UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL E. KATIN and ALFRED GEOFFRION, JR., on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 07-10882-DPW
NATIONAL REAL ESTATE INFORMATION SERVICES, INC., NATIONAL REAL ESTATE INFORMATION SERVICES, ATM CORPORATION OF AMERICA, FIRST AMERICAN SIGNATURE SERVICES, INC., TRANS STATE CLOSERS, INC., LIBERTY TITLE & ESCROW CO., INC., and SERVICE LINK, INC.,	)	
Defendants.	)	

MEMORANDUM AND ORDER
March 31, 2009

Michael E. Katin and Alfred Geoffrin bring this putative class action on behalf of themselves and all others similarly situated against a collection of real estate settlement service providers. The plaintiffs and putative class members are Massachusetts-licensed attorneys who undertake conveyancing for Massachusetts real estate transactions. Plaintiffs allege that defendants have engaged in the unauthorized practice of law by engaging in conveyancing for Massachusetts banks and mortgage

lenders without a license to practice law in the state. Plaintiffs bring claims under Massachusetts law for tortious interference with business expectancies and for unfair competition under Mass. Gen. Laws ch. 93A, §§ 2, 11; they seek both damages and injunctive relief. Defendants jointly move to dismiss the claims for lack of standing and for failure to state a claim upon which relief can be granted. For the reasons discussed below, I will deny defendants' motion as to standing; I will nevertheless grant the motion to dismiss the tortious interference claim for failure to state a claim, but I will deny it as to plaintiffs' Chapter 93A claim.

I. BACKGROUND[1]

A. Parties

Both named plaintiffs are citizens of Massachusetts who are licensed to practice law in that state. They claim to be representative of a class of "all conveyancing attorneys practicing in Massachusetts, who, at any time during the four-year period prior to the filing of this lawsuit to the present were Massachusetts-licensed attorneys in good standing and who were engaged in the practice of performing conveyancing

[1] This factual discussion is drawn from plaintiffs' First Amended Complaint, which is now the operative pleading in this case.

services."[2]

Defendants are non-Massachusetts resident real estate settlement service providers conducting business in Massachusetts. National Real Estate Information Services, Inc. ("NREIS") is a Pennsylvania corporation. National Real Estate Information Services is a limited partnership organized in Pennsylvania. Residential Essentials, LLC d/b/a ATM Corporation of America and ATM Corporation of American are both Pennsylvania corporations. First American Signature Services, Inc. is a California corporation. Trans State Closers, Inc. is a Florida corporation. Liberty Title & Escrow Co., Inc. is a Rhode Island corporation. Chicago Title Insurance Company is a Delaware corporation. Although none of the defendants are licensed to practice law in Massachusetts, they hold themselves out to the public as being able to provide conveyancing services in the state.

B. Defendants' Conveyancing Services

Defendants have entered into contractual agreements with a

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[2] According to the First Amended Complaint, "conveyancing services" include: "(1) the review of the legal title to the property to ensure that the seller has good and clear and marketable title to the property; (2) the supervision of the process by which any title issues or encumbrances are resolved; (3) controlling the settlement or 'closing' of the real estate transaction to ensure that the appropriate legal documents are properly executed, the consideration for the property is exchanged, and the parties' obligations to one another are fulfilled; (4) recording the appropriate documents to protect the various interests in the property; and (5) disbursement of closing proceeds."

number of banks and mortgage lenders, agreeing to provide conveyancing services for them in Massachusetts real estate transactions. Pursuant to these agreements, defendants participate in all facets of the conveyancing process, including: review of title to real property to determine whether the seller or mortgagor has a valid title; preparation of documents required to convey legal interest in real property; disbursement of funds secured by a mortgage to the borrower, seller, and other parties; review of executed loan documents for completeness and recordability; and recordation of documents to effectuate a conveyance of a legal interest with various registries throughout Massachusetts.

Some defendants have hired non-lawyers to conduct these services. Other defendants have hired attorneys licensed to practice law in Massachusetts simply to attend Massachusetts real estate closings. These "witness only" attorneys, however, have no control or supervision over the activities that ensure the legal interest in the real estate is properly conveyed. Instead, the defendants themselves conduct the critical services, and the attorneys effectively fulfill the functions of notaries public.

Plaintiffs allege that under Massachusetts law, conveyancing services may only be performed by licensed attorneys, and that defendants' practices therefore constitute the unauthorized

practice of law.[3] Plaintiffs further allege that as a result of defendants' presence in the market for conveyancing services, Massachusetts real estate attorneys, including the plaintiffs, have lost business, revenues, and profits. Plaintiffs bring suit to recover damages for their past economic losses and to seek injunctive relief to prevent future injuries.

II. MOTION TO DISMISS STANDARD

Defendants have moved to dismiss plaintiffs' claims, under Fed. R. Civ. P. 12(b)(1), for lack of standing, and for failure to state a claim upon which relief can be granted, under Fed. R. Civ. P. 12(b)(6). Where, as here, the defendants' challenge to the plaintiffs' standing is based on the sufficiency of the pleadings, a court "must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff." *Aversa* v. *United States*, 99 F.3d 1200, 1210 (1st Cir. 1996). The applicable standard for this type of challenge to standing is the same as the standard for a motion to dismiss under Rule 12(b)(6) for failure to state a claim. *See, e.g., Chmielinski* v.

[3] Although defendants dispute plaintiffs' assertion that all conveyancing activities in Massachusetts must be performed by licensed attorneys, they have not moved for dismissal on that ground. I will therefore assume for purposes of this motion that Massachusetts law permits only licensed attorneys to engage in the conveyancing services described by plaintiffs in the First Amended Complaint.

Massachusetts, 513 F.3d 309, 314-15 (1st Cir. 2008).[4]

The Supreme Court has held that even under the liberal pleading standard of Fed. R. Civ. P. 8, to survive a motion to dismiss a complaint must allege sufficient facts to demonstrate at least "a plausible entitlement to relief." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007). In setting forth this standard, "the Court disavowed the oft-quoted language of *Conley* v. *Gibson* that 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Rodriguez-Ortiz* v. *Margo Caribe, Inc.*, 490 F.3d 92, 95 (1st Cir. 2007) (internal citation omitted). The *Twombly* Court emphasized that a complaint must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555. The Court expressly rejected the notion that "a wholly conclusory statement of claim would survive a motion to dismiss." *Id.* at 561.

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[4] Defendants' Rule 12(b)(1) motion is a "facial challenge" to standing, directed at the sufficiency of the First Amended Complaint. *See Torres-Negron* v. *J & N Records, LLC*, 504 F.3d 151, 162 (1st Cir. 2007). A challenge that questions the *accuracy* of a plaintiff's asserted jurisdictional facts, on the other hand, is a "factual challenge," which requires the court to engage in factfinding. In that type of challenge, "the plaintiff's jurisdictional averments are entitled to no presumptive weight." *Valentin* v. *Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001).

The "plausible entitlement to relief" standard does not, however, "impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the plaintiff's allegations]." *Id.* at 556. The Court in *Twombly* noted that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* (internal quotation omitted). In *Erickson* v. *Pardus*, 127 S. Ct. 2197 (2007) (per curiam), the Supreme Court reiterated that "[s]pecific facts are not necessary; the statement need only 'give the defendants fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 2200 (*quoting Twombly*, 550 U.S. at 555).

III. STANDING

A. Legal Standard

Article III of the Constitution limits the judicial power of the federal courts to "Cases" and "Controversies," thereby restricting it to "the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009). This restriction "is founded in concern about the proper - and properly limited - role of the courts in a democratic society." *Id.* (*quoting Warth* v. *Seldin*, 422 U.S. 490, 498

(1975)). In furtherance of this fundamental limitation, the doctrine of standing "requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Id.* at 1149 (internal quotations omitted) (emphasis in original).

There are three elements that comprise "the irreducible constitutional minimum of standing." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, the plaintiff must have suffered or be under threat of suffering an "injury in fact" - an invasion of a legally protected interest which is: (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Id.* Second, the injury must be "fairly traceable" to the challenged action of the defendant; in other words, there must be "causation." *Id.* Third, a favorable judicial decision must be likely to prevent or redress the injury. *Id.* at 561.

Even in cases that fall within a federal court's Article III jurisdiction, standing may be denied on "prudential" grounds. The prudential strand of standing jurisprudence "embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11-12 (2004) (internal quotation omitted). Although the Supreme Court has not exhaustively defined the limits of

prudential standing, it "encompasses the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Id.* at 12 (internal quotation omitted).[5]

Although plaintiffs seek to bring this claim as a class action, they must allege sufficient facts to show that they *personally* have standing; a party may not ground standing on injuries allegedly suffered by other, unidentified members of the putative class. *See Warth*, 422 U.S. at 502. Further, the party invoking federal jurisdiction bears the burden of establishing the requisite elements of standing for each claim and for each form of relief sought. *See Summers*, 129 S. Ct. at 1149; *see also Donahue* v. *City of Boston*, 304 F.3d 110, 116 (1st Cir. 2002). In

[5] Defendants have objected to plaintiffs' attempts in the complaint to assert the rights of "members of the public purchasing or refinancing real estate in Massachusetts." (First Am. Compl. ¶ 11.) In its prudential standing jurisprudence, the Supreme Court has consistently held "that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004) (*quoting Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)). Because plaintiffs have not grounded their standing arguments in connection with the motion to dismiss before me on the rights of third party consumers, I will not address this prudential standing concern at length in this memorandum. To the extent the complaint can be read to make such an assertion, however, I find it is not an appropriate basis for plaintiffs' standing in this case.

some circumstances, a party may have standing to claim damages for injuries resulting from past conduct but be unable to demonstrate a "real and immediate threat" of future harm in order to seek injunctive relief. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983). In other circumstances, a party may be unable to allege that the defendant's past conduct caused any concrete and particularized harm, but may nonetheless seek prospective relief to prevent future harm that is both imminent and likely. *See Donahue*, 304 F.3d at 119.

B. Plaintiffs' Constitutional Standing

Defendants contend that plaintiffs have failed to plead sufficient factual allegations to meet the Article III standing requirements for either an "injury in fact" or "causation." In particular, defendants argue that the complaint does not identify any particular clients who stopped using plaintiffs for conveyancing services in favor of the defendants. Nor does the complaint allege that any particular prospective client transactions were adversely affected by the defendants' allegedly unlawful activity. Rather, plaintiffs simply make the general assertion that "[a]s a result of [defendants'] practices, Massachusetts attorneys who properly participate in and supervise the conveyancing process, such as Plaintiffs and [putative] Class members, have been and continue to be excluded from serving as conveyancing attorneys . . . which has resulted in lost business

and, accordingly, lost revenues and profits." (First Am. Compl. ¶ 48.) Plaintiffs contend that this broadly framed allegation is sufficient to establish standing at this stage of litigation.

1. Competitor Standing

In opposing the motion to dismiss, plaintiffs rely heavily on the doctrine of "competitor standing." This doctrine developed in a series of cases where private parties alleged that *government* action either to subsidize their existing competitors or to permit additional competitors into the same market would cause them a "competitive injury." The earliest of the competitor standing decisions was *Ass'n of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), where companies that sold data processing services to businesses challenged a ruling by the Comptroller of the Currency to permit national banks to provide data processing services to customers. *Id.* at 151. The plaintiffs brought their suit against both the Comptroller and the American National Bank & Trust Company - a new competitor in the data processing services market - alleging the loss of two existing customers and the potential loss of future profits. *Id.* at 152. The Supreme Court held that the plaintiffs had adequately alleged an "injury in fact" and therefore met constitutional standing requirements.[6] The Supreme

[6] The Court also found that the plaintiffs satisfied the prudential "zone of interests" test because their commercial interests were intended to be protected by § 4 of the Bank

Court thereafter reached similar conclusions in cases involving travel agents and investment companies that challenged government regulations permitting banks to offer competing services. *See Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970); *Inv. Co. Inst.* v. *Camp*, 401 U.S. 617 (1971).

Plaintiffs argue that the competitor standing doctrine, as it developed under the Supreme Court's *Camp* jurisprudence, stands for the broad principle that "injury in the simple fact of illegal competition" is sufficient to satisfy the constitutional requirement of an "injury in fact." According to plaintiffs, they and other Massachusetts real estate attorneys have a "statutorily-protected right to provide conveyancing services in Massachusetts free from illegal competition," and the invasion of that right by defendants' unlawful presence in the market of itself constitutes a legally cognizable injury. Plaintiffs appear to suggest that they have suffered a "competitive injury" similar in nature to the type of injuries recognized in Equal Protection cases, where the Supreme Court has explained that "a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is *the inability*

Service Corporation Act. *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153-58 (1970).

to compete on an equal footing." *Texas* v. *Lesage*, 528 U.S. 19, 21 (1999) (per curiam) (emphasis added) (internal quotation omitted).[7]

The competitor standing doctrine, however, does not permit a plaintiff in a commercial context to ground standing on the purely abstract injury of "illegal competition." The First Circuit has made it clear that the focus in a competitor standing case is properly on the plaintiffs' ability to allege a likelihood of actual economic harm. In *Rental Housing Ass'n of Greater Lynn, Inc.* v. *Hills*, 548 F.2d 388 (1st Cir. 1977), the plaintiffs were a group of landlords who owned or managed approximately one-third of the existing apartments in Lynn, Massachusetts. *Id.* at 388. The First Circuit held that these plaintiffs had standing to challenge the Department of Housing and Urban Development's (HUD) decision to finance a new low-income housing project in Lynn, concluding that "the allegation of competitive injury is sufficient." *Id.* at 389. The court explained that although "specific proof" of injury would not be possible until the new project was completed, "it could hardly be thought that administrative action likely to cause harm cannot be

[7] Even in the Equal Protection context, a claim for *damages* must be grounded in a more concrete showing of actual harm. *See Donahue* v. *City of Boston*, 304 F.3d 110 (1st Cir. 2002). For a plaintiff seeking injunctive relief for an Equal Protection violation, however, the inability to compete on an equal footing is of itself sufficient to establish standing. *See id.* at 118.

challenged until it is too late." *Id.* The court concluded that standing was appropriate where there were "no insurmountable obstacles to proof of the likelihood that [plaintiffs] will lose tenants to the [HUD] project." *Id.*

In *Adams* v. *Watson*, 10 F.3d 915 (1st Cir. 1993), the First Circuit again applied the competitor standing doctrine by focusing on the likelihood of actual economic harm. The plaintiffs in *Adams* were out-of-state milk producers who challenged a Massachusetts pricing order that would subsidize in-state milk producers. *Id.* at 916-17. The First Circuit rejected the argument that to satisfy the standing requirements, the complaint must allege "specific facts which would substantiate actual injury, such as reduced out-of-state milk sales to Massachusetts dealers, or lower milk prices to out-of-state producers." *Id.* at 919 (internal quotation omitted). Recognizing that "'competitor standing' cases *necessarily* turn on *degrees of probability*," *id.* at 922 (emphasis in original), the court observed that "[s]omewhere along the spectrum of probability, between tomorrow's sunrise and unadorned speculation, lie [plaintiffs'] allegations of 'imminent' injury-in-fact based on the laws of economics." *Id.* at 923. The First Circuit held that the individual plaintiffs had sufficiently alleged a likelihood of imminent economic harm, explaining that the Massachusetts subsidies to in-state producers would almost

certainly lead to a reduction in market share for out-of-state producers, which would in turn force out-of-state producers to lower prices to compete against one another. *Id.* at 924.[8] The court further observed that even if the plaintiffs' estimates of the scale of the market effects were grossly exaggerated, "a relatively small economic loss - even an 'identifiable trifle' - is enough to confer standing, as it affords a constitutionally cognizable stake sufficient to ensure their vigorous prosecution of the litigation." *Id.* (*citing Rental Housing Ass'n*, 548 F.2d at 389).

Framed this way, it becomes clear that the competitor standing doctrine is a method of analyzing the likelihood and imminence of a particular type of actual economic injury. The doctrine is an application of the traditional principles of standing in the context of a commercial marketplace. Any plaintiff seeking injunctive relief - in any setting - must allege sufficient facts to demonstrate that under the circumstances presented, the defendant's conduct threatens

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[8] The Supreme Court has recognized similar reasoning based on economic market principles in standing analysis. *See Clinton* v. *City of New York*, 524 U.S. 417, 433 (1998) ("The Court routinely recognizes probable economic injury resulting from [governmental actions] that alter competitive conditions as sufficient to satisfy the [Article III 'injury-in-fact' requirement] . . . . It follows logically that any . . . petitioner who is likely to suffer economic injury as a result of [governmental action] that changes market conditions satisfies this part of the standing test.") (*quoting* 3 K. Davis & R. Pierce, *Administrative Law Treatise* 13-14 (3d ed. 1994)).

imminent and concrete harm. The Supreme Court this term held in *Summers* v. *Earth Island Institute*, for example, that a plaintiff's assertion of his plans to visit several unnamed National Forests in the future was insufficient to establish standing, because it was highly unlikely that his wanderings among 190 million acres of forest would bring him to a particular parcel affected by allegedly unlawful regulations. 129 S. Ct. at 1150. Similarly, in a competitor standing case, the court must make a probability assessment of the likelihood of future injury based on the facts alleged about the parties, their competitors, and the market in question. *See, e.g., DEK Energy Co.* v. *FERC*, 248 F.3d 1192, 1195-96 (D.C. Cir. 2001) (dismissing a complaint where the plaintiff failed to allege "a substantial (if unquantifiable) probability of injury" because the alleged competitive harm was based on defendant's conduct in a market over 600 miles away).

Despite the original development of the competitor standing doctrine in connection with challenges to government regulations, I find that the process of analyzing probable market effects is equally applicable as a means of evaluating the likelihood and imminence of an alleged injury in a private complaint. For example, in *Bancard Services, Inc.* v. *E*Trade Access, Inc.*, 292 F. Supp. 2d 1235 (D. Or. 2003), the court held that companies engaged in servicing and maintaining ATMs had standing to sue a

competitor company over allegedly invalid "perpetual" customer contracts. The court noted that the plaintiffs and the defendant were direct competitors within the same market and industry, and that the allegedly illegal contracts were likely to prevent the plaintiffs from effectively competing for customers. *Id.* at 1243.[9] On that basis, the court concluded: "[P]laintiffs establish an imminent competitive injury sufficient to show 'injury in fact.'" *Id.*[10]

Defendants contend that even if the competitor standing doctrine is appropriate for evaluating plaintiffs' claim for injunctive relief, it cannot similarly support plaintiffs' claim for damages from past economic harm. Defendants emphasize that "economic logic does not show that [plaintiffs] in particular lost a single client or opportunity." Because a claim for

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[9] Although the plaintiffs in *Bancard* had identified one specific lost customer, the court did not hold that to be a necessary factor in establishing standing; the court simply noted that this showed the alleged injury was "*more* than imminent." *Bancard Servs., Inc.* v. *E*Trade Access, Inc.*, 292 F. Supp. 2d 1235, 1243 (D. Or. 2003) (emphasis added).

[10] In *Ass'n of Data Processing Service Organizations, Inc.* v. *Camp*, the plaintiffs brought their action for injunctive relief not only against the Comptroller of the Currency, but also against one of the national banks offering competing data processing services. 397 U.S. at 151. The Court in *Data Processing* did not expressly address the significance (if any) of the presence of a private defendant, and subsequent cases have generally not sought to refine competitive standing analysis on that basis. *See, e.g., Conte Bros. Automotive, Inc.* v. *Quaker State-Slick 50, Inc.*, 165 F.3d 221 (3d Cir. 1998) (Alito, J.); *but see Am. Soc'y of Travel Agents, Inc.* v. *Blumenthal*, 566 F.2d 145, 151 n.5 (D.C. Cir. 1977).

damages must allege an actual injury that is concrete and particularized in order to establish standing, it would be insufficient for a plaintiff seeking damages merely to allege the *presence* of illegal competition in the same industry. On the other hand, where - as in this case - a plaintiff alleges *actual* economic injury but does not offer specific examples, the competitor standing analysis may be pertinent in determining whether the plaintiff's allegations establish a "plausible entitlement to relief" under the *Twombly* pleading standard. For example, in *Conte Bros. Automotive, Inc.* v. *Quaker State-Slick 50, Inc.*, 165 F.3d 221 (3d Cir. 1998) (Alito, J.), the plaintiffs sought money damages for harm from defendants' alleged false advertising. Although the parties did not dispute plaintiffs' constitutional standing, the court undertook its own standing analysis, and concluded that the plaintiffs' general allegations of "lost sales of motor oil products as a result of [defendants'] false advertising" had sufficiently pled "injury in fact" and "causation" for purposes of Article III. *Id.* at 225. Although the court's analysis in *Conte Bros.* was summary, it plainly relied on the likelihood of economic harm from false allegations in the marketplace to conclude that plaintiffs' very generalized allegations of loss sufficiently demonstrated injury and causation. *See also Gale* v. *Chicago Title Ins. Co.*, No. 3:06 CV 1619, 2008 WL 4000477 (D. Conn. Aug. 21, 2008).

With these considerations in mind, I turn now to plaintiffs' particular allegations in the First Amended Complaint of actual and imminent economic injury.

2. Plaintiffs' Allegations of Injury and Causation

Plaintiffs allege that defendants - by offering conveyancing services to Massachusetts customers - are in direct competition with them in the same market. According to plaintiffs: "[a]s a result of [defendants'] practices, Massachusetts attorneys who properly participate in and supervise the conveyancing process, such as Plaintiffs and [putative] Class members, have been and continue to be excluded from serving as conveyancing attorneys . . . which has resulted in lost business and, accordingly, lost revenues and profits." Plaintiffs further allege that NREIS, one of the defendants in this case, has illegally participated in over 7,000 residential real estate transactions over the three years prior to plaintiffs' filing of this lawsuit.

Although these allegations are undeniably underdeveloped in certain respects - e.g., the lack of any allegations of particular lost customers or sales - I find that they are sufficient under the *Twombly* standard to allege an "injury in fact" and "causation" adequately.[11] The pertinent market in this

[11] Defendants have not disputed the element of "redressability." I find that plaintiffs have satisfied this element because an award of monetary damages and an injunction against defendants' offering of conveyancing services would fully redress the injuries they have alleged.

case may be larger than the city-wide market in *Rental Housing Ass'n*, but it is very similar to the state-wide market for milk producers that was confronted by the First Circuit in *Adams*. Just as the First Circuit concluded with respect to the state subsidies in *Adams*, I find there is a high likelihood that the market for Massachusetts conveyancing services has been affected - and will continue to be affected - by the presence of defendants' allegedly unlawful business. I further find there is a high likelihood that these market effects have had an adverse economic impact on the plaintiffs, however small and uncertain it may be. On this basis, I conclude that plaintiffs have pled sufficient facts "to raise a reasonable expectation that discovery will reveal evidence of" their allegations of lost profits and revenue. *Twombly*, 550 U.S. at 556. The fact that the alleged injuries are predicated to some extent on the independent decisions of third parties (i.e., customers) does not undermine plaintiffs' allegation of causation. *See Adams*, 10 F.3d at 923.

I note that the issue of standing may, if necessary, be revisited at a later stage of the proceedings. The elements of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. In other words,

plaintiffs must after discovery be able to raise at least a genuine issue of fact as to *actual* economic harm they have suffered or will imminently suffer - even if it is only an "identifiable trifle."[12] At this stage of the proceedings, however, plaintiffs' general allegations of economic harm are sufficient to survive defendants' motion to dismiss on grounds of standing.[13]

IV. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendants have also moved to dismiss plaintiffs' claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. I will consider defendants' motion with respect to each of the claims in turn.

A. Tortious Interference

Plaintiffs allege that by illegally providing conveyancing services to Massachusetts residents, defendants have tortiously interfered with plaintiffs' anticipated business relationships

[12] I further note that individualized proof of such actual economic damages may raise difficulties for the plaintiffs in connection with any potential class certification.

[13] Because I find that the First Amended Complaint satisfies the constitutional requirements of standing, I need not further address plaintiffs' argument that federal standing may be grounded entirely on an alleged violation of state law - in this case, Mass. Gen. Laws ch. 93A. *See Rule* v. *Fort Dodge Animal Health, Inc.*, No. 06-10032-DPW, 2009 WL 678744, at *16 (D. Mass. March 11, 2009).

with prospective clients.[14] In a claim for tortious interference with an advantageous business relationship, a plaintiff must demonstrate: "that a business relationship from which the plaintiff might benefit existed; the defendant knew of the relationship; the defendant intentionally interfered with the relationship for an improper purpose or by improper means; and the plaintiff was damaged by that interference." *Pembroke Country Club, Inc.* v. *Regency Sav. Bank*, 62 Mass. App. Ct. 34, 38 (2004) (*citing United Truck Leasing Corp.* v. *Geltman*, 406 Mass. 811, 812-17 (1990)). Plaintiffs have cited, and I have found, no cases applying Massachusetts law that have held these elements satisfied where the alleged interference amounted to no more than general competition for prospective customers in the same marketplace.

In *Massachusetts Society of Optometrists* v. *Waddick*, 340 Mass. 581 (1960), the Supreme Judicial Court of Massachusetts confronted a claim with allegations similar to those of plaintiffs' in this case. A group of registered optometrists brought an action to enjoin the unlawful practice of optometry by competitors who were not properly registered. As an initial

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[14] According to plaintiffs, the business relationships in question were "between Plaintiffs (and Class members) on the one hand and those requiring conveyancing services in Massachusetts real estate transaction (prospective clients) on the other." Plaintiffs have not, however, alleged tortious interference with any existing or ongoing customer transactions.

matter, the court held that the statute restricting the practice of optometry to registered practitioners did not itself provide a private cause of action, because its purpose was merely "to promote public health and welfare by protecting from improper treatment persons suffering from defects of the eye," rather than to protect registered optometrists from unlawful competition. *Id.* at 584.[15] The court then turned to the plaintiffs' claim that the defendants had "interfer[ed] with their advantageous relationships with the general public . . . diminishing the reputation of registered optometrists." *Id.* at 582. Given the absence of any more specific allegations of interference with particular customer relationships, the Supreme Judicial Court held the complaint failed to state a cause of action for tortious interference. *Id.* at 586. *See also Settimo Assocs.* v. *Environ Sys., Inc.*, 14 Cal. App. 4th 842, 846 (1993) (holding that there was no claim for tortious interference with a business opportunity where a properly licensed contractor was denied a contract in favor of a superior bid from an improperly licensed competitor).

Other cases applying Massachusetts law have made it clear that where a plaintiff alleges interference only with its general

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[15] The court further observed that the statute's purpose was "similar[] to that for the statute limiting the right to practice law to members of the bar." *Mass. Soc'y of Optometrists* v. *Waddick*, 340 Mass. 581, 584 (1960).

efforts to compete for prospective customers in the market at large, it has not satisfied even the first element of a tortious interference claim - the existence of an advantageous business relationship. To establish this element, a plaintiff must allege that it had "[a] probable future business relationship anticipating a reasonable expectancy of financial benefit." *Am. Private Line Servs., Inc.* v. *Eastern Microwave, Inc.*, 980 F.2d 33, 36 (1st Cir. 1992) (*citing Powers* v. *Leno*, 24 Mass. App. Ct. 381 (1987)). In *Laser Labs, Inc.* v. *ETL Testing Laboratories, Inc.*, 29 F. Supp. 2d 21 (D. Mass. 1998), the plaintiff contended that it had established "advantageous business relationships" with customers in North Carolina simply because it had distributed advertising flyers in that state and received "numerous" inquiries about its product in response to the mailing. *Id.* at 23. Rejecting this argument, Judge O'Toole explained:

> The plaintiff's definition of "advantageous relations" for these purposes is too expansive. It appears that the plaintiff's theory is that the existence of a potential market for a company's product is sufficient to create a prospective advantageous relationship with each potential customer in that market. Massachusetts does not interpret this tort to reach so far. The plaintiff has not identified any case in which a court applying Massachusetts law has allowed a claim for intentional interference with advantageous business relations where the business relationship said to have been interfered with was as inchoate as alleged here.

Id. at 23-24.[16] *See also In re America Online Inc.*, 168 F. Supp. 2d 1359, 1382 (S.D. Fla. 2001) (dismissing a claim for tortious interference under Massachusetts law because "Massachusetts requires that the plaintiff show more than the possibility that it had potential customers in the market.").

The Massachusetts case principally relied on by plaintiffs is readily distinguishable. In *Farfard Real Estate & Development Corp.* v. *Metro-Boston Broadcasting, Inc.*, 345 F. Supp. 2d 147 (D. Mass. 2004), the plaintiff sued for specific performance of a real estate purchase, and the property's owner counterclaimed for tortious interference with advantageous business relations. *Id.* at 153. Although there was no allegation that any particular buyer had entered negotiations to purchase the property, the court denied the plaintiff's motion to dismiss the counterclaim. *Id.* at 154. The court found the property owner had sufficiently pled a claim for tortious interference because the property in question was "an attractive investment" which its owner was actively attempting to sell. *Id.* Although *Farfard* can be read to suggest a rather broad conception of an "advantageous business relationship," the alleged interference was with a single anticipated transaction involving a specific piece of real

[16] Although *Laser Labs* was decided at the summary judgment stage, its analysis is equally applicable to the present case because, even assuming all of plaintiffs' factual allegations to be true, defendants have interfered only with plaintiffs' prospective customer relationships in the general marketplace.

property. The prospective business relationship was not, therefore, nearly so broadly or vaguely defined as plaintiffs' asserted relationships in this case.[17]

Similar to the plaintiffs in both *Massachusetts Society of Optometrists* and *Laser Labs*, plaintiffs in this case have alleged interference only with their efforts to compete for customers in the general marketplace. I therefore conclude they have failed to state a claim for tortious interference with an advantageous business relationship under Massachusetts law, and I will consequently grant defendants' motion to dismiss that claim.

B. Chapter 93A Violation

In their second claim, plaintiffs allege that defendants' efforts to provide conveyancing services to Massachusetts consumers constituted "unfair methods of competition and/or unfair and deceptive acts and practices" under Mass. Gen. Laws ch. 93A §§ 2, 11. Section 11 of Chapter 93A provides a cause of action for damages or injunctive relief for parties engaged in trade or commerce who have suffered (or may suffer) a loss of money or property as a result of the defendants' wrongful

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[17] In the other case cited by plaintiffs, *Chemawa Country Golf, Inc.* v. *Wnuk*, 9 Mass. App. Ct. 506 (1980), the court described the plaintiff's claim as generally directed to "prospective contractual relations." *Id.* at 509. The specific injury alleged by the plaintiff, however, was the loss of members from its golf club. *See id.* at 510-11. Accordingly, *Chemawa Country Golf* also involved a more specific business relationship than is alleged in the instant case.

conduct. In interpreting Chapter 93A, § 11, Judge Keeton in *Cash Energy, Inc.* v. *Weiner*, 768 F. Supp. 892 (D. Mass. 1991), noted that "[t]he statutory phrase 'unfair method of competition' suggests a competitive relationship . . . [and] the statutory phrase 'unfair or deceptive act' suggests a relationship as parties to a transaction." *Id.* at 894. Because plaintiffs have alleged a competitive - and not transactional - relationship with defendants, I consider their Chapter 93A claims only as "unfair methods of competition."

The boundaries of what conduct qualifies as a Chapter 93A violation is a question of law. *See Incase Inc.* v. *Timex Corp.*, 488 F.3d 46, 56-57 (1st Cir. 2007). The Supreme Judicial Court has explained that "[t]he relief available under c. 93A is sui generis. It is . . . not subject to the traditional limitations of preexisting causes of action." *Kattar* v. *Demoulas*, 433 Mass. 1, 12 (2000) (internal quotation omitted). A cause of action for unfair competition under Chapter 93A, § 11 is based on conduct that allegedly gives rise to an "[i]njury to the marketplace . . . which by preventing consumers from making an informed decision, impairs the ability of a competitor to compete fairly." *Mass. Sch. of Law* v. *Am. Bar Ass'n*, 952 F. Supp. 884, 890-91 (D. Mass. 1997) (*quoting* Michael C. Gilleran, *The Law of Chapter 93A* § 4:9 at 111 (1989)). Unfair methods of competition include "causing confusion or misunderstanding as to the sponsorship, endorsement

or affiliation of services, or representing that goods or services have a sponsorship, approval, status, affiliation, or connections which they in fact lack." *Id.* at 891. I find plaintiffs' allegations that defendants adversely affected their competitive position in the market for conveyancing services by engaging in the unauthorized practice of law may constitute an "unfair method of competition" within the meaning of Chapter 93A.[18]

Defendants argue that plaintiffs' Chapter 93A claim must nonetheless be dismissed because plaintiffs have failed to allege sufficient facts to establish either causation of an injury (for damages) or imminent and irreparable injury (for injunctive relief).[19] For the reasons discussed in connection with defendants' arguments as to standing - *see* Section III, *supra* - I

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[18] I note that the plaintiffs whose action was dismissed in *Massachusetts Society of Optometrists*, 340 Mass. 581 (1960) - discussed in Section IV.A, *supra* - did not have recourse to filing an unfair competition claim under Mass. Gen. Laws ch. 93A, because the statute was not enacted until 1967. *See Purity Supreme, Inc.* v. *Att'y Gen.*, 380 Mass. 762, 766 (1980).

[19] I am unconvinced by plaintiffs' suggestion that the language of Chapter 93A, § 11 - which indicates that a plaintiff may seek injunctive relief where the defendant's conduct "*may* have the effect of causing . . . loss of money or property" (emphasis added) - establishes a lower threshold for the issuance of an injunction than the general standards applied in federal court or in the Massachusetts Supreme Judicial Court. Although the language of the statute is very broad, I conclude this language was not intended to eliminate the requirements for a plaintiff to demonstrate harm that is both imminent and irreparable.

find that plaintiffs have pled sufficient facts at this stage to allege past economic injury caused by defendants' actions. I also find that plaintiffs have pled sufficient facts to allege that they are subject to ongoing economic harm of a potentially indefinite nature from the adverse effect of defendants' presence in the market for conveyancing services. If plaintiffs are successful on the merits as to each of these allegations, they would be entitled under Chapter 93A to monetary damages and to prospective injunctive relief to prevent future injury. I will therefore deny defendants' motion to dismiss plaintiffs' Chapter 93A claim.

V. CONCLUSION

For the reasons set forth more fully above, I DENY defendants' motion to dismiss this action for lack of standing. I GRANT defendants' motion to dismiss plaintiffs' claim for tortious interference with business expectancies, but I DENY the motion to dismiss plaintiffs' claim under Mass. Gen. Laws ch. 93A. The Clerk will set this matter down for a status/scheduling conference at which the parties may propose an approach to resolving this case, especially considering the progress of the earlier filed case in this court styled *The Real Estate Bar Ass'n*

for Massachusetts, Inc. v. *National Real Estate Information Services*, No. 1:07-cv-10224-JLT, which appears to raise the same basic substantive questions.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE