5th

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 2011-00624H

COMMONWEALTH OF MASSACHUSETTS

vs.

DAVID ZAK, ZAK LAW OFFICES, P.C.,
and
LOAN MODIFICATION GROUP, INC. d/b/a
LOAN MODIFICATION GROUP OF MASSACHUSETTS

FINAL JUDGMENT AND PERMANENT INJUNCTION

JUDGMENT is accordingly entered pursuant to G.L. c. 93A, § 4, in favor of the Commonwealth of Massachusetts against Defendants David Zak, Zak Law Offices, P.C., and Loan Modification Group, Inc., with respect to all claims as follows:

1. Pursuant to Mass. R. Civ. P. 65, this Court hereby permanently enjoins the Defendants and those otherwise bound by the Court's injunction pursuant to Mass. R. Civ. P. 65(d) from engaging in or otherwise facilitating the following activities or conduct within the Commonwealth of Massachusetts or directed to any Massachusetts resident(s), whether directly or indirectly through any other person or entity:

Note Ent 7/15/15 MHS SC IHP

a. Making or using any promotional, marketing, solicitation, or advertising material, in any form or medium, that is false or misleading or has the tendency or capacity to be misleading to a reasonable consumer.
b. Requiring any consumer to disclaim any direct or implied representations made in any promotional, marketing, solicitation, or advertising activity or materials.

JUDGMENT ENTERED ON DOCKET 7/15 20 15
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SEND TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

A TRUE COPY OF JUDGMENT DULY ENTERED ON 7-15-15

c. Soliciting, arranging, or accepting any advance fee(s) or payments for foreclosure-related services or mortgage assistance relief services in a manner that violates 940 CMR 25.02(2) or 16 C.F.R. 322.5.

d. Affiliating or forming any business, organizational entity or identity, or "doing business as" as a method to evade the terms of this Court's Judgment.

2. Pursuant to G.L. c. 93A, § 4, the Defendants are ORDERED to pay to the Commonwealth of Massachusetts a $2,000 civil penalty for each violation of G.L. c. 93A, § 2, as follows:

a. Defendant LMG shall pay civil penalties of $114,000, for soliciting, accepting, and/or arranging "advance fees" from fifty-seven consumers, in violation of 940 CMR 25.02(2) and G.L. c. 93A, § 2;

b. Defendant ZLO shall pay civil penalties of $86,000, as follows:

i. $16,000 for soliciting, accepting, and/or arranging "advance fees" from eight consumers, in violation of 940 CMR 25.02(2) and G.L. c. 93A, § 2; and

ii. $70,000 for publishing and/or causing to be published 35 unfair or deceptive infomercials in violation of 940 CMR 6.04(1), 940 CMR 25.03(c), and G.L. c. 93A, § 2,

c. Defendant Zak shall pay civil penalties of $200,000, as follows:

i. $130,000 for soliciting, accepting, and/or arranging "advance fees" from sixty-five consumers, in violation of 940 CMR 25.02(2) and G.L. c. 93A, § 2; and

ii. $70,000 for publishing and/or causing to be published 35 unfair or deceptive infomercials in violation of 940 CMR 6.04(1), 940 CMR 25.03(c), and G.L. c. 93A, § 2.

3. Pursuant to G.L. c. 93A, § 4, the Defendants are ORDERED to pay to the Commonwealth of Massachusetts restitution in the amount of $157,000, reflecting "advance fees" collected in violation of G.L. c. 93A and 940 CMR 25.02(2), from 65 consumers who filed complaints with the Commonwealth.

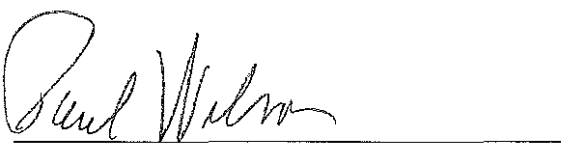
4. Pursuant to G.L. c. 93A, § 4, the Defendants are ORDERED to pay to the Commonwealth of Massachusetts $68,146.00 in attorney's fees and costs for its investigation and litigation of this matter.

5. The terms of this Judgment shall extend to Defendants, whether acting, directly or indirectly, individually or in concert with others, or through any corporation, partnership, trust, association, franchise, distributorship, or other entity or device through which they may now or hereafter act or conduct business in the Commonwealth of Massachusetts, and this Final Judgment shall constitute a continuing obligation.

6. Violation of this Final Judgment and Permanent Injunction shall constitute a violation of G.L. c. 93A, § 4, and may be punished as contempt.

7. The Defendants shall inform any successors or assigns of the terms of this Final Judgment, including, specifically, the terms of injunctive relief described herein.

SO ORDERED,



Paul D. Wilson
Justice of the Superior Court

July 14, 2015

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2011-~~642~~-H
624

COMMONWEALTH OF MASSACHUSETTS

vs.

DAVID ZAK and others[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this case, the Commonwealth alleges that Defendants violated M.G.L. c. 93A and regulations promulgated under that statute, by engaging in a pattern and practice of unfair or deceptive acts in their advertising and operation of a residential mortgage loan modification business. Defendants defaulted, thereby conceding liability. I held a non-jury trial to determine what relief, both monetary and injunctive, should be awarded to the Commonwealth. This is my post-trial decision as to that question.

Notice Sent 7/15/15 MHS SC IHP

Procedural History

In July 2012, this court issued an order compelling production of documents by Defendants. When Defendants failed to comply, Judge Leibensperger held a hearing on the Commonwealth's motion for default, and then defaulted each Defendant in October 2013.

Defendant Zak then filed for bankruptcy. Apparently that bankruptcy petition eventually was dismissed, because on September 4, 2014, Judge Leibensperger issued a pretrial order for a non-jury trial on the subject of the Commonwealth's request for monetary and injunctive relief.

[1] Zak Law Offices, P.C. and Loan Modification Group, Inc., d/b/a Loan Modification Group of Massachusetts

After two continuances requested by various parties, that non-jury trial was scheduled for January 14, 2015, with the agreement of the parties.

In anticipation of the trial, the Commonwealth filed a Motion for Assessment of Damages and an Entry of Final Judgment and Permanent Injunction against Defaulted Defendants on December 22, 2014. Defendants did not file or serve an opposition to that motion.

On January 8, 2015, the parties filed a Joint Pretrial Memorandum for Jury-Waived Trial. Both parties included proposed findings of fact in the Joint Pretrial Memorandum. Thereafter, on the Commonwealth's motion, I struck Defendants' proposed findings of fact from that document, because they were unsupported by citations to expected evidence, in violation of the pretrial order of September 2014. That joint pretrial memorandum contained proposed conclusions of law suggested by the Commonwealth, but not by Defendants.

Defendant Zak filed for bankruptcy again on January 15, 2015. A week later, the Commonwealth filed a brief arguing that the Bankruptcy Code's automatic stay did not prevent a case of this nature from going forward against Defendant Zak, and stating that the Commonwealth had obtained an order from the Bankruptcy Court to that effect. Defendants ultimately agreed with the Commonwealth's legal argument on this point in open court.

Because of this maneuvering, the trial date had already passed, so I rescheduled the trial for January 30, 2015. I made various pretrial rulings. Among other things, I excluded from evidence certain exhibits proposed by Defendants because of their failure to produce those documents in discovery, while allowing Defendants to introduce certain other documents into evidence over the Commonwealth's objection. On or about January 29, 2015, the parties filed an Amended Joint Pretrial Memorandum for Jury-Waived Trial, which included among other things

the Commonwealth's original proposed findings of fact and Defendants' responses to those proposed findings, as well as the Commonwealth's proposed conclusions of law.

The non-jury trial then proceeded before me on January 30, February 2, February 17, and February 18, 2015. Despite their earlier default, Defendants were represented by counsel at trial, and in the proceedings immediately preceding the trial described above. Six witnesses testified at trial, and 53 exhibits, many of them lengthy and containing numerous attachments, were admitted into evidence.

At the conclusion of the trial, at the request of the parties, I set a schedule (suggested by the parties) for the Commonwealth's filing of supplemental proposed findings of fact and supplemental legal argument, and for Defendants' response under Superior Court Rule 9A. On April 30, 2015, the Commonwealth made its supplemental filing, along with a Rule 9A certificate indicating that Defendants had neither responded nor served any supplemental filings of their own. Because I was then sitting a different county, that supplemental filing reach me sometime in early May.

Findings of Fact

Based on the parties' agreement as to certain facts (found in Defendants' response to the Commonwealth's proposed findings of fact, located in the January 29, 2015 Amended Joint Pretrial Memorandum for Jury-Waived Trial), all the credible evidence presented at trial, and all the reasonable inferences drawn from those that evidence, I find the following facts.

1. The Defendants

At all relevant times, Defendants Zak was a licensed attorney in the Commonwealth of Massachusetts.

In 2007, Zak incorporated Defendant Zak Law Offices, P.C., as an entity through which he would perform legal services. Zak Law Offices was located in Needham through August 1, 2010, and thereafter in Revere. Zak was the sole owner, officer, and director of Zak Law Offices, and controlled all of its employees and affairs. He does not dispute that he was ultimately responsible for everything at Zak Law Offices.

On February 6, 2009, Zak incorporated Defendant Loan Modification, Group, Inc. ("LMG"), whose purpose was to engage in loan modification services. LMG's office was at 701 Broadway in Revere, and Zak Law Offices operated out of the same space after August 1, 2010. Zak was the sole owner, officer and director of LMG. Zak concedes that he oversaw LMG's operations, made its ultimate decisions, and had final say over all of its operations. In LMG's standard fee agreement with its clients concerning foreclosure-related services, LMG describes itself as "a wholly owned and operated subsidiary of Zak Law Offices PC, a Massachusetts Professional Corporation licensed and engaged in the practice of law." By some point in 2010, LMG had stopped operating, and its functions reverted to Zak Law Offices. On June 30, 2014, the Secretary of the Commonwealth involuntarily dissolved LMG.

2. Creation of the Loan Modification Business

In 2007, Zak met Elizabeth "Lisa" Reed. Reed was a mortgage broker who had placed thousands of sub-prime mortgage loans, many of them for lower-income persons of Hispanic or Portuguese or Brazilian descent. Much later, in 2011, Reed pleaded guilty in federal court in Massachusetts to money laundering and wire fraud in connection with her placement of sub-prime mortgage loans, for which she served 14 months in federal prison.

Well before this, in late 2008, Reed and Zak joined forces to offer loan modification services to homeowners facing foreclosure. Reed brought to the enterprise her list of thousands

of borrowers for whom she had placed subprime mortgage loans; she and Zak correctly surmised that many of those borrowers might now be unable to make their mortgage payments. Reed also brought along with her some of the agents who had worked for her in her mortgage placement business, many of them Spanish speakers. Zak brought to the enterprise its initial funding, as well as his willingness to market himself as a lawyer who could save such borrowers from foreclosure by obtaining modifications of their mortgage loans. However, at this point Zak had never performed any loan modification, bankruptcy, or foreclosure avoidance services; had never sued a bank on behalf of a homeowner; and had never represented a homeowner in connection with a loan modification or other foreclosure-related services.

Zak and Reed agreed to a 50/50 split of the profits they would earn from their planned loan modification business. Zak and Reed could not share profits from loan modification work performed through Zak Law Offices, however, because Reed, who was not an attorney, could not be a partner in that law firm. Nonetheless, Reed moved into the Needham office of Zak Law Offices, and, under the auspices of Zak Law Offices, Zak and Reed began to offer loan modification services to consumers.

A few months later, Reed and Zak agreed to create LMG and make it the vehicle for at least some aspects of their loan modification business. Reed already was facing legal troubles at this point, and so Zak suggested that her name not be associated with LMG. To put in place the 50/50 split of the profits, Zak, acting for LMG, entered into an oral partnership arrangement with Reed. Zak and Reed then set up LMG's office in Revere in February 2009.

About a year later, in January 2010, Zak told Reed that he no longer needed her in the loan modification business, and he had her escorted out of LMG's offices by an armed police

officer. Federal court litigation ensued, leading to a trial in which a jury awarded Reed $414,000, a result that was affirmed on appeal by the First Circuit.

3. Defendants' Infomercials

Under Zak's direction, Zak Law Offices, and later LMG, advertised, marketed, and promoted residential mortgage loan modification and foreclosure avoidance services to Massachusetts residents. Defendants used the Internet, Massachusetts-based newspapers, Spanish-language television stations directed to Massachusetts residents, and radio infomercials directed to Massachusetts residents. The infomercials were the primary source of clients for the loan modification services.

Zak oversaw and was responsible for all marketing and advertising for Defendants, and scripted the content of all radio infomercials. Zak testified that the infomercials were for the benefit of all three Defendants, and I so find.

In the winter and spring of 2010, more than 35 such infomercials aired. In each one, Zak made various statements in English about the services that Zak and Zak Law Offices purportedly provided, and everything he said was then translated into Spanish or Portuguese. (Zak speaks neither Spanish nor Portuguese.) During each infomercial, Zak gave out a phone number for potential clients to call. That phone number went straight to a particular non-lawyer agent of Defendants who spoke either Spanish or Portuguese as appropriate to the particular infomercial.

In the infomercials, Zak made direct or implied claims that he would initiate litigation against lenders to obtain permanent loan modifications on behalf of his clients. Zak also made direct or implied claims about results, including claims that Defendants could "cut your mortgage payment in half," reduce the mortgage principal to the fair market value of the home, and obtain a 2% interest rate. Zak testified that he claimed he could cut payments in half

because that was his usual result. I find, however, that, when he made that claim in the infomercials, Zak was aware that cutting payments in half was not his usual result.

Among Zak's specific statements in the infomercials were repeated claims that Zak was "the only lawyer in the state of Massachusetts that has obtained permanent modifications for Brazilian homeowners," that Zak Law Offices has emerged "as the only law firm in Massachusetts that has been able to help Latinos save their homes from foreclosure," and the like. Zak often claimed in the infomercials that Defendants had obtained hundreds of permanent mortgage loan modifications. This was false, and, of course, Zak knew it.

Zak sometimes cited alleged clients by name and described loan modifications that Defendants had purportedly obtained for those named clients. In a representative sample statement, Zak said, "I want to congratulate Senor Carrion who thought it would never happen with HomEq until Zak Law Offices came with its little lawsuit and made HomEq realize what time it is, and his mortgage payment went from $2500 a month to $1346 a month with a principal balance reduction of $15,984." In these infomercials, Zak cited the purported results he had obtained for the named individuals as representative of the results that Defendants could obtain for other consumers. The infomercials did not disclose that the results that Defendants obtained for some clients may not be representative of results for other clients.

Many other specific quotations from the infomercials are found in the Commonwealth's proposed findings of fact Nos. 23-28, and are not disputed by Defendants. I make the findings listed in those paragraphs, and incorporate those findings of fact into this decision.

In these infomercials, Zak frequently referred to "the Obama Plan" as the vehicle under which Defendants could obtain permanent loan modifications with reduced interest rates and reduced principal balance. By "the Obama Plan," Zak was referring to the Home Affordable

Mortgage Program ("HAMP"), a federal program created in March 2009 by the Obama Administration in response to the national foreclosure crisis. HAMP is a voluntary program that offers financial incentives to participating lenders and loan servicers in exchange for their modification of eligible mortgage loans pursuant to HAMP guidelines and supplemental directives.

The HAMP guidelines and supplemental directives apply only to lenders or servicers who voluntarily participate in HAMP, and, at the time of the infomercials, some major servicers and lenders did not. The HAMP guidelines and supplemental directives state that a servicer or lender who chooses to participate in the HAMP program may decline to permanently modify a particular mortgage loan for a variety of reasons, including the servicer's or lender's review of the borrower's particular financial situation, or a borrower's failure to live up to his/her obligations under a "trial modification" of the loan.

In situations where a participating servicer or lender agrees to a loan modification, HAMP imposes no requirement that the servicer or lender forgive principal. While HAMP guidelines provide that 2% is the lowest allowable interest rate for a modified loan, higher interest rates are also permitted, based on the financial situation of the borrower.

Whether or not a lender or servicer participated in the HAMP program, it also had the power to grant an "in-house" loan modification on whatever terms it found appropriate. Whether a lender or servicer granted such an in-house modification was within the sole discretion of the lender or servicer.

The infomercials do not disclose that a servicer or lender is under no obligation to grant a permanent loan modification, under HAMP or otherwise. The infomercials do not disclose that a permanent loan modification, under HAMP or otherwise, cannot be guaranteed for any

homeowner. The infomercials do not disclose that even a servicer or lender that agrees to grant a trial loan modification may later decide not to grant a permit modification. The infomercials do not disclose that a permanent loan modification might not include particular terms such as a specific interest rate, a reduction in principal, or the like.

At the time that any homeowner retained Defendants, Defendants did not know: (1) whether Defendants would be able to obtain either a trial or permanent loan modification, under HAMP or otherwise, for that homeowner; (2) the particular terms of any modification that they might be able to obtain for the homeowner; and (3) whether Defendants would obtain a better loan modification for the homeowner than the homeowner could have obtained on his or her own or through other service providers. The infomercials did not disclose any of these facts.

Defendants intended for homeowners to rely on the representations made by Zak in the infomercials. Massachusetts consumers did in fact rely on those representations in retaining Defendants, and in making the advance payments described below.

4. Defendants' Business Practices

Most or all of the homeowners who retained Defendants to obtain a loan modification dealt with non-attorney agents affiliated with LMG or Zak Law Offices. Two of those agents, Reed (who also trained and supervised agents) and Evelyn Aguirre, testified at trial.

Zak testified that the infomercials became the primary source of clients for Defendants' services, and I so find. Other homeowners were recruited by agents. The agents were paid a commission for each homeowner they serviced, which was paid after the homeowner's check had cleared. The agent's commission did not turn on whether or not the homeowner received a final or even a trial modification, whether Defendants filed any litigation for that homeowner, or whether foreclosure was avoided for that homeowner. If Defendants gave a homeowner a refund

for some reason, which they occasionally did in the early days of the operation, Defendants reclaimed the associated commission from the agent.

This compensation arrangement gave the agents a financial incentive to sign up as many homeowners as possible. In fact, Zak instructed Aguirre, and I infer that he instructed other agents, to sign up 10 new clients a month, and he threatened to delay the payment of commissions already due to the agents if they failed to sign up 10 new clients in a particular month. Zak did not back off from his 10-clients requirement even when Aguirre told him that she was too busy rendering services to current clients to meet that requirement.

Until May 2009, Defendants permitted their agents to meet with prospective clients outside Defendants' offices, with no supervision. That changed as a result of an email dated May 21, 2009 from attorney Jonathan Friedmann, a business associate of Zak and referral attorney for Defendants. That email to Zak began,

> I am sending you this email in follow-up to the telephone discussion we just had. Until further notice my office will not be accepting referrals from Loan Modification Group of Massachusetts for mortgage modifications. I'm very concerned with your business practices and the failure/potential failure of your employees and agents compliance with Massachusetts law and the regulations of the Attorney General. In particular I have received at least one call from a consumer, indicating that you are [sic] sales force is promising results including but not limited to, a reduction in the principal amount of the loan, an extension of the loan term, and a decrease in interest rate. As you know, you cannot guarantee results and a consumer cannot be misled this way.

Exhibit 26. Although the email concerned the practice of LMG, Friedmann addressed it to dzak@zaklawoffices.com, and also sent Reed a copy at a Zak Law Offices email address. In response, Reed emailed Friedmann that "we will put together a non-guarantee form that will be approved by you where the supervising manager will go over the details of the deal and have the customer sign off." *Id.* Zak then drafted and sent to Friedmann a "Non-Guarantee Disclosure" that clients thereafter were required to sign before receiving any services from Defendants. *Id.*

In fact, both before and after the Friedmann email, Defendants' agents were promising results to consumers, as was made clear by the testimony of agent Aguirre. Aguirre was trained by Reed, Zak, and one other person. During her training, Zak instructed her to explain the services of LMG by saying that Zak, whom she was instructed to mention by name, would save the homeowner's house, would obtain a lower payment, would get the interest rate down to 2%, and would obtain a reduction of the principal amount of the loan to the fair market value of the house. Zak instructed Aguirre to say these things in the first meeting with any homeowner. I infer from the evidence as a whole, and find, that Zak trained other agents to say the same things.

After obtaining an initial payment from a homeowner and gathering information from the homeowner, Defendants would provide certain "deliverables" to the homeowner, all as more fully described below. Then, in return for a second payment, Defendants promised to deal (to a certain point, anyway; see below) with the servicer or lender on behalf of the homeowner.

For some period of time, Zak and Aguirre both testified, it was Defendants' policy to close a homeowner's file as soon as a trial modification was obtained. I credit this testimony. Defendants did not tell consumers, either in the fee agreement or otherwise, that Defendants considered their obligations to the homeowner to be satisfied when trial loan modification was obtained. Most or all of the homeowners who retained Defendants would not have retained them had they been told that Defendants considered a trial loan modification to be an end result.

Zak instructed Aguirre, and I infer he instructed other agents, to tell homeowners for whom Defendants obtained trial modifications that permanent modifications would follow. However, for several reasons, there was no guarantee that any trial modification would lead to a permanent modification. For one thing, during the trial modification phase servicers or lenders would sometimes continue their due diligence by requiring borrowers to submit additional

documents. In other cases, borrowers could not or did not make payments required by trial modifications. In still other cases, lenders or servicers that granted trial modifications failed to grant permanent modifications because they claimed, inaccurately, that they had not received documents they had requested of the borrower, or that the homeowner had failed to make payments that the homeowner actually had made. For other reasons completely unrelated to the particular homeowner's situation, such as limits on the overall number of loans within a securitized pool that could be modified, a servicer or lender might decide not to extend a permanent loan modification to a homeowner.

During the trial modification period, many homeowners would have benefitted from the assistance of a lawyer with regard to any problems that cropped up. I find, based on the testimony of two such homeowners who testified before me (Blanca Garcia and Magdalena Morales), that the homeowners who retained Defendants reasonably believed that Defendants would continue to assist them to some extent through the trial modification period.

5. Defendants' Success Rate

Defendants were retained by at least 600 Massachusetts consumers. At least 65 of those consumers complained to the Attorney General of the Commonwealth regarding their experiences with Defendants.

At first Defendants would outsource to other attorneys the responsibility for contacting the lender or servicer, sending a Chapter 93A letter to the lender or servicer, negotiating with the lender or servicer, and, in a limited number of cases, filing suit against the lender or servicer. In the first half of 2009, many matters were outsourced to attorney Friedmann. In June 2009, Zak ended Defendants' referral relationship with attorney Friedmann. Zak says he did so because Friedman had been largely unsuccessful in obtaining loan modifications. I credit this testimony,

but further find that a more important reason that Zak terminated the relationship was his unhappiness with the Friedmann email of May 21, 2009.

After Friedman's departure from the scene, Zak Law Offices took a more active role in dealing with the servicers and lenders. While Zak Law Offices had better success than its referral attorneys in obtaining trial loan modifications, it, too, was largely unsuccessful in obtaining permanent loan modifications – in part because it often did not try, considering its work to be done if it obtained a temporary loan modification. I credit the testimony of agent Aguirre that, throughout 2009 (that is, during the period when Defendants were referring many matters out, and also during the time when Zak Law Offices was doing much of the work itself), she never saw any results for the clients she was working with. I further credit her testimony that Zak's focus was not in helping people resolve claims, but rather on bringing in more homeowners and dollars.

Zak testified that Zak or Zak Law Offices filed 43 lawsuits between 2009 and 2013 for homeowners, and referral counsel filed another 29 lawsuits. Although I generally disbelieve Zak's testimony (except as otherwise noted in these findings of fact), I credit his testimony on this point, because these numbers, which he stated on cross-examination after stating a higher number during his direct examination, are consistent with his testimony before the Board of Bar Overseers – and because this testimony was followed immediately by Zak's concession that such lawsuits resulted in loan modifications on only one or two occasions, testimony that I also credit.

Defendants did obtain trial modifications for some, but certainly not all, of the homeowners who retained them. As Zak conceded at trial, the terms of those partial modifications generally did not come close to the numbers he mentioned in his infomercials; for

instance, few if any of the trial modifications obtained by Defendants reduced the principal of the loan to the fair market value of the house.

Zak testified that Defendants obtained final modifications for 31 or 32 homeowners. I make no finding of fact on this point, because I generally disbelieve Zak's testimony. However, even if this number were accurate, it would represent a success rate of approximately 5%, given that Defendants serviced 600 or so homeowners.

6. The Advance Payments

I credit Zak's testimony that he was aware at all relevant times of 940 CMR 25.02(2), which makes it a violation of Chapter 93A to solicit or accept advance fees in connection with arranging or providing for the sorts of foreclosure-related services that Defendants were providing to homeowners. Nonetheless, Defendants undertook little or no work for a homeowner until they had received an initial payment, and the homeowner's check had cleared. This was the practice of Zak Law Offices before the creation of LMG; the practice of LMG when it was active; and the practice of Zak Law Offices once again after LMG became inactive. In fact, Defendants do not dispute that LMG's agents specifically advised some homeowners that LMG would not begin working for the homeowner until the homeowner paid all or a substantial portion of LMG's fee.

Zak drafted the form fee agreement used by Zak Law Offices, and by LMG. While that document evolved over time, one basic requirement was that homeowners were charged a flat fee of $5000, which they could make in one payment or two equal monthly payments. (If a foreclosure sale had already been scheduled, the fee agreement said that Defendants would charge the homeowner $8,000 for what the fee agreement called "Foreclosure Rescue;" there was little testimony at trial about these higher-priced services.) Most homeowners chose to

make two payments. Zak Law Offices or LMG generally collected the first $2500 payment when the homeowner hired Defendants, and Defendants retained that payment regardless of the results they obtained for the homeowner.

For the first payment of $2500, Defendants provided the homeowner with three deliverables. First, based on whatever financial information the homeowner provided at the first meeting, Defendants would "prequalify" the homeowner, by attempting to determine, based on the homeowner's resources and the size of the loan, whether the lender or servicer would consider the homeowner as qualified to seek a loan modification. Reed referred to these prequalifications as "guesstimates." The prequalification process was complicated by the fact that each lender or servicer used its own discount rate in the net present value estimate that it would perform in deciding whether a particular loan qualified for modification, and these discount rates were not publicly available until sometime in 2011. Nonetheless, Reed testified, Defendants' agents generally were fairly accurate in these predictions. I credit this testimony.

In the first part of 2009, if a homeowner failed this prequalification guesstimate, Defendants would not accept that person as a customer, and would return the $2500 check. In mid-2009, however, Zak began requiring agents to take in the homeowner as a customer, and to accept the payment regardless of the results of the prequalification guesstimate. At Zak's instruction, the agents did not tell homeowners who failed this test that they were unlikely to get a loan modification.

The second deliverable that a homeowner received for the initial $2500 payment was a "Loan Benefit Analysis." This document, generated by inputting information provided by the homeowner into a software program, was a chart containing two columns. The first column, headed "Current," listed the homeowner's loan terms and the status of his payments, showing the

original loan amount, the current interest rate, and the total monthly payment. The second column, headed "Proposed," showed a target loan modification, which consisted of a reduced loan amount, a reduced interest rate, and a reduced monthly payment. Also shown in the chart were the expenses that Defendants predicted that the lender would incur if it foreclosed, the market value of the property, and other items.

One example is Exhibit 18A, which shows that, on a house worth $250,000, the homeowner was carrying a loan whose original amount was $339,348, with an interest rate of 7.88%, for a total monthly payment of $2,329. The "Proposed" column showed a loan of $225,000, with a 4% interest rate, for a total monthly payment of $940.36. The Loan Benefit Analysis prepared on the letterhead of LMG for homeowner Blanca Garcia, who testified at trial, is Exhibit 43; it shows a reduction in monthly payments from $3530 to $745.55. The Loan Benefit Analysis prepared on the letterhead of Zak Law Offices for homeowner Magdalena Morales, who also testified at trial, is part of Exhibit 45; it shows a reduction in monthly payments from $2304.14 to $797.04.

Homeowner Garcia testified that the LMG agent who handled her matter said that the $745 monthly payment shown on the Loan Benefit Analysis would be her payment after she got her loan modification. Homeowner Morales testified that Zak himself presented her with her Loan Benefit Analysis, telling her that he would cut her the principal of her loan in half and leading her to understand that $800 would be her monthly payment. I credit the testimony of both of these homeowners.

Zak testified that he believed that the interest rate in any loan modification would be 2% because, in his experience, loan modifications would include a 2% interest rate more than 99% of the time. (This testimony may be belied by the 4% interest rate shown in the "Proposed"

column of Exhibit 18A, described two paragraphs above, which was the target that Defendants claimed to be aiming for in the case of that loan.) Based on this experience, Zak testified, he would tell homeowners that a 2% interest rate was "practically guaranteed." I credit Zak's testimony that he said this to homeowners. In so doing, Zak was not taking into account the possibility that the homeowner might not even qualify for a loan modification. Zak further testified that he never guaranteed that a homeowner's monthly payment would be cut in half; instead, he testified, Zak told homeowners "as a matter of fact" that cutting a monthly payment half is something he "could do, and had done." I credit Zak's testimony that he said this to homeowners, too.

Reed testified that she told the homeowners she dealt with that "we could get you" the modified loan shown in the Proposed Column in the Loan Benefit Analysis. Aguirre testified that she told clients that they "would get" this modified loan, because she was instructed by Zak to say that. I find that Zak instructed Defendants' agents to state or to imply to homeowners that Defendants could obtain the results shown in the "Proposed" column of these Loan Benefit Analyses, that Defendants' agents followed that instruction, and that Zak himself stated or implied this to homeowners with whom he dealt directly.

The Loan Benefit Analysis form did not contain a disclaimer, but other documents presented to homeowners, including the "Non-Guarantee" document drafted by Zak at Friedmann's insistence in May 2009, did state that Defendants were not guaranteeing any particular result. I find, however, that the homeowners, most of whom were unsophisticated in business matters and many of whom had limited or no English language ability, were likely to ignore any disclaimers when they heard an express or implied guarantee from Defendants' agent.

Indeed, that is why Zak instructed Defendants' agents to imply or state outright that Defendants could obtain the results shown in the "Proposed" column.

Zak testified that the "Proposed" column in the Loan Benefit Analysis was actually intended not the homeowner but for the lender, as a "low-ball number for the bank." It was an intentionally aggressive number intended, Zak testified, to be sent in a Chapter 93A demand letter, providing a starting point for Defendants in a negotiation with the lender. While some Loan Benefit Analyses were sent to lenders, I find that this was hardly the sole purpose served by that document, as demonstrated by Zak's own use of the document with homeowner Morales. I further find that Defendants never explained to their homeowner customers that these numbers were aggressive negotiating positions; rather, Defendants deliberately induced homeowners to believe that these were achievable results.

Even when Defendants obtained trial loan modifications, and in the very few cases in which they obtained permanent loan modifications, Defendants did not achieve the "Proposed" modifications shown in the Loan Benefit Analyses. In fact, as Zak testified before me and before the Board of Bar Overseers, "very few" of the ultimate loan modifications even "came close" to the numbers shown in these Loan Benefit Analyses. I credit this testimony.

The third deliverable that Defendants provided to homeowner was a forensic audit of the homeowner's mortgage documents. The purpose of this audit was to look for ways in which the lender or servicer had failed to comply with Massachusetts law when it prepare the mortgage documents, sent notices to the borrower, and the like. At first, Defendants outsourced this work to a third party consulting firm, but eventually this work was done at LMG and, later, Zak Law Offices.

All three of these deliverables were prepared by people who were not lawyers. No legal services were rendered by any of the Defendants in the course of preparing these three deliverables which, according to the fee agreement, were what the homeowner got for his or her initial payment of $2500.

According to most versions of the fee agreement, in return for the second $2500 payment, the homeowner could expect that Defendants would submit a loan modification application or a demand letter, and would negotiate with the servicer or lender. See, e.g., Exhibit 2 at sub-exhibit C, pp. 773-774; *id.* at p. 783. This work would be done by Zak Law Offices, according to the fee agreement, even during the periods when LMG was an active entity and responsible for the first three deliverables described above. The second $2500 fee would be nonrefundable, the fee agreement said, regardless of the result of negotiations with the lender/servicer.

The fee agreement also informed the homeowner that any work beyond that described above would require additional payments. Some versions of the fee agreement specifically said that any court appearance to contest a foreclosure proceeding would require the payment of extra fees beyond the first $5000. See, e.g., *id.* at p. 777.

Defendants do not dispute that LMG agents arranged for and accepted fees from consumers in advance of the consumer actually receiving all of the services promised for that fee. Response to Commonwealth's Proposed Finding of Fact ¶ 110. Defendants further concede that the manner in which LMG and Zak Law Offices collected fees from clients was consistent from 2009 onward. *Id.* ¶ 112.

Zak testified that he set up LMG in order to create a business structure that complied with the prohibition in 940 CMR 25.02(2) against soliciting, arranging, or accepting advance fees for foreclosure-related services. That regulation contains an exception for law firms, Zak pointed

out: "a licensed attorney" could solicit, arrange or accept an advance fee "for legal service in connection with the preparation and filing of a bankruptcy petition, or court proceedings, to avoid foreclosure." *Id.*

If Zak's intent was to seek the safe harbor of this attorney exception – and I make no finding either way on the question – his business structure entirely failed to accomplish it. The $2500 initial payment went not to the Zak Law Offices law firm, but rather to LMG. Although Zak controlled LMG, it was not a law firm. The services it rendered in return for that advance fee were largely performed by non-lawyers, and were not "in connection with the preparation and filing of a bankruptcy petition, or court proceedings, to avoid foreclosure." In fact, under the fee agreement drafted by Zak, no legal services of any sort were rendered until the homeowner paid the second $2500, after which either Zak Law Offices or a referral law firm would begin a negotiation, often by sending a Chapter 93A letter to the lender or servicer. As result, when Zak's two-entity business structure was in place, the advance fees solicited and collected by LMG did not qualify for the attorney exception to the regulatory prohibition. And during the periods when Zak Law Office itself prepared the three deliverables, it was not practicing law when it did so, much less preparing and filing a bankruptcy petition or court proceedings to avoid foreclosure, and so the regulatory exception does not save Defendants in those cases, either.

Of the 65 homeowners who complained to the Attorney General's office regarding their experiences with Defendants, 64 paid at least $2500 to Defendants as an initial payment. Two of these consumers received refunds. The 65th consumer paid $2000 to Defendants as an initial payment. In total, the 63 consumers who did not receive refunds paid $157,000 to Defendants as

initial payments. Of these 65 homeowners, 57 made their initial payments to LMG, and eight made their initial payments to Zak Law Offices. See Exhibit 2.

Conclusions of Law

The Complaint, Exhibit 1, charged Defendants with committing unfair or deceptive acts or practices in violation of M.G.L. c. 93A, § 2. The Complaint also charged Defendants with violating the regulations issued by the Attorney General in 2007 as 940 CMR 25.00, entitled "Foreclosure Rescue Transactions, and Foreclosure-Related Services." See Complaint ¶ 47. The specific foreclosure-related regulations cited in the Complaint prohibited: offering or carrying out predatory, for-profit Foreclosure Rescue Transactions, 940 CMR 25.02(a); soliciting or accepting an advance fee in connection with the offering, arranging, or providing Foreclosure-Related Services, 940 CMR 25.02(b); or advertising Foreclosure-Related Services without clearly and conspicuously disclosing the precise services offered by the promoter and how the promoter will assist persons to avoid foreclosure, 940 CMR 25.03(c). See Complaint, ¶ 13. In addition, the Complaint charged Defendants with violating a more general regulation issued by the Attorney General under Chapter 93A, which prohibited making material representations of fact in an advertisement that Defendants knew or should have known were false and misleading, or had a tendency or capacity to be misleading, or that the Defendants did not have sufficient information upon which to base a reasonable belief in the truth of the material representation, 940 CMR 6.04 (1). See Complaint, ¶ 47(i).

The Commonwealth argues Defendants have conceded that they violated Chapter 93A , and the regulations, first by defaulting in this case, and then by failing to oppose the Commonwealth's December 2014 Motion for Assessment of Damages and Entry of Final Judgment and Permanent Injunction against Defaulted Defendants. I agree. Nonetheless, out of

an abundance of caution, I independently conclude as a matter of law, based on my Findings of Fact, that Defendants violated Chapter 93A, by committing acts of the sort declared "unfair" in *PMP Assocs. v. Globe Newspaper Co.*, 366 Mass. 593, 596 (1975). I also independently conclude as a matter of law, based on my Findings of Fact, that Defendants violated the regulations on which the Attorney General relies.

The Commonwealth asks for an assessment of civil penalties, restitution, and its attorneys' fees and costs for its investigation in litigation of this case. The Commonwealth also seeks a permanent injunction against all three Defendants.

1. Civil Penalties

Assessment of civil penalties against Defendants is authorized by M.G.L. c. 93A, § 4, which provides for a civil penalty, payable to the Commonwealth, of not more than $5000 for each violation. Assessment of a civil penalty is appropriate in this case.

The Commonwealth has asked for a civil penalty of $2000 per violation, which is less than half the maximum civil penalty. The Commonwealth's thinking is that assessment of the maximum civil penalties may interfere with Defendants' ability to make full restitution to consumers.

The size of a civil penalty is set by a court in the exercise of its discretion. The Appeals Court has instructed that the following factors are relevant to that exercise of discretion: "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the [Commonwealth]." *Commonwealth v. AmCan,* 47 Mass. App. Ct. 330, 338 (1999). I will briefly touch on each of these factors.

Defendants' presentation at trial was directed to attempting to prove that Defendants acted in good faith, because they honestly attempted to obtain loan modifications for homeowners, and in some cases they obtained modifications. I agree that Defendants did not take the money and run; in many cases, including the cases of the two complaining homeowners who testified at trial, Defendants provided information to the homeowner, entered into a negotiation with a lender, and obtained some relief for the homeowner. However, on behalf of the other Defendants, Defendant Zak also made statements in infomercials that were knowingly misleading. Defendants accepted advance fees in violation of a regulation that Defendant Zak knew about. Defendants also at some point began accepting nonrefundable advance fees from homeowners whom they knew were unlikely to be granted a loan modification. These acts, and many others contained in my Findings of Fact, are hardly the behavior of Defendants acting entirely in good faith.

The most direct injury to the public was consumers' loss of the fees they paid in vain to Defendants to save their homes. The award of restitution below theoretically will redress that injury, but only as to consumers who complained to the Attorney General. Another injury to the public arises because in most cases the homeowners who retained Defendants lost their homes to foreclosure. The blame for that injury, however, is not Defendants' alone. That blame is properly shared by the lenders, servicers, and mortgage brokers who talked homeowners into agreeing to unsustainable mortgage loans. Furthermore, in cross-examination of the two testifying consumers, Defendants suggested at trial that some blame must accrue to the homeowners themselves.

Defendants' ability to pay is likely quite limited. LMG has been out of business for several years, and has been dissolved by the Secretary of the Commonwealth. At the time of the

trial, Zak faced ongoing proceedings before the Board of Bar Overseers, which are likely to lead to discipline, and perhaps disbarment. The third Defendant, Zak Law Offices, has no ability to generate income if Zak is not practicing law. There was no testimony at trial about any assets owned by any of the Defendants, but I surmise that they are financially beleaguered; Reed testified, for example, that she has not collected anything on her $414,000 federal court judgment against Zak.

The restitution award that I make below will eliminate some of the benefits that Defendants derived by their violations of Chapter 93A and the regulations. And the authority of the Commonwealth will be vindicated by any substantial civil penalty.

On balance, after considering the relevant factors, I agree with the Commonwealth that a civil penalty of $2000 per violation is appropriate.

The specific violations for which the Commonwealth seeks civil penalties are of two types. First, the Commonwealth seeks civil penalties for the solicitation, acceptance, and arranging of advance fees, in violation of 940 CMR 25.02(2) and M.G.L. c. 93A, § 2. The Commonwealth has established 65 such violations. Second, the Commonwealth seeks civil penalties for the publishing or causing to be published of 35 unfair or deceptive infomercials, in violation of 940 CMR 6.04 (1) and 940 CMR 25.03(c) and M.G.L. c. 93A, § 2. The Commonwealth has established 35 such violations.

Defendant LMG solicited and accepted advance fees from 57 consumers. I therefore assess a civil penalty of $114,000 against LMG.

Defendant Zak Law Offices solicited and accepted advance fees from eight consumers, and published 35 unfair or deceptive infomercials. I therefore assess a civil penalty of $86,000 against Zak Law Offices.

Defendant Zak is responsible for all of the violations established by the Commonwealth. First, I conclude that he is personally liable for civil penalties for each of the violations because he personally participated in each of the violations. He drafted and delivered the infomercials, and he directed the two entities he controlled, LMG and Zak Law Offices, to accept the advance fees. The fact that corporate entities actually committed the violations does not relieve Zak of his personal responsibility; "It is settled that corporate officers may be held personally liable under c. 93A for their personal participation in conduct invoking its sanctions." *Cmty. Builders, Inc. v. Indian Motorcycle Assocs., Inc.*, 44 Mass. App. Ct. 537, 560 (1998). Second, Zak is also liable for the violations committed by LMG and Zak Law Offices as a corporate officer who "operated or controlled the corporation" and "had knowledge of [the] unlawful acts." *Nader v. Citron*, 372 Mass. 96, 103 (1977), abrogated on other grounds, *Iannacchino v. Ford Motor Co.*, 451 Mass. 623 (2008). Therefore, I assess a civil penalty of $200,000 against Zak.

2. Restitution

An order directing restitution is authorized by M.G.L. c. 93A, §4, which gives a court the authority to "make such other orders or judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of such unlawful method, act or practice any monies . . . which may have been acquired by means of such method, act, or practice." Restitution is appropriate in this case.

The Commonwealth seeks restitution in the amount of $157,000 for the 65 consumers were charged illegal advance fee payments. That amount represents disgorgement of $2500 per consumer, minus any known refunds and accounting for one instance where the consumer paid less than $2500. The details of the calculation are found in the affidavit which is Exhibit 2, and the back-up documents attached to that affidavit.

I order Defendants to pay the Commonwealth of Massachusetts restitution in the amount of $157,000, reflecting advance fees collected in violation of M.G.L. c. 93A and 94 CMR 25.02(2) from 65 consumers who filed complaints with the Commonwealth.

3. Costs of Investigation and Litigation, Including Attorney's Fees

An award of reasonable costs of the Commonwealth's investigation and litigation of this claim, including reasonable attorneys' fees, is authorized by M.G.L. c. 93A, § 4. The Commonwealth seeks an award of attorney's fees in the amount of $62,800, as well as $5346 for deposition transcripts and court reporter fees, for a total of $68,146. The Commonwealth supports its request with post-trial amended affidavits of Sara Cable and Jennifer David, the two attorneys who tried this case.

Chapter 93A requires that I decide whether the fees and costs sought by the Commonwealth are "reasonable." In deciding whether attorneys' fees requested are reasonable, a court considers "the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." *Haddad v. Wal-Mart Stores, Inc.*, 455 Mass. 1024, 1025 (2010), quoting *Linthicum v. Archambault,* 379 Mass. 381, 388-89 (1979). I have reviewed the amended affidavits with those factors in mind, and I will briefly discuss each factor below.

While the legal issues presented in this case were not particularly complex, I find that development of the facts took considerable work, given the number of violations and the necessity of dealing with more than 65 complaining consumers, many of whom had limited or no English language ability.

My review of the time and labor required is made more difficult by the fact that, unlike attorneys in private practice, assistant attorneys general do not contemporaneously record their time. However, the trial attorneys have summarized the tasks they performed, and estimated the hours they spent on those tasks, in their amended affidavits. The number of hours they claim is far less than I would have expected, given the factual complexity of the case; the trial exhibits alone constitute thousands of pages, filling up more than several large binders. And I note that the Commonwealth is not seeking fees and costs for much work that went into the investigation, the lawsuit, and the trial itself. For example, other lawyers in the Attorney General's office filed the complaint, and, more recently, other lawyers reviewed written filings by attorneys Cable and David. In addition, the Commonwealth is not seeking fees or costs for the efforts of the Attorney General's investigators and paralegals, who prepared and submitted lengthy affidavits, attaching and explaining many documents uncovered in the investigation and litigation (which became Exhibits 2 through 5), or for the costs expended by other employees of the Attorney General with Spanish or Portuguese language skills who obtained and translated various consumer affidavits which also became Exhibits.

The award of civil penalties and restitution obtained by the Commonwealth totals more than $500,000, and would have exceeded $1 million if the Commonwealth's focus on restitution had not caused it to seek less than the maximum civil penalties. The result obtained was exactly the resulted the Commonwealth asked for.

Attorneys Cable and David are both experienced. Attorney David was admitted to Massachusetts bar in 2003, and attorney Cable was admitted in 2006 after clerking in an appellate court in New York for two years. I cannot speak to their reputations, because I had encountered neither of them before this case. After reviewing their voluminous written work,

and their oral advocacy in pretrial proceedings and at trial, I have the highest regard for their abilities.

The Commonwealth seeks a $200 hourly rate for their services, which is quite conservative given the quality of their advocacy. I am aware from my fairly recent experience in private practice, and for my review of attorneys' fee petitions as a judge, that many attorneys would have charged higher rates for similar services performed by lawyers at the experience level of attorneys Cable and David.

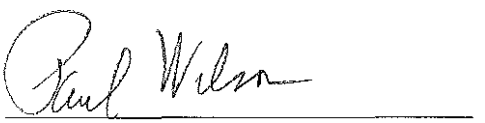
I conclude that the Commonwealth's request for an award of the costs of investigation litigation, including attorneys' fees, is reasonable. I award the Commonwealth $68,146 for such costs and fees.

4. Injunctive Relief

The Commonwealth seeks a permanent injunction against the Defendants, prohibiting them from engaging in certain of their practices that violate Chapter 93A and the regulations at issue in this case. Entry of the requested injunction is authorized by M.G.L. C. 93A, § 4, and is appropriate in this case. I will issue the requested permanent injunction, as part of the Final Judgment.

Conclusion

Based on these Findings of Fact and Conclusions of Law, **Judgment is to enter in favor of the Commonwealth.**



Paul D. Wilson
Justice of the Superior Court

July 14, 2015