

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 89-2424

RHETTA B. SWEENEY,
Individually and as Trustee of the
MAPLE LEAF REALTY TRUST;
CANADIAN REALTY TRUST;
and
JOHN SWEENEY, Individually,
Plaintiffs

vs.

COMFED SAVINGS BANK,
COMFED MORTGAGE CO., INC.,
COMFED ADVISORY CO., INC.
and
DENNIS FUREY,
Defendants

OPINION AND ORDER ON POST-TRIAL
AND POST-JUDGMENT MOTIONS

This opinion disposes of a number of post-judgment motions following a jury verdict on March 19, 1990, and following a hearing on presentation of arguments, affidavits, and memoranda submitted and filed by the plaintiffs and the defendants on those motions and upon the plaintiffs' claims under M.G.L. c. 93A.

For the facts in this action and upon which this opinion is based, this court refers to its Findings of Fact, Rulings of Law and Order filed this day. This action arose on several theories. Those causes of action submitted to the jury are as follows:

Count I: breach of contract

Count II: specific performance of contract to give
partial releases (against defendant ComFed Savings Bank)

COUNT III: fraud in connection with \$1.6 million loan

against defendants ComFed and Furey

COUNT IV: breach of fiduciary duty with respect to \$1.6 million dollars (against defendants ComFed and Furey) this count was waived by plaintiffs prior to submission of case to jury.

COUNT V: breach of contract relating to the forward commitment in relation to the payment of \$65,000.00 in interest (against defendant ComFed)

COUNT VI: breach of fiduciary duty with respect to the forward commitment in relation to the payment of \$65,000.00 in interest; constructive trust (against defendants ComFed and Furey). This count was waived by plaintiffs prior to submission of case to the jury.

COUNT VII: interference with advantageous business relation (against ComFed and Furey)

COUNT VIII: unfair and deceptive trade practices (against ComFed)

COUNT IX: intentional infliction of emotional distress by plaintiff Rhetta Sweeney (against ComFed and Furey).

Prior to trial upon the plaintiffs' application and after hearing, the court issued a preliminary injunction against ComFed precluding that bank from foreclosing on the \$1.6 million loan which was in default. A memorandum of this court was filed at that time and is docketed as No. 47. Said preliminary injunction is still in force. On March 16, 1990, the plaintiff waived Counts IV

and VI of their complaint. In addition to Counts II and VIII, which are pending before this court, there are pending the

following plaintiffs' motions:

1. Plaintiff's motion for a new trial which is DENIED.
2. Motion to Alter or Amend Judgment which is DENIED.
3. Motion for Remittitur on Defendants' Counterclaim which is DENIED.
4. Motion for Additur on Count IX of the Complaint which is ALLOWED in the sum of \$250,000.00. The facts upon which the additur is given are those set forth in those filed this day. It is also obvious that the jury in granting the plaintiff Rhetta Sweeney \$65,000.00 for her emotional upset was giving her the amount of the interest paid to ComFed. That measure of damage does not take into account any incidents of emotional upset the plaintiff Rhetta Sweeney suffered, is suffering, or may suffer in the future because of the tortious behavior of the defendants. The amount awarded to the jury was just the out-of-pocket sum of money that was involved in the incident giving rise to the tortious behavior of the defendants. It would appear the jury gave no thought as to a sum of money for the pain and suffering involved in an emotional upset of a person like the plaintiff, Rhetta Sweeney. Thus, in my opinion the total amount of \$315,000.00 is a fair and adequate judgment on Count IX.

On April 25, 1990, the plaintiffs filed a Motion to Permit Disclosure of Restrictive Materials which is allowed.

The defendants filed a Motion to Strike from the Record plaintiff Rhetta B. Sweeney's "analyses" of findings of fact and G.L.c.93A (found at Plaintiffs' Appendix Tabs 60 and 61) on June

19, 1990. Without hearing and upon the record, this motion is

ALLOWED.

On October 15, 1990, the plaintiffs filed a Motion to Reopen M.G.L.c.93A Proceedings for Purposes of Additional Submissions and Additional Oral Argument. The request for oral argument is

DENIED and the motion to reopen is DENIED.

For the purposes of the rulings made herein, I adopt all Findings of Fact and Rulings of Law entered this day on Counts II and VIII.

Katherine Liacos Izzo
Justice of the Superior Court

DATED: January 30, 1991

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FINDINGS OF FACT, RULINGS OF LAW
AND ORDER RELATIVE TO COUNT II
AND COUNT VIII OF PLAINTIFFS' COMPLAINT

PROCEDURAL BACKGROUND

The plaintiffs, owners of two parcels of land, Rhetta B. Sweeney and John Sweeney ("Sweeneys") are seeking a preliminary injunction to restrain a foreclosure and for damages against the defendants, ComFed Savings Bank, ComFed Mortgage Company, Inc., ComFed Advisory Company, Inc. (collectively "ComFed"), and Dennis Furey. The plaintiffs allege in a nine-count complaint that the defendants engaged in fraudulent conduct in negotiating a loan agreement setting forth the following claims:

Count I: breach of contract

Count II: specific performance of contract to give partial

releases (against defendant ComFed Savings Bank)

Count III: fraud in connection with \$1.6 million loan against defendants ComFed and Furey

Count IV: breach of fiduciary duty with respect to \$1.6 million dollar (against defendants ComFed and Furey) this count was waived by plaintiffs prior to submission of case to jury

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still in force. On March 16, 1990, the plaintiffs waived Counts IV

and VI of their complaint.

A trial before a jury was commenced on February 26, 1990 and continuing until March 19, 1990, wherein the jury rendered a verdict by way of special questions. A copy of that verdict is hereby attached, marked "A" and made part of this decision. The court did not submit to the jury any questions with respect to Counts II and VIII and this court sat during the trial as judge without jury on those counts with the consent of all parties.

Subsequent to the trial and specifically on April 26, 1990, the court heard arguments as to Counts II and VIII and received in June 1990 suggested findings of fact and rulings of law from all parties. The court now makes findings of fact and rulings of law in this action with respect to Counts II and VIII.

GENERAL FACTS

I adopt as findings of fact those which are stipulated to by and between the parties as follows:

1. The plaintiff, Rhetta B. Sweeney as trustee, is the record owner of the real estate located at 776 Bay Road and 24 Meyer Lane in Hamilton, Massachusetts. Mrs. Sweeney is trustee of the Canadian Realty Trust and Maple Leaf Realty Trust, which trusts own these properties.

2. The real estate consists of a large house at 24 Meyer Lane and three acres of land; an antique house at Bay Road; three

buildable house lots and one buildable remaining lot with two barns on it.

3. Plaintiff John Sweeney is the husband of Rhetta Sweeney and brings this action as an individual.

4. Defendant, ComFed Savings Bank, is a federally chartered savings and loan bank with a principal place of business in Lowell, Massachusetts. Defendants, ComFed Mortgage Company, Inc. and ComFed Advisory Company, Inc., are Massachusetts corporations with a principal place of business in Lowell, Massachusetts. Defendants ComFed are to be considered one group. The defendant Dennis Furey was and is an employee of ComFed.

5. In early 1987, Rhetta Sweeney entered into partnership negotiations with a professional developer, Congress Group Properties, Inc. ("Congress Group"). The negotiations led to a preliminary agreement on March 20, 1987, between Rhetta Sweeney and Congress Group for the development of the Sweeneys' real estate.

6. Congress Group acquired the ten existing first mortgage on the Bay Road parcel to hold off foreclosure.

7. As of the summer of 1987, Rhetta Sweeney and Congress Group had failed to reach agreement on a partnership arrangement and terminated their relationship.

8. In July of 1987, Rhetta Sweeney retained Richard D. Simmons, Sr., a real estate appraiser and certified real estate counselor.

9. At the time, Harbor Equity Funds, Inc., which held a mortgage on the Bay Road parcel, was proceeding with a foreclosure

action against that property.

10. In June, 1987, Rhetta Sweeney also retained the services Cape Cod National Mortgage, a professional mortgage brokerage house. Mr. Meldon, the President of Cape Cod National Mortgage, performed the services for the Sweeneys.

11. In July of 1987, Mr. Meldon contacted ComFed and thereafter a meeting took place between Mrs. Sweeney, Mr. Meldon and Mr. Dennis J. Furey, an officer of ComFed.

12. Through the assistance of Mr. Meldon, the Sweeneys secured a written commitment dated August 20, 1987 from ComFed for a commercial loan of \$1,600,000. The loan was intended to discharge the pre-existing debt and facilitate the work required to secure sub-division approval of the property from the Town of Hamilton.

13. The Sweeneys' loan with ComFed closed on August 27, 1987 in time to prevent the scheduled foreclosure by Harbor Equity Funds, Inc. The mortgages, liens, and pre-existing claims against the property which were discharged at or shortly after the closing totaled approximately \$1,250,000.

14. In February of 1988, the town of Hamilton approved the plaintiffs' proposed subdivision of the real estate. To date no sales have taken place of either of the pre-existing residences, structures or unimproved lots.

15. In August of 1988, the Sweeneys' loan with ComFed came due.

16. In the fall of 1988, Rhetta Sweeney and ComFed had negotiations regarding an additional loan of \$175,000 for the purpose of implementing certain physical improvements to the existing homes and the site. This loan was the source of disagreement and never closed.

17. The total amount of principal, interest, and related charges claimed to be due as of February 1, 1990 is approximately \$2.1 million.

18. In this case, the Sweeneys allege that ComFed failed to honor a commitment to provide further construction financing. The lawsuit seeks damages for breach of contract and other claims. ComFed has denied all the plaintiffs claims and seeks recovery on plaintiffs' Promissory Note to ComFed.

I make further findings as follows:

19. The plaintiff, Rhetta B. Sweeney, brought this action individually and as Trustee of the Canadian Realty Trust and Maple Leaf Realty Trust, the record owners of 776 Bay Road and 24 Meyer Lane respectively both in Hamilton, Massachusetts, and the plaintiff, John Sweeney, brought this action individually (both hereinafter collectively referred to as the "Sweeneys").

20. The corporate defendants ComFed Mortgage Company, Inc. ComFed Advisory Company, Inc., are Massachusetts corporations wholly owned and controlled by the defendant, ComFed Savings Bank, (hereinafter collectively referred to as "ComFed").

21. The defendants, Dennis Furey, was at all times relevant hereto a corporate officer of ComFed, acting as agent, servant or

employee of ComFed within the scope of his employment, (hereinafter referred to as "Furey").

22. Prior to July of 1987 the real estate, which is the subject matter of this litigation, consisted of a large home at 24 Meyer Lane in Hamilton, Massachusetts, situated on an approximately nine acre parcel of land and an antique home at Bay Road situated on a four acre parcel of land.

23. John and Rhetta Sweeney acquired the real estate involved in this case over a period of time beginning about 1966. Certain of the property was inherited by John Sweeney and other portions were purchased from family members. Prior to July 1987 both properties were encumbered by mortgage debts. In July of 1987 the mortgage in the sum of approximately \$400,000 encumbering the Bay Road parcel was in default and in danger of foreclosure.¹The mortgage encumbering the Meyer Lane parcel was not in default and not the subject of foreclosure.

24. Prior to July of 1987 the plaintiff, John Sweeney, had experienced a period of business reversals owing to the failure of a business he and a partner had established in the early 1980's. In furtherance of that business the Sweeneys had placed virtually all of their savings and investments into John's business and had encumbered both of the parcels of land, which are the subject of

this litigation, in order to provide capital for that business venture. During this period of time the Sweeneys caused their

¹ Harbor Equity Funds, Inc. held a mortgage on the real estate located on Bay Road, Hamilton.

property to be placed into trusts, which are also plaintiffs in this action (Exhibits 113, 123).

25. The Sweeneys encumbered the property with debts relating to personal and business expenses. Between 1983 and 1986, they placed on the property additional debt of approximately \$760,000.

26. By July, 1987, the property had accumulated secured and unsecured debts of approximately \$1,137,400. (Exhibit #151).

27. Prior to July 1987 the plaintiff, John Sweeney, was employed in the Philadelphia area and was commuting to the Sweeneys' Hamilton home on weekends only. Both Sweeneys were knowledgeable about business affairs.

28. In July of 1987, Rhetta Sweeney embarked on a program of trying to save her family's home and assets by seeking ways of doing so by the development, the refinancing, and the partial sale of the family's holdings. Rhetta had been engaged in some aspects of the advertising business in the early 1980's.

29. Rhetta Sweeney had been engaged in negotiations with a company known as Congress Group toward a joint venture project designed to construct condominium-style residences on the subject parcels. However, when the Town of Hamilton rejected such a concept, Rhetta terminated negotiations with the Congress Group in July, 1987. These facts concerning the financial background of the Sweeneys and their properties and their intention to construct

homes on the subject property were made known to Furey from the outset of his contact with the Sweeneys.

30. The Congress Group, in the context of a preliminary written agreement with Mrs. Sweeney, had assumed the existing first mortgage position of Eastern Bank on the Bay Road property.

31. By July, 1987, another mortgagee, Harbor Equity Funds, Inc., initiated, through public notice and the usual legal process, a foreclosure of the Bay Road property. A foreclosure sale was noticed and scheduled for September 1, 1987 (Exhibits 2 and 120). The prospect of imminent foreclosure sale caused the Sweeneys to look for immediate financing to refinance so much of the debt as would be necessary to avoid foreclosure.

32. The imminent foreclosure and the need to consolidate the existing debt caused Mrs. Sweeney to retain a mortgage broker, John Meldon of Cape Cod National Mortgage, to locate refinancing and a certified real estate consultant, Richard D. Simmons, Sr. to advise her on values and to assist in securing refinancing.

33. In July of 1987 through the efforts of Meldon, the plaintiff, Rhetta Sweeney, was introduced to ComFed's construction loan officer, Furey. Furey represented himself at that time and at all relevant times as a construction loan expert, who knew what was involved in the operation of real estate development. He did so deceptively and unfairly to get Rhetta to trust him and his expertise.

34. Meldon's initial request to ComFed on behalf of the Sweeneys for \$725,000 was processed and resulted in a preliminary

commitment letter. Thereafter, in late July or early August, 1987, the Sweeneys, again through Meldon, increased their request to \$1.6

million (Exhibits 1, 3, 114).

35. Negotiations between Rhetta Sweeney and Dennis Furey led to an agreement which provided in part that ComFed would provide a commercial mortgage loan in the amount of \$1.6 million dollars, and that the Sweeneys would immediately undertake to secure subdivision approval by combining the two parcels and applying to the Town of Hamilton for permission to construct a flexible subdivision anticipated to consist of six to eight building lots.

36. ComFed issued a commitment letter dated August 10, 1987 for the \$1.6 million refinancing (Exhibit 114).

37. The Sweeneys were not satisfied with various provisions of the August 10th Commitment Letter. At a meeting on August 20, 1987, they expressed their desire to change the term of the loan from eight months to twelve months; modify the language of the "non-use" provision to avoid any penalty effect; and eliminate the requirement that certain portions of the property be sold by December 31, 1987, to reduce indebtedness. Dennis Furey and Karen McCormack were the representatives of ComFed at that meeting.

38. At the conclusion of the August 20, 1987 meeting, ComFed issued another commitment letter which the Sweeneys signed (Exhibit 3). This letter contained various terms and language which gave rise to the Sweeneys' belief that they would get more financing in the future for construction purposes. For example, there was under paragraph 17(s) a provision for a "1% nonuse fee

in the event ComFed does not finance the development and construction of the 7 plus/minus additional lots;" and "(t) the

property must be actively marketed on the MLS system or it's (sic) equivalent within 30 days after final approval of the master plan is attained from the Town of Hamilton."

I find that the terms set out above, the testimony of the plaintiffs and Furey, together with the added use of a "Construction Loan Agreement", which was entered into between the parties at the time of closing, affirm the contention of the plaintiffs that they were relying on ComFed for the commitment to them for loan construction funds once the subdivision approval was received.

39. In an August 21, 1987 letter to Mr. Furey, Rhetta Sweeney identified the existing liens, mortgages, and debts on the properties. Mr. Furey sent Mrs. Sweeney's letter, which also contained a list of liens to be discharged, to counsel engaged by the bank to close the loan (Exhibits 4, 151).

40. On August 27, 1987 the \$1.6 million loan was closed. The closing was approved and arranged by Furey who acted in violation of procedures established by ComFed and his superiors, Raymond Miller, William Porter and Frederick Maloof.

FINDINGS OF FACT RELATIVE TO COUNT VIII
UNFAIR TRADE PRACTICES

I make the following findings of fact which pertain to Count

VIII of plaintiffs' complaint (unfair trade practices):

41. William Porter, a senior vice president of the ComFed Mortgage Advisory Board and member of ComFed's loan committee, testified that they (the bank) had "a very tight system"; that ComFed would not close a loan without an appraisal first; and that was a strict rule of ComFed. James Baldini who was president of ComFed Mortgage Co. also testified that ComFed could not close without an appraisal being done first.

42. 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.

43. ComFed received approximately \$78,000 in a variety of fees and points² charged at that closing of the Sweeney loan and placed into escrow the sum of approximately \$200,000 without interest to cover interest on the loan during its proposed term of one year (Exhibit 9). Unbeknownst to the Sweeneys, Furey received a \$1,600 commission for this loan.

44. ComFed knew or should have known prior to August 27, 1987 that based upon its representations the Sweeneys believed that ComFed would provide construction mortgage financing once subdivision approval had been obtained for the subject parcels.

45. ComFed encouraged the Sweeneys not to obtain independent counsel for the closing of the \$1.6 million loan but suggested they accept the services of the bank's own closing attorney. ComFed

² ComFed's profits were dependent in large measure on the points charged on loans.

knew or should have known that independent counsel may have determined that the actions and inactions, both written and oral, of ComFed upon which the Sweeneys were relying were inadequate to protect them in their expectation of subsequent construction financing. ComFed also knew that its bank counsel would provide little or no guidance to the Sweeneys regarding their provide little or no guidance to the Sweeneys regarding their personal rights and obligations under the loan documents.

46. ComFed's profits were dependent in large measure upon the points charged on loans. Testimony from various officers of ComFed revealed that their aggressive marketing of loans expanded the ComFed Mortgage Co.'s assets from \$350,000,000 in 1982 to \$2.5 billion in 1987. Most of the officers such as Furey, Baldini, Porter, and Maloof benefited from this large volume of loans receiving their commissions based on these amounts.

47. As part of the loan transaction with the Sweeneys, there was a reserve established in the amount of approximately \$400,000 for interest and other costs associated with subdivision approval. These monies were not disbursed at closing, but instead were disbursed over the course of the loan term after requisitions were approved for payment.

48. The reserve feature of this loan was essentially an accounting device. The Sweeneys were not paying interest on the reserve until amounts in the reserve category were actually

disbursed; nor did they receive interest on this money held by ComFed.

49. The said actions and inactions of ComFed were

unconscionable and oppressive and breached the bounds of substantive fairness in that ComFed:

- a) Placed in its original and amended loan commitment letters substantial penalties for failure to accept construction mortgage financing from ComFed when ComFed knew that it did not intend to provide such financing, and that the Sweeneys would be deceived into believing that such financing was forthcoming (Exhibits 3 and 114,)
- b) Permitted bank counsel at the closing to prepare an opinion letter reciting the existence of building permits and other language unfairly and deceptively designed to deceive the Sweeneys into believing that construction mortgage financing would subsequently be forthcoming. (Exhibit 59).
- 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 forthcoming (Exhibit 7). 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.

50. The Construction Loan Agreement³ provided in pertinent part:

1. Borrower's Covenants

a) Construction

To have a certain building or buildings and improvements constructed and equipped on the mortgaged premises in accordance with plans and specifications submitted to Lender for its written approval, using materials of the best quality called for by said specifications and first class workmanship, both satisfactory to Lender.

4. Construction Advances

Lender agrees, subject to the provisions of this Agreement that it will advance the mortgage proceeds as the construction progresses. . . .

9. Cessation of Construction

Borrower agrees that if construction subsequently ceases for fifteen (15) successive days due to any cause within Borrower's control, such cessation shall constitute a breach of this Agreement.

51. ComFed knew or should have known that the Sweeneys would be deceived by the writings above-mentioned and by its conduct. ComFed failed to correct such deception when it could have:

- a) Advised the Sweeneys that they should have independent counsel to examine the documentation;
- b) Informed the Sweeneys that in spite of the contents of the documentation ComFed did not intend to

provide construction mortgage financing once subdivision approval had been received.

52. The documents delivered and executed at the closing can not be explained away (as asserted by the defendant Furey) by the

³ Exhibit 7, pp. 1, 3-4, 6.

fact that the Sweeneys requested moneys for cosmetic repairs or that the documents were used by the bank's attorney because of the imminence of foreclosure proceedings alluded to in Finding No. 31. There is no credible reason to believe that ComFed would permit erroneous documents for a 1.6 million loan merely for convenience.

53. I find that the use of these documents, letters of commitment and actions of Furey and other bank officials are unfair business practices designed to deceive the plaintiff into entering into a debt which could not be paid off by the plaintiffs based on their present financial circumstances.

54. ComFed scheduled the mortgage loan closing on August 27, 1987, the day before the contemplated foreclosure of the mortgage encumbering the Bay Road parcel, and ComFed did not provide the mortgage documentation in advance of the closing to the Sweeneys knowing that both of these actions would induce the Sweeneys to execute the documents at the closing.

55. Prior to August 27, 1987 and on August 27, 1987, ComFed unfairly and deceptively induced the Sweeneys to believe that the loan documentation executed at the closing was not intended by ComFed to contain the entire agreement between the parties, and that the documentation itself was not to be strictly interpreted. ComFed knew or should have known that such inducement would

persuade the Sweeneys to believe in ComFed's intention to provide construction mortgage financing even if the provisions of the same were not fully set forth in the documentation. Additionally, ComFed's unfair and deceptive actions with respect to this loan

are:

- a) The Sweeneys were required to execute a document swearing that they did not occupy the subject premises as a residence even though ComFed knew that the Sweeneys did in fact occupy the premises as a residence.
- b) 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 subdivision once approved (Exhibit 114). This promise was contained in ComFed's initial commitment letter but removed in the subsequent letter. ComFed encouraged the Sweeneys to rely upon its good faith and to rely upon representations made outside the written documents.

56. In order to grant the \$1.6 million loan, the Sweeneys property had to be appraised in excess of \$2,000,000. ComFed knew that the Sweeneys had never obtained a formal appraisal of the premises. ComFed unfairly and deceptively induced the plaintiffs to rely upon its assessment of values in determining whether the contemplated project would be viable and successful. Toward that end ComFed promised the Sweeneys that an appraisal would be

performed by an independent appraiser and that that appraisal would be a complete R41C⁴ appraisal of the property. ComFed knew that

⁴ Such an appraisal is required by Federal Home Loan Bank regulations.

the Sweeneys were relying upon an appraised value of \$2.1333 million to induce them to accept the \$1.6 million dollar loan and undertake the project contemplated. Bank policy and the Federal Home Loan Bank regulations prohibited the issuance of a loan in an amount more than 75 per cent of the appraised value(Exhibits 3 and 82).

57. The appraisal, however, did not confirm the values required by the commitment letter (Exhibit 80) and did not comply with R41C standards and policies of the Federal Home Loan Bank Board (FHLBB) governing loans of institutions such as ComFed (Exhibit 82). The appraisal was completed after the closing and stated that the property had a fair market value of \$1,960,000—a lower amount than was needed for this loan.⁵

58. I find that absent a proper appraisal being completed bank policy prohibited a closing. However, evidence given by James Baldini, the president of ComFed Mortgage Co., Inc., showed the bank had grown substantially (in 1987 and 1988); that ComFed was servicing between 50,000 to 60,000 loans during that period; that in order to close on these loans at times the loan originator would

tamper with the bank's rules and close on a loan without an appraisal.

59. Prior to the closing ComFed through Furey informed the Sweeneys that the appraisal had been completed and was satisfactory

⁵ The appraisal is dated "August 25, 1987", however it also states that the "research of relative date was performed during the period from August 25, 1987, to August 28, 1987" (Exhibit 80).

even though ComFed and Furey knew that statement to be false.

60. The various functions performed by the appraiser were not completed until August 28, 1987, one day after the closing of the \$1.6 million loan (Exhibit 80). The closing was, therefore, held in violation of ComFed's policy and in violation of the FHLBB's regulations. The Sweeneys were not informed that the appraisal had not been completed. The Sweeneys never knew of the appraisal results until after the commencement of this litigation. I find that the appraisal was not completed until after the closing. I find this action by ComFed an unfair and deceptive practice.

61. On August 27, 1987 at the time of the closing of the \$1.6 million loan the sum of \$1,287,095.60 was disbursed in payment of bank fees and in repayment of the encumbrances on the subject properties. At all times thereafter the remaining funds were held by ComFed in a non-interest bearing account which regularly applied a portion thereof to interest payments and disbursed portions of the balance in accordance with the bank's approval of requests made by the Sweeneys. ComFed made certain errors in these disbursements causing the Sweeneys embarrassment and difficulties but eventually upon demands made by the Sweeneys corrected its errors.

62. Subsequent to the August 27, 1987, mortgage closing, the Sweeneys sought and obtained approval of a flexible subdivision plan from the Town of Hamilton allowing the Sweeneys to construct four new residences in addition to the two existing houses. The

approval was orally granted in January 1988 and written approval issued shortly thereafter.

63. Commencing in January 1988 the Sweeneys took certain measures to prepare for anticipated construction of subdivision roads, landscaping, and the construction of houses contemplated on the vacant lots. Toward that end the Sweeneys engaged construction professionals anticipating that they would commence their work by April 1 (Exhibit 236), and obtained a full analysis of the cost which might be anticipated in renovating the existing homes and building four new homes on the premises. (See Fogarty Report, Exhibit 49c.) These acts, expenditures, and plans were entered into and in reliance upon ComFed's previous promises by the Sweeneys.

64. Following receipt of the Fogarty estimates the Sweeneys actually obtained construction bids for the work to be performed (Exhibit 49d).

65. ComFed knew in advance that the Sweeneys were engaging the services of such professionals and that the Sweeneys had no other source of financing this project but it did not inform them that it did not intend to provide them with construction mortgage financing.

66. At the behest of Furey in January or February 1988, Mrs. Sweeney met with Helen Pullin of ComFed who was then handling construction loan financing. Ms. Pullin gave Mrs. Sweeney construction loan application forms including, among other things,

personal financial statements and a request for plans and specifications (Exhibit 198).

67. Much of the interaction between the Sweeneys and ComFed particularly the conversations and correspondence between Rhetta Sweeney and Dennis Furey concerned the construction and sale of the properties during the early months of 1988. That interaction consisted of:

- a) Telephone calls from Rhetta Sweeney;
- b) Letters from Rhetta Sweeney referring to such things as phase 2 and her attempt to begin construction, which clearly were indicative of her intention to inform ComFed of her readiness to accept the additional funds she anticipated;
- c) Invoices tendered to ComFed for payment of such items as the Fogarty estimates which ComFed knew were being prepared for construction purposes (Exhibit 141L).

68. In spite of ComFed's knowledge of the Sweeneys continued reliance on its promises, ComFed failed to respond to the Sweeney letters sent to Furey, failed to inform the Sweeneys that no construction financing would be forthcoming, continued to expend the escrowed sums necessary to carry the interest on the subject

loan by approving payment for construction related activities including the Fogarty estimates when it knew it did not intend to provide future construction financing.

69. During the spring of 1988 ComFed routinely permitted the

Sweeneys to draw upon the escrowed funds for purposes of making payments to professionals who had been hired to render advice or services in connection with the subject property, the subdivision process and actual construction expenses.

70. In January 1989 Dennis Furey received information from Rhetta Sweeney with reference to a sale transaction of the Meyer Lane property. There is no evidence that ComFed did anything to frustrate any arrangement between Mrs. Sweeney and the prospective buyer; but there is evidence that the bank stated that the proposed sales price of \$775,000 was too low so that it would have an excuse not to grant a partial release to effect this sale to the plaintiffs' detriment. (Exhibit 41).

71. Dennis Furey and Rhetta Sweeney had a meeting at ComFed on or about August 25, 1988. Mrs. Sweeney brought with her a purchase and sale agreement for the 24 Meyer Lane home. The purchase price on the document was \$1,000,000. Mrs. Sweeney told Mr. Furey that now that she had a purchase and sale agreement for a portion of the property she wanted to apply for further lending (Exhibit 144).

73. Dennis Furey asked Mrs. Sweeney if he could call Mr. Mammola, the prospective buyer, to confirm his interest and financial ability to purchase. Mrs. Sweeney agreed and at the same

time delivered to Mr. Furey a proposal for construction financing of approximately \$3 million for proposed new homes on the vacant lots of the subdivision and additional improvements to existing structures.

74. Mrs. Sweeney concedes that she does not know what happened to Mr. Mammola's desire to purchase her property. There is no evidence that ComFed did anything to frustrate any arrangement between Mrs. Sweeney and Mr. Mammola.

75. On or about September 15, 1988, Dennis Furey and William Porter, a Vice President of ComFed met with Rhetta Sweeney and Scott Ainsworth. Mrs. Sweeney introduced Mr. Ainsworth as the person who was going to develop the property and that Ainsworth would work at his cost and share in the equity. Mrs. Sweeney and Mr. Ainsworth presented a new pro forma which identified a financing need of \$2,500,000. It was contemplated that the \$1.6 million loan would be repaid by the proceeds of this new loan.

76. Subsequently (between September 15, and 26, 1988), Dennis Furey informed Rhetta Sweeney and Scott Ainsworth that the Loan Committee would not approve a loan request in the additional amount of \$663,750. He further stated that the Loan Committee would consider a smaller amount so long as the loan proceeds would be used to improve the two existing homes in order to help sell the properties.

77. ComFed informed them that bank policy made it impossible for ComFed to extend additional credit to the Sweeneys unless the \$65,000 arrearage in the payment of interest was made current. No

proof of such bank policy was offered by the defendants. I find that such statements were made in furtherance of ComFed's bad faith and unfair practices to these plaintiffs.

78. The \$65,000 interest arrearage existed at that time in

part due to the fact that ComFed had permitted approximately \$40,000 of the escrowed funds to be used for construction and renovation expenses on the existing dwelling houses. ComFed permitted the use of such knowing that a default in the \$1.6 million loan would be accelerated thereby.

79. ComFed did not inform the Sweeneys at that time that it did not intend to provide additional construction mortgage financing.

80. It is undisputed that at the time of the loan of \$1.6 million in August, 1987, and subsequently through the Spring of 1988, the Sweeneys had no outside source of funds with which to pay back the initial loan or even service the debt. The only source of contemplated pay back of the loan was the subdivision of the property into lots with subsequent development construction to render the property saleable. The actual advancement of funds for construction and renovation of the existing dwellings on the property effectively deceived the Sweeneys into believing that they would be provided with further construction financing sufficient to upgrade existing structures, construct subdivision roads, and build dwellings that could be sold to pay back the initial loan and make a profit for the plaintiffs.

81. In addition to ComFed's misrepresentations about bank policy concerning loan arrearages, ComFed also suggested that if the loan was made current by the payment of \$65,000, ComFed would provide a \$175,000 construction loan together with a forward

commitment for construction financing of the entire subdivision project.

82. At the time of such suggestions, ComFed knew that no approval had been made as to a forward commitment to fund the Sweeney project, and that ComFed did not intend to provide a forward commitment for the entire project.

83. The Sweeneys relied on ComFed's representation that it would provide a forward commitment for the entire project upon the payment of the \$65,000 loan arrearage to their detriment.

84. On October 3, 1988 Rhetta Sweeney borrowed \$65,000 from another person paying two points as a fee and a 13 per cent per annum interest rate and pledging as security certain family heirlooms including her engagement ring to pay the entire \$65,000 to ComFed. ComFed did not need to receive the payment of \$65,000 in order to grant an additional loan to the Sweeneys. Nor at this time did ComFed obtain authority from its lending committee or any other person to provide a forward commitment for construction of the entire project.

85. I find that the testimony of Dennis Furey, Karen McCormack and Helen Pullin, the defendants' loan officers who also dealt with the plaintiff, Rhetta Sweeney, not credible in stating that there was no further construction loan commitment by the

defendants. In fact the jury also found that an agreement or agreements existed between the Sweeneys and ComFed under which ComFed agreed to provide construction financing in addition to the \$1.6 million loan. (See Special question A.1, Appendix A)

86. Subsequent to the payment of \$65,000 ComFed offered to carry out its promise to loan \$175,000 toward construction, which promise has been set out in a commitment letter of September 30, 1988. That letter contained the terms and conditions under which ComFed would make such a loan. (Exhibit 17)

87. On October 18, 1988 ComFed prepared another commitment letter for a loan in the amount of \$175,000 (Exhibit 18), which provided that at the time of the receipt of the \$175,000 loan (only a small portion of which would actually be paid over to the Sweeneys) the Bank would also receive an escrow payment from the Sweeneys in excess of \$175,000.⁶ (Exhibit 18 pg. 9). ComFed inserted such provision in its commitment letter knowing that the Sweeneys were unable to make such a payment of funds into escrow.

88. The aforementioned commitment letter of October 18, 1988 (Exhibit 18) and the subsequent commitment letter of November 10, 1988 (Exhibit 20) each contained provisions which deviated from and expanded upon the simple conditions set forth in the commitment letter of September 30, 1988 (Exhibits 17, 18, 20) ComFed refused to close the \$175,000 loan unless the new conditions set forth in

its subsequent commitment letters were honored, although the same had not been agreed to at the time of the commitment on September 30, 1988.

89. On November 14, 1988, ComFed presented to Rhetta Sweeney

⁶ The provision in that letter (Exhibit 18) provided: The borrower agrees to escrow adequate funds in ComFed Savings to maintain the debt service on this loan as well as the first mortgage loan on the subject property for a period of nine months from the date of closing.

a document entitled Forward Commitment (Exhibit 33) at the commencement of the actual closing of the \$175,000 loan which letter never had been made available to her or to her attorney prior thereto. The forward commitment letter contained provisions which made performance by the Sweeneys impossible and was actually meaningless on its face. (Exhibit 37).

90. At the time of the loan of \$1.6 million in August 1987 and through the Spring of 1988, the Sweeneys' financial history showed that they had no outside sources of funds with which to either pay the interest or the principal amount of the initial loan. The only source of payment of said principal and interest known to ComFed (or should have been known to ComFed) would have been the subdivision of the property into lots with the subsequent of sales of houses and/or its lots.

91. To their detriment the Sweeneys acted in reliance upon these unfair and deceptive practices and acts committed by the defendants.

92. I find that the actions of ComFed recited above are acts or practices unfair or deceptive in nature under G.L.c.93A, 2 and 11.

93. I find that Furey at all times acted on behalf of ComFed and not individually.

94. ComFed is guilty of unfair and deceptive trade practices by loan \$1.6 million to the plaintiff's knowing full well that the Sweeneys could never service the debt from their income or

other assets; that they were not in the construction business; that the property as it was in its undeveloped stage and without subdivision was not worth the amount of the loan of \$1.6 million. True in July 1987 the property may have had the potential of selling for \$1.6 million or more but that was purely speculative.

95. Bank regulations and practices require that loans of this type be predicated on the securing a subdivision plan from the Town which was a speculative plan at best. That Rhetta Sweeney did secure approval within six to seven months after the loan is no doubt due to her tenacity, hard work and ability to deal with diverse elements in her town.

96. 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 \$775,000.00 (Exhibit 41). I find that ComFed's refusal to do so was unfair and deceptive practice.

97. 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.

98. ComFed knew or should have known that the loan would go into default at the end of the year.

99. The total amount of principal, interest, and related charges owed to ComFed by the Sweeneys as of March 1, 1990 was \$2,069,581.33 (Exhibit 303).

100. In response to special questions, the jury found that there was no breach by ComFed of any obligation owed to plaintiffs under any agreement, whether oral or in writing. The jury found that neither ComFed nor its employees or officers committed fraud or interfered with any business relations the plaintiffs may have had. The jury found that ComFed had inflicted emotional distress upon Rhetta Sweeney and awarded her damages of \$65,000. The jury found that the Sweeneys were liable to ComFed under the terms of the \$1.6 million loan and awarded damages to ComFed of \$2,069,581,33, which amount included principal, interest, late charges and attorney's fees (Exhibit 303).

101. No question with respect to Count VIII of the complaint was submitted to the jury as advisory or otherwise for the purposes of this decision.

102. By a letter of June 7, 1989, ComFed made a tender of settlement to the Sweeneys. A copy of ComFed's tender is attached hereto as Exhibit B.

103. By its tender, ComFed offered the following three alternative settlement proposals to the Sweeneys:

a) ComFed proposed to tender a release to the Sweeneys in exchange for deeds to the Sweeneys' real estate in lieu of foreclosure.

b) ComFed proposed to forebear foreclosure proceedings for six months to facilitate sales and to agree to partial discharges for amounts equal to of 90% of bona fide selling prices,

not less than the following:

24 Meyer Lane \$700,000

226 Bay Road \$400,000

Lots each at \$200,000

In addition, ComFed offered to suspend and not charge interest during the forbearance period.

c) ComFed offered to forbear foreclosure proceedings for 3 months, charge no interest during this period and reduce accrued interest and charges to \$125,000, thereby limiting the debt to \$1,725,000, a reduction of approximately \$125,00 at that time.

104. The Sweeneys rejected ComFed's tender.

105. At the time it was made, ComFed's tender respecting settlement could not be considered fair and reasonable under the circumstances of this case.

FINDINGS OF FACT AS TO DAMAGES

I make the following findings on damages:

106. I find that since ComFed should have known or did know that the Sweeneys could not service the \$1.6 million loan and deceptively granted them the loan, ComFed is not entitled to any interest on that loan from June 6, 1989, the date of the C.93A Notice to date. The amount of interest payment due to \$20,666.70 monthly. The plaintiffs are to recover as damages the 19 months

interest at \$20,666.70 which totals \$392,667.30. In addition, the plaintiffs are to recover damages for the closing fees made on this loan in the amount of \$79,651.92.

107. I find that the plaintiffs' expert witness Pamela McKinney was well-qualified as an expert witness as to real estate values and as to quantifying and estimating future development costs and estimated profits of the subject real estate.

108. McKinney's testimony was credible and her evaluation and report as to the development's potential of the Sweeneys' property was well-reasoned, precise, and based on accurate and precise facts of the market at the time she prepared her report.

109. McKinney's estimated profit which the Sweeneys would make from the loss of opportunity to develop their property amounted to the sum of \$1,009,964.00. I find that this amount is fair and reasonable in the circumstances.

110. I find that the \$1,009,964.00 as stated in the previous paragraph is a fair summary of loss of profit suffered by the plaintiffs and are damages recoverable under G.L.c.93A.

111. I find that the defendants offered no contrary evidence as to the development costs and made no showing of any difference in the profit estimates.

112. I find that the payment of \$65,000 to ComFed for the arrearage of interest for the ostensible reason to get further financing gives rise to another element of damages suffered by the plaintiffs under G.L.c.93A.

113. I find that the additional interest and fees accruing to secure that \$65,000 loan in the amount of \$11,455.00 to make the \$5,000 payment to ComFed is another element of damages suffered by

the plaintiffs under G.L.c.93A.

114. I find that the defendants' acts of unfairness and deceptive practices are obvious and wilful in three levels in violation of M.G.L.c.93A, 2:

First: The granting of the \$1.6 million loan;

Second: The refusal to grant additional construction financing; and

Third: The demand for payment of \$65,000 interest to enable the plaintiffs to secure additional loan funds.

115. Therefore, I make the following findings as to punitive damages:

First: As to the loan with its charges of interest and closing fees, the plaintiffs are entitled to double damages in the amount of \$944,638,44 (See Paragraph 106 above).

Second: As to the value of loss of profits of \$1,009,964. the plaintiffs are entitled to double damages in the sum of \$2,019,928.00. (See Paragraph 107, 108, 109, 110 111, above); and

Third: Plaintiffs are entitled to treble damages as to the amount of \$11,455.00 which amounts to \$34,365. (See Paragraph 113 and 114, above).

RULINGS OF LAW AS TO COUNT II

1. For several independently sufficient reasons, ComFed is entitled to judgment on Count II of plaintiffs Complaint seeking a decree of specific performance requiring ComFed to give partial

releases of its mortgage.

- a) First, Count II, even if it were an appropriate equitable claim, is moot because there is no pending or proposed sale which requires a partial release of ComFed's mortgage.
- b) Second, this Court cannot order specific performance of any purported implied undertakings to give partial releases "on reasonable prices" as requested by plaintiff. (Verified Complaint, paragraph 169). Specific performance can only be sought with respect to express contracts. Baseball Pub. Co. v. Burton, 302 Mass. 54 (1938); Berry v. Nardozzi, 362 Mass. 145 (1972). It is not a matter of strict or absolute right, Forman v. Gadouas, 247 Mass. 207, 211, 142 N.E. 87 (1924). McCormick v. Proprietors of Cemetery of Mt. Auburn, 285 Mass. 548, 189 N.E. 585 (1934).

RULINGS OF LAW AS TO COUNT VIII

1. Chapter 93A, 11 reads in pertinent part:

Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another

person who engages in any trade or commerce of an unfair or deceptive act or practice declared unlawful by section two or by any rule or regulation issued under paragraph © of section two may, as hereinafter provided, bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-five C, whether

by way of original complaint, counterclaim, cross-claim or third-party action for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

2. Chapter 93A, 2 reads in part:

- a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
- c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter.

3. The attorney general has promulgated such rules and regulations. Under such regulations an act or practice is a violation of G.L.c.93A, 2 if it:

 Fails to comply with existing statutes, rules, regulations, or laws meant for protection of the public's health, safety or welfare promulgated by the Commonwealth or any political subdivision thereof intended to provide consumers of this Commonwealth protection; or

 Violates the Federal Trade Commission Act, the Federal Consumer Credit Protection Act or other federal consumer protection statute within the purview of G.L.c.93A, 2.

 See 940 CMR, Sections 3.16(3) and (4).

4. Violations of a statute intended to protect the public interest constitutes a violation of G.L.c.93A. See MacGillivray v. W. Dane Bartlett Ins. Agency, 14 Mass. App. 52, 61 (1982).

5. A negligent violation of a statute is to be taken to constitute a violation of G.L.c,93A, 2, for which recovery under

11 is allowable. MacGillivray, supra at 61. See also Piccuirro v. Gaitenby, 20 Mass. App. Ct. 286, 290 (1985).

6. This court finds that it has jurisdiction to render a decision and that the case before the court is properly pleaded. It is for the trier of facts (and in this case the judge) to determine if the conduct of the defendants was an unfair or deceptive act or practice. DiMarzo v. American Mutual Ins. Co., 389 Mass. 85, 96 (1983); Nei v. Burley, 388 Mass. 307, 311-317 (1983).

7. Relief under G.L.c.93A is additional to that received under any common law remedies. Linthicum v. Archambault, 379 Mass. 381 (1979).

8. 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. My findings of fact are based on the statutory claim (c.93A) and have an opposite result as to the outcome of the case. The Chapter 93A claim is one for the trial judge. Wallace Motor Sales, Inc. v. American Motor Sales Corp., 780 F.2d 1049, 1063-67 (1st Cir. 1985). See also Turner v. Johnson & Johnson, 809 F.2d 90, 102 (1st

Cir. 1986) and Shaw v. Rodman Ford Truck Center, Inc., 19 Mass. App. Ct. 709 (1985).

9. The conduct undertaken by the defendants in this action constitutes violations of the Federal Home Loan Bank Act, 12 U.S.C. 1421, 216. This act was initiated to protect the public interest

by regulating federal home loan banks⁷ in their granting of mortgage loans. It set up a Federal Home Loan Bank Board which promulgated rules and regulations such as requiring a mortgage loan not to be more than 75 per cent of appraised value.⁸

10. Only a single award of joint or several damages will be granted against all the defendants where there were no independent wrongs and some of the defendants were liable only because of vicarious liability, or where the individual active independent wrongdoers were acting for the defendant corporation or its alter ego. Pepsi-Cola Metro, Bottling Co. v. Checkers, Inc., 754 F.2d 10 (1985).

11. In the instant case that court finds wrongdoing by the defendant Furey was on behalf of ComFed and finds that such wrongdoing was further exacerbated by the conduct of other employees of the defendant banks. The court finds, however, that in each instance the wrongdoing was performed by the individuals

acting for the defendant banks and, accordingly, will award only a single award of damages.

12. The standards of harm to be applied are not limited to traditional common tort or contract concepts. Slaney v. Westwood Auto Inc., 366 Mass. 688, 689 (1975). Such relief is an

⁷ The defendants ComFed were federal home loan banks.

⁸ 12 U.S.C. 1421, 1441, 21. The language of the statute states "whoever makes any statement knowing it to be false or whoever willfully overvalues any security for the purpose of influencing in any way the action of a Federal Home Loan Bank or Board upon any application . . . or loan, under this Act, . . . shall be punished by a fine of not more than \$5,000. or by imprisonment for not more than two years, or both.

addition to and not in substitution for traditional tort and contract remedies. Linthicum v. Archambault, 379 Mass. 381 (1979).

13. Since the court finds that there has been actual loss to the plaintiffs in the instant case, the claims of the plaintiffs fall properly within section 11. The actual loss as stated in the findings of fact consist of (a) the debt of the plaintiffs in having judgment for the principal, interest, late fees, legal fees and cost for \$2,069,581.33 entered by the jury on the defendants' counterclaim; the payment of closing costs, commissions of the August 27, 1986 closing in the amount of \$78,000., the loss of profit on the development of the property, and the loss of sale or sales of parcels of the property by the unwillingness to grant a partial release because the defendants bank thought the sale price was too low, and finally, the interference with a contractual right to develop the properties and loss of profit therefrom, causing the plaintiff Rhetta Sweeney's emotional distress (this fact was found by the jury). DiMarzo at 94-95, Wolfberg v. Hunter, 385 Mass. 390, 398 (1982), Smith v. Caggiano, 12 Mass. App. Ct. 41 (1981).

14. In order for the plaintiffs to recover, no intent to violate the act by the defendants need be shown. In fact a

violation may be committed in good faith and still be actionable.

Slaney, supra, 366 Mass. At 703.

15. Even a negligent misrepresentation of fact when the truth could be reasonably ascertained is an unfair and deceptive act within the meaning of Chapter 93A. Reliance upon the

misrepresentation is unnecessary; merely proof of causation between the misrepresentation and the plaintiffs' damages need be shown.

Reymer v. Bay State Nat'l Bank, 384 Mass. 310 (1981), Glickman v. Brown, 21 Mass. App. Ct. 229, 235-236, (1985).

16. In determining whether an act or practice is unfair as opposed to deceptive, the equities of the party should be weighed. That is calculation should be made as to what each reasonably should have known. Swanson v. Bankers Life Co., 389 Mass. 345, (1983). The court finds that in weighing the knowledge of the plaintiffs versus the greater knowledge of the defendant Furey and other bank officers the acts and practices of ComFed were both unfair and deceptive.

17. The court finds that the actions of ComFed with respect to the plaintiffs "attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble world of commerce" Levings, Trustee v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498 (1979).

18. Assuming that the plaintiffs were more sophisticated than found by the court (or indeed were as sophisticated as the defendants wish to claim) the unfair and deceptive practices of defendants as alleged by plaintiffs are sufficient to state claims

for relief since 93A "did not limit the statutes protection to small, unsophisticated businesses." VSH Realty, Inc. v. Texaco, Inc., 757 F.2d 411 (1st Cir. 1985).

19. In addition to being clearly unfair, the acts of the defendants as related to the plaintiffs within the findings of fact

set forth above are deceptive in nature since they "could reasonably be found to have caused a person to act differently from the way he otherwise would have acted" See also York v. Sullivan, 369 Mass. 157, 162 (1975); Lowell Gas Co. v. Attorney General, 377 Mass. 37, 51 (1979).

20. Deceptive acts or practices also consist of failures to disclose important information, York v. Sullivan, 369 Mass. 157, 162-163 (1975).

21. Failure to fulfill promises and misrepresentations of material and other facts are rampant in the transactions between the defendants and plaintiffs and also constitute deceptive acts within the meaning of the statute. Slaney, supra at 702; Brandt v. Olympic Const., Inc., 16 Mass. App. Ct. (1983). Glickman v. Brown, 21 Mass. App. Ct. 229 (1985).

22. In fixing damages, lost profits as set forth by expert testimony are a proper basis for an element of recovery where it appears that the loss was a probable consequence of the unfair and deceptive practices. Gagnon v. Sperry & Hutchinson Co., 206 Mass. 547 (1910); Knightbridge Marketing v. Promociones Y Provectos, 728 F.2d 572, 575 (1984).

23. The prospective profits need to be shown by the plaintiffs that they have lost such profits by reasonable facts and evidence and need not be proven with mathematical accuracy. Rombola v. Cosindas, 351 Mass. 382 (1966). Gagnon, supra at 555.

24. "Expert testimony alone has been explicitly recognized as a method of proving prospective damages." Knightbridge Marketing, v. Gidley-Eschenheimer Corporation, 16 Mass.App.Ct. 372 (1983).

25. Multiple damage provisions of c. 93A are designed to impose a penalty. Liability under 11 for multiple damages ought

to vary with the culpability of the defendant. International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 856-857 (1983); Linthicum, supra at 385; Heller, supra at 627-628.

26. In any case where there is a finding for the plaintiff, irrespective of the amount, the plaintiff shall be entitled to be awarded reasonable attorney's fees and costs. Raymer v. Baystate National Bank, 384 Mass. 310 (1981); Patry v. Liberty Mobile Home Sales, Inc., 15 Mass. App. Ct. 701 (1983), modified, 394 Mass. 270 (1985); Burnham v. Mark IV Homes, 387 Mass. 575 (1982).

27. Under 11, attorney's fees may be awarded in the case where a reasonable written offer of settlement was rejected. G.L. c.93A, §11 states "If the court finds in any action commenced hereunder that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and costs incurred in said action." Kohl v. Silver Lake Motors, Inc., 369 Mass. 795 (1976).

28. The amount of reasonable attorneys' fees and costs is within the broad discretion of the court. DiMarzo, supra at 85; Linthicum, supra at 388; Heller v. Silverbranch Constr. Corp., 376 Mass. 621 (1978); McLoughlin v. Disarro, 7 Mass. App. Ct. 853, (1979); Levy v. Bendeton, 6 Mass. App. Ct. 558, (1978); Patry v. Liberty Mobile Home Sales, supra at 706-707; Morse v. Mutual Federal Sav. & Loan Assn., 536 F. Supp. 1271 (D.Mass. 1982).

29. Since this c. 93A claim is made under 11, a demand letter is not required and, therefore, there is no need to decide the sufficiency of the plaintiffs' demand. Nader v. Citron, 372 Mass. 96 (1977).

30. In this case the Court has examined defendant's letter of June 7, 1989 submitted to this Court on April 25, 1990,

(Defendant's App. 63) which is submitted as defendant's tender of a reasonable settlement offer. This offer was rejected by the plaintiffs. Such a rejection would bar attorney's fees if tender was adequate. Kohl v. Silver Lake Motors, supra at 801-802.

31. A careful examination of the defendant's tender shows that it is inadequate as a matter of law in the following respects:

- a) The tender makes reference to conduct before and after the letter is written, and the failure to consider reasonable solutions. The defendants make no offer of proof concerning the background surrounding the forwarding of the tender letter. The court finds it inadequate.
- b) The primary basis of the proposed settlement would have exchanged the property in question for a discharge of the \$1.6 million dollar debt plus interest and fees. The appraisal by defendants in August 1987 demonstrated the value of the property in its then state in an amount in excess of the debt at the time of the tender some 17 months later (Exhibit 80). The approval of a flexible subdivision by the Town of Hamilton in February, 1988, added substantial value to the property. Accordingly, the said offer actually agreed to exchange property valued in excess of \$2,600,000 (claimed by the plaintiffs) for a debt of approximately \$1,900,000 or less makes such an offer unfair and inadequate.
- c) A portion of the offer purports to waive interest while giving the plaintiffs an opportunity to sell the premises. The court finds, however, that a

proposed sales price for the Meyer Lane home of \$700,000 was an offer too little, too late. By rejecting a purchase price of \$775,000 (Exhibit 41) earlier, defendants had made known that partial releases would not be forthcoming and thereby chilled prospective purchasers as to this real estate.

32. The prime goal of c. 93A, 11 is to promote reasonable settlement. "[T]he conduct proscribed by the statute is as much the failure to make a reasonable settlement offer as it is the substantive violation of c.93A." International Fidelity, supra at 857.

FINDINGS AS TO ATTORNEYS' FEES

In making a finding on attorneys' fees, the Court has discretion to grant the plaintiffs reasonable attorneys' fees and costs incurred in connection with this action with respect to services rendered as to Count VIII, the c.93A claim as to unfair practices.

In setting the fees, I have taken into account the following factors: how long the trial lasted, the complexity of the legal and factual issues involved and the degree of competence and skill demonstrated by the attorneys. Also I have considered the result obtained, the experience, reputation and abilities of the attorneys, the necessity of the plaintiffs having more than one attorney, and the usual fees charged for similar services by other attorneys in the same area.

My assessment of legal fees is based on the lengthy and detailed affidavits of Attorneys James A. Freiden, Christopher Weld, Jr., and Robert M. Axelrod which are part of the papers and records of this case (Documents #83A, 83B, and 83C).

I am factoring out of the award the considerable amount of time spent on the other aspects of the case. For that reason, I am excluding the major portion of the work done by Attorney James A. Frieden. As his detailed bills show, his work was mostly the initial drafts of complaint, interviews with clients and with other persons. He is being, however, credited with the taking of depositions of the bank officers and the costs incurred therefor.

As to Attorney Christopher Weld, it was necessary for this attorney to appear before the court in order to have Massachusetts counsel at the bar to allow Connecticut counsel, Attorney Axelrod to appear. There was also need for additional counsel to assist lead counsel in this very complex litigation involving 12-14 days of trial; several days of hearings; with the handling of more than 140 documents filed with the court; and with over 300 exhibits used in this case.

The task of deciding which fees are to be apportioned between the various claims is not easy of definition because of the many areas of trial and the many overlapping claims. Attempting to sort these factors by examination of the various affidavits is difficult but the attorneys have made a good faith effort in their affidavits to describe their work.

Therefore, I make the following findings of fact as to legal fees and costs:

1. As to Attorney James A. Frieden, I award and grant the total legal fees of \$7,300.00 and for the costs of depositions \$2,300, for a total sum of \$9,600 for legal fees and costs.

2. As to Attorney Christopher Weld, Jr., I award and grant for legal fees the sum of \$6,500.00, and the sum of \$404.00 for costs, for a total sum of \$6,904.00 for legal fees and costs.

3. As to Attorney Robert M. Axelrod, I award and grant for

legal fees the sum of \$70,200.00 and for costs the sum of \$11,000.00, for a total sum of \$81,200.00.

4. The total sum granted above for legal fees and costs is \$97,704. which the plaintiffs are entitled to recover from the defendants, ComFed, under M.G.L.c.93A, Count VIII of the plaintiffs' complaint.

ORDER

It is therefore ORDERED, ADJUDGED, and DECREED as follows:

1) I find for the defendants on Count II of the plaintiffs' complaint and deny specific performance and damages. The defendant is not to have costs.

2) I find that the plaintiffs are entitled to judgment against the defendants ComFed on Count VIII in the sum of \$2,998,931.44 with interest from the date of filing and costs.

3) I find that the plaintiffs are entitled to the total sum of \$97,704.00 for legal fees and costs.

4) On count VIII judgment shall enter in the amount of \$2,998,931.44 for the plaintiffs, plus interest from the date of filing and costs and in the amount of \$97,704.00 for attorney fees and costs without interest and costs.

Katherine Liacos Izzo
Justice of the Superior Court

DATED: January 30, 1991