

WRITTEN STATEMENT OF RHETTA B. SWEENEY before the UNITED STATES SENATE HEARINGS of the SUB-COMMITTEE OF GOVERNMENT OVERSIGHT, January 31, 1995, at 2 p.m.

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Mr. Chairman, distinguished members of the Sub-Committee of Government Oversight Management, may I take this opportunity first to thank you for allowing me to appear before you today to testify from my personal knowledge and experience about abuse by the Resolution Trust Corporation, (RTC) and the misapplication of the doctrine of D'Oench, Duhme against me and my family as borrowers of a failed S&L, ComFed Savings Bank. Secondly, although the focus of these hearing is D'Oench I am providing you additionally with a list of factual information which details an extensive and an apparently repetitive pattern of abuse by the RTC against me and the American people and a waste of their tax dollars; in my case, **after** the RTC took over ComFed Savings Bank and ComFed Mortgage Company for reasons of unsafe and unsound lending practices. Finally, the patent and continuing resistance and failure of the RTC to prosecute the RICO action against the individuals who ran the S&L ComFed, and are responsible for its failure, has resulted in further devastating losses to the American taxpayer to this very day.<sup>1</sup>

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<sup>1</sup> See C.A. 90-6712, ComFed Savings Bank, ComFed Mortgage Co. Inc., v. Baldini, et al., Middlesex Superior Court, Cambridge, MA. -- NB: --this case was removed by the RTC, and subsequently became C.A.10132-S, ComFed/RTC, et al. v. Baldini, et al., U. S. District Court for the District of Massachusetts. (See Appendix B)

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Pursuant to your letter of January 24, 1995, Mr. Chairman, you requested that I provide the following information: (1) the events which resulted in my filing suit against my lender, ComFed Savings Bank; (2) the history of the state court's involvement in my case and any state court judgments; (3) the status of my case at the time of the ComFed failure; (4) the RTC's application of the D'Oench, Duhme doctrine and how it affected my claim against ComFed; and (5) the current status of my case.

I will also speak with particular references to the judiciary in an effort to illustrate for you that the federal courts have shown themselves insensitive to the plight of those similarly situated like me, and are not inclined to provide any relief in this instance when there has been a clear misapplication of the D'Oench, Duhme doctrine by the RTC or FDIC.

In addition, borrowers cannot expect fair and equal treatment by an executive branch which is operating on its own agenda pursuing goals which appear at cross-purposes with the equitable interests of every man, woman, and child to be treated fairly and squarely by its government. The executive branch is not pursuing relief for the little guy. The RTC, is actually, in fact clearly, intent on destroying the little guy with an overzealous and cross-eyed purpose to implement a mandate which it does not have, and

which it **cannot** conceivably have been given by this legislative branch. When CNN World Head Line news covered our story of the abuse we were suffering at the hand of the RTC in July, 1994, the RTC's response was, "We are only doing what Congress told us to do."<sup>2</sup> When NPR<sup>3</sup> requested the RTC to explain their actions against me and my family and their failure to prosecute the bank directors and officers, the RTC declined to comment.

#### BACKGROUND

The background of my story begins in 1987 when I entered into a commercial loan agreement with ComFed Savings Bank to develop a real estate project in Hamilton, MA.

During the spring of 1987, I began preliminary work on a real estate plan with the Hamilton Planning Board seeking to sub-divide a 14 acre piece of property including our home which has been in the family for five generations.

In July of 1987 I was introduced to S&L ComFed Savings Bank as a potential real estate lender. Four loan commitment letters were issued by ComFed during July and August, 1987. The original commitments proposed a loan amount of \$600,000 or \$725,000 which

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<sup>2</sup> July 1 & 2, 1994, CNN WORLD HEADLINE NEWS - Sweeney story.

<sup>3</sup> July 5, 1994, NATIONAL PUBLIC RADIO, WBUR BOSTON FM 90.9 reporting the Sweeney story and the broad based abuse of the misapplication of the D'Oench doctrine by the RTC and FDIC.

was to refinance the four acre parcel of land, and included an 18 century home and two barns located at 776 Bay Road. On August 10, 1987 ComFed issued a third commitment letter for \$1,600,000 which would have held a first position mortgage on the four acre 776 Bay Road property and a second mortgage on the larger 10 acre piece of property which included our home. The August 10, 1987 commitment letter detailed the pay back provision, but was later omitted in the fourth commitment. On August 20, 1987 ComFed issued a fourth commitment letter for \$1,600,000 which was to refinance the mortgages for both pieces of real estate, putting ComFed in first position for the entire asset. The mortgage of \$350,000 held on 776 Bay was in danger of foreclosure because the mortgage payments were in arrears, but the mortgage on the 10 acre piece of property at 24 Meyer Lane, which included our family home, was current -- posing no threat to our home and the larger 10 acre asset.

During July and August of 1987, the S&L ComFed requested and received many of my documents, to include deeds, trusts, financial statements, mortgages, list of debts. The documents supplied to the S&L ComFed -- on their face -- clearly showed there was not an approved sub-division in place at the time.

After the bank learned of my preliminary sub-division work, they stated that they would like to be comprehensive lenders of the

entire real estate project, to include development, construction, and sales. At this point I agreed to borrow \$1,600,000 rather than the initial loan amount of \$600,000, as a means of guaranteeing the future financial support for the entire project. I did not know that our loan officer was operating on a commission basis, and had not been made aware in any way by the lender of this significant and material fact. The bigger the loan, the bigger his commission would be.

The S&L suggested that their lawyer could represent both parties at the closing. On August 27, 1987 the loan of \$1,600,000 closed. I had not seen the documents prior to the closing. Discovery in our action produced further proof that the lawyer misrepresented in letters to the Bank that real estate approvals were in place in 1987. This was an intentional false statement by the bank and their lawyer which would serve the lawyer's and banker's self-dealing purpose of over-valuing the loan.

Because ComFed Savings Bank was a federally regulated state chartered, FSLIC S&L, I believed I was dealing with a trustworthy lender, not questionable back street loan sharks.

After the closing of the August 27, 1987 loan, I hired a team of professionals to include a real estate lawyer, engineer, landscape architect, architect, land use planner, and the

development work to get sub-division approval from the Hamilton Planning Board began.

Between the period of September, 1987 and May, 1988 I, with the support of the real estate lawyer and engineer, attended every planning board meeting seeking to gain speedily the necessary development approvals. Dennis Furey, our loan officer from ComFed, was informed regularly of the progress of the development work through letters, copies of preliminary engineering plans, estimates for construction work, and all other relevant reports, orally and in writing.

Preliminary approvals for the sub-division project were in place by January of 1988 and the Flexible Sub-Division Plan was signed in February, 1988 -- subject to Special Permit approvals. When the Special Permits were in place -- with the exception of a Conservation Easement -- on May 23, 1988 construction and sales were ready to start. Suddenly on May 24, 1988, the bank officer Dennis Furey wrote a letter to me stating the S&L was "suspending lending."

Between June, 1988 to April, 1989 the bank refused to accept sales from a qualified buyer, refused to honor their commitment of construction financing, and filed foreclosure proceedings on November 30, 1988.

After months of unfair business dealings by the bank and our bank officer, Dennis Furey, surrounding the work on the real estate project, I filed a complaint for reasons of violations of state laws against ComFed Savings Bank, ComFed Mortgage Company, Inc., ComFed Advisory Company, Inc., and my loan officer, Dennis Furey, in Middlesex Superior Court, Cambridge, MA, the district in which ComFed did business. The claims against the bank were for violation of their own rules,<sup>4</sup> violation of state law,<sup>5</sup> violation of federal laws<sup>6</sup> as they applied to a state chartered institution,

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<sup>4</sup> See commitment letter of August 20, 1987, stating a FHLBB, R41C appraisal was required by the federally insured, federally regulated bank's own rules. (See Appendix C)

<sup>5</sup> See Massachusetts Consumer Protection Act, Mass.Gen.L.c.93A, the law of 93A-- Commonly referred to as the "unfair and deceptive trade practices." The statute states; "...such rules and regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45

<sup>6</sup> See, U. S. House Report of 1987, Fraud and Abuse. . .-- "The following Federal criminal statutes are usually the principal ones violated by insiders and outsiders: (i)18 U.S.C. 215; kickbacks; (ii)18 U.S.C. 656; misapplication of bank funds; (iii)18 U.S.C. 1344; financial institution fraud; scheme or arrangement to defraud a federally insured institution to take money, funds, credits, assets, securities, or other property by misrepresentation; (iv)18 U.S.C. 1001; general false statements. . .; (v)18 U.S.C. 1005; false entries in bank documents including material omissions; (vi)18 U.S.C. 1014; false statement (oral or written), . . .which would include an intentional overvaluing of real estate; (vii)18 U.S.C. 1341 and 1343; mail and wire fraud. .scheme that makes use of either the U.S. mail or electrical transmissions; (viii) 18 U.S.C. 2 and 371; the general Federal aiding and abetting statute and the general Federal conspiracy statute, often applicable when

violations of code of federal regulations,<sup>7</sup> and, perhaps most importantly, violation of the Massachusetts Consumer Protection Act for "unfair trade practices." **THE BANK LOST.**

I was awarded a \$4 million dollar judgment for "the bank's unfair and deceptive trade practices." The press reported the stunning bank loss as "Lender Ruling May Be A First In The U.S."<sup>8</sup> Lawyers from all over the country, for several successive months, ordered the state court opinion from Lawyers Weekly who sells court opinions.

After a three week trial in February and March, 1990, the jury entered a verdict finding for ComFed on its counterclaim and awarded ComFed \$2,069,580.33 on the \$1.6 million dollar note, costs, and legal fees. The jury also found for ComFed on all of my claims, with the exception of the claim of "intentional infliction of emotional distress" which was decided in my favor against ComFed and Furey, as to which the jury awarded me \$65,000. The claims of

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two or more persons are involved in the commission of an offense.  
 NB: See FIRREA amendments, 12 U.S.C.1833. (See Appendix P)

<sup>7</sup> ComFed exceeded the applicable maximum loan-to-value ratio of 75% prescribed by its Board of Directors, in violation of 12 C.F.R. Section 545.32

<sup>8</sup> See Lawyers Weekly, "Lender Ruling May Be A First In The U.S.," March 11, 1991). See also Boston Globe, "Ex-ComFed Customers Win \$4m 'Lender-Liability' Suit," February 26, 1991

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"unfair and deceptive trade practices" and for specific performance regarding pay back of the note were reserved for determination by the trial judge as state law requires the state court judge to hear and rule on the claim of "unfair and deceptive trade practices."

On January 30, 1991, after further hearings and deliberation on the "unfair and deceptive trade practices" claim, the state court judge entered final judgment for my case in Middlesex Superior Court, Cambridge, MA. The state court judge stated, "although I have considered essentially the same evidence that the jury considered, I have come to the opposite conclusion in most areas. The jury's verdicts on the other claims will stand."

The judgment against the ComFed defendants for "unfair and deceptive trade practices" was not based on "secret side agreement" but on "written documents" which -- on their face -- intended to defraud, and in fact did defraud me. The following violations of law were found by the state court judgment one year prior to the RTC raising a D'Oench, Duhme question.

Please listen to the words of the state court trial judge who found as follows:<sup>9</sup>

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<sup>9</sup> The Opinion and Order On Post-Trial and Post-Judgment Motions and Findings of Fact, Rulings of Law and Order Relative to Count II and Count VIII of Plaintiffs' Complaint, Middlesex Superior Court, Cambridge, MA, dated January 30, 1991, (Izzo, J.)

- [1.] "The conduct undertaken by the defendants in this action constitutes violations of the Federal Home Loan Bank Act, 12 U.S.C. 1421 Section 216. . ." <sup>10</sup>
- [2.] "Furey was on an incentive program to close loans. He was one of three vice-presidents who received commissions as a loan originator; this was incentive for loan originators to close loans."
- [3.] "The said actions and inactions of ComFed were unconscionable and oppressive and breached the bounds of substantive fairness in that ComFed:  
 . . . .  
 c. Had the Sweeneys execute a Construction Loan Agreement without the benefit of independent counsel, which Construction Loan Agreement contained provisions which by their nature would tend to deceive the Sweeneys into believing that their anticipated construction financing would be forth coming. The statement by Furey during his testimony suggesting that the use of this document was in error or mere happenstance occasioned by the time constraints of the closing is not credible."
- [4.] "ComFed promised to provide partial releases in exchange for payments of 80 percent of the value or sales price of any home or lot sold within the subdivisions once approved. This promise was contained in ComFed's initial commitment letter but removed in the subsequent letter. . ."
- [5.] "After bringing of this instant action, the defendant ComFed refused to give the plaintiffs a partial release on the sale of one parcel with the house thereon on Meyer Lane, when an offer was received for \$775,000. I find that ComFed's

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(See Appendix A, pp. 40, paragraph 9).  
 (See Appendix D, Trial Exhibit 80).

refusal to do so was unfair and deceptive trade practices."

[6.] "ComFed's behavior in its dealings and practices with the plaintiffs from the inception of these dealings was to doom the plaintiffs to become financially bereft and to lose their property."<sup>11</sup>

Motivated by greed, the loan officer Furey admitted that he was being paid commissions on the loans he closed in violation of 18 U.S.C. 215.<sup>12</sup>

Motivated by greed, the bank and its loan officers, made intentionally false statements in an effort to close the loan of \$1,600,000 in violation of 18 U.S.C. 1001.<sup>13</sup>

Motivated by greed, the bank and their lawyers intentionally omitted the partial agreement clause which detailed the business

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<sup>11</sup> (See Appendix A, Judge Izzo's Opinion, pp.32, paragraph 97).

<sup>12</sup> 18 U.S.C. 215, kickbacks and bribes prohibition: making it unlawful for any officer, director, employee, agent, et al, (hereafter "insiders") of a financial institution to solicit, accept, or give anything of value in connection with an transaction or the business of the institution.

(See Appendix A, pp. 16, paragraph 42).

(See Appendix E, Trial Exhibit 9).

<sup>13</sup> 18 U.S.C. 1001; general false statements statute: knowingly and willfully falsifying or concealing a material fact or making a false statement, etc.

(See Appendix A, pp. 18 & 19, paragraph 49).

(See Appendix F, Trial Exhibit 7).

agreement for pay back of the loan, a violation of 18 U.S.C. 1005.<sup>14</sup>

Motivated by greed, the bank and their lawyers, willfully, and intentionally violated the Massachusetts "unfair and deceptive trade practice statute by obstructing the pay back of the loan for reasons of self-dealing -- clearly they wanted and intended to take the whole pie from the outset of the loan closing in 1987, a violation of the Massachusetts Consumer Protection Act;<sup>15</sup>

Motivated by greed, the bank intentionally and willfully, overvalued our property in violation of Title 12 and 18 U.S.C.1014.<sup>16</sup>

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<sup>14</sup> 18 U.S.C. 1005; false entries in bank documents including material omissions, with intent to injure or defraud the commercial bank regulatory agencies or other individuals or companies.

(See Appendix A, pp. 21, paragraph 55(b).

(See Appendix G, Trial Exhibit 114).

<sup>15</sup> See Massachusetts Consumer Protection Act, Unfair and Deceptive Trade Practices, Mass.Gen.L.c.93A.

(See Appendix A, pp. 32, paragraph 96).

(See Appendix H, Trial Exhibit 41).

<sup>16</sup> 18 U.S.C.1014; false statement (oral or written), such as a loan application, an agreement with the financial institution or another document, made knowingly for the purpose of influencing any federally insured institutions (which would include an intentional overvaluing of real estate). (See Appendix I, Trial Exhibits 58, 59, 60).

This vicious and mean-spirited course of dealing has driven me into bankruptcy.

ComFed Savings Bank was taken over on December 13, 1990 by the RTC for reasons of unsafe and unsound lending practices.

**AND NOW COMES THE RTC -- Kicking, clawing, elbowing their way to their weapon called D'Oench in an attempt to wipe out our state court judgment.**

January, 1991 began a four year ordeal and period of cover up, including fraud, obstruction of justice, and conflict of interest by the federal regulator, RTC, against me and my family, which has been worse than what we had experienced at the hands of the failed bank ComFed and continues to this day.

Since January of 1991, the RTC has disregarded its own rules, violated the Massachusetts Rules of Civil Procedure,<sup>17</sup> the Federal Rules of Civil Procedure,<sup>18</sup> the Code of Federal Regulations,<sup>19</sup> violated state law,<sup>20</sup> violated federal statutory law,<sup>21</sup> federal criminal statutory law,<sup>22</sup> and ignored every rule of common decency,

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<sup>17</sup> See Massachusetts Rule of Civil Procedure 25. (See Appendix J, K, L).

<sup>18</sup> See Federal Rules of Civil Procedure 63.

<sup>19</sup> See 12 C.F.R. Section 1606. Conflicts of Interest, Government Contracts.

fairness and justice, all under the guise of a court created federal common law doctrine known as D'OENCH, DUHME.<sup>23</sup>

The RTC, in violation of their own Conflict of Interest rules, hired the same law firm, Hanify & King, which had been counsel to ComFed and its subsidiaries, to represent the RTC as an independent legal contractor. Bear in mind, this is the same law firm that was counsel for years to the bank prior to the failure of the S&L ComFed, and whose representation included acting as defense lawyer to the defendants in my case. John Hanify and his law firm of Hanify & King defended the officers and directors whose business practices had contributed substantially to the failure of ComFed. To this day the RTC refuses to acknowledge any conflict of

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<sup>20</sup> 12 U.S.C. Section 1819 (b)(2)(D) State actions. (See Appendix M).

<sup>21</sup> See 12 U.S.C. Section 1441a(1)(1)(2)(3)- Removal

<sup>22</sup> 18 U.S.C. Section 2071. Concealment, removal, or mutilation generally (a)whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with the judicial or public officer of the United States, shall be fined not more than \$2,000 or imprisoned not more than three years, or both.

<sup>23</sup> (See, D'Oench, Duhme & Company, Inc. v. FDIC, 315 U.S. 447 (1942)).

interest, yet at the same time refuses FOIA requests for the Legal Service Agreement between the RTC and Hanify & King.

In the context of the so-called S&L clean up, the RTC and ComFed had a potential or real adversarial relationship; at a bare bone minimum, there had to have existed a conflict of interest on the face of it, and, at worse, it was collusion to defraud.

The RTC, in their rush to get out of state court and avoid our judgment, violated Massachusetts Rules of Civil Procedure by failing to substitute the proper parties when they succeeded as Conservator to the bank. The proper parties have not been substituted in our case to this day, and three federal courts ignored this material violation.

The RTC, in violation of the federal removal statute failed to remove the case to the proper court of jurisdiction, the U. S. District Court for the District of Columbia; instead they went "forum shopping" to the U. S. District Court for the District of Massachusetts.

The RTC's use of 12 U.S.C. Section 1819 (b)(2)(D) further illustrates the misapplication of D'Oench to the subsidiaries of ComFed which were not federally insured institutions; rather, they were state chartered mortgage companies operating under state law.

The RTC's counsel Hanify & King, when learning of the state court judgment, removed my entire original file from state court, kept it hidden in their offices for 25 days, and never informed our counsel either of the existence of the judgment, or of the whereabouts of the case file.<sup>24</sup>

Furthermore the RTC, never received the necessary writ from the federal court allowing the removal of my files.

Incredibly, the U. S. District Court for the District of Massachusetts in an order issued on June 7, 1991, allowed the above described violations and refused to return our case to state court.

Meanwhile, with a state court judgment against the failed bank which had been taken over, incredible as it might sound to your ears, in January, 1992 the Resolution Trust Corporation moved for Summary Judgment in federal court on grounds of D'Oench. The RTC requested of the federal judge that **only** the jury verdict be entered, and the state court judgment on "unfair and deceptive trade practices" and the claim of "partial release," (pay back) be expunged (struck from the record). The RTC also requested the court to lift the "stay" (preliminary injunction) which had been entered by the state court Judge on October 25, 1989, allowing the

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<sup>24</sup> See John Hanify Affidavit filed in U.S. District Court for the District of Massachusetts.

RTC to proceed immediately with foreclosure of our project, home, and property. The federal court allowed all of the above and implicitly countenanced such conduct and in the process completely rendered moot the findings and ruling of a state court judge -- **all** -- on grounds of D'Oench.

#### **THE RTC'S MISAPPLICATION OF D'OENCH AGAINST ME**

In raising the federal question of D'Oench the RTC has not only misapplied a doctrine which does not lie in this case, and cases similarly situated, it blatantly abused the doctrine to bludgeon the opponent for the following reasons:

#### **PAY BACK OF THE LOAN**

**The key element of D'Oench** is, did the borrower have a secret side agreement with the bank that the loan would not be called for repayment which would hurt the taxpayer when the bank fails?

The record is clear that I have never asked that the **pay back** of the note borrowed from ComFed be forgiven. In fact, the record is clear that I have tried to pay back the loan as many as four different times only to be obstructed by the bank and subsequently by the RTC. I have been unable to this day to gain release from the bank or the RTC of my property in any fashion. The following examples detail my attempts to pay back.

In June of 1988, a Purchase & Sales agreement was offered by a potential buyer (Mammola) in the amount of \$1,100,000 for the Meyer Lane house and three acres.<sup>25</sup>

In January, 1989 a P&S was offered in the amount of \$775,000 for the Meyer Lane house and three acres, note that this was the same potential buyer who now knew ComFed had started foreclosure proceedings. (See the letter from ComFed counsel, Hanify & King, refusing to allow the release of that portion of the real estate project.)<sup>26</sup>

In January, 1991, the final judgment issued in the state court allowed the jury finding of ComFed's counterclaim to stand and the judgment, in fact, incorporated a pay back of the note within the damages. The amount of \$2,069,580.33 paid back the loan in dispute

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<sup>25</sup> See Appendix N (Trial Exhibit 144, and 9).

<sup>26</sup> The counsel for ComFed, Hanify & King, refused to allow a partial release for the house at Meyer Lane and three acres, stating: "This confirms my recent telephone conversation with you and responds to Rhetta Sweeney's letter to Dennis Furey dated January 12, 1989. The Bank believes that the price proposed for the house and lot at 24 Meyer Lane, Hamilton of \$775,000 is well below market value. Accordingly, on the basis of information known to the Bank, ComFed is not prepared to consent to the sale. NB: The November 29, 1994 **RTC AUCTION** price of \$344,000. for the 776 Bay Road property and \$450,000. for the 24 Meyer Lane property totalling \$794,000. -- for the entire property themselves -- using tax dollars. (See Appendix H).

plus interest, legal fees, and costs. (See Judge Izzo's judgment detailing the damages owed).<sup>27</sup>

In November of 1994, we attempted yet again to pay back the note by making the RTC a settlement offer of 70% cash of the appraised value for the two original pieces of property which ComFed and subsequently the RTC held as collateral, as security on the \$1,600,000 note. This offer was rejected.<sup>28</sup>

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<sup>27</sup> See Judge Izzo's judgment; In favor of Plaintiffs:  
 (i)jury verdict for emotional distress: \$65,000; (ii)Judge's verdict -- additur for emotional distress: \$250,000;  
 (iii)interest to which ComFed is not entitled since 93A notice on 6/7/89 (19mo. @ \$20,666.70) \$392,667.30; (iv)punitive doubling of above item: \$392,667.30; (v)damages for closing fees of ComFed \$79,651.92; (vi)punitive damages doubling of closing fees: \$79,651.92; (vii)loss of opportunity to develop property: \$1,009,964; (viii)punitive damages doubling the loss of opportunity to develop property: \$1,009,964.; interest arrearage, induced to obtain additional financing commitment: \$11,455.00; punitive trebling of above item: \$22,910; Sub-total (with interest from date of filing and costs, \$3,313,931.44; Attorneys' fees and costs: \$97,704.00; **Total --\$3,411,635.44.**  
In favor of Defendants: Jury Verdict on Counterclaim on promissory note with interest: \$2,069,580.33

<sup>28</sup> John Ryan, acting head of the RTC, after representing for several months that he would be interested in finding a resolution which would bring closure to the dispute between the Sweeneys and the RTC, in fact -- acting in apparent **BAD FAITH** -- rejected the Sweeneys' good faith efforts to end the seven year period of fraud, abuse and mismanagement by the RTC and ComFed against me. It is important to note that the "RTC has often netted less than **one cent** on the dollar." (See RTC report titled: RTC's JDC Program (INS94-006 -- paragraph 1, pp.5) See also RTC National Loan Auction VI, December 14-15, 1994, note the RTC's qualification of bank fraud law under, 18 U.S.C. 215; 656; 657; 1005; 1006; 1007; 1008; 1014; 1032; 1341; 1343; 1344. **NB:** **The RTC**

At all times, the PAY BACK of the note was OBSTRUCTED, for now obvious motives, by the S&L ComFed and subsequently by the RTC.

#### WRITTEN AGREEMENTS

In raising the federal question of 12 U.S.C. Section 1823(e), through which Congress had meant to clarify the use of D'Oench some 45 years ago, the RTC has blatantly abused the federal statute for the following reasons:

The dispute between the parties in this case was never about a "secret side agreement" but rather, written agreements which were intended to defraud and did defraud me. The agreements have at all times met the four predicates required under 1823(e). The RTC has known at all times, the agreements were;

- (1) in writing;
- (2) signed by both parties;<sup>29</sup>
- (3) recorded in the loan committee report;<sup>30</sup>
- (4) and, have been continuously recorded in the MA Essex

County Registry of deeds.<sup>31</sup>

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**has cited the same criminal statutes which the state court judge had found ComFed and their employees had committed against us -- resulting in a state court judgment for "unfair and deceptive trade practices" in our favor. (See Appendix O, correspondence between the RTC and Sweeneys, and Appendix P, laws).**

<sup>29</sup> (See Appendix Q, Loan documents).

<sup>30</sup> See Appendix R, Loan Committee Report).

However, the RTC was in effect given blanket immunity by the judiciary from all of the above violations of rules and laws, **all** for reasons of D'Oench. Why?

**THE REAL DAMAGE TO THE TAXPAYER BECAUSE OF COMFED FAILURE**

**Why should the American taxpayer care about the abuse of the financial industry or federal regulators who are charged with overseeing the industry and who are paid by their tax dollars?**<sup>32</sup>

The RTC, using the D'Oench, Duhme doctrine, has also spent tens of millions of dollars in legal fees. From 1991 through June 1994, the RTC has paid a total of \$1,062,060.85 in legal fees to the three Boston law firms involved with my case, after the state court judgment was entered.<sup>33</sup>

The RTC's misapplication of D'Oench Duhme to borrowers whose assets were held as collateral by failed S&L ComFed has resulted in further abuse and loss of tax dollars,<sup>34</sup> because of the tens of millions of dollars in legal fees spent when a course of equitable

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<sup>31</sup> See Appendix S, Essex Country Deeds, Book and Page).

<sup>32</sup> See Appendix T, Freedom of Information Act

<sup>33</sup> See Appendix U, Freedom of Information Act Report  
Hanify & King in the amount of \$155,402.07;  
Nutter, McClennen & Fish in the amount of \$884,527.63;  
Ropes & Gray in the amount of \$22,131.15.

<sup>34</sup> See CNN NEWS -- U. S. Senate Whistleblower Hearings, September 23, 1993.

and fair dealing designed to work out a dispute would have prevented the continued legal expenses in cases such as ours.

The financial industry acting in concert with the federal regulators appears to have defrauded the American taxpayer and borrowers of the failed S&L ComFed as follows:

On October 1, 1990, after an internal bank investigation, lengthy investigations by a grand jury, the FBI, and an audit by Peat Marwick -- auditors for ComFed, -- the bank filed its own RICO law suit against 35 past employees, including Baldini, Miller, Porter, Maloof<sup>35</sup>, in Middlesex Superior Court, Cambridge, MA and not in federal court. However, Dennis Furey, our loan officer was conspicuously absent from the list of defendants, despite the fact that he was cited in the body of the complaint for violations previously charged in our lawsuit. Also cited in the complaint was appraiser Peter Reilly, who had performed the illegal appraisal for the underwriting of our loan. A similar pattern of willfully overvaluing real estate in violation of law has been reportedly admitted by individuals in the course of the Whitewater investigations who are responsible for the Madison S&L failure.<sup>36</sup>

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<sup>35</sup> C.A. 90-6712, ComFed Savings Bank, ComFed Mortgage Co., Inc., v. Baldini, et al., Middlesex Superior Court, Cambridge, MA.

<sup>36</sup> See Washington Post, "S&L Figure Pleads Guilty In Arkansas," December 5, 1994.

On August 9, 1991, a mere seven months after the RTC removed the ComFed case to the U. S. District Court for the District of Massachusetts, the racketeering case which had been filed by ComFed against their very own officers for insider abuse was hurriedly and mysteriously dismissed when the RTC filed a "Stipulation of Dismissal" for the entire case.<sup>37</sup>

By dismissing the claims against 35 defendants of the failed bank, the RTC has implicitly given those individuals immunity and career protection within the financial industry to the officers, directors, lawyers, accountants, and appraisers, when the S&L had admitted in the verified filing of C.A. 90-6712 that these individuals used ComFed as their own personal piggy bank.

The RTC sold part of the assets of the subsidiary, ComFed Mortgage Company, Inc. in the amount of \$1,238,105,000. to Goldman Sachs, N. Y. for \$182,000,000.<sup>38</sup>

The RTC sold the balance of the assets of the subsidiary, ComFed Mortgage Company, Inc. in the amount of \$2,420,457,000. as a

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<sup>37</sup> See C.A.91-10132.S, RTC, et al., v. Baldini, et al., U. S. District Court for the District of Massachusetts, "Stipulation of Dismissal." NB: The charges by ComFed against Baldini, included, but were not limited to, violations of RICO (Racketeering Influenced Corrupt Organization)

<sup>38</sup> NB: This is the equivalent to fifteen cents on the dollar. See Appendix V, Freedom of Information Act Report

portfolio to Lomas Mortgage USA, in Dallas, TX for a mere \$218,500,000.<sup>39</sup>

The judiciary appears to have become a ready and willing handmaiden to the arrogant conduct of the RTC.

On **April 14, 1992**, the U. S. District Court for the District of Massachusetts entered summary judgment in favor of the RTC on grounds of D'Oench.<sup>40</sup>

On **January 31, 1994**, the U. S. Court of Appeals for the First Circuit affirmed the Summary Judgment order of the U. S. District Court for the District of Massachusetts and compounded the injury when the panel of three judges ignored the errors in the lower court's representation of facts in addition to the above described errors of law which were brought to their attention.<sup>41</sup>

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<sup>39</sup> NB This is the equivalent to nine cents on the dollar. See Appendix V - Freedom of Information Act Report

<sup>40</sup> C.A. 91-10098-H, Rhetta B. Sweeney, Individually and as Trustee of the MAPLE LEAF REALTY TRUST and of the MAPLE LEAF REALTY TRUST and of the CANADIAN REALTY TRUST, and JOHN SWEENEY, v. RESOLUTION TRUST CORPORATION, in its capacity as Conservator of COMFED SAVINGS BANK, COMFED MORTGAGE COMPANY, INC., COMFED ADVISORY COMPANY, INC., and DENNIS FUREY, U. S. District Court for the District of Massachusetts.

<sup>41</sup> C.A. 93-1427 and 93-1613, RHETTA B. SWEENEY, ET AL., v. RESOLUTION TRUST CORPORATION, ET AL., U. S. Court of Appeals for the First Circuit.

On **October 3, 1994**, the Supreme Court of the United States denied our writ of certiorari and on **January 9, 1995** the court denied my Petition of Rehearing, turning a deaf ear and would not touch the case.<sup>42</sup> The doctrine had become a facile tool in the hands of the executive branch to browbeat and cow tow the innocent borrowers of the failed institutions into submission, and all the federal courts have had by way of guidance from the legislative branch, from you the lawmakers, is a 45 year old statute, which is at best outmoded,<sup>43</sup> and, in my case, simply does not apply for reasons previously stated.

On **November 29, 1994**, despite all of what you have heard today, the RTC held an illegal auction on our property with court matters still pending in this case, and while we were on a respite with our family for Thanksgiving. They now have represented that they believe to hold legal title to our home and property.

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<sup>42</sup> C.A. 93-1782, RHETTA B. SWEENEY, ET AL., v, RESOLUTION TRUST CORPORATION, ET AL., In The Supreme Court of the United States, October Term, 1993.

<sup>43</sup> Even the FIRREA amendment of 12 U.S.C. Section 1821(d)(9)(A), again greatly lacked in clarity as to the application of D'Oench. 12 U.S.C. Section 1821(d)(9)(A) provides: Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1812(e) of this title shall not form the basis of, or substantially comprise, a claim against a receiver or the Corporation.

On **January 31, 1995**, as I speak before you, the RTC has notified us -- if we are not out of our home by today, physical eviction will begin forthwith.<sup>44</sup>

#### CONCLUSION

The purpose of these hearings is to focus on the broad based abuse of the misapplication of the D'Oench, Duhme doctrine to borrowers of failed banks and S&Ls.

There is a need for Congress to rectify the RTC and FDIC abuse of the D'Oench, Duhme, and it ought to be retroactive to be effective and meaningful, in that the RTC is about to go out of business, leaving behind on the books a large body of bad precedent, injustice and wrongful acts, and the shards of the disrupted lives of many ordinary, innocent borrowers. This is manifestly unfair.

Federal courts, lacking guidance from Congress, have proceeded to continue to fashion their own devastating body of common law which has been harmful to the consumers who had done business with banks which failed.

Conflict arises when the RTC succeeds to a failed S&L and they blindly pursue their mission of removing cases with potential liability to the agency from state courts to federal courts, --

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<sup>44</sup> See Appendix W, Eviction Notice.

sometimes, as is the case here, **after the case was already tried in state court**, and the RTC goes after the little guy. Further tension arises when the borrower is unfairly attacked and the directors and officers of the failed S&L are protected by the RTC.

The RTC has misapplied the D'Oench, Duhme doctrine to commit and escalate government abuse, rather than correct it.

Furthermore, not all members of the Federal Court of Appeals are in unison with the U. S. Court of Appeals for the First Circuit. The fact alone that there is conflict over the application of the D'Oench, Duhme doctrine in the circuits provides all the more reason for Congress to set the record straight, setting forth specific guidelines as to what the courts must do and must not do in their application of the judge made D'Oench, Duhme doctrine.

The most terrible period of abuse suffered by me and my family has occurred at the hand of the RTC over the past four years. The RTC has known at all times of the terrible abuse we suffered at the hands of ComFed and their loan officers. Having borrowers pay for the misdeeds and mistakes in judgment made by the S&L's directors and officers should not be condoned and allowed to happen to us, or to anyone else in the future. An unrestrained exercise of government power cannot be the intent of Congress, --

not now, not ever, -- and only you the law makers can now correct this abuse.<sup>45</sup>

Too often, D'Oench is being misapplied, as it has been here, to preclude such claims. Our claim for deceptive practices by the bank in violation of state statute does not turn on the enforceability of any written agreement or the validity of any unwritten representation. The U. S. Congress and this subcommittee are respectfully urged to use this occasion to dispel this confusion about D'Oench, Duhme by issuing retroactive legislation which properly limits it to effecting its intent.

Thank you.

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<sup>45</sup> D'Oench, Duhme was not intended to bar all claims against failed banks or their related entities. Nor was the related legislation intended to do so forty five years ago. Instead, the law advises customers of such banks that they cannot rely on oral agreements or representations, as the basis for a claim or a defense, in respect of determining their obligations to the bank or the bank's obligation to them. If, however, the bank is liable for violations of the law which do not depend on the existence of any unwritten agreement, the bank is not immune from otherwise viable claims.