined it was reasonable as it was both the median and the mean value for similar products available in the marketplace. The average of the comparable online fitness services was approximately $17.00 per month. He testified that he thought the numbers he used were from 2020 and possibly 2021. He wrote his report in 2023. The evidence did not establish a timeframe for the comparable. Ultimately, these calculations are irrelevant because, as noted above, Dr. Cowan improperly applied this benefit to all members.

C. Restitution

As noted, G.L. c. 93A, § 4, permits the court "to restore to any person who has suffered any *ascertainable loss* by reason of the use or employment of such unlawful method, act or practice any moneys or property, real or personal, which may have been acquired by means of such method, act, or practice." (Emphasis added). *See Commonwealth v. Mega Life & Health Ins. Co.*, 2023 WL 8541129 at *2 (Suffolk Super. Ct. Nov. 8, 2023) (Kazanjian, J.) (holding that loss is ascertainable "'even though the precise amount of the loss is unknown'" where plaintiff suffers "'definite, certain and measurable loss'" that is not "'merely theoretical'" (citations omitted)); Webster's College Dictionary 79 (1991) (defining "ascertain" as "to find out definitely; learn with certainty or assurance"); The American Heritage Dictionary 132 (2d ed. 1982) (defining "ascertain" as "[t]o make certain and definite"). *Cf. In re Equifax, Inc., Customer Data Sec. Breach Litig.*, 371 F. Supp. 3d 1150, 1160 (N.D. Ga. 2019) (holding that injuries were "ascertainable" and "not speculative . . . [or] threatened future injuries" where "the banks . . . pleaded" "actual, current, monetary damages" "in the form of costs to investigate fraudulent charges, costs to cancel and reissue cards compromised in the data breach, and costs to refund fraudulent charges").

The Commonwealth seeks $3,850,048 in restitution for the TSI members' ascertainable losses arising from the April Billing, deceptive communications, and HCA violations. *See DeCotis*, 366 Mass. at 245 (holding that "relief in the form of restitution" is available under G.L. c. 93A, § 4). Walsh argues that TSI's efforts sufficiently compensated over 55,000 of 103,000 TSI members, and to the extent that the court does award restitution, it should consider offsets. To the contrary, by conducting a member-by-member analysis, Petron subtracted from his calculations those TSI members who received compensation. Further, Petron utilized TSI's raw

payment data sets and cancellation data as well as bankruptcy data that Huron, TSI's bankruptcy firm, maintained. *See, e.g., Federal Trade Comm'n v. Direct Marketing Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010) (holding that "consumer loss, as represented by the Defendants' gross receipts, would appear to be an appropriate measure of damages"). The losses that Petron calculated are therefore ascertainable losses that TSI members suffered.

First, Petron determined that the payments that 103,230 members made while the clubs were closed was $7,196,893, an amount that does not include declines, chargebacks, or payments allocated to March 1st through 16th (Analysis One). Second, he separately determined that 14,852 members incurred $747,497 in charges after they requested cancellation, without factoring in the 30-45 day cancellation period (Analysis Two); that 8,392 members incurred $92,782 in cancellation fees (Analysis Four); and that 4,117 members incurred $251,272 in charges after they were involuntarily transferred to another club (Analysis Three).[42] The transactions in each set of calculations did not overlap. The total of these losses is $8,296,444.

Next, Petron considered refunds and credits: 11,502 members received $904,983 in refunds (Analysis Five); and 69,058 members utilized credits totaling $6,007,536 (Analysis Six). Petron then deducted these calculations from the total losses by conducting a member-by-member analysis that excluded members with negative net charges (i.e., members who were compensated) so as not to offset the other members' positive net charges (i.e., members who were not compensated). Based on his calculations, Petron determined that 47,658 members had net charges of $3,850,048; alternatively, Petron excluded March 2020 charges and determined that 37,836 members had net charges of $2,337,264 (Analysis Seven).

[42] On this point too, the court disagrees with Dr. Cowan's analysis. He did not characterize involuntary transfers as a loss to members because he considered such transfers to be a practice in the industry.

Based on these calculations, the court awards the Commonwealth $3,850,048 in restitution as ascertainable losses suffered "by reason of" Walsh's unfair and deceptive acts or practices. *See* G.L. c. 93A, § 4; *DeCotis*, 366 Mass. at 245-46 ("see[ing] no logical reason for a distinction in an action brought by the Attorney General under § 4" and "a class action brought by a consumer under G.L. c. 93A, § 9," and holding that relief under G.L. c. 93A, § 4, extends to "all wronged persons"); *Commonwealth v. Chatham Dev. Co.*, 49 Mass. App. Ct. 525, 528-29 (2000) ("[T]he Attorney General has the power to bring suit not only on behalf of those persons specifically injured but also on behalf of those similarly situated." (citing *DeCotis*, 366 Mass. at 245-46)). While April Billing does not implicate charges incurred in March 2020, the deceptive communications occurred in March, and some members attempted to cancel their memberships in March, therefore the court does not award Petron's alternative calculation of $2,337,264.

D. Civil Penalties

General Laws c. 93, § 4, also permits the court to "require" a person who "has employed any method, act or practice which he knew or should have known to be in violation of said section two . . . to pay to the commonwealth a civil penalty of not more than five thousand dollars for each such violation . . . ." The Commonwealth asks the court to impose civil penalties on Walsh in the amount of $8.5 million for the April Billing and for the deceptive communications, arguing that this number approximately represents a penalty of $100 for each of the 83,682 members who were billed for April 2020, or, alternatively, $30 for each of the 100,000 TSI members who the Commonwealth alleges received the deceptive communications. Walsh counters that a civil penalty is inappropriate here because he acted in good faith.

To impose a civil penalty, the court must first find that the defendant knew or should have known that his acts or practices were unfair or deceptive. *See* G.L. c. 93A, § 4;

Commonwealth v. Source One Assocs., Inc., 436 Mass. 118, 130 (2002) (holding that Commonwealth has to have "establish[ed] that the defendants intended to commit the acts and knew that such acts were deceptive"). Walsh was involved in the firing of almost all of TSI's employees, and thus, knew – or at the very least should have known – that TSI's clubs could neither open in April regardless of any governmental orders, nor issue credits immediately upon opening without those employees to staff the clubs and process the credits.

Next, "a judge possesses discretion to determine the amount of the penalty." *Commonwealth v. Fall River Motor Sales, Inc.*, 409 Mass. 302, 310 (1991). In exercising that discretion, the court may consider factors that include: (1) the defendant's good or bad faith; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived from the violations; and (5) the necessity of vindicating the authority of the Commonwealth. *Id.* at 311. The court applies those factors here. *See Commonwealth v. AmCan Enters., Inc.*, 47 Mass. App. Ct. 330, 338 (1999) (holding that while "the *Fall River* case involved a party who violated a consent decree, essentially the same factors apply when a consent decree or other court order is not involved").

As to Walsh's bad faith, the court is mindful that Walsh's actions took place during a period of worldwide uncertainty, and that Walsh was balancing a variety of interests, particularly in light of TSI's financial problems.

As to his ability to pay, the evidence at trial showed that Walsh earned a lucrative annual salary of $690,000 plus stock awards during his almost four years as TSI's CEO, and he received a retention payment of $1.5 million in September 2020. Walsh therefore has some ability to pay a civil penalty, although there is no evidence that he could pay the $8.5 million that the Commonwealth seeks. *See Fall River Motor Sales, Inc.*, 409 Mass. at 311.

While Walsh's conduct did not reach the general public, it did affect all of TSI's members. The benefits that TSI and Walsh derived from Walsh's violations were significant, as they included the $7,196,893 from the April Billing and the continued membership of those individuals who opted not to cancel so that they could receive the credits of which the deceptive communications assured them. *See id.*

Finally, the court is not persuaded that a civil penalty is necessary to vindicate the Commonwealth's authority in this case. The court takes into consideration that Walsh himself was not the only bad actor: the Commonwealth also brought this action against TSI LLC, which filed for bankruptcy protection in September 2020; TSI Holdings, which was defaulted in January 2022; New TSI Holdings Inc., which entered into a final judgment agreement with the AGO pursuant to which, in pertinent part, it paid $200,000, half of which was a civil penalty; V Fitness Group LLC and One Fitness Group LLC, which entered into a final judgment agreement with the AGO pursuant to which, in pertinent part, they paid civil penalties in the amounts of $81,250 and $43,750, respectively; and Michael Poirier, who entered into a final agreement with the AGO pursuant to which, in pertinent part, he paid a civil penalty of $5,000.

Based on the factors discussed above, and in light of the significant restitution award, the court declines to award a civil penalty. *Compare Commonwealth v. Crowther*, 93 Mass. App. Ct. 1120, 2018 WL 3520805 at *5 (2018) (Rule 1:28 decision) (holding lower court judge did not "abuse[] her discretion in refusing to impose the added punishment of civil fines and attorney's fees" where "[t]he evidence showed that (1) [defendant] committed these acts at a time when agency fee practices were unregulated; (2) he was not fully aware that his practices were improper; and (3) the victims were sophisticated business clients who chose not to ask [defendant] questions about his compensation before purchasing their insurance"), *with AmCan*

Enters., Inc., 47 Mass. App. Ct. at 339-40 (accepting lower court judge's rationale in awarding civil penalty "'[i]n order to punish the defendants and to deter them as well as others from engaging in similar schemes in the future to bilk Massachusetts consumers, . . . particularly where the defendants have not been required to pay any significant restitution'").

E. Disgorgement

On September 8, 2020, Walsh signed a retention agreement with TSI pursuant to which he received a $1.5 million payment. The Commonwealth seeks an order of disgorgement in that amount, arguing that it represents "ill-gotten" profits from Walsh's unfair and deceptive conduct. *See* Commonwealth's Proposals, at 52. Walsh contends that his retention agreement is unrelated to the Commonwealth's case and that the Commonwealth failed to show any connection between this award and any loss to TSI members.

The court declines to order a separate award of disgorgement. The court agrees that the optics of TSI's payment of the $1.5 million bonus to Walsh in the midst of a global pandemic and TSI's own financial crisis is not ideal. There is no evidence, however, suggesting that Walsh's unfair and deceptive conduct resulted in that payment or that he was somehow involved in the decision for TSI to make this payment to him. This request is therefore denied.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that:

1. Judgment shall enter for Plaintiff Commonwealth and against Defendant Patrick Walsh on Counts I, II, and III of the complaint.

2. The Commonwealth shall be awarded restitution damages in the amount of $3,850,048.

Hélène Kazanjian
Justice of the Superior Court

DATE: September 9, 2025