

A. RICHARD SCHUSTER, and
ROBERT RANSON,
*individually and on behalf of all others
similarly situated,*
Plaintiffs,

v.

WYNN RESORTS HOLDINGS, LLC,
WYNN MA, LLC, and
WYNN RESORTS, LTD.,
Defendants.

C.A. No. 1:19-cv-11679-ADB

BURROUGHS, D.J.

Plaintiff A. Richard Schuster (“Plaintiff”) filed this putative class action challenging practices at the Encore Boston Harbor casino (“Encore”). [ECF No. 13 (“Am. Compl.”)]. Plaintiff brings a host of state-law claims, including breach of contract (Count I), unjust enrichment (Count II), promissory estoppel (Count III), conversion/theft (Count IV), and unfair and deceptive business practices under Massachusetts General Laws Chapter 93A (Count V). [Id. ¶¶ 62–97]. In particular, Plaintiff challenges Encore’s practices relating to Blackjack payouts and slot machine winnings at the casino’s redemption machines. [Id. ¶¶ 2, 4]. The parties have jointly moved to certify a question to the Massachusetts Supreme Judicial Court (“SJC”). [ECF No. 62]. For the reasons set forth below, the motion is GRANTED.

On July 15, 2019, Plaintiff filed an action in Middlesex County Superior Court alleging breach of contract, unjust enrichment, promissory estoppel, and conversion/theft based on

gaming practices at the Encore casino, which is run by defendants Wynn MA, LLC, Wynn Resorts, Ltd. and Wynn Resorts Holdings, LLC (collectively “Wynn”). [ECF No. 1-2 (“Complaint” or “Compl.”)]. That same day, Plaintiff served Wynn with a formal demand letter pursuant to Massachusetts General Laws Chapter 93A and a draft of an amended complaint that added a Chapter 93A claim. [ECF No. 29-1]. On August 5, 2019, Wynn removed the case pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). [ECF No. 1]. On August 28, 2019, Plaintiff amended the complaint by right and added his Chapter 93A claim. [Am. Compl.]. The Complaint and the Amended Complaint brought claims against three defendants, including Encore Boston Harbor, Wynn MA, LLC and Wynn Resorts, Ltd. The complaint has since been amended a second time to add an additional plaintiff, Robert Ranson (whose claims are not relevant here), as well as to substitute Wynn Resorts Holdings, LLC for nominal defendant Encore Boston Harbor.

On September 11, 2019, Wynn filed a motion to dismiss. [ECF No. 16]. On July 1, 2020, when the motion was under advisement, Wynn filed a notice of supplemental authority, [ECF No. 30], alerting the Court to a decision by the Hampden County Superior Court regarding blackjack practices at the MGM Springfield casino and the MGC Rules of Blackjack, [ECF No. 30-1 (DeCosmo v. MGM Springfield LLC, No. 1979CV0574 (Mass. Super. Ct. June 29, 2020))]. Plaintiff further informed the Court that the plaintiff in DeCosmo has appealed the Superior Court’s order. [ECF No. 31]. On July 9, 2020, this Court issued a decision granting in part and denying in part Wynn’s motion to dismiss. [ECF No. 33.]. Wynn’s motion to dismiss Plaintiff’s unjust enrichment claim (Count II) was granted. Wynn’s motion to dismiss all other counts of the Complaint was denied. [Id.].

The Court then held a Scheduling Conference on September 3, 2020 where the Court

discussed staying this case pending the resolution of the appeal in DeCosmo. The DeCosmo Litigation raises similar issues concerning Blackjack odds as those issues that were raised in this case. The state court in that case dismissed the case pursuant to MASS. R. CIV. P. 12(b)(6) – a decision which is now on appeal.¹ Since the Parties agree that – at least to the Blackjack odds issues – these two cases present similar questions of law, the Court will certify the question of law that arises out of the dismissed DeCosmo Litigation for consideration by the SJC.

II. FACTUAL BACKGROUND

The following facts are adopted from the Second Amended Complaint as discussed in the Memorandum and Order on Motion to Dismiss. On July 11, 2019, Plaintiff visited Encore, a casino located in Everett, Massachusetts. [Am. Compl. ¶¶ 7, 43]. While visiting the casino, Plaintiff played several table games, including Blackjack. [Id. ¶ 44]. At the Blackjack table, the dealer used eight decks of cards, dealt the cards face up, and players were not allowed to touch the cards. [Id. ¶¶ 45, 47]. The Blackjack tables did not have a display notifying players that “even money insurance” wagers were void. [Id. ¶ 46]. Further, the Blackjack tables paid out at 6:5 when a player was dealt “a blackjack,” which Plaintiff knows because he was dealt several “blackjacks” during play and received a 6:5 payout for each. [Id. ¶ 49]. Plaintiff alleges that the 6:5 payout and other aspects of the play at the Blackjack tables at Encore do not comply with the Massachusetts Gaming Commission’s (“MGC”) approved Blackjack rules. [Id. ¶¶ 20–29]. Specifically, Plaintiff claims that according to the MGC’s rules applicable at the time, a 6:5 payout on a blackjack is allowed only when the 6:5 variation of the game is offered, and that Encore does not offer this variation. [Id. ¶¶ 22–29]. In addition, Plaintiff alleges that the MGC’s

¹ A petition for Direct Appellate Review has since been granted, and the DeCosmo appeal has been transferred to the SJC. See DeCosmo v. Blue Tarp Redevelopment, LLC, No. SJC-13031.

rules applicable at the time required that the layout on Encore Blackjack tables that offer a 6:5 payout state that “even money insurance” wagers are void. [*Id.* ¶ 46].

III. DISCUSSION

The SJC “may answer questions of law certified to it by . . . a United States District Court . . . when requested by the certifying court” where the question of Massachusetts law “may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court [that] there is no controlling precedent in the decisions of [the SJC].” Mass. S.J.C. R. 1:03. Certification of questions to the highest court of a state is likewise permissible as a matter of federal judicial discretion where the question is potentially case dispositive and no controlling precedent exists. *See Nieves v. Univ. of P.R.*, 7 F.3d 270, 274 (1st Cir. 1993) (“Absent controlling state-law precedent, a federal court sitting in diversity has the discretion to certify a state-law question to the state’s highest court.”).

Here, the requirements for certification are met because the issue of whether the MGC’s regulations permit the 6:5 payout for blackjack is determinative of the blackjack related causes of action alleged, and there is no controlling SJC precedent. Given the pending appeal in *DeCosmo*, this Court believes certification is appropriate at this time.

IV. CERTIFIED QUESTION

Accordingly, the parties’ joint motion, [ECF No. 62], is GRANTED and the Court certifies the following question of law to the SJC:

Did the February 11, 2019 version of the Rules of Blackjack that were published by the Massachusetts Gaming Commission and posted on its website in accordance with 205 CODE MASS. REGS., § 147.02 permit a Massachusetts casino to pay 6:5 odds to a player who was dealt a winning Blackjack hand, while not otherwise playing by the “6 to 5 Blackjack Variation” rules that were articulated in Rule 6a of the February 11, 2019 version of the Rules of Blackjack?

The Court also welcomes any other comments that the SJC may wish to offer on any relevant aspect of Massachusetts law. The Clerk of this Court is directed to forward to the SJC, under the official seal of this Court, a copy of the certified question, this Order, and the Memorandum and Order on Motion to Dismiss. The Clerk is further directed to forward to the SJC any other portion of the record that the SJC may require. The Court retains jurisdiction over this matter pending resolution of the certified question.

SO ORDERED.

Date: January 5, 2021

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE