Commonwealth of Massachusetts
Appeals Court

2020-P-0964

H1 LINCOLN, INC. DOING BUSINESS AS MAJESTIC HONDA,

Plaintiff-Appellee,

vs.

SOUTH WASHINGTON STREET LLC ET AL.,

Defendants-Appellants.

On Appeal from the Decision of the Trial Court

BRIEF FOR THE DEFENDANTS-APPELLANTS

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Dated: November 20, 2020

CORPORATE DISCLOSURE STATEMENT OF APPELLANTS

Pursuant to Supreme Judicial Court Rule 1:21, Appellants South Washington Street LLC, 849 South Washington Street LLC, 849 South Washington Street Realty Trust under Declaration of Trust dated June 9, 2000, Alfredo Dos Anjos, Trustee, 855 South Washington Street Realty Trust under Declaration of Trust dated October 2, 2008, Alfredo Dos Anjos, Trustee, 865 South Washington Street Realty Trust under Declaration of Trust dated May 14, 1998, Alfredo Dos Anjos, Trustee, and Cooper Avenue Realty Trust under Declaration of Trust dated May 14, 1998, Alfredo Dos Anjos, Trustee state that no public company owns any interest in any defendant.

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STATEMENT OF ISSUES

1. Whether the trial judge properly concluded that a clause in a commercial lease entered into by sophisticated commercial parties represented by counsel, in which they freely and knowingly agreed that "in no event shall the Landlord be obligated to compensate the Tenant for any speculative or consequential damages" in the event of a breach, was not to be enforced, and proceeded to award millions of dollars of the same, doubled under M.G.L.c. 93A, to the Plaintiff Tenant, for the Defendant Landlord's breach.
2. Did the trial judge commit error when he found that the Defendant Landlord's termination of the lease, occurring after the Tenant's due diligence but before the Plaintiff Tenant had begun the development of a car dealership to be situated on the Leased Property, amounted to a violation of M.G.L.c. 93A?
3. Did the post judgment conduct of the Defendant Landlord regarding ownership of the Leased Property create grounds for further damages under M.G.L.c. 93A, where the Plaintiff Tenant had long been aware of the title discrepancies but delayed bringing it to the Defendant Landlord's attention, and thereafter declined to agree to the Defendant Landlord's proposed solution thereto?

STATEMENT OF THE CASE

This is a simple breach of commercial lease case filed by Plaintiff-Appellee H1 Lincoln, d/b/a/ Majestic Honda ("Majestic Honda"), a commercial tenant,

against its landlords, South Washington Street, LLC and 849 South Washington Street, LLC ("Dos Anjos LLCs") challenging a termination and requesting equitable relief in the form of specific performance.[1] See V:I:16, 62-90.[2]

On September 18, 2018 a jury trial commenced on the common law claims asserted by Majestic Honda for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, and Declaratory Judgment (seeking to establish that the commercial lease was still in force and effect). Addendum ("Add.") at 50; V:I:30-34. Upon conclusion, the jury found that the Dos Anjos LLCs breached its lease with Majestic Honda. Add. at 50. Specifically the Jury Verdict found that:

- the "Lease" was in "full effect;"
- Dos Anjos LLCs' breached the Lease and the covenant of good faith and fair dealing implied therein;
- $5,616,600 would "reasonably compensate Majestic" for the breach;
- this amount ($5,616,600) included "compensation for a delay in operating the dealership" in the amount of $3,762,500 and $891,600 for "compensation for the purchase price of the 'Cash Land,'" but did not include compensation for "lost opportunity in operating the dealership . . . that is separate and apart from any delay damages and/or Cash Land purchase price awarded."

See V:I:95-98.

[1] Majestic Honda asserted common law claims for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, and a statutory claim Massachusetts General Laws Chapter 93A, Section 11.

[2] References to the appendices appear as "V:[VOLUME NUMBER]:[PAGE NUMBER]."

On October 26, 2018, the trial judge conducted a jury-waived trial on the 93A claim ("the First 93A Trial"). Add. at 51.[3] On January 28, 2019, the trial judge issued his Findings of Facts and Rulings of Law . Add. at 50. The trial judge found that "Dos Anjos acted with ***willful and knowing disregard for his contractual obligations***" and that the Dos Anjos LLC's "unreasonable termination of the Lease" resulted in a 21.5 month delay at a cost of $2.1 million."[4] Add. at 77 (emphasis added). The trial judge concluded that by signing the Lease, "***the Plaintiff did not contractually waive its ability to seek damages under G.L.c. 93A***." (emphasis added). Add. at 76. Rather, in reliance upon Exhibit Source Inc. v. Wells Ave. Bus. Ctr. LLC, 94 Mass. App. Ct. 497, 502 (2018) the trial judge (without discussion) summarily concluded that the Chapter 93A claim "***sounded in tort***," but doubled the jury's award of ***contract damages*** and ordered the Dos Anjos LLCs to pay Majestic Honda double the 93A damages ($10,300,000). Add. at 76-77, 83.

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[3] On January 14, 2019, the trial judge ordered that Majestic Honda could elect either to enforce the lease and receive delay damages, or receive compensatory damages after the trial judge issues his Findings of Fact and Conclusions of Law and Before Entry of Judgment on the 93A claim. Add. at 73; V:I:39.

[4] The trial judge found that Majestic Honda's delay damages, including lost profits, totaled $2.1million per year. Add. at 71. He then "[d]ivid[ed] such value by twelve (12) and multiplying by 21.5 (the number of months Balise has been delayed at the time of trial)" which resulted in delay damages in the amount of $3,762,500. Id. The trial judge then extended "that value by the additional 4 months" from the date of jury verdict, which resulted in 25.5 months at $175,000 per month totaling $4,462,500." Add. at 72.

The trial judge also issued a permanent injunction requiring the Dos Anjos LLCs (upon Majestic Honda's election of specific performance of the Lease) to (1) "cooperate with and approve any necessary paperwork for any permits or other items required for Majestic's full use and enjoyment of the Leased Property, planned construction, and operation of its business," and (2) "give Majestic unfettered access to the Leased Property for the duration of the Lease as permitted under the Lease." Add. at 84. Majestic elected specific performance on February 12, 2019. Add. at 89.

On August 7, 2019 Majestic Honda filed a Motion under Mass. R. Civ. P. 60, requesting additional delay damages because of the Dos Anjos LLC's "continued alleged misconduct causing additional delay." Add. at 89; V:I:46. In response, the trial judge issued an order on August 15, 2019 allowing Majestic Honda to amend its complaint to include: 849 South Washington Street Realty Trust under Declaration of Trust dated June 9, 2000, Alfredo Dos Anjos, Trustee, 855 South Washington Street Realty Trust under Declaration of Trust dated October 2, 2008, Alfredo Dos Anjos, Trustee, 865 South Washington Street Realty Trust under Declaration of Trust dated May 14, 1998, Alfredo Dos Anjos, Trustee, and Cooper Avenue Realty Trust under Declaration of Trust dated May 14, 1998, Alfredo Dos Anjos, Trustee, (collectively the "Dos Anjos Trusts"), and to re-open the trial on Majestic Honda's Chapter 93A claim. Add. at 89; V:I:47, 236-249.

On October 4, 2019 and December 13, 2019 the trial judge held a jury waived trial for the Chapter 93A claims ("the Reopened 93A Trial"). Add. at 89. The trial judge issued his Findings of Facts and Rulings of Law on April 30, 2020, in favor of Majestic Honda. Add. at 137-138. The trial judge amended the previous judgment to include additional delay damages for the Dos Anjos LLCs' failure to perform from February 12, 2019 until November 16, 2019 "in the amount of $1,592,250 doubled to the amount of $3,184,500." Add. at 137. The trial judge also ordered the Dos Anjos LLCs to pay Majestic Honda's attorney's fees and costs, including any amounts already ordered. Id.

On June 16, 2020, the trial judge entered an Amended Judgment in the amount of $3,184,500.00 for damages pertaining to the reopened 93A claims against the Dos Anjos LLCs. See V:I:432-433. On June 17, 2020 the trial judge issued another Amended Judgment against the Dos Anjos LLCs in relation to the initial 93A trial for $9,573,367.13, in addition to statutory interest. See V:I:434. The Dos Anjos LLCs filed a notice of appeal on July 3, 2020. See V:I:435-437.

STATEMENT OF THE FACTS

The following facts are not in dispute, unless otherwise stated. James ("Jeb") Balise ("Balise") is the principal of Majestic Honda. Add. at 51. Alfredo Dos Anjos ("Dos Anjos") is the manager and principal of the Dos Anjos LLCs, and the trustee of the Dos Anjos Trusts that collectively own and control the two adjacent

properties located at 849 and 865 South Washington Street, North Attleborough, Massachusetts (hereinafter collectively referred to as the "Leased Property"). See Add. at 52; V:IX:40. Dos Anjos also owns the land that is to the south of the Leased Property. Add. at 52. He rents that land to CarMax under a long-term lease. Id. There is no dispute that all parties engaged in trade or commerce in Massachusetts. Id.

I. The Leased Property.

"The Leased Property is located on Route 1," in North Attleborough, Massachusetts, "adjacent to the intersection of Route 1 and Interstate-295." See Add. at 53. The area is known as "Auto Road" because there are other new and used car dealerships nearby. Id. The Leased Property is within North Attleborough's Zoning District of C-30 that allows for the sale of new and used cars and the storage of vehicles. Id. "Each parcel within the Leased Property contains one vacant building." Add. at 52.

II. The Lease.

In 2016, Joshua Teverow was aware of Balise's interest in relocating a Honda Dealership that he had recently purchased in Lincoln, Rhode Island, and was aware of the availability of the Dos Anjos properties in North Attleborough that would be suitable for the relocation. See V:IV:178 (Tr. 170:2-8), 181-182 (Tr. 173:15-174:1), 185 (Tr. 177:6-14). "In August of 2016, Teverow arranged a meeting between Balise

and Dos Anjos." Add. at 54. On October 28, 2016, the parties executed a written lease (the "Lease") in which the named Tenant under the Lease is "Hl Lincoln, Inc., d/b/a Majestic Honda" and the Landlord is listed as the two Defendants, 849 South Washington Street, LLC and 849 South Washington Street, LLC." Id.; V:VII:62. The Lease

- provided for an initial term of twenty-three (23) years with four consecutive five (5) year options;
- Authorized the demolition of the existing buildings and the construction of a new Honda dealership but required Dos Anjos LLC's consent to the plans; and
- limited the damages "caused by Landlord's failure to perform under this Lease." Specifically, paragraph 28 captioned, "Events of Landlord's Default; Tenant's Remedies" authorized Majestic (the Tenant) to "pay or perform such" uncured obligation of the Landlord, and collect "Tenant's reasonable and actual costs of performance" including "transaction costs and attorneys' fees plus interest" but precluded recovery of "***speculative or consequential damages caused by Landlord's failure to perform its obligations under this Lease.***"

See V:VII:69, 87-88.

III. Balise's Due Diligence and Undisputed History – 2016-2017.

As set out below, and as the undisputed evidence overwhelmingly establishes, Balise and his team of lawyers and permitting consultants were fully aware in 2017 (if not 2016) that all available land title and assessor records identified the Dos Anjos Trusts, not the Dos Anjos LLCs, as the record owners of the Leased Properties, and, consequently, for permitting purposes, an apparent discrepancy between those

records and the Lease might exist. This issue however was never raised with Dos Anjos or his legal counsel until May 31, 2019. See V:IX:39-40.

In April 2016, Teverow, an attorney and real estate consultant who had done a significant amount of work for Dos Anjos, and had begun doing work for Balise, decided to attempt to facilitate a deal between the two businesses. Add. at 53-53. Consequently, he entered separate "Consulting Agreements" with each of them regarding a potential lease thereof. Add. at 53-54; V:VII:158.

On April 27 and 29, 2016, Teverow provided Balise with information and documents describing the "Anjos site": 849 South Washington Street, 865 South Washington Street and 120 Draper Street, to Balise. See V:VII:9-30. Included in that information were North Attleborough Tax Assessor records identifying the owners of the parcels as the "Dos Anjos Alfredo M. Tr. 849 S. Wash.", "Dos Anjos Alfredo M. Tr. 865 S. Wa." and "Dos Anjos Alfredo M. Tr. Draper Ave.". Id.

On May 9, 2016 Teverow signed his "Consulting Agreement" with Dos Anjos regarding finding a lessee for the properties. See V:VII:158. The Agreement was drafted by Teverow, and identified "Alfred M. Dos Anjos, Trustee" as the "Lessor" and was executed by Dos Anjos as "Trustee". Id.

Thereafter, in August of 2016, Dos Anjos and Balise met and ultimately agreed to terms. Add. at 54. Teverow, who at this point was working for Balise and Dos Anjos, prepared a draft of the lease in which he identified the Lessor as the Dos

Anjos LLCs, with Dos Anjos as its Manager.[5] Add. at 54. After the lease was executed in October 28 2016, Balise began his due diligence. In that regard, and in addition to Teverow, Balise hired the law firm of Egan, Flanagan and Cohen, attorney Ed Casey and Engineer Steve Cabral to assist his in-house counsel in that effort and to prepare a variety of permit applications as well as a TIF application, for submission to the North Attleborough town officials. See V:IV:242-243 (Tr. 234:6-235:3); V:VII:31-40, 55-61.

As part of its role in the due diligence and permitting process, in April of 2017, the Egan firm ordered a title survey of the leased parcels, going back in each instance more than fifty years, and accurate as of April 2017. See V:I:253; V:VII:31-40. The title search identified the current "Owner" of the parcels as: "Alfredo M. Dos Anjos Trustee" of the 855 South Washington Street Realty Trust, the 849 South Washington Street Realty Trust, the Cooper Avenue Realty Trust, and of the 865 South Washington Realty Trust. See V:VII:39. Attorney Ed Casey, in June 2017, in preparing the draft permit applications also reviewed the records in the Town's Assessor's Office which were to the same effect, and so informed Balise. See

[5] Public records at the Secretary of State's Office show that both of these LLCs were organized in October 2008 for the purposes of "Ownership, Investment and Development of Real Estate." Alfredo M. Dos Anjos was identified as their Manager.

V:VII:32. In spite of the obvious discrepancy between the Trusts as title owners of the parcels and the LLCs identified as the Lessor in the lease, no effort was made to inquire about or clarify the issue, and it was apparently of little consequence to the lease or Balise, who testified that he was aware of the discrepancy in 2016 or 2017, but viewed it as "not an issue" but a matter for "cleanup". See V:VI:630-632 (Direct Examination of Balise).

Consistent with the Dos Anjos Trusts being the identified owners, all of the applications for permits prepared in 2017 by Balise's legal advisors, identified the Dos Anjos Trusts as the property owners, and called for the signature of Alfredo M. Dos Anjos, as their "Trustee". See, e.g., V:VII:31-40. Balise and Teverow were sent copies of these applications to secure signatures, and voiced no concerns about or objections to the information contained therein. Id. Indeed in connection with preparing the TIF Application in August of 2017, Attorney Casey sent to Balise the "results" of his ownership research (including deeds) identifying the Dos Anjos Trusts as the proper parties for the TIF Application and, without objection from Teverow, shared that information with the North Attleborough Town Counsel and Board of Selectmen. See V:VII:41-54. Thereafter, in November 2017, Balise signed the TIF Application which identified the principal property as the 865 South Washington Street Realty Trust, and specifically declared that Balise's company was

going to "lease" the land "owned by the Realty Trust" to construct its Honda store. See V:VII:55-61.

The litigation regarding Dos Anjos' termination of the lease was commenced by Majestic Honda the following month, and was brought against the Dos Anjos LLCs, as the Lessor, asserting that the Landlord Defendants owned the leased property. See V:I:62. No effort had been made by Balise, or his counsel to correct the apparent discrepancy or even identify it for Dos Anjos' counsel.

IV. The Cash Land.

Between the Leased Property and CarMax is a piece of land owned by the Cash family (the "Cash Land"). Add. at 58. Like the Leased Property, the Cash Land is zoned as C-30. Add. at 59. Both Dos Anjos and Balise attempted to purchase the Cash Land. Id. Neither knew of the other's intentions to purchase the Cash Land. Id. On January 27, 2017, Dos Anjos put in an offer to purchase the Cash Land for $800,000. Id. Around the same time, Balise, using a straw buyer, also made an offer to purchase the Cash Land for $800,000. Id. The Cash family rejected Dos Anjos' offer, but accepted Balise's offer. Id. On June 30, 2017, the Cash family executed a quitclaim deed and conveyed the Cash Land to Balise. Id.

V. Termination of the Lease.

On May 24, 2017, Majestic Honda shared with Dos Anjos a concept site plan for his review. Add. at 60. As part of the site plan, Majestic Honda intended to

demolish one of the buildings on the Leased Property, and construct a new building. Id. Majestic Honda also intended to renovate the other building on the Leased Property and to use the Cash Land as a space for "new vehicle inventory" and "new vehicle display." Id. Majestic Honda's site plan also "included a request to merge the two parcels owned by the [Dos Anjos LLCs]." Id. "Dos Anjos assented to the merger so long as Majestic [Honda] would agree to preserve the existing curb cuts and drainage facilities," which they did. Id.

Around July 25, 2017, Majestic Honda "issued a notice of its intent to demolish buildings and construct a new building on the site." Add. at 61. Majestic Honda resubmitted to Dos Anjos the May concept site plan "and included building elevations with its second submission. The Site Plan again depicted the Cash Property being used as a parking lot." Id.

On July 28, 2017, Manoogian and Dos Anjos discussed Dos Anjos' concerns that he did not expect one of the buildings on the Leased Property to be demolished and replaced, and the other renovated. Add. at 62;V:VII:310. On July 31, 2017, Lisa Pariseault ("Pariseault"), Dos Anjos' daughter, emailed Manoogian, copying Dos Anjos, and stated that Dos Anjos would like to "put in writing that there will be only one new car franchise on the property, that being Honda." Add. at 64; V:VII:310. On August 4, 2017, Manoogian shared Dos Anjos' concerns with Majestic Honda. Add. at 64. Majestic Honda agreed to a Honda

exclusivity pending a review of the amendment. Id. On August 4, 2017, Manoogian emailed Majestic Honda's counsel the Honda Exclusivity Amendment. Id. As of August 9, 2017, however, Dos Anjos was still concerned about Majestic Honda's site plans. Add. at 65. That same day, Manoogian emailed Dos Anjos and Pariseault, attaching a proposed notice to terminate the lease with Balise. Id. The reasons for the termination included:

> The proposed site plan depicts additional land not owned or controlled by the Landlord that will likely be part of a special permit application for a planned business development within the Town of North Attleborough, Massachusetts. Should such a special permit be granted based on the site plan presented, at the conclusion of the Lease the Landlord may be left with one or more buildings that violate any special permit that may issue. In addition, the Landlord is unwilling to place the parcels that comprise the leased premises in common ownership nor grant easements permitting the common use of any planned access drives and/or utility systems.

Id.; V:VII:162-163. On August 9, 2017, Dos Anjos mailed the termination letter to Balise. Add. at 66. That same day, Balise returned by email and mail to Manoogian the signed Honda Exclusivity Amendment. Id. On August 10, 2017, Manoogian suggested to Dos Anjos that the Cash Land "be transferred for fair market value at the end of the Lease period" given that Balise had executed the amendment. Add. at 68; V:VII:164. On August 11, 2017, Balise wrote to Dos Anjos to discuss the termination letter and his concerns to try to resolve them. See Add. at 67; V:VIII:9. In response, Dos Anjos told Manoogian to send a letter offering to reinstate the lease "[w]ithout waiving the effects of the notice of termination of lease sent to HI

Lincoln, Inc." on the condition that Balise continued on with the Honda Exclusivity Amendment and sell the Cash Land to one of the "landlord entities for One ($1.00) Dollar." Add. at 68; V:VII:133-134. "In return, the leased premises would be expanded to include the [Cash Land] without additional rent." Id. On September 7, 2017, Balise agreed to Dos Anjos' terms. Add. at 68. Thereafter, on September 15, 2017 Manoogian prepared and circulated a lease reinstatement document for the parties to sign. Id.; V:VII:143. Manoogian followed up with Balise's counsel that same day to let him know that Dos Anjos "has not yet decided to sign the lease reinstatement agreement but was willing to provide same for the parties' review" and that he was "still considering the matter." Id.; V:VII:157. Dos Anjos ultimately decided not to sign the lease reinstatement.

"In early November of 2017, Dos Anjos expressed to Teverow his concerns that Majestic Honda's use of the Cash Land could negatively impact his separate rental relationship with CarMax across the street." Add. at 69. On November 22, 2017, the Dos Anjos LLCs "confirm[ed]" "the termination letter sent in August." Id. The Dos Anjos LLCs also returned Majestic Honda's "rent checks from August 9, 2017 until November 22, 2017, along with prepaid rent through December 4, 2017." Id. The Dos Anjos LLCs retained the $150,000 security deposit. Id.

Balise emailed the Dos Anjos LLCs on December 4, 2017, requesting that they withdraw the termination letter. Id.; V:VII:135-137. On December 26, 2017,

the Dos Anjos LLCs rejected Majestic[Honda]'s request." See Add. at 70. Majestic Honda commenced this action on December 27, 2017. See V:I:62. Its complaint alleged that the termination "was pretext for the Defendants' true intentions, to locate another car dealership at the site to be operated by persons or entities related to the Defendants." See V:I:68.

VI. Events of 2019.

After Majestic Honda chose specific performance on February 12, 2019, it had total free access to the property to enter "at will" for testing, evaluating and engineering purposes. See Add. at 89; V:VI:621 (Tr. 92:2-24), 625 (Tr. 96:3-16), 630 (Tr. 101:8-22) (Balise testifying that since February 13, 2019, he has been working on developing the Leased Property and had access to the property). It also authorized its previously retained team of consultants and attorneys to proceed with the permitting process. See V:VI:425 (Tr. 87:4-10), 562 (Tr. 33:15-23), 621 (Tr. 92:2-24), 625 (Tr. 96:3-16), 630 (Tr. 101:8-22). Geotechnical testing was completed on March 15, 2019 (V:VI:624 (Tr. 95:17-25)); asbestos testing was completed on May 21, 2019 (V:IX:14-38), and an asbestos clearance letter was received on July 3, 2019 (V:IX:96), all important predicates to the permitting, demolition and construction process. There was no delay in these predicate processes caused by the Dos Anjos LLCs.

In February, 2019, the permitting consultants who had worked on this aspect of the project back in 2017, including attorneys Casey and Teverow, and Steve Cabral from Crossen Engineering, were reactivated to draft permit applications, including zoning, an Application for Planned Business Development and an Application for a TIF (Tax Incremental Financing), all of which required identification of the owners of the property. See V:VI:603 (Tr. 74:4-19) (Casey testifying that they were required "to identify who the record titleholder was"). Casey and Cabral again reviewed both the assessor's records and the records at the Registry of Deeds, and confirmed that there had been no change in the title holders of the property since they last checked and drafted such applications back in 2017. See V:VI:426 (Tr. 88:4-22), 431-435 (Tr. 93:3-97:1), 442 (Tr. 104:7-17), 603 (Tr. 74:4-19); V:IX:114-120. Consequently, all of the drafts once again identified the Dos Anjos Trusts in their applications as the property owners. See V:VI:426 (Tr. 88:4-22); 430-431 (Tr. 92:16-93:24), 566 (Tr. 37:7-8); V:IX:115-120.

On March 18, 2019 Cabral and Casey circulated the draft applications they had prepared. See V:IX:115-120, 189-196. For the first time Teverow advised that he was "confused" with respect to ownership of the properties because the lease listed only the two LLCs (South Washington Street and 849 South Washington Street) as the Landlord. See V:VI:570 (Tr. 41:1-13). Casey responded that the title holders of the property were "quite clearly" the Trusts and provided Teverow with

a map of the properties, identifying the Trusts as the title holders. See V:VI:439 (Tr. 101:1-23), 575 (Tr. 46:1-24), 578 (Tr. 49:2-22); V:IX:114. Teverow then responded that that was "incorrect" and instructed Cabral and Casey to change the applications to list the owners as the Dos Anjos LLC entities that he "believed owned the property". See V:VI:432-437 (Tr.94:5-99:7). Casey and Cabral objected, advising that what was required for the application was the record title holder, that the application needed to be consistent with the town records, and that it did not matter who the Landlords were or the terms of the Lease. See V:VI:441 (Tr. 103:8-10), 568 (Tr. 39:2-15), 569, 578-580, 616-617 (Tr. 87:6-88:16).

On March 19, 2019, Attorney Michael McDonough (one of the lawyers at the Egan firm), reviewed the applications as drafted, completed a review of the title searches and called Teverow to discuss the issue further. See V:I:259. As a result, and in reliance on Teverow's instructions Cabral and Casey amended their applications. See V:VI:443 (Tr. 105:2-23), 454 (Tr. 116:14-20); V:IX:124-126. Subsequently, on April 1, 2019, Majestic Honda provided an application for a Planned Business Development to the Landlord Defendants that asked for Dos Anjos to sign as "Trustee" with an asterisk identifying him as "Trustee" for the two Dos Anjos LLCs. See V:VIII:62-64. Balise had already signed it. Id. Balise well understood at this time that the "discrepancy" between the lease and the record title holder had not been dealt with. See V:VI:630-633 (Tr. 101:19-104:16), 644 (Tr.

123:12-19). Dos Anjos signed the Amended Application on or before April 18, 2019, and it was sent back to Majestic Honda for filing. See V:VI:584-585 (Tr. 55:2-56:15), 647 (Tr. 118:2-18); V:VIII:97. But it was never filed, nor did Majestic Honda provide the signed application to Casey and Cabral. Id.

With respect to the TIF Application, on April 25, 2019, Teverow directed Casey to change the draft TIF Application to reflect that Dos Anjos was filing as the landlord. See V:VI:586-588 (Tr. 57:5-59:23). Accordingly, the changes sent to Dos Anjos identified Alfredo Dos Anjos as "Trustee" of the 849 South Washington Street LLC and the South Washington Street LLC. See V:VIII:97. Casey knew that this was inaccurate and that he was not going to present it to the town. See V:VI:593-594 (Tr. 64:21-65:17). On May 14, 2019, Dos Anjos signed the Amended TIF letter of intent and returned it to Majestic Honda. See V:VI:597 (Tr. 68:4-17); V:IX:9-13. It was never filed because of the discrepancy (created by Teverow) between the information in the TIF Application that the Dos Anjos LLCs were the property owners and the Dos Anjos Trusts whom Casey knew to be the record title holders. See V:VI:597-599 (Tr. 68:4-69:4).

On May 31, 2019, the Egan firm sent a letter to the Dos Anjos LLCs' lawyers alleging that they had only "recently" requested a title search (when in fact one had been done at their request in April of 2017) and discovered that the "actual owners of the Leased Property" were not the Dos Anjos LLCs but were "related Trusts

owned and controlled by Dos Anjos". See V:IX:39-41-32. The letter proposed that "since applications already had been filed with the Town," (which was not true) it would be "more efficient" that the property be transferred from the Trusts to the LLCs. Id.

One June 13, 2019 Dos Anjos' counsel proposed to Majestic Honda's counsel that they enter into an "attornment" by which two principal Trusts would agree to recognize the lease, and "attorn to the rights of the Tenant thereunder." Add. at 105; V:IX:87-89. What followed was a failed negotiation over whether an Attornment from the Dos Anjos Trusts would satisfy Majestic Honda's concern to protect all of its rights under the lease. Add. at 105; V:IX:87-89. This was rejected on June 19, 2019, primarily because Majestic Honda then had a multimillion judgment against the Dos Anjos LLCs which, without ownership of the property, had fewer assets to pursue for collection. Add. at 105; V:IX:91-92. The issue was no longer about the soundness or viability of the lease itself, or the ability to obtain permits.

Counsel for the Dos Anjos LLCs resisted the demand to transfer the properties as unnecessary to the viability of the lease and the obtaining of permits. Add. at 106. A motion under Mass. R. Civ. P. 60 for additional delay damages based on the alleged noncooperation of the Dos Anjos LLCs regarding Majestic Honda's application for permits was served on the LLCs in late June 2019, and filed with the Court in August. See V:I:43.

Thereafter, on August 15, 2019 the trial judge held a hearing regarding whether to grant the relief requested by Majestic Honda and reopen the 93A trial. See V:VI:259, 261 (Tr. 3:16-25). The day before the Motion hearing, Majestic Honda issued a proposed Order and for the first time requested that the trial judge refer claims of perjury against Dos Anjos and Manoogian to the District Attorney's office. See V:VI:278-280 (Tr. 20:15-22:23), 287-288 (Tr. 29:23-30:16). The trial judge advised the Dos Anjos' parties and their counsel that he took these allegations and their actions very seriously, and that he was inclined to refer the matter to the Attorney General's Office who would be more apt and better equipped to bring perjury prosecution against them. See V:VI:278-280 (Tr. 20:15-22:23), 287-288 (Tr. 29:23-30:16). He ruled that he would hold a hearing on the matter and reopen the 93A trial and take further evidence on the causes of the delay. See V:VI:307 (Tr. 49:4-14).

He further directly advised Dos Anjos, his daughter Lisa Pariseault and Manoogian that if they were called to testify they "would be well advised to have counsel present" and "to consider carefully their testimony" alluding to asserting the privilege against self-incrimination. See V:VI:279 (Tr. 21:22-25), 288 (Tr. 30:9-11). In light of these explicit threats and admonitions, Alfred Dos Anjos, Lisa Pariseault and Attorney Manoogian all asserted the Fifth Amendment privilege when

called to testify on October 4, 2019, in the subsequently reopened trial.[6] Add. at 113. Finally, at the August 15 hearing the parties agreed to file a stipulation amending the original complaint brought by Majestic Honda to add the Dos Anjos Trusts, as parties to the proceedings and to the judgment entered against the Dos Anjos LLCs. See V:VI:292 (Tr. 34:2-14).

ARGUMENT

I. STANDARD OF REVIEW.

A judge's findings of fact will be set aside when they are "clearly erroneous." Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 509 (1997). "A finding is 'clearly erroneous'" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id. (quoting Bldg. Inspector of Lancaster v. Sanderson, 372 Mass. 157, 160 (1977)). The Court, however, is not bound "by the judge's conclusions of law, and [the Court] must ensure that the judge's ultimate findings and conclusions are consistent with relevant legal standards." Id. at 510. "Legal

[6] In light of these assertions, the trial judge instructed Majestic Honda's counsel to prepare written lists of all the questions they intended to ask of the witnesses, and to provide those lists to attorneys for Dos Anjos, Pariseault and Attorney Manoogian. Add. at 113. He further instructed their attorney to provide in writing whether each witness would assert their privilege, raise a different objection or answer each of the questions. Id. Those written questions and response (which largely amounted to assertions of the Fifth Amendment or, as to Manoogian, the attorney-client privilege) were admitted into evidence. Id.

conclusions drawn from those facts [] are subject to de novo review." Recore v. Town of Conway, 59 Mass. App. Ct. 1, 5 (2003).

II. MAJESTIC HONDA'S CLAIMS FOR CONSEQUENTIAL AND 93A WERE BARRED BY THE PLAIN LANGUAGE OF THE LEASE AND THEREFORE THE COURT COMMITTED ERROR.

With the signing of the Lease Majestic Honda explicitly waived its right to recover consequential damages and its statutory rights under 93A, § 11.[7] Thus, the Court's refusal to recognize the waiver and its associated award of 93A damages was an error of law.[8] Massachusetts Courts have uniformly recognized the principle of freedom of contract. See Beacon Hill Civil Ass'n v Ristorante Toscano, Inc., 422

[7] Consequential damages are defined as economic expectation damages, including lost profit, loss of good will, lost value and lost customers which arise from a breach of contract. See e.g., Delano Growers' Co-op Winery v. Supreme Wine Co., Inc., 393 Mass. 666, 679-80 (1985) (consequential damages include any loss of prospective profits); LAR Service Center Inc. v. Whirlpool Corp., 896 F. Supp. 48, 52 (D. Mass. 1995) (precluding recovery of prospective profits based on no-consequential damages provision in service contract); Williston on Contracts, § 66:72, (4th ed.) (loss of good will consequential damage). Delay damages are by their nature consequential damages. See e.g., Pierce v. Clark, 66 Mass. App. Ct. 912, 914 (2006) (in action for specific performance of purchase and sale agreement and delay damages, delay damages were consequential damages); Canal Elec. Co. v. Westinghouse Elec. Co., 973 F.2d 988, 996 (1st Cir. 1992) (damages caused by delay in installing equipment, including lost profits due to delay, considered consequential damages precluded by contractual damages waiver). Here, the only actual damages suffered by Majestic Honda were $653,285.12 for *inter alia* engineering, architectural and legal fees related to the Property. See V:VII:98.

[8] Under Massachusetts law the interpretation of a contract is ordinarily a question of law for the court. Somerset Sav. Bank v. Chicago Title Ins. Co., 420 Mass 422, 427 (1995); Agri-Mark, Inc. v Niro, Inc., 233 F. Supp. 2d 200, 209 (D. Mass. 2002).

Mass. 318 (1996) ("general rule of our law is freedom of contract"). Through the application of this principle, sophisticated commercial parties are encouraged to consensually allocate risk by agreement. Canal Electric Co. v. Westinghouse Electric Corp., 406 Mass. 369, 374-375 (1990) (holding no reason for the court to disturb a contractual allocation of risk between commercial parties). Even statutory rights including claims under 93A and damages may be waived, modified or altered by agreement. Id. This is because "in a corporate context these types of modifications of rights represent 'a reasonable accommodation between two commercially sophisticated parties' which does not offend any public policy of the state." Logan Equip. Corp., 736 F. Supp. at 1195 (citing Canal Electric, 406 Mass. at 374), and the Legislature did not authorize courts to render meaningless the agreed-upon damage waiver provisions in a signed contract. Chestnut Hill Dev. Corp. v. Otis Elevator Co., 653 F. Supp. 927, 933 (D. Mass. 1987) (finding that party not entitled to consequential damages under Chapter 93A where subcontract waived liability for consequential damages because *inter alia* "the Legislature did not authorize this Court to render meaningless the agreed-upon provisions in a signed contract" between the parties). Thus, absent a claim of fraud or commercial unconscionability contractually agreed upon allocation of commercial risk ***should not be disturbed***. See e.g. Deerskin Trading Post Inc v. Spencer Press Inc., 398 Mass. 118, 124 (1986).

Here, two sophisticated commercial parties represented by counsel in a purely private transaction negotiated, selected and agreed upon express language allocating unknown or undeterminable risk associated with a breach of the Lease. Specifically, the parties agreed that any remedies under the Lease to only the "***reasonable and actual***" costs to cure the breach and expressly excluded recovery of any "speculative or consequential damages caused by Landlord's failure to perform its obligations under the Lease." See V:VII:87 (emphasis added).

The trial judge refused to recognize and enforce the parties' agreement and their consensual allocation of the risk. The trial judge did not conclude that there was fraud or that the enforcement of this risk allocation was unreasonable. Rather the trial judge summarily concluded that "***Plaintiff did not contractually waive its ability to seek damages under G.L.c. 93A***." Add. at 76. (emphasis added). This conclusion is simply incorrect. It is well-settled that a commercial party waives its right to recover under Chapter 93A where it signs a contract containing a provision barring recovery for consequential damages and its Chapter 93A claim is based on its claim for breach of contract. Canal Elec. Co., 406 Mass. at 377-379 (holding that limitation of liability provision in commercial contract which limited remedies to actual damages under the claim for breach of warranty could bar recovery for a claim under G.L. c. 93A, § 11 arising from a breach of contract if it is "duplicative of a

traditional contract claim.");[9] see also Physician Ins. Agency of Mass., Inc. v. Inv'rs Capital Holdings, Ltd., No. 0303597, 2005 WL 3722373, at *3 (Mass. Super. Ct. Dec. 30, 2005) (Connolly, J.) ("A commercial party to a contract waives its right to recover under G.L. c. 93A where the G.L. c. 93A claim is based on a breach of the contract and the contract contains a limitation of damages provision barring the recovery of indirect, special, incidental and consequential damages, so long as it does not frustrate public policy.").[10]

[9] In Canal Elec. Co.. the Supreme Judicial Court concluded that limitation of liability provision in a commercial contract between two private parties that limited remedies to actual damages (and precluded consequential damages) was enforceable so as to bar recovery under G.L.c. 93A, § 11. 406 Mass. at 377. The Court recognized that a Chapter 93A claim may be "merely duplicative of a traditional contract claim," id. at 378, and that in such circumstances, a limitation of liability provision in the parties' contract would apply to and limit the parties' recovery under the 93A claim. Id. at 377-379. Specifically, the Court held:

> [T]he c. 93A, § 11[] claim arises from [a] breach of warranty and merely is an alternate theory of recovery under the contract. Moreover. the dispute is purely commercial one that does not affect the public interest. Nothing suggests that in these circumstances the waiver of the 93A, § 11 claim would frustrate the public policies of the statute. Thus we concluded the limited facts before us that the Limitation of Liability provisions require [the conclusion that a c. 93A, § 11 claim may be waived.]

Id. at 378 -379.

[10] See also First Mut., Inc. v. Rive Gauche Apparel Distribution, Ltd., No. CIV. A. 90-10899-Z, 1990 WL 235422, at *3 (D. Mass. Dec. 21, 1990) (Zobel, J.) ("where the dispute is essentially a private one arising between two commercial entities, and where the ch. 93A claims merely supplement private claims, a party may waive its rights under ch. 93A by contract.").

To justify its award of 93A damages (and modify the parties agreed upon risk allocation), the trial judge appears to have relied upon a distinction between tort and contract claims under 93A. Specifically, the trial judge concluded because Majestic Honda's claim "sounds in tort" it overrides any contractual defense. Add. at 76. This is simply incorrect for at least two reasons.

First, the 93A claim does not "sound in tort." Majestic Honda's 93A claim at its "core" is based on Dos Anjos LLCs' termination of the lease agreement, including the breach of the covenant of good faith and fair dealing, as explained by the trial judge. Add. at 82. The damages claimed by Majestic Honda in its complaint all flow from the breach of the contract and *not* from any of the alleged misrepresentations made regarding the reason why the Dos Anjos LLCs terminated the lease. Even the trial judge agreed that any damages incurred by Majestic Honda were as a result of the wrongful termination of the lease, specifically the trial judge's finding that "[Majestic Honda] sustained damages in the form of both lost value of operating the dealership in North Attleborough (lost opportunity should the Plaintiff elect to not continue with the Lease) and delay damages ***resulting from the significant delay caused by the Defendants' unreasonable termination of the Lease***." Add. at 71 (emphasis added). Majestic Honda did not articulate or establish any damages arising from the misrepresentations, which the trial judge concluded served as the basis for the 93A violation, and the misrepresentations did not cause

any additional damages beyond the breach of the contract itself. See K.G.M. Custom Homes, Inc. v. Prosky, No. 15-P-1333, 2016 WL 3568129, at *2 (Mass. App. Ct. July 1, 2016) (holding chapter 93A claim sounded in tort rather than contract where the misrepresentations "are at the core" of the claim). There is simply no basis to support the judge's conclusion that this breach of contract claim "sounds in tort" because at its "core" it is a 93A tort claim. Moreover, as explained further below, the Dos Anjos LLCs' actions do not run afoul of Chapter 93A.

Second, even if it did "sound in tort," this would not be justification to alter the parties agreed upon contractual allocation of risk. Massachusetts has universally refused to recognize any tort claim were the parties to a contract have already allocated risk. See Arthur D. Little Intern., Inc. v. Dooyang Corp., 928 F. Supp. 1189, 1202 (D. Mass. 1996). This is because "contract law . . . is well suited to commercial controversies . . . the parties may set the terms of their own agreements . . . Since a commercial situation generally does not involve large disparities in bargaining power" there is "no reason to intrude into the parties' risk allocation." East River Steam Ship Corp. v Transamerica Delaval, Inc., 476 U.S. 858, 872-73 (1986); see also Arthur D. Little Intern., Inc., 928 F. Supp. at 1202 ("parties to a contract may allocate their risks by agreement and do not need the special protections of tort law to recover damages caused by a breach of contract").

In this case, there is simply no justification to alter the parties previously agreed upon risk allocation after–the-fact. These types of risk allocation agreements limiting consequential damages are common in commercial leases and are widely regarded as a "reasonable accommodations between parties to a commercial agreement. These types of agreements have the advantage of allowing landlords to shift significant risk inherent in a long term lease. Moreover, the Supreme Judicial Court has not adopted the tort/contract distinction relied upon by the trial judge. To the contrary, the Supreme Judicial Court has repeatedly confirmed the enforceability of such provisions in commercial contracts, elevating the predictability of the parties agreement over a relatively arbitrary distinction.

Nor is this conclusion altered by either of the Appeals Court cases relied upon the trial judge. Both Standard Register and Exhibit Source involved claims of misrepresentation (i.e. fraud). Specifically, in Standard Register the court explained that the "misrepresentations of the defendants are at the core of Standard Register's claim for a violation of G.L. c. 93A, § 11, thereby making it a chapter 93A claim which sounds in tort rather than contract." Standard Register Co. v. Bolton-Emerson, Inc., 38 Mass. App. Ct. 545, 550 (1995). "The trial judge concluded that the defendants violated § 11 by misrepresenting [plaintiff's] ability to [perform under the contract] so as to induce Standard Register both to enter into the contract and to refrain from cancelling the contract." Id. The trial judge also concluded that

"because the tort-like elements of the chapter 93A claim predominate over the contract elements, the limitation of liability provisions in the [] contract are ineffective to bar [plaintiff] from recovering for a violation of G.L. c. 93A, § 11, based on such deceitful activity." Id.

In Exhibit Source Inc. v. Wells Ave. Bus. Ctr. LLC, 94 Mass. App. Ct. 497 (2018), the tenant prevailed on claims for *inter alia* conversion, misrepresentation and violation of Chapter 93A against its landlord related to the wrongful retention of a security deposit. The judge found that after the tenant vacated the property and demanded the return of its deposit, the landlord falsely represented repeatedly that the "full amount would be forthcoming" when it had no intention of returning the deposit. Id. at 498. Instead, months later, the landlord returned only a small portion of the deposit and falsely claimed the tenant damaged the property to justify its wrongful retention of the remainder of the deposit. Id. The Appeals Court found that because "[t]his was not a dispute over the application of a contract, but rather was a considered and intentional exercise of control over the plaintiff's property – a strategy employed in the hope that the property could be, ultimately, taken by the defendant without right to do so," and that the landlord's course "of action (and inaction) designed to result in the wrongful conversion of the plaintiff's property" sounded "predominantly in tort" and was "distinct from the contract claim." Id. at 501-502.

III. THE DOS ANJOS LLCS' CONDUCT DID NOT AMOUNT TO A CHAPTER 93A VIOLATION.

In the first trial on the 93A Claim of Majestic Honda's complaint, the trial judge found that the Dos Anjos LLCs' "purported reasons for terminating the Lease were a pretext for Dos Anjos' bitterness over Balise's purchase of the Cash Land." Add. at 78. The trial judge explained that the Dos Anjos LLCs "asserted their termination reasons either with knowing or willful disregard of their contractual obligations." Id. In his opinion, the trial judge stated that Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451 (1991) "inform[ed] [his] analysis" because the case recognized that "conduct 'in disregard of known contractual arrangements' and intended to secure benefits for the breaching party constitutes an unfair act or practice' under G.L. c. 93A." Add. at 74 (quoting Anthony's Pier Four, Inc., 411 Mass. at 475). In Anthony's Pier Four, Inc., the trial judge found that Anthony's decisions "were designed to forc[e] financial concessions from HBC" and that such actions constituted a 93A violation. 411 Mass. at 472-73. However, as explained below, none of the purported actions by the Dos Anjos LLCs were intended to culminate in "financial concessions" from Majestic Honda in favor of the Dos Anjos LLCs.

Specifically, the trial judge found that the Dos Anjos LLCs "willfully and knowingly" violated Chapter 93A for several reasons, including terminating the Lease out of bitterness because Balise purchased the Cash Land, using the leveraging

powers under the Lease to obtain financial concessions from Majestic Honda such as the Honda Exclusivity Amendment and the transfer of the Cash Land to Dos Anjos, withholding Majestic Honda's $150,000 security deposit, violating the covenant of good faith and fair dealing, and refusing to reinstate the Lease. Add. at 78-82.

As detailed further below, even if the trial judge correctly found that Majestic Honda did not waive its right to recover consequential damages under Chapter 93A, the Dos Anjos LLCs' conduct is a far cry from what constitutes a Chapter 93A violation.[11]

A. Termination of the Lease Out of Bitterness

The trial judge found that Dos Anjos' true reason for terminating the Lease was grounded in bitterness over Balise's purchase of the Cash Land. Add. at 78. Even if true, the Dos Anjos LLCs' reason for deciding to terminate the lease is of little consequence for Chapter 93A purposes unless it is to obtain a benefit from Majestic Honda, which it was not. Personal disagreements and "bitterness" are not sufficient to sustain a 93A action. See Primarque Prod. Co. Inc. v. Williams W. & Witts Prod. Co., 303 F. Supp. 3d 188, 208 (D. Mass. 2018) (finding no Chapter 93A claim where "parties' dispute stems from nothing more than "a failed business

[11] There was no damage limitation provision at issue in the Anthony's Pier Four Inc. case.

relationship due primarily to personality conflicts"); Alphagary Corp. v. Gitto, No. 20030384A, 2007 WL 1829396, at *3 (Mass. Super. Ct. May 21, 2007) (finding no Chapter 93A violation where alleged improper conduct was "motivated by . . . personal dislike of [a party]").

B. The Honda Exclusivity Amendment

The conduct of the Dos Anjos LLCs does not rise to the level of a Chapter 93A violation because it did not "obtain advantage for the party committing the breach in relation to the other party." See Atkinson v. Rosenthal, 33 Mass. App. Ct. 219, 225–226 (1992). The trial judge found that "[t]he Defendant's demand for the Honda exclusivity amendment violated Majestic's usage rights as set forth in the Lease, ¶15." The record belies this finding. After learning of Balise's intention to demolish one of the structures on the Leased Property, replace it with a new building, and renovate the other existing building on the Leased Property, Dos Anjos sought to document the true intention of the parties, which was to operate only one car franchise on the property. Indeed, the record is clear that the purpose of the Honda Exclusivity Amendment was to conform the lease to the original intent of the parties. See V:VII:310. As a result, on or about August 4, 2017, the Dos Anjos LLCs requested that Majestic Honda sign an amendment to the Lease to reflect Balise's prior representations that the Property would be operated exclusively as a Honda franchise. Add. at 62-64. Further, the Dos Anjos LLCs' request for "Honda

exclusivity" was made before mailing the termination letter on August 9, 2017. Add. at 64, 66. The exclusive purpose of the Honda Exclusivity Amendment was to assure adherence to the original intent of the parties. See Ahern v. Scholz, 85 F.3d 774, 799 (1st Cir. 1996) (finding no Chapter 93A violation where party breached contract and tried to hold on to plaintiff's money but did not use the breach to try "to force [the plaintiff] to do what otherwise [he] would not be legally required to do" and reversing lower court's decision regarding Chapter 93A violation).

C. Withholding the Security Deposit.

Withholding of a security deposit in this case cannot be the basis for a 93A violation because Majestic Honda never requested the return of the security deposit and there is no obligation in the lease that Dos Anjos LLCs return said deposit. From October 28, 2016 through at least July 25, 2017, the Dos Anjos LLCs had taken the property off-the market and had not received rent from Majestic Honda for that period. Yet, Majestic Honda had unfettered use of the property to conduct its due diligence. See V:IV:242-243 (Tr. 234:6-235:3); V:VII:31-40, 55-61. When the Dos Anjos LLCs confirmed the termination of the Lease in the November 22, 2017 letter, they returned to Majestic Honda all rent checks from August 9, 2017 through November 22, 2017, including prepaid rent through December 4, 2017. Add. at 69. Nowhere in the Lease is there a provision that required the Dos Anjos LLCs to return the security deposit. Where a party properly demands the return of the security

deposit and the landlord refuses to return it, the landlord violates Chapter 93A. Gentle Commc'ns, LLC v. Naggar, No. 03-1911, 2004 WL 505136, at *4 (Mass. Super. Ct. Mar. 15, 2004) ("violation of G.L. c. 93A for [a landlord] to have refused to return the [a security deposit] to [a tenant] after [the landlord] received [a] letter [from the tenant] revoking the offer to execute a Lease, terminating all negotiations regarding a Lease, and demanding return of the deposit."); Exhibit Source, Inc., 94 Mass. App. Ct. at 501 (finding a violation of 93A where landlord falsely claimed tenant's security deposit after landlord promised to return it but had no intention of doing so). That is not this case.

D. Cash Land.

The record is clear that after Dos Anjos terminated the lease in August, it was *Majestic Honda* who initiated settlement conversations in an effort to persuade Dos Anjos to withdraw the termination. As Attorney David Manoogian testified, Attorney Teverow "call[ed] [] on a regular basis . . . asking if there was anything [h]e could do to try to reinstate the lease, and those were the catalysts of the settlement discussions." See V:V:125 (Tr. 117:11-15). Two days after the Dos Anjos LLCs issued the termination letter on August 9, 2017, Balise, reached out to Dos Anjos asking him to "tell [Balise] exactly what [Dos Anjos'] concerns are," "work out any issues . . . [and] . . .satisfy your concerns." See V:VIII:9. Majestic Honda's counsel pushed the Dos Anjos LLCs' counsel to tell them what it would

take to reinstate the lease. The evidence presented at trial showed that the Dos Anjos LLCs did not want to reinstate the lease but wanted the property back and Majestic Honda "pushed to negotiate." See V:VIII:31. Thereafter, in response to Majestic Honda's requests to "satisfy concerns," Attorney Manoogian represented that "my client is willing to explore whether his concerns regarding the site plan and elevation may be restored" and proposed that Majestic Honda transfer title to the Cash Land to the Dos Anjos LLCs for $1.00 as a possible vehicle to ameliorate those concerns. See V:VI:93 (Tr. 85:9-23), 100-101 (Tr. 92:24-93:2); V:VII:133, 143-156. Although the parties circulated an amendment to the Lease that would transfer the Cash Land to Dos Anjos for $1.00, Dos Anjos did not in fact want the transfer, refused to accept it, and never took ownership of the Cash Land. See V:VI:85-86 (Tr: 77:24-78:6); V:VII: 143-156. Dos Anjos' intent was to retain his original land, and nothing more, and the Cash Land offer was not made to "extract economic concessions."

IV. THE DOS ANJOS LLCS SHOULD NOT BE FOUND CULPABLE FOR ANY DELAY BETWEEN FEBRUARY 12, 2019 AND AT LEAST MAY 31, 2019.

In his Findings of Fact and Rulings of Law on the reopened 93A trial, the trial judge drew a significant number of adverse inferences against the Defendants based on their assertion of privilege. Add. at 114. These assertions, of course, were the natural result of the judges' explicit threats and admonitions regarding their

testimony and his inclination to refer them for criminal prosecution. But the judge also wrote that "I arrived at my findings of fact and rulings of law on Plaintiff's re-opened Chapter 93A claim and damages . . . independent of these adverse inferences." Add. at 136-137.

I urge the Appeals Court to take the judge at his word, to disregard the adverse inferences he drew from the privilege assertions of the witnesses in light of the circumstances under which they occurred, and to look to the other evidence presented by the parties at the trial. That evidence does not support the judge's findings and conclusion regarding the Defendants' post February 12, 2019 conduct having knowingly and willfully delayed the project and its permitting – at least prior to May 31, 2019. Simply put, there was no evidence of such conduct during that period of time. To the contrary, Balise testified that during that period Majestic Honda had total free access to the Leased Property for testing, evaluation and engineering purposes, which were completed in a timely fashion. See V:VI:621 (Tr. 92:2-24), 625 (Tr. 96:3-16), 630 (Tr. 101:8-22).

Moreover, during this period, Dos Anjos signed every permit and TIF application that was sent to him by Majestic Honda's permitting team. V:VI:584-585 (Tr. 55:2-56:15), 647 (Tr. 118:2-18); V:VIII:97. With respect to the question of title and ownership of the Leased Property, Balise testified, and the judge found, that he had been "aware from as early as 2016 or 2017" that "the titleholder to the Leased

Premises was the 'Dos Anjos Realty Trusts,'" and "minimized the discrepancy between the named landlords and the record title holders" believing that "such discrepancy would be worked out as a matter of 'clean up' " by the lawyers. Add. at 91. The Majestic Honda lawyers were also fully aware of the discrepancy since at least April 2017, when they obtained a title survey. See V:VII:31-40.

That discrepancy was never brought to the attention of the Dos Anjos LLCs or the lawyers, and was not an issue in any respect in the termination litigation. After electing specific performance on February 12, 2019, the same permitting experts were retained, and five weeks later presented identical permit applications listing the Dos Anjos Realty Trusts as the owners to Balise and his counsel. See V:VI:425 (Tr. 87:4-10), 562 (Tr. 33:15-23), 621 (Tr. 92:2-24), 625 (Tr. 96:3-16), 630 (Tr. 101:8-22); *see also* V:VI:426 (Tr. 88:4-22); 431-432 (Tr. 92:16-93:24), 566 (Tr. 37:7-8); V:IX:115-120. This created an internal dispute, prompted by Attorney Teverow, who insisted that the Landlord LLCs be listed as the owners, and the experts who strongly advised that the property titleholders, not the Landlord, needed to be on the applications. See V:VI:432-437 (Tr.94:5-99:7). In an apparent attempt to compromise this internal dispute (the issue still not having been raised with the Dos Anjos LLCs or their counsel), applications were prepared identifying Dos Anjos as "Trustee" of the Dos Anjos LLCs. See V:VIII:62-64. These applications were sent by Majestic Honda experts to Dos Anjos in April or May, signed by him and returned

to Majestic Honda but, unbeknownst to Dos Anjos, they were never filed. See V:VI:584-585 (Tr. 55:2-56:15), 647 (Tr. 118:2-18); V:VIII:62-64, 97.

Counsel for Majestic Honda finally brought this discrepancy to the attention of counsel for the Dos Anjos LLCs on May 31, 2019. See V:IX:39. Thereafter counsel for the LLCs attempted to fashion solutions that would have protected the tenancy and provided a path to permitting, but declined to agree to a transfer of the properties' title. Majestic Honda on the other hand demanded the property transfer so that the assets would be available for the collection of the first 93A judgement.

These failed negotiations led to the Rule 60 filing by Majestic Honda's counsel and, on August 15, 2019, to the parties agreeing to stipulate to adding the Dos Anjos Realty Trusts to the original complaint and the judgement – thereby making their assets available. Thereafter, permit applications were once again signed and returned on September 18, 2019, with the exception of a Conservation Commission application, which was inadvertently delayed until November 16.

Although minds may differ as to whether after June 2019 the conduct was consistent with the Judge's January 28, 2019 order requiring cooperation in the permitting process, that is plainly not the case with respect to their conduct between February 12 and May 31. At a minimum, the judgement for delay damages should be modified accordingly to exclude those three and a half months from any calculation of delay attributed to the noncooperation of the Dos Anjos' Defendants.

CONCLUSION

For the reasons expressed above, the Dos Anjos Defendants respectfully request that this Court reverse the trial judge's findings that the limitation of damages clause in the lease contract was overridden by the conduct of the Dos Anjos Defendants, and that the Dos Anjos Defendants violated Chapter 93A when they terminated the lease in August 2017, and thereafter refused to reinstate it. The Dos Anjos Defendants also respectfully request that this Court reverse the trial judge's findings that the post judgment conduct of the Dos Anjos Defendants created grounds for further damages under M.G.L.c. 93A, and grant the Dos Anjos Defendants request that this Court modify any such judgment for delay damages to exclude those three and a half months from any calculation of delay attributed to the noncooperation of the Dos Anjos' Defendants.

Dated: November 20, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Robert J. Cordy, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14, and contains 9,821 total non-excluded words as counted using the word count feature of Microsoft Word 2016.

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on November 20, 2020, I have made service of this Brief and Appendix upon the attorney of record for each party through the Odyssey Filing System:

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ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1779CV899

HI LINCOLN, INC. D/B/A MAJESTIC HONDA,
Plaintiff/Defendant-in-Counterclaim

vs.

SOUTH WASHINGTON STREET, LLC,
AND
849 SOUTH WASHINGTON STREET, LLC,
Defendants/Plaintiffs-in-Counterclaim

FINDINGS OF FACT AND RULINGS OF LAW

A. Background

I conducted a jury trial in the above-captioned matter during the period September 18, 2018 – September 27, 2018. After trial, the jury returned the following Special Verdict:

a. The Plaintiff/Defendant-in-Counterclaim (the "Plaintiff") proved by a preponderance of the evidence that the Lease is in full effect.

b. The Defendants/Plaintiffs-in-Counterclaim (the "Defendants") did not prove by a preponderance of the evidence that their withholding of consent was exercised reasonably or that the termination of the Lease was valid.

c. The Plaintiff proved by a preponderance of the evidence that the Defendants breached the Lease when it terminated the Lease.

d. The Defendants' breach of contract occurred on August 9, 2017.

e. The Plaintiff proved by a preponderance of the evidence that the Defendants breached their covenants of good faith and fair dealing implied in the Lease.

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f. The Defendants' breach of the implied covenant of good faith and fair dealing occurred on August 9, 2017.

g. The Plaintiff proved by a preponderance of the evidence that it suffered money damages as a result of the Defendants' breach of the Lease.

h. The Plaintiff proved by a preponderance of the evidence that it suffered money damages as a result of the Defendants' breach of the implied covenant of good faith and fair dealing.

i. The amount that would compensate the Plaintiff for the Defendant's breaches is $5,616,500 in compensatory damages. Of this amount, $891,600 is for the Plaintiff's purchase of the Cash Land.

j. The amount that would compensate the Plaintiff for the delay in operating the dealership to date is $3,762,500.

I reserved the plaintiff/defendant-in-counterclaim's claim for violations of G.L. c. 93A, §§ 2, 11 set forth in Count 5 of plaintiff/defendant-in-counterclaim's complaint, and on October 26, 2018, I conducted a jury-waived trial on Count 5.My findings of fact and rulings of law on Count 5 are set forth below.

B. Findings Of Fact

After hearing, I find based upon a preponderance of the credible evidence as follows:

Plaintiff/Defendant-in Counterclaim is H1 Lincoln Inc. D/B/A Majestic Honda ("Plaintiff," "Majestic," "Tenant," and "Lessee"). James Balise ("Balise") is the principal of Plaintiff and the owner of approximately 24 automobile dealerships in Massachusetts, Connecticut, and Rhode Island.

In 2015, Balise Auto Group purchased Majestic Honda ("Majestic"), a new and

used Honda dealership located in Lincoln, RI. To improve performance, Majestic sought to move to a more suitable location within its area of responsibility ("AOR") for selling Honda automobiles.

Defendant South Washington Street, LLC and Defendant 849 South Washington Street, LLC (together "Defendants," "South Washington Street," the "Dos Anjos entities," and "Landlord") own two adjacent properties located at 849 and 865 South Washington Street, North Attleborough, Massachusetts (hereinafter collectively referred to as the "Leased Property"). Alfredo Dos Anjos ("Dos Anjos") is the principal of the two Defendant entities and has owned approximately six new and used automobile dealerships over the course of his career. At all times material hereto, Dos Anjos acted on behalf of the Defendants. Currently, Dos Anjos operates one new and used automobile dealership, Pride Hyundai, in Seekonk, Massachusetts. He also owns and operates a finance company, Blackstone Finance. Lisa Pariseault ("Pariseault"), Dos Anjos's daughter, manages Dos Anjos's Seekonk Hyundai dealership. Pariseault also serves as Dos Anjos's agent on behalf of Dos Anjos and the Defendants. At all times material hereto, the Plaintiff and the Defendants and their agents were engaged in trade or commerce in Massachusetts.

Dos Anjos owns land to the south of the Leased Property, which he rents to CarMax, a large national used car retailer, under a long-term lease with similar terms and conditions to the lease in this matter.

Dos Anjos formerly owned and operated new and used automobile dealerships out of the buildings located on the Leased Property. Each parcel within the Leased Property contains one vacant building. The Leased Property and its buildings had been vacant for several years before

2016, with the exception of a parking agreement that Dos Anjos entered into with a local Nissan dealer.

The Leased Property is located on Route 1, also known as South Washington Street, in North Attleborough, Massachusetts, adjacent to the intersection of Route 1 and Interstate-295. Interstate 95 intersects Interstate 295 just east of the Leased Property. The Leased Property is a desirable location to sell new and used cars. There are other new and used car dealerships nearby, including CarMax, Boch Toyota South, Boch Nissan South, Patriot Subaru, and others, giving the area the commonly known moniker of "Auto Road." The Leased Property falls within Majestic's AOR with Honda.

The Leased Property falls within North Attleborough's Zoning District of C-30, which is a Business District for which the sale of new and used cars and the storage of vehicles is a permissible use. In fact, Dos Anjos previously used the two lots for that same use. The Leased Property also had, as of 2016, a pre-existing special permit for a planned business development for an automobile dealership. No zoning changes were required to operate a new and used car dealership on the Leased Property. Zoning on the Leased Property allowed for multiple additional uses all as set forth in North Attleborough's Town Zoning Bylaws.

In 2016, Majestic and South Washington Street each engaged the brokerage services of Joshua Teverow. Teverow is an attorney, and the principal of Florida Automotive Consulting, LLC. Florida Automotive Consulting, LLC and Dos Anjos entered into a consulting agreement on May 9, 2016. The consulting agreement provides, in part, that Florida Automotive Consulting, LLC's duties were to "locate a Lessee for the Property for a long-term Lease" for Dos Anjos as the "Lessor." The consulting agreement did not state that Teverow would be doing any legal work for Dos Anjos. Paragraph 2 of the agreement differentiated Florida Automotive

Consulting, LLC's consulting role from prior legal services Teverow performed. Paragraph 3 of the consulting agreement stated that Dos Anjos would retain some other person as "local counsel." Paragraphs 4 and 5 of the consulting agreement disclosed that Teverow would provide assistance to the Lessee, and ¶ 9 stated that "[n]othing herein precludes the Consultant from obtaining consulting fees from the Lessee for assistance in locating the Property, and for providing other consulting services."

In August of 2016, Teverow arranged a meeting between Balise and Dos Anjos. Pariseault was also present. During the meeting, the parties discussed lease terms and arrangements. No documents were executed at the meeting.

Thereafter, Dos Anjos retained Attorney David Manoogian to represent him in leasing the Leased Property to Majestic. Dos Anjos had a prior relationship with Manoogian, who was his real estate attorney dating back many years. Dos Anjos retained Teverow to draft the Lease. Teverow used the same form of lease that he had negotiated for Dos Anjos for CarMax, which occupied property across the street from the Leased Property (the "Car Max Lease").

At the same time, Teverow represented Majestic while working with Majestic's real estate attorney, Attorney Joseph Pacella. Although Teverow claimed that he was representing Balise in the negotiation of the Lease, he never disclosed to Dos Anjos that he represented Balise in the lease negotiations.

The parties negotiated until October 28, 2016, when they executed a written lease (the "Lease"). The named Tenant under the Lease is the Plaintiff in this case, "H1 Lincoln, Inc., d/b/a Majestic Honda." The Landlord is listed as the two Defendants, 849 South Washington Street, LLC and 849 South Washington Street, LLC. Paragraphs 32 and 37 of the Lease disclosed Teverow's role and waived any possible conflicts of interest. Balise and Dos Anjos each initialed

every page of the Lease and signed on the signature pages. Dos Anjos signed twice for each of his entities. Before signing on behalf of Majestic, Balise read the Lease several times over.

Dos Anjos claims to have never read the Lease before signing, purportedly because he does not understand legal documents. Dos Anjos's testimony is not credible in light of his decades of experience as an automobile dealer, experience with six dealership agreements with automobile manufacturers, experience as a commercial landlord, and his ownership and operation of a finance company. His experience has built a level of sophistication in commercial lease matters which cannot be denied or ignored.

Upon signing the Lease, Balise paid a deposit of $150,000 to the Defendants. The initial term of the Lease is for twenty-three (23) years. The Lease provides the Tenant with four options to extend the Lease for five (5) years each, for a total of forty-three (43) years. Rent under the Lease is to begin at $45,000 per month and, throughout the life of the Lease, rent will increase to as high as $82,699.65 per month. Under the Lease, Majestic received a reduction in rent during the first three years. All of said money, however, is to be repaid as deferred rent.

The Lease contains a "merger clause," by which the Lease language supersedes and makes invalid any reliance by any party on any purported prior discussions, negotiations or agreements. The merger clause states:

> Entire Agreement; Merger. This Lease, including all exhibits hereto (which are hereby incorporated herein by reference for all purposes), contains the full and final agreement of every kind and nature whatsoever between the parties hereto concerning the subject matter of this Lease, and all preliminary negotiations and agreements of whatsoever kind or nature between Landlord and Tenant are merged herein. This Lease cannot be changed or modified in any manner other than by a written amendment or modification executed by Landlord and Tenant.

The Lease is unambiguous and clear. I have construed the Lease so as to enforce its unambiguous terms according to the plain meaning of the words. Its terms and conditions are unmodified by virtue of any extrinsic communications.

The Lease sets forth the level of Landlord approval necessary should the Tenant seek "demolition" or "construction" of a building on the Leased Property during the Lease's "Feasibility Period" as follows:

> 2. Demolition and Construction of Buildings and Improvements.
>
> (a) Tenant shall determine during the Feasibility Period as defined in Section 4(IV)(b) below, whether the 849 Building or the 865 Building, or both (collectively, the "Existing Buildings, and each one, an Existing Building"), will need to be demolished to accommodate Tenant's planned use of the Property. If Tenant determines that either or both of the Existing Buildings will need to be demolished in connection with Tenant's planned use of the Property, or that any new buildings need to be constructed ("New Buildings"), Tenant shall give Landlord written notice of such determination within the Feasibility Period ("Demolition/New Buildings Notice"). If Tenant fails to furnish Demolition/New Buildings Notice within the Feasibility Period, Tenant shall be deemed to have elected not to demolish either of the Existing Buildings or construct New Building [sic]. Demolition/New Buildings Notice shall include preliminary site plans and elevations for Tenant's proposed development of the Property, which shall be in reasonable detail, but which shall not be construction drawings, showing the size, location, and materials of the building or buildings Tenant plans to construct in place of the demolished Existing Building or Existing Buildings or in addition to Existing Buildings. Within fifteen (15) days after Landlord's receipt of the Demolition/New Building Notice, Landlord shall have the right to terminate this Lease by written notice to Tenant if Landlord reasonably withholds consent to such new construction, in which event this Lease shall terminate as of the date of Landlord's written notice and the parties shall have no further obligation to one another except those obligations that expressly survive termination hereunder including provisions set forth with respect to the Tenant's deposit as set forth in Section 34(a) below. If Landlord fails to terminate this Lease within such fifteen (15) day period, Landlord shall be deemed to have waived the right to terminate this Lease pursuant to this Section 2(a), and Tenant shall be permitted to demolish Existing Building or Buildings or construct New Buildings as described in Tenant's Demolition/New Buildings Notice; provided, however, that under no circumstances shall any Existing Building be demolished or New Buildings be constructed until Tenant has secured a demolition permit for the Existing Buildings ***and*** building permit for the New Building or Buildings and associated improvements, and secured adequate financing for the construction of the New Buildings and site work

> associated therewith. Notwithstanding the foregoing, Landlord acknowledges that Tenant's present intention is to demolish the 865 Building and the 849 Building and replace with a prototypical Honda dealership facility. Tenant shall submit to Landlord during the Feasibility Period a prototypical elevation showing the materials and general architectural appearance of the Honda dealership facility and reasonably detailed plans for the Tenant's proposed improvements for the review and approval of the Landlord, which such approval shall not be unreasonably withheld.

The Tenant's concept site plan, which it originally submitted on May 24, 2017, and again on July 25, 2017, satisfied the "reasonably detailed" requirement set forth in ¶ 2(a).

With respect to the deposit, the Lease provides:

> II) Deposit. Upon the execution of this Lease, Tenant will deposit with Landlord the sum of $150,000 as a good faith Deposit, which Deposit shall be equally applied to the first 6 months of full Base Rent at $25,000 per month. The Deposit or any remaining portion thereof, shall be forfeited to Landlord as liquidated damages should Tenant default on its obligations under this Lease prior to the entire Deposit being applied toward Base Rent as described in this Paragraph or forfeited to Landlord in accordance with the provisions of Paragraph 34(a) below. No interest shall be paid on the Deposit.

The Lease further provides that if the "Tenant terminates the Lease during or at the conclusion of the Feasibility Period the Tenant shall not be entitled to the return of all or any portion of the Deposit..." under a section of the Lease captioned "Tenant's Right to Terminate."

With respect to the obtaining of permits, the Lease states at ¶ 9, that "[w]ithout cost or expense to Landlord, Landlord shall cooperate with Tenant in obtaining any and all licenses, building permits, certificates of occupancy or other governmental approvals ... which may be required in connection with any such modifications or alterations, and Landlord shall execute, acknowledge and deliver any documents reasonably required in furtherance of such purposes." The Lease provides the Landlord with the "sole discretion" to consent or not consent to the Tenant's pursuit of "special use permits."

With respect to the Tenant's permissible "use" of the Leased Property, the Lease states that:

> Use. Tenant shall have the right to use the Premises for any use permitted under the current zoning for the Premises, or any change in zoning requested by Tenant with Landlord's consent which shall not be unreasonably withheld. Nothing contained in this Lease shall be construed to require Tenant to operate the Premises continuously for any use.

With respect to easements, the Lease states that:

> Easements. Tenant shall have the right to grant, and. [sic] Landlord, and any and all Mortgagees, shall join in and acknowledge the grant of utility, access, storm water management, or similar easements, for Tenant's conduct of its business or the expansion thereof, or for the operation of any alterations permitted by this Lease. Said utility and access easements shall be located in areas of the Premises which are not improved with buildings, outbuildings, or other permanent structures.

With respect to Landlord's default and the Tenant's demand to cure, ¶ 28 of the Lease provides the following "Event of Default" by the Landlord: "Landlord's failure to perform any nonmonetary obligation of Landlord hereunder within thirty (30) days after receipt of written notice from Tenant to Landlord specifying such default and demanding that the same be cured." Upon Landlord's Event of Default, the Tenant may "sue for damages, including interest, transaction costs and attorneys' fees."

Directly between the Leased Property and the CarMax site, which are each owned by Dos Anjos entities, lies a piece of land located at 115 Draper Avenue, North Attleborough, Mass., formerly owned by the Cash family (the "Cash Land"). Unbeknownst to Balise and Majestic, Dos Anjos had been trying to purchase the Cash Land for fifteen (15) years. Dos Anjos and Pariseault used a broker named Tim McNamara in 2016 and early 2017 in their latest attempts to purchase the Cash Land. Pariseault told McNamara that her father Dos Anjos "wants to buy everything around him" and proposed using a straw to buy the Cash Land from the Cash family.

After exchanging offers, on January 27, 2017, Dos Anjos and Pariseault offered to purchase the Cash Land for $800,000.

During an overlapping timeframe in late 2016 and early 2017, Balise and Dos Anjos were both attempted to purchase the Cash Land, with no knowledge of the other's involvement or offers. Utilizing a straw buyer, Balise also offered to purchase the Cash Land for $800,000. Nancy Jones, of the Cash family, accepted Balise's $800,000 offer in January of 2017. Jones rejected an offer from Dos Anjos for the same amount. Balise and the Cash family executed a quitclaim deed conveying the Cash Land to Balise on June 30, 2017 (the deed is dated incorrectly as July 30, 2017). The deed for the Cash Land was recorded on July 6, 2017.

Nothing in the Lease prohibited either the Tenant or the Landlord from acquiring parcels of land abutting the Leased Property. Neither party had any obligation to the other to disclose its attempts to purchase the Cash Land. Neither party disclosed to the other their interest in acquiring the Cash Land.

The Leased Property and the Cash Land are both zoned as C-30 and can both be used for a new and used automobile dealership, storage of vehicles, and other uses. Nothing within the Zoning By-Laws prevents Majestic from operating an automobile dealership or vehicle storage on the Cash Land and the Leased Property. Majestic could do so without a special permit for a planned business development for the Cash Land. In particular, Majestic could develop the Leased Property under its pre-existing permit for a planned business development and separately proceed with its plan for the Cash Land under the less formal "site plan review" process. Alternatively, Majestic could obtain a separate special permit for a planned business development for the Cash Land itself. The only difficulty with permitting the two properties separately, from Majestic's perspective, would be an increased open space requirement of 10%

on the Cash Land only, which would equate to losing a few parking spaces. Lastly, one special permit for a planned business development could be used for the entire project if the Landlord agreed to sign off on the special permit application.

On May 24, 2017, Majestic sent a concept site plan to the Defendants showing Majestic's proposed demolition and construction of one of the buildings on the Leased Property and proposed renovation of the second building with an orange roof. The May concept site plan also displayed an intended use of the Cash Land by clearly depicting parking for "new vehicle inventory" and "new vehicle display" on the Cash Land along with other uses that are not portrayed on other land featured on the plan, such as the neighboring CarMax land.

Dos Anjos reviewed the plans in May and was on notice on receipt of the plans that Majestic intended to use the Cash Land together with the Leased Property. Indeed, Pariseault recognized the Cash Land when she saw the concept site plan. Dos Anjos's testimony that he did not recognize the Cash Land on the plans in May as depicted on the concept site plan is unpersuasive.

Importantly, Dos Anjos revealed his true intentions in ultimately terminating the Lease when he stated, "I can assure you, and everybody, if I had discovered [the Cash Land was on the Concept Plan in May], I would have cancelled the deal right then and there. We would not have gone to July 25. It would have been done right then and there."

Majestic's May submission included a request to merge the two parcels owned by the Defendants. Dos Anjos assented to the merger so long as Majestic would agree to preserve the existing curb cuts and drainage facilities. Pursuant to ¶ 2(a) of the Lease, the Defendants had fifteen (15) days from receipt of the May 24, 2017, correspondence to object to any demolition and construction.

The Defendants neither objected to the May concept site plan nor attempted to terminate the Lease within the fifteen-day time period. Accordingly, pursuant to ¶ 2(a) of the Lease, the Defendants waived their right to terminate the Lease, and Majestic was entitled to take steps to demolish and build, as set forth in the May concept site plan, subject to the provisions of ¶ 2(a). Balise called Dos Anjos multiple times about the May submission in order to discuss the plans with Dos Anjos. Dos Anjos did not return Balise's calls.

On July 12, 17, and 21, of 2017, a team of Majestic representatives (including Balise, Steve Cabral and Ed Casey) contacted and met with residential neighbors of the Leased Property to hear their concerns for Balise's proposed project.

In June and July of 2017, Majestic's representatives met with and solicited feedback from town officials, including North Attleborough's Town Planner, Nancy Runkle.

On or about July 25, 2017, in accordance with ¶ 2(a) of the Lease, Majestic Honda issued a notice of its intent to demolish buildings and construct a new building on the site. Majestic re-sent the same concept site plan to the Defendants and included building elevations with its second submission. The Site Plan again depicted the Cash Property being used as a parking lot. In its correspondence, Majestic agreed that it would satisfy Dos Anjos's curb cut and drainage requirements for merging the Lease Property lots as previously discussed in Manoogian's May 30, 2017 letter. Majestic's counsel suggested that Dos Anjos and Balise "do a site walk, discuss any concerns and see on the ground what is planned." Balise suggested Dos Anjos contact him with any questions or concerns he might have. Defendants did not respond to Balise's suggestions.

On July 25, 2017, Manoogian sent Dos Anjos a detailed recitation of Dos Anjos's contractual rights and responsibilities under the Lease. That same day, Manoogian e-mailed a PDF copy of Majestic's site plan package to Dos Anjos and Pariseault, writing:

> "Lisa and Al:
>
> See below and attached. Balise is moving forward with the lease. The attached coincides with the email I previously sent to Al outlining the notices due from Balise and Al's actions upon receipt. I agree with Balise's counsel that at this point a site walk would be beneficial. Please let me know when Al would be available to meet on site with me and Balise's reps.
>
> Thanks.
>
> Dave"

On the morning of July 28, 2017, Manoogian and Dos Anjos spoke on the telephone. In an email to Dos Anjos and Pariseault later that day, Manoogian summarized the content of the morning telephone conversation. Manoogian's email noted that Dos Anjos's "specific concern" during the call was "that [Dos Anjos] did not contemplate the demolition of one of the building on the premises (old Dodge store) and its replacement with another new building and the renovation of the newer existing building."

Manoogian's email of July 28, 2017, also advised Dos Anjos and Pariseault: "Before sending a notice to terminate the lease on or before August 10, 2017 or scheduling a meeting prior to said date with Balise's representatives in order to discuss your concerns, please be advised as follows, . . ." after which Manoogian copied and pasted the verbatim language of ¶ 2(a) of the Lease pertaining to the Landlord's ability to approve demolition or construction of buildings, "which such approval shall not be unreasonably withheld."

Manoogian's email emphasized the following sentence in bold and underlined font: "**Landlord acknowledges that Tenant's present intention is to demolish the 865 Building and the 849 Building and replace with a prototypical Honda dealership facility**." In respect of the bold and underlined language, Manoogian wrote that "[i]n my opinion the lease clearly expresses the tenant's ability thereunder to construct more than one new building and demolish the existing structures."

The email also stated:

> "Paragraph 2(a) does provide you with the ability to terminate the lease with written notice if you reasonably withhold consent to such new construction, however, the primary reason you provided to me over the phone does not appear to be a reasonable and sufficient basis to terminate the lease.
>
> If you have specific concerns regarding the site plan and elevation proposed I suggest we meet early next week to review those plans so that I may attempt to establish a meeting with the tenant and its legal counsel and relay your concerns.
>
> If we simply try to establish a meeting and/or give notice of termination of the lease based on the grounds that you did not contemplate the demolition of one building and its replacement together with the renovation of the other existing building, the tenant would not be responsive to any such invitation to meet and would regard the notice to be insufficient.
>
> ...
>
> If you are concerned that two dealerships may ultimately operate from the leased premises there is no prohibition contained in the lease preventing such use, however, as I understand, given Honda's declaration to the tenant that only its franchise may operate from the premises this concern may never become a realty [sic] under the lease. If this is your concern we may be able to address the issue my [sic] requesting an amendment to the lease that if more than one franchise operates from the premises a certain percentage rent increase would kick in."

On July 31, 2017, Manoogian again proposed a site visit, which the Defendants again declined. That same day, Pariseault emailed to Manoogian, copying Dos Anjos, in which she

conditioned forgoing the site walk on Majestic's agreeing to a Honda-exclusivity lease amendment. Pariseault wrote:

> "[M]y father would like Balise to put in writing that there will be only one new car franchise on the property, that being Honda. So long as they attest to that my father does not need to walk the property with them. He is not concerned about offshoots of a new car franchise such as a separate quick lube or car wash building, or a collision center.
>
> However, if you cannot get them to memorialize this in writing then we would need to reschedule the walk through for a day and time when you will be available as well.
>
> Thanks,
>
> Lisa"

On the morning of August 4, 2017, Manoogian conveyed to Majestic's attorney, Joseph Pacella, the Defendants' position that a site visit would not be necessary so long as Majestic agreed to the Honda exclusivity amendment. In order to secure site plan approval, Majestic's counsel agreed to Honda exclusivity in principal, pending review of the actual amendment language. In turn, on August 4, 2017, at 1:59 pm, Manoogian emailed a "proposed lease amendment" to Dos Anjos and Pariseault, which limited Majestic's use of the Leased Property to a Honda dealership only. Manoogian's email stated, "[u]pon your approval I'll send it to Balise's counsel."

On August 4, 2017, at 4:34 pm, Manoogian sent to Majestic's counsel the "proposed lease amendment" that he had sent to Dos Anjos for approval earlier that day. Manoogian's email stated, "Attached for your consideration is the lease amendment my client requests the parties sign." Dos Anjos acknowledged that the original Lease did not limit Majestic to use a Honda dealership only.

As of August 9, 2017, at 10:16 am, Dos Anjos remained troubled by his "two building" objection to the site plan, even if such buildings were to be Honda-exclusive. For example, Dos Anjos sent an email to Manoogian that stated:

> "I was never told there would be more than one building on the property, regardless of the manufacturer. I entered into good faith dealings that were centered around one building and one franchise. The plans presented depict otherwise. Right now I feel as though I was taken advantage of.
>
> If Mr. Balise wishes to live up to the arrangements discussed in that meeting in my office then we can move forward. If not the deal is off and we'll take all necessary measures to cancel it even if that means having to go to court."

Shortly thereafter, at 10:57 am on August 9, 2017, Manoogian emailed Dos Anjos and Pariseault, stating:

> "Lisa and Al:
>
> I have attached hereto the proposed notice to terminate the lease with Balise. If acceptable, Al should sign in the two places indicated ....
>
> ...
>
> While I understand Al's frustrations as set forth in his most recent email, the lease is very specific as to grounds for termination and the attached notice attempts to follow the lease so that the cause for termination reflects the specific lease language.
>
> Please contact me should you have any questions.
>
> Thanks.
>
> Dave"

Manoogian's email indicates that as of August 9, 2017, Mr. Dos Anjos continued to object to Majestic's concept site plan because he objected to either two buildings on the site and/or to the possibility of two dealerships on the site.

Manoogian's August 9, 2017, email enclosed a draft termination letter that recited the following reasons for termination:

> "The proposed site plan depicts additional land not owned or controlled by the Landlord that will likely be part of a special permit application for a planned business development within the Town of North Attleborough, Massachusetts. Should such a special permit be granted based on the site plan presented, at the conclusion of the Lease the Landlord may be left with one or more buildings that violate any special permit that may issue. In addition, the Landlord is unwilling to place the parcels that comprise the leased premises in common ownership nor grant easements permitting the common use of any planned access drives and/or utility systems."

The reasons stated in the termination letter were not the same as the reasons discussed among the Defendants, which Manoogian had earlier described as not "reasonable" or "sufficient" in his July 28, 2017, email.

The Defendants mailed the termination letter to the Plaintiff on August 9, 2017, by overnight mail. That same day at 4:52 pm Majestic accepted the Defendants' Honda exclusivity amendment to the Lease by emailing and mailing the signed amendment to Manoogian. Attorney Manoogian immediately forwarded that email to Pariseault and Dos Anjos and represented, "I'm in court tomorrow morning but will discuss a response with you tomorrow afternoon. I still believe the site plan presents issues that have to be worked out and believe the termination notice was the right move at this point." On August 10, 2017, the Plaintiffs received the Termination Letter.

On August 10, 2017, Manoogian wrote to Dos Anjos and Pariseault:

> "Al and Lisa:
>
> Given Balise's apparent acquiescence to Al's original use limitation as embodied in the first amendment we originally suggested and now signed by Jeb Balise, should we open up communications to address the issues raised in the notice of termination we sent yesterday? Those issues may be resolved by amending the lease so that the tenant is obligated to sell Al the old Cash land at the lease's termination for a specific amount or at the then current fair market value as determined by the parties [sic] appraisers. Your thoughts?
>
> Thanks.

Dave"

On August 11, 2017, Mr. Balise wrote to the Defendants, stating:

"Dear Al:

I thought it best to contact you directly businessman-to-businessman to see if we could discuss your concerns with the site plan. I have always been more than willing to meet with you at any time to make you comfortable with our plans for the property and to get your input, but for whatever reason you did not wish to have such a meeting. I believe we are both honorable businessmen, and that we both truly want to live up to our commitments. I am more than willing to consider any concerns you have with the site plan, and to make an effort to resolve them.

Since we first signed the Lease many months ago, I have poured my heart and soul into this project. I invested a significant amount of time and money in due diligence costs, engineering costs, architectural costs, legal costs, the Honda approval process, meetings with Town officials, meetings with neighbors, etc., all based on our mutual commitment to do business together. As long as you are willing to tell me exactly what your concerns are, we should be able to work out any issues. We could have an "off the record" discussion which would not affect any position either of us might need to take in the future if I am unable to satisfy your concerns.

I can come to your office to meet with you alone, or with you and Lisa, or with Josh if you wish. I'm willing to have our attorneys attend, but it might be better not to include them as we might be able to accomplish more working together as reasonable business people. My cell is [redacted].

Thanks,

Jeb"

Mr. Balise's August 11, 2017, email was sent in direct response to the Defendants' notice of termination. Mr. Balise invited a meeting with the Defendants with or without counsel. Mr. Balise's email satisfied ¶ 28 of the Lease insofar as it specified the Defendants' default in terminating the Lease and demanded a cure.

In response to Mr. Balise's August 11, 2017, email, the Defendants informed Mr. Balise that Dos Anjos would "be discussing the matter with his advisors over the weekend" and would "have his attorney send [Majestic] an email early next week with his position." During their

discussions, Manoogian suggested to Dos Anjos that the Cash Land be transferred for fair market value at the end of the Lease period. Dos Anjos rejected Manoogian's proposal.

Instead, Dos Anjos authorized Manoogian to send a letter to Pacella on August 14, 2017, offering to "reinstate the lease" "[w]ithout waiving the effects of the notice of termination of lease sent to HI Lincoln, Inc." if Balise continued on with the Honda exclusivity amendment and sold the Cash Land to one of the "landlord entities for One ($1.00) Dollar" forthwith. "In return, the leased premises would be expanded to include the [Cash Land] without additional rent." Dos Anjos admitted that, at this point, he was "fishing for a deal."

On September 7, 2017, the Plaintiff accepted the Defendants' terms via email from Teverow to Manoogian. In reply, Manoogian informed Teverow that upon Dos Anjos's "confirmation I'll prepare a lease reinstatement document for the parties' signatures...."

Approximately one week later, on September 15, 2017, at 10:05 am, Manoogian sent a twelve-page (12-page) lease reinstatement document to Balise's representative, Teverow. In his e-mail, Manoogian stated, "See attached. If it meets with Mr. Balise's approval let me know and I'll advise Al accordingly and produce a final version for signing that contains the legal description and site plan." Paragraph 3 of the reinstatement document limited Majestic to selling Hondas only, and ¶ 4 effectuated an immediate transfer of the Cash Land from Balise to Dos Anjos "for the nominal consideration of One Dollar ($1.00)."

Forty-two minutes later, Manoogian sent Teverow an e-mail stating, "Just to be clear and to restate the substance of our phone call this morning, Al has not yet decided to sign the lease reinstatement agreement but was willing to provide same for the parties' review. He's still considering the matter."

During the period August 14, 2017, to early November, 2017, Balise contacted Dos Anjos in order to meet to no avail. Dos Anjos did not respond to Balise's calls.

In early November of 2017, Dos Anjos expressed to Teverow concerns that Majestic's use of the Cash Land could negatively impact his separate rental relationship with CarMax across the street. Dos Anjos was concerned about Balise becoming "a competitor with CarMax," his other tenant.

By letter dated November 22, 2017, Defendants "confirm[ed]" the termination letter sent in August." At that time, the Defendants returned the Plaintiff's rent checks from August 9, 2017 until November 22, 2017, along with prepaid rent through December 4, 2017, but not the $150,000 deposit.

Balise emailed the Defendants on December 4, 2017, notifying the Defendants of their default and failure to perform obligations under the Lease, and requesting the withdrawal of the Termination Letter. Balise wrote:

> "Dear Al and Lisa,
>
> I want to take one more last shot at resolving the issues before I meet with my attorneys on Thursday. The termination notice gives three reasons, all of which are not correct. They are:
>
> 1. The termination notice states that Al "may be left with one or more buildings which violate any special permits that may issue". This is not correct, Steve Cabral has told me that the special permit for Al's land and the Cash land can be obtained separately.
>
> 2. The termination notice state that Al is "unwilling to place the parcels that comprise the lease premises in common ownership", but in accordance with the lease and in a letter to Joe Pacella on May 30, 2017, Mr. Manoogian stated that Al had agreed to combining the property into one parcel, with conditions that I accepted.
>
> 3. The termination notice states that Al is unwilling "to grant easements permitting common use of any planned access drives and/or utility systems", but Steve Cabral

has told me that I do not need any easements or common use or access drives or utility systems.

Attached is a letter from Steve Cabral to me on these issues, and Mr. Manoogian's letter to Joe. It seem that every item in the termination notice had been resolved, so I would ask that the termination notice be withdrawn and we move forward with the lease.

Sincerely,
Jeb"

Balise enclosed an email from its civil engineer, Steve Cabral, explaining that the Defendants' termination reasons pertaining to permitting and easements could be easily overcome. Balise also enclosed Manoogian's letter agreeing to the merger of the two Dos Anjos parcels making up the Leased Property. The December 4, 2017, email constituted an offer to have Defendants' cure their non-monetary default of improperly claiming the Lease to be terminated under ¶ 2(a).

On December 26, 2017, the Defendants sent the Plaintiff and Teverow a three-way reciprocal release of all claims, rejecting Majestic's request that the Defendants cure their failure to perform obligations under the Lease. The proposed release did not require the return of Majestic's $150,000 security deposit. In response, Majestic commenced this action on December 27, 2017.

The Plaintiffs have established by a preponderance of the evidence that Defendants' reasons given in the August 9, 2017, Termination Letter were invalid and unreasonable for the following reasons:

First, Paragraph 9 of the Lease gives the Landlord discretion to approve or disapprove special permits sought by the Tenant, which may include an application for a planned business development. The language set forth in ¶ 9 of the Lease, does not, however, give the Landlord the right to cancel the Lease. Paragraph 2(a) of the Lease grants the Landlord the right to

terminate the Lease based on the construction and demolition of a building. The Defendants waived such right. Nowhere does the Lease permit the Landlord to terminate the Lease based upon the Tenant's use of land outside the purview of the Lease, such as the Cash Land.

Second, the Defendants had already given Majestic permission to merge the two parcels making up the Leased Property on May 30, 2017.

Third, the Landlord had already contracted away all control of easements to the Tenant in ¶ 25 of the Lease.

I have credited the Plaintiff's expert and lay testimony. Plaintiff has established by a preponderance of the evidence that all of the Defendants' purported reasons for termination were either incorrect or easily overcome by minor adjustments to the concept site plan.

Balise sustained damages in the form of both lost value of operating the dealership in North Attleborough (lost opportunity should the Plaintiff elect to not continue with the Lease) and delay damages resulting from the significant delay caused by the Defendants' unreasonable termination of the Lease. At the time of trial, the Plaintiff was delayed 21.5 months by the Defendants' refusals to sign any permits as required under the Lease, such as TIF applications and permitting applications to the Town of North Attleborough, and as a result of their purported termination of the Lease. Through to the date of hearing on October 26, 2018, the Defendants have refused to allow Majestic any access to the Property, refused to allow Majestic to engage in any pre-construction planning or assessment, and even refused to respond to Majestic's agent's requests for information related to the Property. I find that Majestic has demonstrated by a preponderance of the evidence that Majestic's delay damages total $2,100,000 per year. Dividing such value by twelve (12) and multiplying by 21.5 (the number of months Balise has been delayed at the time of trial), results in delay damages in the amount of $3,762,500.

Extending that value by the additional 4 months which have lapsed since the date of the jury's verdict, September 27, 2018, results in 25.5 months at $175,000 per month totaling $4,462,500. Should Majestic elect specific performance, as provided for in my Decision and Order on Plaintiff's Motion to Elect Its Remedy After Announcement of Findings and Before Entry of Judgment and Defendants' Motion to Enforce Plaintiff's Election of Specific Performance (Pleading #95), Majestic's delay damages of $175,000 per month will continue until such time as Defendants have complied with my orders relating to specific performance below.

In evaluating the Plaintiff's claim for damages should Plaintiff not elect specific performance, I find that the Plaintiff's delay damages are fully subsumed within those damages. At a minimum, hence, Majestic has suffered damages totaling $4,462,500. The components of Majestic's damages should it not elect specific performance, include, without limitation: the value of the fixed assets, the goodwill or blue sky value of the franchise, and expected earnings before depreciation, interest, and taxes (or EBDIT).

I accept the value Majestic's expert, Todd Berko, utilized in applying the ratio of new to used cars sold as well as his consideration of revenue other than sales, such as finance revenue and insurance revenue along with warranty/service packages and the parts and service business. I have accepted, similarly, Mr. Berko's calculations relating to operating costs and other expenses in assessing pre-tax profit resulting in an annual value of $1.75 million.

I differ with Mr. Berko's application of a factor of 5.5 to 5.8 in multiplying his valuation of $1.75 million. Whereas, Mr. Berko elected the higher end of the range of 5 – 6 (about 5.7) which he identified, I have multiplied $1.75 million by 5 resulting in a value of $8,750,000. Whereas Mr. Berko's value of $10,000,000 was reduced by a discount rate of about 5.64% to a present

day value of $7,600,000, I have applied the same discount rate, reducing $8,750,000 to $6,650,000.

In a separate regard, I accept Mr. Berko's valuation of a Honda dealership such as at the leased premises, were the dealership to be sold, as $1.5 million. Reducing $6,650,000 by the value of a Honda dealership, $1,500,000, results in total damages of $5,150,000. Such damages do not reflect the purchase price of the Cash Land in the amount of $891,600, and are not reduced by that amount, accordingly.

It is well settled that my calculations of damages need not be identical to that reflected in the jury's verdict. See *Exhibit Source* v. *Wells Avenue Business Center, LLC.*, 94 Mass. App. Ct. 497, 500 (2018), citing *Klairmont* v. *Gainsboro Restaurant, Inc.*, 465 Mass. 165, 186 (2013) (noting the "well-established principle" that a judge may deviate from the jury's factual findings when determining c. 93A liability). As set forth in my Decision and Order on Plaintiff's Motion to Elect Its Remedy After Announcement of Findings and Before Entry of Judgment and Defendants' Motion to Enforce Plaintiff's Election of Specific Performance (Pleading #95), Majestic may elect either to enforce the Lease and receive its delay damages of $4,462,500, to date, or it may walk away from the Lease and receive its total compensatory damages of $5,150,000.

C. Rulings of Law

General Laws c. 93A, §2 makes unlawful any "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." This prohibition is "extended to those engaged in trade or commerce in business transactions with others similarly engaged" by G. L. c. 93A, § 11. See *Datacomm Interface, Inc.* v. *Computerworld, Inc.*, 396 Mass. 760, 779 (1986) (citing *Manning* v. *Zuckerman*, 388 Mass. 8, 12 [1983]). The enactment

of G. L. c. 93A, § 11, ensured that "these protections were extended to persons engaged in trade or commerce in business transactions with other persons also engaged in trade or commerce." *Manning*, 388 Mass. at 12.

The SJC's opinion in *Anthony's Pier Four, Inc.* v. *HBC Assocs.*, 411 Mass. 451, 475 (1991), informs my analysis. In *Anthony's Pier Four, Inc.*, the SJC recognized that "there may be 'cases where an act might be unfair if practiced upon a commercial innocent yet would be common practice between two people engaged in business.'" *Id.*, quoting *Spence* v. *Boston Edison Co.*, 390 Mass. 604, 616 (1983). "In such circumstances, a claimant would have to show greater 'rascality' than would a less sophisticated party." *Id.* In particular, the SJC held that conduct "'in disregard of known contractual arrangements' and intended to secure benefits for the breaching party constitutes an unfair act or practice" under G. L. c. 93A. *Anthony's Pier Four, Inc.* v. *HBC Assocs.*, 411 Mass. at 475, quoting *Wang Laboratories, Inc.* v. *Business Incentives, Inc.*, 398 Mass. 854, 857 (1986). The SJC illustrated this concept by resort to two additional case parentheticals:

> *Hannon v. Original Gunite Aquatech Pools, Inc.*, 385 Mass. 813, 825 (1982) (if proved, submission of low bid followed by demand for more money after award of contract would constitute violations of c. 93A); *Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc.*, 754 F.2d 10, 17–19 (1st Cir. 1985) (commercial extortion giving rise to c. 93A liability, and treble damages, where defendant withheld payment due under contract not because of dispute over liability or inability to pay but, rather, as "'wedge' against [plaintiff] 'to enhance [defendant's] bargaining power for more product'").

Anthony's Pier Four, Inc. v. *HBC Assocs.*, 411 Mass. at 475.

Pertinent to the case before me, a breaching party's "knowing use of a pretext to coerce [the non-breaching party] into paying [the breaching party] more than the contract required establishes willfulness as a matter of law." *Anthony's Pier Four, Inc.*, 411 Mass. at 475 (citing *Pepsi-Cola Metropolitan Bottling Co., Inc. v. Checkers, Inc.*, 754 F.2d at 18. See *id*, quoting

Pepsi-Cola Metropolitan Bottling Co., Inc., 754 F.2d at 18 ("[T]he evidence is sufficient to support its determination that [the defendants] . . . were guilty of a willful violation of . . . c. 93A. The court was entitled to believe that [the defendants] . . . had withheld monies which they legally owed as a form of extortion -- to force Pepsi to do what otherwise it could not be legally required to do"); see also *Datacomm Interface, Inc.* v. *Computerworld, Inc.*, 396 Mass. at 780 ("Actions involving fraudulent representations in knowing disregard of the truth encompass culpable, 'willful' behavior under the statute"); *Service Publications, Inc.* v. *Goverman*, 396 Mass. 567, 578 n.13 (1986); *Shaw* v. *Rodman Ford Truck Center, Inc.*, 19 Mass. App. Ct. 709, 711-712 (1985); *Computer Sys. Eng'g, Inc.* v. *Qantel Corp.*, 740 F.2d 59, 68 (1st Cir. 1984).

The Appeals Court's ruling in *Atkinson* v. *Rosenthal*, 33 Mass. App. Ct. 219, (1992), similarly, is noteworthy. There, the Appeals Court examined a series of breach of contract cases and concluded that:

> [T]here is in those cases a constant pattern of the use of a breach of contract as a lever to obtain advantage for the party committing the breach in relation to the other party; i.e., the breach of contract has an extortionate quality that gives it the rancid flavor of unfairness.

Atkinson, 33 Mass. App. Ct. at 226.

Of equal note, the Appeals Court has held that "[o]ne of the more specific categories of unfairness developed by the case law consists of coercive or extortionate tactics designed to extract undeserved concessions from other business entities or consumers." *Renovator's Supply, Inc.* v. *Sovereign Bank*, 72 Mass. App. Ct. 419, 430 (2008). The *Renovator's Supply, Inc.* case cited several illustrative examples in this regard:

> See, e.g., *Anthony's Pier Four, Inc.* v. *HBC Assoc.*, 411 Mass. at 472-476 (landowner's pretextual disapproval of a development plan attempted to squeeze additional compensation out of the developer); *Massachusetts Employers Ins. Exch.* v. *Propac-Mass, Inc.*, 420 Mass. 39, 43 (1995) (a contract breach employed to disrupt another party's remaining rights has the coercive character of a c. 93A violation); *Frank J.*

> *Linhares Co.* v. *Reliance Ins. Co.*, 4 Mass. App. Ct. 617, 622–623 (1976) (holding a truck hostage in exchange for the owner's waiver of warranty rights); *Community Builders, Inc.* v. *Indian Motocycle Assocs.*, 44 Mass. App. Ct. 537, 557–559 (1998) (nonpayment of contractual debt to pressure an opponent for a compromise of its claim); *Arthur D. Little, Inc.* v. *Dooyang Corp.*, 147 F.3d 47, 52 (1st Cir. 1998) (withholding validly owed payments as bargaining leverage).

Renovator's Supply Inc. v. *Sovereign Bank*, 72 Mass. App. Ct. at 430.

Contrary to the Defendants' assertion, the Plaintiff did not contractually waive its ability to seek damages under G. L. c. 93A.

> The limitation of liability clause does not aid the defendant here. In *Standard Register Co.* v. *Bolton-Emerson, Inc.*, 38 Mass. App. Ct. 545 (1995), this court similarly considered whether a limitation of remedies clause in a commercial contract applied so as to preclude remedies otherwise available under c. 93A. We held that the applicability of such a contract provision depends upon whether the c. 93A claim sounds more in contract, or in tort: '[A] chapter 93A claim analogous to a tort-based recovery overrides any contractual defenses, whereas a § 11 claim founded on a contract theory is subject to a contractual limitation of remedies provision.' Id. at 549. We went on to hold in *Standard Register* that the 'core' of the plaintiff's claim was based upon misrepresentations the defendant made as to its ability to provide the product it was offering. *Id.* at 550. We concluded that this conduct sounded in tort; it was 'deceitful,' and 'distinct' from the facts underlying the plaintiff's contract claim. *Id.*

Exhibit Source Inc. v. *Wells Avenue Business Center, LLC*, 94 Mass. App. Ct. 497, 502 (2018). Here, too, the Plaintiff's c. 93A claim sounds in tort, for similar reasons.

Nor may the Defendants hide behind a curtain of their purported "advice of counsel" for their 93A transgressions. The Defendants' argument that they simply followed the mistaken advice of Manoogian is contradicted by the record. For example, the Defendants rejected Manoogian's advice regarding Dos Anjos's "two building" objection; the Defendants rejected Manoogian's advice that a site walk would be beneficial; the Defendants rejected Manoogian's advice that the parties meet to address Dos Anjos's site plan concern; and the Defendants rejected Manoogian's advice when he recommended a transfer of the Cash Land at the end of the Lease period and for fair market value as determined by the parties' appraisers. In general, Dos

Anjos freely admitted that he does not always follow his lawyer's advice and rejected it in matters pertaining to the Lease. Cf. *G.S. Enterprises Inc.* v. *Falmouth Marine, Inc.*, 410 Mass. 262, 275 (1991) (listing elements of advice of counsel defense, including "honest[] compli[ance] with . . . counsel's advice").

Neither is Defendants' misconduct forgiven by Dos Anjos's testimony that he cannot read or understand legal documents. Dos Anjos's testimony is belied by his sophisticated experience in the automobile industry as well as his demonstrated ability to read and understand documents while on the witness stand. Regardless, a party's failure to read or understand a contract does not free him from his obligations thereunder. Dos Anjos's allegation that he failed to read the Lease does not free him of his obligations under the Lease. See *Miller* v. *Cotter*, 448 Mass. 671, 680 (2007), citing *Wilkisius* v. *Sheehan*, 258 Mass. 240, 243 (1927); and *Grace* v. *Adams*, 100 Mass. 505, 507 (1868). Even if Dos Anjos could not read the Lease, he had at least one attorney working for him who could do so and, in fact, who did explain the Lease to Dos Anjos.

It matters not that Defendants terminated the Lease and claimed no monetary benefit from their actions. Their unlawful conduct is notforgiven by virtue of the termination of the Lease. Rather, it is their actions leading to the termination of the Lease which were unfair, which were deceptive, and which violated G. L. c. 93A, §§ 2, 11. Under Massachusetts law the "coercive effort" need not succeed. Rather, "the party targeted for pressure may resist, absorb its losses, and pursue its remedies under the statute." *Renovator's Supply, Inc.*, 72 Mass. App. Ct. at 430 (citing *Anthony's Pier Four, Inc.*, 411 Mass. at 462).

Dos Anjos acted with willful and knowing disregard for his contractual obligations, which, as a matter of law, constitutes a violation of G. L. c. 93A. See *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. at 475; *Wang Laboratories, Inc. v. Business Incentives, Inc.*, 398 Mass.

at 857; *Hannon* v. *Original Gunite Aquatech Pools, Inc.*, 385 Mass. at 825. As in *Anthony's Pier Four, Inc.*, the Defendants' conduct "more than meets the standard of an 'unfair or deceptive act or practice' – even taking into account that both parties to the transaction were sophisticated business people." *Anthony's Pier Four, Inc.* at 475.

The Defendants South Washington Street willfully and knowingly committed the following unfair methods of competition and unfair and deceptive acts and practices in violation of G. L. c. 93A, §§ 2, 11:

1. The Defendants' purported reasons for terminating the Lease were a pretext for Dos Anjos's bitterness over Balise's purchase of the Cash Land. The Defendants asserted their termination reasons either with knowing or willful disregard of their contractual obligations for the following reasons:
    a. The Lease provides the Landlord with the "sole discretion" to consent or not consent to the Tenant's pursuit of "special use permits." The language of the Lease under ¶ 9 does not empower the Landlord to terminate the Lease upon such disapproval for a special use permit. Rather, the Tenant is left with the ordinary use permitted under the North Attleborough Zoning By-Law, which in this case would permit a new and used car dealership and vehicle storage such as tenant proposed. Regardless, special permits were available for the Cash Land and the Premises as separate parcels;
    b. Dos Anjos had agreed to combine the Lease parcels in common ownership pursuant to the conditions Balise accepted; and

c. Easements or common use of access drives or utility systems were not required for Majestic to operate. The power to grant easements was provided to the Tenant under the Lease, ¶ 25.

2. The Defendants leveraged their approval power under ¶ 2(a) of the Lease which is limited to the demolition and construction of buildings "as a lever to obtain advantage[s]" (*Atkinson* v. *Rosenthal*, 33 Mass. App. Ct. at 226) and "to extract undeserved concessions from other business entities," in this case Majestic. *Renovator's Supply, Inc.*, 72 Mass. App. Ct. at 430 (landowner's pretextual disapproval of a development plan attempted to squeeze additional compensation out of the developer). In his December 4, 2017, correspondence to Dos Anjos, Balise addressed and satisfied every termination reason that had been tendered by the Defendants. Compare *Chapman v. Katz*, 448 Mass. 519, 534 (2007) ("In light of the [tenant's] agreement to address and satisfy each concern raised by the [landlord] before litigation commenced, the [landlord's] failure to consent to the erection of the ATM kiosk was unreasonable as a matter of law"). After the Defendants refused to withdraw the termination notice, Majestic was forced to commence this action in which it has proved that the Defendants breached the Lease, breached the implied covenant of good faith and fair dealing, and violated G. L. c. 93A.

3. The Defendant's demand for the Honda exclusivity amendment violated Majestic's usage rights as set forth in the Lease, ¶ 15. To obtain such coerced advantages or to improve the contract in this manner is impermissible. See *Massachusetts Employers Ins. Exch.* v. *Propac-Mass, Inc.*, 420 Mass. at 43 (contract breach employed to disrupt another party's remaining rights has coercive character of c. 93A violation); *Frank J.*

Linhares Co. v. *Reliance Ins. Co.*, 4 Mass. App. Ct. at 622-623, (1976) (withholding truck to coerce owner's waiver of warranty rights).

4. Dos Anjos admitted the Cash Land was his true reason for terminating the Lease when he testified, "I can assure you, and everybody, if I had discovered [the Cash Land was on the Concept Plan in May], I would have cancelled the deal right then and there. We would not have gone to July 25. It would have been done right then and there." It was Dos Anjos's intent to extract additional concessions from the Plaintiff that were not bargained for in the nature of a Honda exclusivity amendment and extracting the Cash land for one dollar ($1.00). The Defendants' knowing use of a pretext to coerce lease amendments and to obtain the Cash Land "establishes willfulness as a matter of law." *Anthony's Pier Four, Inc.*, 411 Mass. at 475 (citing *Pepsi-Cola Metropolitan Bottling Co., Inc. v. Checkers, Inc.*, 754 F.2d at 18 [1st Cir. 1985]).

5. The Defendants leveraged their approval authority under ¶ 2(a) of the Lease in order to extract from Majestic the Cash Land for the price of $1.00.

6. The evidence supports a finding that the Defendants willfully and knowingly strung along Majestic to see what unwarranted benefits the Defendants could extract from Plaintiff. Such conduct violates G. L. c. 93A as a matter of law. *See Full Spectrum Software, Inc* v. *Forte Automation Sys.*, 858 F.3d 666, 674 (1st Cir. 2017) ("one business's stringing along of another to the other's detriment" can violate G. L. c. 93A, § 11), citing *Greenstein* v. *Flatley*, 19 Mass. App. Ct. 351, 358 (1985); and *Mass. Eye and Ear Infirmary* v. *QLT Phototherapeutics, Inc.*, 552 F.3d 47, 69–70 (1st Cir. 2009)). Dos Anjos was "fishing for a deal." The Defendants' disingenuous

offers went "beyond the toleration even of persons inured to the rough and tumble of the world of commerce" and so constituted a "stringing along" bargaining style that is, as a matter of law, in violation of M.G.L. c. 93A. *See Full Spectrum Software, Inc* v. *Forte Automation Sys.*, 858 F.3d at 674.; *Greenstein* v. *Flatley*, 19 Mass. App. Ct. at 358.

7. Balise sent Dos Anjos an email on December 4, 2017, requesting withdrawal of the Termination Letter as all of the reasons listed therein were addressed and satisfied. Dos Anjos refused to cure his default and, as such, willfully failed to perform his obligations under the Lease.

8. Dos Anjos willfully and knowingly withheld the $150,000 deposit. The Lease provided that the deposit was to be converted to rent. Yet, it was not returned with rent checks sent by the Defendants on November 22, 2017, and December 4, 2017. The only language in the Lease which entitled the Landlord to keep the deposit appeared under a section of the Lease describing the results of Tenant's cancellation of the Lease. As Justice Gants wrote in *Gentle Communs., L.L.C.* v. *Naggar,* this is "precisely the type of commercial unfairness that G.L.c. 93A, § 11 was intended to remedy." 17 Mass. L. Rep. 366 at *14 (Mass. Sup. Ct. 2004). A commercial landlord's wrongful withholding of a security deposit may also violate G. L. c. 93A, § 11. *See id.* In *Gentle Communs., L.L.C.*, the court found that the landlord had engaged in an "unscrupulous and therefore an unfair act or practice in violation of G. L. c. 93A, § 2 for the landlord to refuse to return the deposit in full" to the tenant. *Id.* at *13. The court held that the landlord "had no legal right to retain the deposit and was both legally and morally obligated to return it," and the court doubled the

damages and awarded attorneys' fees to the tenant under G. L. c. 93A. *Id.* at *13–*14.

Here, the jury found the Defendants breached the covenant of good faith and fair dealing. Nonetheless, a "finding of a breach of the covenant of good faith and fair dealing" may but does not "compel[] a finding of a violation of G. L. c. 93A." *Frostar Corp. v. Malloy*, 63 Mass. App. Ct. 96, 109 n.26 (2005). Based on the above findings of fact and rulings of law, I find that the Defendants' breach of contract and breach of the covenant of good faith and fair dealing were committed in violation of G. L. c. 93A, §§ 2, 11. The evidence warrants a finding that the Defendants' actions were committed in disregard of known contractual arrangements, intended to secure benefits for the Defendants' knowingly and willfully.

G. L. c. 93A provides for the recovery of actual damages as well as attorney's fees. "Actual" damages under c. 93A are similar to compensatory damages in tort in that an injured party can recover all such damages proximately caused by the defendant's unfair or deceptive conduct. A c. 93A claim analogous to a tort-based recovery overrides any contractual defenses. *Standard Register Co.* v. *Bolton-Emerson, Inc.*, 38 Mass. App. Ct. at 549.

Based on the Defendants' violations of G. L. c. 93A, Majestic "is entitled to multiple (not more than treble and not less than double) damages if [the breaching party] acted 'knowingly' or 'willfully' in violation of § 2." *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. at 475. In a case of commercial extortion, double damages are appropriate. See *Pepsi-Cola Metropolitan Bottling Co.* v. *Checkers, Inc.*, 754 F.2d at 17-19 (commercial extortion giving rise to c. 93A liability, and treble damages, where defendant withheld payment due under contract not because of dispute over liability or inability to pay but, rather, as "'wedge' against [plaintiff] 'to enhance [defendant's] bargaining power for more product.'").

ORDER

Judgment is to enter in favor of Plaintiff on Count 5 of its Complaint. Plaintiff's G. L. c. 93A damages shall be doubled so that the Defendants are hereby ordered to pay to Majestic $10,300,000 should Majestic elect to not enforce the Lease. Whereas the jury has returned a verdict on Counts 3 and 4 of the Complaint in the amount of $5,616,500, Plaintiff's recovery is limited to judgment on Count 5.

If Majestic elects to enforce the Lease, its associated delay damages shall be doubled so that Defendants are hereby ordered to pay to Majestic $8,925,000. Whereas the jury has returned a verdict on Counts 3 and 4 of the Complaint in the amount of $3,762,500, Plaintiff's recovery is limited to judgment on Count 5.

Based on Defendants' violations of G. L. c. 93A, Defendants are ordered to pay Plaintiff's attorneys' fees and costs, including the amounts I have ordered pursuant to the jury's verdict in favor of Plaintiff on Count 3 of its Complaint, together with any additional fees and costs relating to Count 5. Plaintiff is to file and serve its Affidavit of Attorney's Fees and Costs within 14 days of the docketing of my Findings and Order. Defendants are to file their opposition thereto within 30 days of the docketing of my Findings and Order.

If Majestic elects specific performance, as provided in my Decision and Order on Plaintiff's Motion to Elect Its Remedy After Announcement of Findings and Before Entry of Judgment and Defendants' Motion to Enforce Plaintiff's Election of Specific Performance (Pleading #95), Majestic shall have thirty (30) days from the docketing of my Findings and Order to elect its remedy by notice to the Court and Defendants.

If Plaintiff elects specific enforcement of the Lease:

a. the Defendants will cooperate with and approve any necessary paperwork for any permits or other items required for Majestic's full use and enjoyment of the Leased Property, planned construction, and operation of its business.

b. The Defendants will give Majestic unfettered access to the Leased Property for the duration of the Lease as permitted under the Lease.

c. Effective upon such election, Majestic shall have access to the Leased Property.

d. Majestic will begin paying rent under the structure provided in the Lease as of the date of this decision.

e. Majestic does not owe any back rent from 2016, 2017 or the time period during which Majestic was forced to pursue this action in court.

January 28, 2019

Mark D Mason
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 1779CV899

HI LINCOLN, INC. D/B/A MAJESTIC HONDA,
Plaintiff/Defendant-in-Counterclaim
v.

SOUTH WASHINGTON STREET, LLC,

849 SOUTH WASHINGTON STREET, LLC,

849 SOUTH WASHINGTON STREET REALTY TRUST UNDER DECLARATION OF TRUST DATED JUNE 9, 2000, ALFREDO DOS ANJOS, TRUSTEE,

855 SOUTH WASHINGTON STREET REALTY TRUST UNDER DECLARATION OF TRUST DATED OCTOBER 2, 2008, ALFREDO DOS ANJOS, TRUSTEE,

865 SOUTH WASHINGTON STREET REALTY TRUST UNDER DECLARATION OF TRUST DATED MAY 14, 1998, ALFREDO DOS ANJOS, TRUSTEE,
and

COOPER AVENUE REALTY TRUST UNDER DECLARATION OF TRUST DATED MAY 14, 1998, ALFREDO DOS ANJOS, TRUSTEE.
Defendants/Plaintiffs-in-Counterclaim

FINDINGS OF FACT AND RULINGS OF LAW ON THE REOPENED 93A TRIAL

A. Background

1. The Jury Trial

I conducted a jury trial in the above-captioned matter during the period September 18, 2018 – September 27, 2018. After trial, the jury returned the following Special Verdict:

a. The Plaintiff/Defendant-in-Counterclaim (the "Plaintiff") proved by a preponderance of the evidence that the Lease is in full effect.

b. The Defendants/Plaintiffs-in-Counterclaim (the "Defendants") did not prove by a preponderance of the evidence that their withholding of consent was exercised reasonably or that the termination of the Lease was valid.

c. The Plaintiff proved by a preponderance of the evidence that the Defendants breached the Lease when it terminated the Lease.

d. The Defendants' breach of contract occurred on August 9, 2017.

e. The Plaintiff proved by a preponderance of the evidence that the Defendants breached their covenants of good faith and fair dealing implied in the Lease.

f. The Defendants' breach of the implied covenant of good faith and fair dealing occurred on August 9, 2017.

g. The Plaintiff proved by a preponderance of the evidence that it suffered money damages as a result of the Defendants' breach of the Lease.

h. The Plaintiff proved by a preponderance of the evidence that it suffered money damages as a result of the Defendants' breach of the implied covenant of good faith and fair dealing.

i. The amount that would compensate the Plaintiff for the Defendant's breaches is $5,616,500 in compensatory damages. Of this amount, $891,600 is for the Plaintiff's purchase of the Cash Land.

j. The amount that would compensate the Plaintiff for the delay in operating the dealership to date is $3,762,500.

I reserved the plaintiff/defendant-in-counterclaim's claim for violations of G.L. c. 93A, §§ 2, 11 set forth in Count 5 of plaintiff/defendant-in-counterclaim's complaint.

2. The Initial 93A Bench Trial

On October 26, 2018 and December 10, 2018, I conducted a jury-waived trial on Count 5 of Plaintiff's Complaint. On January 28, 2019, I issued Findings of Fact and Rulings of Law finding in favor of Majestic on its c. 93A claim. I incorporate as if stated fully herein my prior Findings of Fact and Rulings of Law in this case through January 28, 2019. *See* Findings of Fact and Rulings of Law, January 28, 2019, pp. 21-24.

In my Findings of Fact and Rulings of Law, I found that the Defendants acted with willful and knowing disregard for their contractual obligations in violation of G.L. c. 93A c. 93A, §§ 2, 11. *Id.,* p. 28. In particular, I found that the "Defendants' actions were committed in disregard of known contractual arrangements, intended to secure benefits for the Defendants[] knowingly and willfully." *Id.,* p. 33. I found that the Defendants violated c. 93A through their misrepresentations, deceptions, deceit, and stringing along of Majestic. *Id.*, at 27.

Notably, I cautioned the Defendants on the possibility of additional damages continuing after the January 28, 2019 date of the Order with the following language:

> Should Majestic elect specific performance, …Majestic's delay damages of $175,000 per month will continue until such time as Defendants have complied with my orders relating to specific performance below.

Id., p. 23.

On January 28, 2019, I issued the following order:

ORDER

Judgment is to enter in favor of Plaintiff on Count 5 of its Complaint. Plaintiff's G. L. c. 93A damages shall be doubled so that the Defendants are hereby ordered to pay to Majestic $10,300,000 should Majestic elect to not enforce the Lease. Whereas the jury has returned a

verdict on Counts 3 and 4 of the Complaint in the amount of $5,616,500, Plaintiff's recovery is limited to judgment on Count 5.

If Majestic elects to enforce the Lease, its associated delay damages shall be doubled so that Defendants are hereby ordered to pay to Majestic $8,925,000. Whereas the jury has returned a verdict on Counts 3 and 4 of the Complaint in the amount of $3,762,500, Plaintiff's recovery is limited to judgment on Count 5.

Based on Defendants' violations of G. L. c. 93A, Defendants are ordered to pay Plaintiff's attorneys' fees and costs, including the amounts I have ordered pursuant to the jury's verdict in favor of Plaintiff on Count 3 of its Complaint, together with any additional fees and costs relating to Count 5. Plaintiff is to file and serve its Affidavit of Attorney's Fees and Costs within 14 days of the docketing of my Findings and Order. Defendants are to file their opposition thereto within 30 days of the docketing of my Findings and Order.

If Majestic elects specific performance, as provided in my Decision and Order on Plaintiff's Motion to Elect Its Remedy After Announcement of Findings and Before Entry of Judgment and Defendants' Motion to Enforce Plaintiff's Election of Specific Performance (Pleading #95), Majestic shall have thirty (30) days from the docketing of my Findings and Order to elect its remedy by notice to the Court and Defendants.

If Plaintiff elects specific enforcement of the Lease:

a. the Defendants will cooperate with and approve any necessary paperwork for any permits or other items required for Majestic's full use and enjoyment of the Leased Premises, planned construction, and operation of its business.
b. The Defendants will give Majestic unfettered access to the Leased Premises for the duration of the Lease as permitted under the Lease.
c. Effective upon such election, Majestic shall have access to the Leased Premises.
d. Majestic will begin paying rent under the structure provided in the Lease as of the date of this decision.
e. Majestic does not owe any back rent from 2016, 2017 or the time period during which Majestic was forced to pursue this action in court.

Judgment was entered on August 6, 2019, which calculated the total delay damages, doubled those damages in accordance with my ruling of January 28, 2019, and added attorneys' fees, costs, and expert costs for a total award without prejudgment interest of $9,573,367.13. As set forth in my Decision and Order on Plaintiff's Motion to Elect Its Remedy After Announcement of Findings and Before Entry of Judgment and Defendants' Motion to Enforce

Plaintiff's Election of Specific Performance (Pleading #95)**,** Majestic was ordered to elect either to enforce the Lease and receive its delay damages of $4,462,500 to date, or walk away from the Lease and receive its total compensatory damages of $5,150,000. On February 12, 2019, Majestic elected specific performance under the Lease and delay damages of $4,462,500 to date.

3. The Reopened 93A Trial

Majestic filed a Motion under Mass. R. Civ. Proc. 60, seeking, *inter alia*, additional delay damages as a result of the Defendants' continued alleged misconduct causing additional delay from January 28, 2019 through the date the Defendants turned over all signed permits. After hearing on Majestic's Rule 60 Motion on August 15, 2019, I issued an order to re-open the trial on Majestic's c. 93A claim.

On September 23, 2019, I reiterated and expanded on my ruling of August 15, 2019, in response to the Defendants' "Emergency Motion to Limit the Scope of the c. 93A Hearing." In my Order of September 23, 2019, I informed the parties that:

> Because title to the premises is core to issues such as the approval of municipal permitting, plaintiff may present evidence at the 93A hearing relating to defendants' alleged misrepresentations relating to title as those representations bear upon matters affecting, for example, municipal permitting. Accordingly, the plaintiff is permitted to adduce certain evidence at the 93A hearing that defendants' alleged misrepresentations relating to title contributed to additional delay damages. What is relevant for the purposes of the 93A hearing is whether the evidence demonstrates a delay in the execution of this Court's orders and judgment as a result of the defendants' misrepresentations of title.

Findings of Fact

I held two additional days of trial on October 4, 2019 and December 13, 2019, including witness testimony and the submission of additional exhibits. On October 4, 2019, Majestic offered three witnesses: Alfredo Dos Anjos ("Dos Anjos"), Lisa Pariseault, Esq. (Pariseault), and David Manoogian, Esq. (Atty. Manoogian). Each answered only questions related to their

personal identity and thereafter invoked the privileges to avoid responding to further inquiry. Dos Anjos and Pariseault invoked their Fifth Amendment privilege against self-incrimination under the United States Constitution and Art. 12 of the Massachusetts Declaration of Rights. *See* Tr. Oct. 4, 2019, pp. 40:23, *et seq*., and 64:24, *et seq*. Atty. Manoogian invoked both the attorney-client privilege and privilege against self-incrimination. *Id.* I advised the witnesses and Defendants that the invocation of such privileges could trigger my ability to draw adverse inferences against the Defendants. *See* Court's Order of October 9, 2019; Tr. of Oct. 4, 2019, pp. 55:23 – 56:3, 138:25 – 141:4; 142:12-25. Noting that the attorney-client privilege belongs not to Atty. Manoogian, but to the Defendants, his clients, I advised the witnesses and Defendants that an adverse inference may be drawn against the Defendants. Mass. G. Evid, § 502(c).

In turn, I ordered Majestic's counsel to submit in writing their proposed questions for Dos Anjos, Pariseault and Atty. Manoogian. I ordered the witnesses to respond in writing simply identifying whether they would invoke any privilege with regard to each question. *See* Order of October 9, 2019. Those questions and responses were entered into the record as 93A Exs. 97 (Dos Anjos), 98 (Pariseault), and 99 (Atty. Manoogian). Together, those exhibits evince a written record of the questions posed and, for each witness, the nature of the privileged invoked. *Id.*

Majestic then called Dr. Steven Cabral ("Dr. Cabral"), a licensed civil engineer employed by Majestic to assist in the design and permitting of the construction of the new and used Honda automobile dealership at the leased premises (the "Leased Premises"). Thereafter, upon the entry into evidence of 93A Exs. 14 through 100, Majestic rested.

The Defendants called Edward J. Casey, Esq. ("Atty. Casey") an attorney also employed by Majestic to provide professional services in the permitting of its proposed new and used

automobile dealership. Finally, the Defendants called the Plaintiff's principal, James E. Balise, Jr. ("Balise"). Thereafter, upon the entry of 93A Exs. 101 through 113, the Defendants rested. The parties agreed to waive closing arguments. Each party submitted Proposed Findings of Fact and Rulings of Law, which I have reviewed and considered.

I also reviewed and considered all exhibits and testimony from the underlying jury trial and the initial c. 93A bench trial, which the parties agreed to incorporate into the re-opened c. 93A trial.

After a review of the record, I find based upon a preponderance of the credible evidence as follows:

1. On October 28, 2016, the Defendants drafted and signed a Lease provided a warranty of title in the LLCs in "fee simple," as follows:

> Landlord represents, warrants and covenants to Tenant that … Landlord's fee simple interest in the Premises is free and clear of any mortgages, deeds encumbrances, declarations, easements, agreements, leases, tenancies or restrictions, or any other encumbrance which would restrict Tenant's use of the Premises….

See Jury Ex. 2, ¶ 16(a)(ii).

2. Majestic was aware, as early as 2016 or 2017, after it signed the Lease, that the Defendants did not own the Leased Premises. Instead, Balise understood that the titleholder to the Leased Premises was the "Dos Anjos Realty Trusts." Tr. of December 13, 2019, pp. 101, 102, 104, 122).

3. Based upon his significant experience in car dealership development, Balise minimized the discrepancy between the named Landlords and the record title holders at that time. In Balise's mind, such discrepancy would be worked out as a matter of "clean-up." Tr. of Oct. 4, 2019, p. 104.

7. The deed to Balise Automotive Realty, the so-called "Cash Premises," dated July 30, 2017, identified Alfredo Dos Anjos as "Trustee" of 849 South Washington Street LLC and South Washington Street LLC. Exh. 37

4. In or around summertime 2017, Majestic drafted an Application for Planned Business Development listing the Dos Anjos Realty Trusts. Trial Ex. 42. The application was never submitted however, because Dos Anjos refused to sign the application and otherwise cooperate with its processing. His refusal to do so contributed to Majestic's confusion surrounding true ownership of the Leased Property as discussed below.

5. On February 12, 2019, Majestic elected specific performance and provided notice of the same to the Court and Defendants. *See* 93A Ex. 60, ¶ 5.

6. On February 13, 2019, Majestic asked the Defendants for "immediate unfettered access" to the Leased Premises and removal of Nissan Village vehicles. *See* 93A Ex. 19. Under the Lease, the removal of the Defendants' prior tenant (an owner of Nissan Village vehicles that was using the site for storage) would mark the "Land Delivery Date" between Defendants and Majestic. *See* Jury Ex. 2, ¶ 4(I)(a).

8. Majestic's letter of February 13, 2019 provided to the Defendants prorated rent for the month of February 2019, and it requested that the Defendants complete and return W-9 forms. *See* 93A Ex. 19.

9. The Defendants failed to reply to Majestic's February 13, 2019 letter asking for "immediate unfettered access" to the Leased Premises. Defendants provided no justification for this failure to reply to Majestic's request for access to the land.

10. Having not received a reply, Majestic wrote to Defendants on February 28, 2019. *See* 93A Ex. 20. Majestic again asked Defendants for "unfettered access" so that Majestic could

pursue pre-construction testing and referenced "continued damages" caused by defendants' delay and failure to respond, but nonetheless provided March rent. *Id.*

11. The Defendants replied later that day claiming that Majestic had access to the Leased Premises all along. *See* 93A Ex. 21.

12. Commencing February 13, 2019, Majestic had started the process to determine what it needed to do in order to procure necessary permits. Majestic's preliminary work included geotechnical testing which it completed on March 15, 2019; asbestos testing which it completed on May 21, 2019, receiving an asbestos clearance letter (July 3, 2019); and the commencement of demolition on July 3, 2019. As noted below, Majestic was unable to obtain a building permit until September 16, 2019.

13. On March 4, 2019, Majestic asked Defendants to remove the Nissan Village vehicles so that Majestic may "commence demolition and construction as soon as possible." *See* 93A Ex. 23. In the same letter, Majestic proposed communicating through appropriate business contacts (Majestic proposed Balise employee, Becky Bragga, as its contact) to save time. *Id.*

14. The Defendants failed to reply to Majestic's March 4, 2019 letter.

15. On March 14, 2019, Majestic sent another letter to Defendants seeking to confirm whether the Land Delivery Date would be April 1, 2019 so that Majestic could prepare for its construction planning purposes. *See* 93A Ex. 24. In the letter, Majestic renewed its request to make communications easier among the parties by communicating through designated business contacts. *Id.*

16. Later that day, the Defendants responded to Majestic's letter agreeing to communicate through designated business contacts, Beckie Bragga for Majestic, and Lisa Pariseault for Defendants. *See* 93A Ex. 25.

17. On March 18, 2019, Majestic learned from a third party that the Defendants agreed to a Land Delivery Date of April 1, 2019. *See* 93A Ex. 26.

18. After Majestic made its election for specific performance of the Lease, on February 12, 2019, Dr. Cabral began planning by working on the necessary permits for the project with Majestic's permitting attorneys, Atty. Edward Casey and Atty. Joshua Teverow. Trial Transcript ("Tr."), Oct. 4, 2019, pp. 79:6-12, 80:1, 84:15, and 87:4-9; *see also* Tr. Dec. 13, 2019, p. 33:15-19.

19. Dr. Cabral drafted permits for construction and use of the new and used Honda dealership at the Leased Premises, including the "lot merger application, Form A, special permit with the planning board and then a notice of intent with the conservation commission." Tr. Oct. 4, 2019, p. 79:14-22. The lot merger application was necessary because the proposed building will "overlap the existing Premises lines … but [Majestic] could avoid seeking dimensional relief by merging the lots." *Id.*, p. 83:19 – 84:4. Defendants had already agreed to the merger by letter on May 30, 2017. *See* Jury Ex. 31.

20. Atty. Casey transmitted a Tax Increment Financing and Economic Development Incentive Program (TIF) letter to be submitted to the Town of North Attleborough. Tr. Oct. 4, 2019, pp. 79:23 – 80:1. All permits in this case required listing the actual owner of the Premises signifying the owner's authorization. *Id.*, p. 80:2-9. Dr. Cabral testified that the permits would be submitted to the Town's Planning Board. *Id.*, p. 85:11-13.

21. Atty. Casey, Atty, Teverow, and Dr. Cabral were confused in March 2019 about who to list as "owner" in the various permit applications due to a discrepancy between the record title holder (four Dos Anjos Realty Trusts, as shown on 93A Ex. 62, and the two Dos Anjos LLCs, as represented in the Lease, ¶ 16(a)(ii), Dos Anjos affidavit (93A Ex. 69)).

22. The original applications Majestic drafted on March 18, 2019, identified the record titleholders. In his transmittal letter to Dr. Cabral, however, Atty. Casey underscored the discrepancy and lack of clarity surrounding ownership of the Leased Premises when he stated, "Joshua [Tevereau] and I disagreed about the properties that are involved in the TIF. Would you mind checking the accuracy of the references in my TIF application (last two pages) for accuracy?" See 93A Ex. 101.

23. The source of the confusion was that the record titleholders for the land making up the Leased Premises were four realty trusts that each listed Dos Anjos as the trustee (the "Dos Anjos Realty Trusts"). *See* 93A Ex. 103.

24. Shortly after receiving Atty. Casey's e-mail on March 18, 2019, Dr. Cabral e-mailed the Application for a Planned Business Development to Atty. Tevereau identifying "Alfredo M. DosAnjos, Trustee**" as the Owner of the Leased Premises. The double asterisks listed the Dos Anjos, Trustee of the DosAnjos Trusts. *See* 93A Ex. 63.

25. On March 20, 2019, Dr. Cabral e-mailed Atty. Casey and Atty. Teverow pointing out the discrepancies between the box/page information on the assessor sheets and the land area on the assessor sheets. See 93A Ex. 105.

26. Later on March 20, 2019, and in reliance upon Teverow's instructions, Dr. Cabral amended the applications (the "amended applications") and transmitted it to Teverow for his review. See 93A Ex. 65.

27. On March 22, 2019, Teverow emailed the amended application to Balise. The amended applications did not identify all the Dos Anjos Trusts, but identified "Alfredo M. Dos Anjos, Trustee**" The asterisks denoted the following:

- "Alfredo Dos Anjos Trustee, 849 S Washington Street Realty Trust (BK 08832 Pg 232),"

- "Alfredo Dos Anjos Trustee 865 S Washington Street Realty Trust (Bk 07642 Pg 302)"

  See 93A Exhs. 65. 66 (Day 1 (Cabral) Tr. at 114)

28. The permit applications called for the actual owner of the land, which could be different from the record title holder in the case of a private or unrecorded deed. Tr. Oct. 4, 2019, p. 123:4-13. None of the applications called for the "record title holder." Id., at p. 123:14-15.

29. By e-mail dated April 1, 2019, Majestic (Bragga) provided the Landlord Defendants the Amended applications prepared by Cabral and approved by Casey and which Balise had signed. In the e-mail, Majestic and requested that "Al Dos Anjos sign as Owner on the application. Jeb has already signed." See 93A Exh. 29.

30. While the Lease represented that the Dos Anjos LLCs owned the Lease Premises, the record title to the Lease Premises was with the Dos Anjos Realty Trusts.

31. A "record title-holder" is to be distinguished from a "Premises owner." It is possible for the Premises owner not to be the record title-holder to the extent the Premises owner holds onto a deed without recording it. *Id.*, p. 32:18 – 33:5.

32. Majestic believed that the record title-holders were not the actual Premises owners by virtue of Defendants' representations that the LLCs owned the Leased Premises – not the record title-holding Realty Trusts – on at least the following occasions prior to March 18, 2019:

a. On October 28, 2016, the Defendants drafted and signed a Lease that stated that it provided a warranty of title in the LLCs in "fee simple," as follows:

> Landlord represents, warrants and covenants to Tenant that … Landlord's fee simple interest in the Premises is free and clear of any mortgages, deeds encumbrances, declarations, easements, agreements, leases, tenancies or restrictions, or any other encumbrance which would restrict Tenant's use of the Premises….

See Jury Ex. 2, ¶ 16(a)(ii).

b. The Lease imposed an obligation on Defendants that "Landlord's representations, warranties and covenants, including but not limited those set forth in section 16 herein [which would include the warranty of title at ¶ 16(a)(ii)], being true and accurate as of the Land Delivery Date," which in this case was on April 1, 2019. *See* Jury Ex. 2, ¶ 34(d). Accordingly, the Lease required the Defendants to put title in the LLCs by April 1, 2019.

c. On February 8, 2017, Pariseault signed and provided to Majestic a "Landowner Consent Form" that represented that the LLC defendants were the "owners" of the Leased Premises. *See* 93A Ex. 67. The form provides no mention of any realty trusts.

d. On May 30, 2017, Atty. Manoogian as attorney for the LLCs agreed to merge the lots that made up the Leased Premises into one lot, indicating that that the LLCs had the power as owners to do so. *See* Jury Ex. 31.

e. On February 2, 2018, in response to Majestic's Complaint in this action, the Defendants filed a "Consolidated Opposition to Majestic's Request for Preliminary Injunction and Lis Pendens and Cross-Special Motion to Dismiss," signed by Attys. Briansky and Manoogian, which represented that Dos Anjos "owns the Premises through two limited liability companies … [the Dos Anjos LLCs]." *See* 93A Ex. 68 (p. 3, ¶ 1).

f. The Defendants submitted with opposition an "Affidavit of South Washington Street, LLC and 849 South Washington Street, LLC," which was signed by their "member and manager" Alfredo Dos Anjos (hereinafter the "Dos Anjos Affidavit"). The Dos Anjos Affidavit asserted that upon reviewing "personal knowledge, public records, business records of the Landlord, and communications with other members and managers of the Landlord," the LLC defendants owned the Leased Premises. *See* 93A Ex. 69 (¶¶ 1-3, and Ex. A). Majestic did not have access to the business records Dos Anjos cited and reasonably relied upon the Defendants' misrepresentations that the Dos Anjos LLCs owned the Leased premises. *Id*. at p. 128:11-25**.**

f. The Dos Anjos Affidavit attached as Exhibit A two site plans with the Leased Premises outlined in black marker. In the first site plan, next to the Leased Premises were the words "South Wash St. LLC" and "849 S. Wash. St. LLC," the names of the LLC Defendants. In the second site plan, next to the Leased Premises were the words "Dos Anjos Parcels." *See* 93A Ex. 69, Ex. A.

g. On March 12, 2018, the Defendants served upon the Court and Majestic an Answer which specifically admitted that the LLCs owned the Leased Premises. *See* 93A Ex. 70.

h. Also on March 12, 2018, the Defendants served on the Court and Majestic a counterclaim in which the Defendants affirmatively asserted that the LLCs owned the Leased Premises. *See* 93A Ex. 70.

i. Balise reasonably relied upon Defendants' Answer and Counterclaim representing that the Dos Anjos LLCs owned the Leased premises. Tr. Dec. 13, 2019, p. 129:14 – 130:5.

j. During his deposition on May 23, 2018, Dos Anjos referred to the Leased Premises as Premises that he owned and referred to the "Dos Anjos Parcels." *See* 93A Ex. 97, ¶¶ 448-449.

k. During opening statements on September 18, 2018, the Defendants' lead trial counsel (Atty. Briansky) asserted to the jury that the LLC Defendants "own" the Leased Premises. *See* 93A Ex. 72; Tr. Sep. 18, 2018, pp. 214:3-19 and 215:10-17.

l. At trial on September 24, 2018, Pariseault testified that the two LLC defendants each own one of the two parcels making up the Leased Premises. *See* 93A Ex. 73; Tr. Sep. 24, 2018, pp. 114-115; *see also* 93A Ex. 98, ¶¶ 496-497.

m. At trial on September 24, 2018, Defendants' trial counsel (Atty. Briansky) argued to the Court that "these entities [the LLC defendants] just hold real estate." *See* 93A Ex. 73; Tr. Sep. 24, 2018, p. 121:10.

n. At trial on September 25 and 26, 2018, Dos Anjos testified to the Leased Premises as belonging to Dos Anjos as the "Dos Anjos Parcels." *See* 93A Ex. 97, ¶¶452-453.

o. In closing arguments at trial on September 27, 2018, Defendants' lead trial counsel repeatedly argued to the jury that the LLC defendants "own" the Leased Premises and referred to the Leased Premises as "Mr. Dos Anjos's Premises" *See* 93A Ex. 74; Tr. Sep. 27, 2018, pp. 44:14-15, 18; 45:2, 5, 9; 47:16, 24; 49:24-25; 51:6, 17; 52:5; 53:8, 14-15, 25; and 54:9.

p. On October 16, 2018, the Defendants filed with the Court and served on Majestic an Affidavit of Lisa Pariseault (the "Pariseault Affidavit"), in which Pariseault asserted that the LLC defendants own the Leased Premises. *See* 93A Ex. 71, p. 1, ¶ 1. Like Dos Anjos in the Dos Anjos Affidavit, Pariseault swore that her representations were based upon "my personal knowledge and the business records of Defendants maintained in the course of its regularly conducted business activities." *Id.* Balise reasonably relied on Pariseault's and Dos Anjos's representations.

q. On October 19, 2018, the Defendants filed with the Court and served on Majestic the Defendants' Proposed Findings of Fact and Rulings of Law, which asserted that the LLC Defendants owned the Leased Premises.

r. On December 5, 2018, the Defendants served on the Court and Majestic the Defendants' Amended Proposed Findings of Fact and Rulings of Law, which asserted that the LLC Defendants owned the Leased Premises. *See* 93A Ex. 75 p. 1, ¶ 1.

s. On January 28, 2019, the Defendants and their attorneys remained silent when I included in my Findings of Fact and Rulings of Law the following:

Defendant South Washington Street, LLC and Defendant 849 South Washington Street, LLC (together "Defendants," South Washington Street," the "Dos Anjos entities," and "Landlord") own two adjacent properties located at 849 and 865 South Washington Street, north Attleborough, Massachusetts (hereinafter collectively referred to as the "Leased Premises").

t. On February 28, 2019, the Defendants counsel (Atty. Briansky) asserted in a Motion served on Majestic and filed with the Court that the LLC defendants "hold" the "value of the raw land" as an asset against which Majestic can collect. *See* 93A Ex. 76, p. 10.

u. On March 15, 2019, Defendants' counsel (Atty. Briansky) asserted in a Legal Memorandum filed with the Appeals Court of Massachusetts and served on Majestic that the LLC defendants owned the Leased Premises. *See* 93A Ex. 77, p. 1. Balise reasonably relied upon such representations. Tr. Dec. 13, 2019, p. 133:3-12.

33. Many of the above-referenced pleadings, motions, oppositions and documents in which the Defendants asserted that the LLCs owned the Leased Premises were entered into evidence at trial for the purpose of showing Majestic's reliance on the Defendants' representations in drafting all of Majestic's permit applications with the LLCs as the owners. *See* 93A Exs. 67–79, and 113.

34. Balise reasonably relied on all of Defendants' false representations set forth above. Tr. Dec. 13, 2019, p. 141:5-16.

35. As a result of Defendants' misrepresentations, Majestic incurred a delay in its municipal permitting. Dr. Cabral was unable to submit the draft applications from early 2019 until beginning in September of 2019 because Majestic "didn't have an application signed by the owner." *Id.*, at p. 125:7-8, 20-22 and 126:5.

36. As a result of Defendants' misrepresentations, none of the permit applications were valid or useful to Majestic because they did not identify the correct landowner. Tr. Oct. 4, 2019, p. 86:1. Those misrepresentations resulted in months of delay. *See* 93A Exs. 106-108.

37. As a result of Defendants' misrepresentations, Majestic was unable to obtain a building permit until September 16, 2019. The building permit was necessary for Majestic to conduct necessary demolition of the premises.

38. During the course of Majestic's efforts to permit the Leased Premises, Mr. Dos Anjos refused to speak directly with Balise. Tr. Dec. 13, 2019, p. 102:15-18. Balise attempted to talk to Dos Anjos "[r]epeatedly," but was never given an opportunity to do so. *Id.*, at p. 126:11-15.

39. Relying upon the Defendant's misrepresentations that the Dos Anjos LLCs owned the Leased premises, Majestic reasonably sought to cover all bases and protect itself in its representations to the Town. Accordingly, Majestic referenced "Trustee" under a double asterisk on the name of the owner in the applications to include both the LLCs and the Trusts on the applications. *See* 93 Exs. 29, 112; Tr. Dec. 13, 2019, pp. . 109:20-25, 144:10 – 145:17, p. 145:3-17.

40. By letter dated March 22, 2019, Majestic attempted to confirm the April 1, 2019 Land Delivery Date and notified Defendants that permit applications were forthcoming to Pariseault as Defendants' designated business contact. *See* 93A Ex. 27.

41. On April 1, 2019, Majestic (Bragga) sent to Defendants (Pariseault) Majestic's Planned Business Development application and requested Dos Anjos's signature on behalf of the LLCs as "owner" of the Leased Premises. *See* 93A Exs. 29 and 33; *see also* 93A Ex. 60, ¶ 6.

42. After receiving and reviewing the Planned Business Development application listing the LLCs as the owners of the Leased Premises on April 1, 2019, the Defendants did not correct or raise the issue of ownership in any way with Majestic, nor did Defendants make "true and accurate" the warranty of title in the landlord LLCs as required by the Lease, ¶ 34(d).

43. More than one month after Casey prepared the TIF application, Teverow reviewed the TIP and recommended that it be amended to reflect the Landlord Defendants. (Day 2 (Casey) Tr. 57, 58).

44. By email dated April 25, 2019, Teverow instructed Casey to:

> [R]e-date the attached letter and change the names of the Landlord signatories/lots at the end of the letter to be consistent with the attached final Planned Business Development Applications already signed by the Landlord. You will also need to change the second full paragraph on Page 2 of the letter to correctly reflect that the Landlord is the Trustee of the TWO separate trusts that are the owners of the 6.42 acres parcel of land (see attached paragraph from Lease).

See 93A Ex. 107.

45. Casey complied with Teverow's request and by email dated April 29, 2019, Majestic requested that "Al sign page 5 as landlord" of the "letter Attorney Casey will be submitting to the Town of North Attleboro." (Trial Exhibit 37).

46. The communications between Atty. Casey, Dr. Cabral, Atty. Teverow, Majestic and the Defendants evince the unresolved confusion surrounding owner of the Leased Premises.

47. On April 10, 2019, the Defendants served on Majestic a Motion for a New Trial which asserted that the LLC Defendants were the owners of the Leased Premises, once again

providing false assurance to Majestic that it had chosen correctly in listing the LLCs as landowners on the application sent to Defendants on April 1, 2019. *See* 93A Ex. 78, p. 1.

48. On April 11, 2019, the Defendants informed Majestic that the Planned Business Development application "was sent out for review," the defendants were "just waiting to get it back with necessary signatures."

49. On April 18, 2019, received from the Defendants the signed Planned Business Development Application. *See* 93A Exs. 35 and 36; *see also* 93A Ex. 60, ¶ 8. Importantly, the Defendants did not inform Majestic that the application was drafted with the incorrect owner.

50. On April 29, 2019, Majestic (Bragga) requested from Defendants (Pariseault) Dos Anjos's signature on an Economic Development and Incentive Program ("EDIP") application letter to the Town. *See* 93A Ex. 37; *see also* 93A Ex. 60, ¶ 9.

51. The Defendants did not reply to Majestic's request.

52. On April 30, 2019, the Defendants filed with the Court the Motion for a New Trial, which falsely representing that the LLC defendants are the owners of the Leased Premises. *See* 93A Ex. 79.

53. Having received no response from Defendants on Majestic's request for Defendants' signature on the EDIP application letter, on May 3, 2019, Majestic (Bragga) asked Defendants (Pariseault) for a status update on the application. *See* 93A Ex. 38.

54. The Defendants did not reply, and on May 6, 2019, Majestic's counsel (Atty. McDonough) requested an update from Defendants' counsel (Atty. Hackett) on the status of Dos Anjos's signature on the EDIP letter to the Town. *See* 93A Ex. 39, p. 3.

55. On May 10, 2019, Defendants' counsel (Atty. Hackett) replied by referring Majestic's counsel to Defendants' lead trial counsel. *See* 93A Ex. 39, p. 2.

56. On May 15, 2019, Majestic received the signed EDIP letter 16 days after providing it to Defendants for signature. *See* 93A Ex. 41; *see also* 93A Ex. 60, ¶ 10. The Defendants did not inform Majestic that the application was drafted with the incorrect owner, a fact Defendants withheld from Majestic until August 15, 2019.

57. During the second half of May 2019, Majestic went about its plans for construction at the Leased Premises, which included a title search by Majestic's lender. *See* 93A Ex. 45. At that time, the record title to the land was still in the Dos Anjos Realty Trusts. *See* 93A Ex. 62. The Dos Anjos Realty Trusts were:

a. 849 South Washington Street Realty Trust, dated June 9, 2000, with Alfredo Dos Anjos as Trustee;

b. Declaration of Trust of 865 South Washington Street Realty Trust, dated May 14, 1998, with Alfredo Dos Anjos as Trustee;

c. Declaration of Trust of 855 South Washington Street Realty Trust, dated October 2, 2008, with Alfredo Dos Anjos as Trustee; and

d. Declaration of Trust of Cooper Avenue Realty Trust, dated May 14, 1998, with Alfredo Dos Anjos as Trustee.

58. The title search revealed that Defendants' representations about the LLCs owning the land were false, and the Defendants had failed to make their warranty of title in the LLCs "true and accurate" as of the Land Delivery Date of April 1, 2019 as required under the Lease, ¶¶ 16(a)(ii)) and 34(d). *See* Jury Ex. 2.

59. On May 31, 2019, Majestic's counsel (Atty. McDonough) emailed a letter to Defendants' counsel notifying the Defendants that the LLC defendants were not the owners as warranted in the Lease and as represented on numerous occasions by Defendants and their agents. *See* 93A Ex. 43. In an attempt to remedy the problem, Majestic's May 31, 2019 letter proposed that the Defendants transfer the land from the Dos Anjos Realty Trusts to the Dos

Anjos LLCs and merge the lots making up the Leased Premises as one parcel as the parties had previously agreed. *Id.; see also* Jury Ex. 31.

60. Within 2 minutes of receiving the May 31, 2019 letter, Defendants' privilege log reveals that the Defendants' counsel (Atty. Briansky) forwarded the letter to Pariseault. *See* 93A Ex. 96, p. 4. Atty. Manoogian separately also forwarded the May 31, 2019 letter to Pariseault one minute later. *Id.,* p. 4.

61. Defendants' counsel (Atty. Briansky) and Pariseault continued emailing about the title issue from May 31, 2019 through June 10, 2019, including conversations among themselves and email and telephone calls with employees of Dos Anjos's estate planning law firm, Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C. (hereinafter, "Mintz Levin"). *Id.,* pp. 2-3.

62. In these emails and conversations, the Defendants shared and discussed documents that bear on true ownership of the Leased Premises, including a document titled "Dos Anjos – Real Estate Holdings Chart" and the schedules of beneficiaries for the four Dos Anjos Realty Trusts. *Id.*

63. Despite discussing the title issues internally, the Defendants did not respond to Majestic's letter raising the issue, dated May 31, 2019. *See* 93A Ex. 43.

64. On June 10, 2019, Majestic's lead trial counsel (Egan) sent an email to Attys. Briansky, Hackett and Manoogian asking for a response to its May 31, 2019 letter. *See* 93A Ex. 44. Majestic's counsel proposed, "I assume we can resolve this issue by stipulation once you have executed deeds to conform ownership to you[r] pleadings," and he requested merger of the leased premises lots pursuant to Atty. Manoogian's agreement (Jury Ex. 31) to do so before the jury trial. *See* 93A Ex. 44, pp. 1-2.

65. On June 11, 2019, Majestic's counsel emailed Atty. Briansky again, reiterating the importance of clarifying ownership for Majestic's plans. *See* 93A Ex. 46.

66. Despite possessing the "Dos Anjos – Real Estate Holdings Chart" on June 4, 2019 and the "Schedule of Beneficiaries" (*id.*), the Defendants refused to transfer the deeds in compliance with the Lease's warranty of title or promise to make all warranties "true and accurate," a known contractual obligation under the Lease, ¶¶ 16(a)(ii) and 34(d).

67. The Defendants also refused to confirm who truly owned the land, the Dos Anjos LLCs or the Dos Anjos Realty Trusts, and rejected all of Majestic's proposals to transfer the land and stipulate to ownership as dictated by the Lease.

68. The Defendants began negotiating with Majestic over the issue, including a telephone call between counsel on June 13, 2019 (*see* 93A Ex. 60, ¶ 11), an email suggestion by Atty. Briansky later that day to enter into an attornment (*See* 93A Ex. 48, p. 1), and a follow-up email from Atty. Briansky on June 18, 2019 providing a draft attornment or subordination in lieu of fee simple guaranteed in Lease. *See* 93A Exs. 49 and 50.

69. The subordination or attornment document proposed that the Majestic accept from just two of the four record title owner trusts language that those two "…recognize the Lease, Tenants' rights under the Lease and agree to attorn to the rights of Tenant thereunder." *See* 93A Exs. 49 and 50.

70. The agreement was less than the unencumbered fee simple interest guaranteed to the Majestic under the Lease, ¶¶ 16(a)(ii) and 34(d), and purported to bind half of the actual owners of the land. *See* 93A Ex. 50; *see also* 93A Ex. 62.

71. On June 19, 2019, Majestic declined the Defendants' offer of attornment or subordination. *See* 93A Exs. 50-51.

72. On June 28, 2019 Majestic's counsel wrote to Defendants' counsel again asking to merge the Leased Premises into one parcel. *See* 93A Ex. 81.

73. On July 1, 2019, the Defendants continued representing that the Dos Anjos LLCs owned the Leased Premises when Dos Anjos authorized Atty. Briansky to file a complaint against Atty. Teverow in Bristol County Superior Court. *See* 93A Ex. 15. The Dos Anjos LLCs' Bristol County complaint against Atty. Teverow falsely asserted that the Dos Anjos LLCs owned the leased premises. *Id.*, at ¶ 3

74. Attempting again to resolve the ownership and merger issues, from July 22 through July 26, 2019, Majestic's counsel provided to the Defendants (Atty. Briansky) various deeds and trust certificates drafted to place title in fee simple in the landlord LLC Defendants, along with applications for lot merger. *See* 93A Exs. 54-57. These proposals would have satisfied the Lease's warranty of title at ¶¶ 16(a)(ii) and 34(d) as well as the parties' prior agreement to merge the land. *Id.*

75. The Defendants rejected all such proposals.

76. On August 15, 2019, at oral argument on Majestic's Rule 60 Motion, the Defendants (Briansky), for the first time, admitted that the LLC Defendants did not own the Leased Premises, that there was no private deed, and the land was owned by the Dos Anjos Realty Trusts – not the Dos Anjos LLCs. *See* 93A Ex. 83, Tr. Aug. 15, 2019, pp. 28:3-16, 33:13-15.

77. At the hearing, the Defendants agreed to stipulate to add the Dos Anjos Realty Trusts as defendants in the case *nunc pro tunc* to the date of filing. I issued an order (1) memorializing the Defendants' representation as to actual ownership of the land and the stipulation to add the Dos Anjos Realty Trusts as defendants, (2) ordering the Defendants to

execute all permit applications and deeds to effectuate merger, and (3) re-opening the 93A trial as to the issue of additional delay damages and attorneys' fees claimed by Majestic. *See* Order of Aug. 15, 2019.

78. I also took under advisement whether I should refer the Defendants' alleged perjurious behavior to an appropriate law enforcement agency. *See* Order, August 15, 2019.

79. On August 16, 2019, Majestic's counsel (Atty. Pacella) sent to Defendants (Attys. Briansky and Manoogian) proposed deeds to accomplish the transfer and merger of the parcels ordered by the Court on August 15, 2019. *See* 93A Ex. 84.

80. The Defendants did not reply, and on August 19, 2019, Majestic's counsel (Atty. Egan) wrote a letter to the Defendants (Atty. Briansky) requesting an update on status of documents to transfer and merge lots. See 93A Ex. 85.

81. On August 26, 2019, the parties filed the Stipulation and Amended Complaint adding the Dos Anjos Realty Trusts as defendants in the case *nunc pro tunc* to the date of filing.

82. On August 26, 2019, Defendants instead filed an "Emergency Motion" objecting to adding the Dos Anjos Realty Trust Defendant that now owned the merged Premises as a landlord under the Lease. See 93A Ex. 89.

83. On August 27, 2019, I denied the Defendants' Emergency Motion, ruling that the merged entity "is to be one or both of the defendant LLCS landlords, or …such [other] entity is to be added to the lease as a Landlord *nunc pro tunc* to October 28, 2016." *See* Order, August 27, 2019; *see also* 93A Ex. 89.

84. After the denial of Defendants' first Emergency Motion, the Defendants persisted in unreasonably refusing to cooperate with Majestic as ordered by the Court, this time by

refusing to define the Leased Premises with a "red lease line" in the ANR application. *See* 93A Ex. 90.

85. On September 5, 2019, rather than executing Majestic's permits and paperwork with the Town, the Defendants filed an Emergency Motion, now objecting to Majestic's inclusion of a "red lease line" in the ANR plan that Majestic asked Defendant to sign. *See* 93A Exs. 91-93.

86. The Defendants also unreasonably refused to approve the Amendment of Lease and Notice of Lease. *See* 93A Exs. 91-93.

87. On Sep. 10, 2019, I denied the Defendants' second Emergency Motion, stating:

> [D]efendants are ordered to cooperate by approving the ANR Plan including the red lease line defining the Leased Premises thereby allowing the completion of the ANR application and … cooperate with the plaintiff in executing the plaintiff's proposed Amendment of Lease and Notice of Lease. The defendants are to comply with this order immediately.

See 93A Ex. 94 (Order, Sep. 10, 2019).

88. Eight days after the Order, on September 18, 2019, the Defendants sent Majestic most of the signed permit and application documents then outstanding, but did not return Majestic's signed application to the Conservation Commission. *See* 93A Ex. 95.

89. In order for Majestic to move forward with the project, it required Conservation Commission approval. It could not procure approval without the signed application to the Conservation Commission. The Planning Board required the signed Conservation Commission application in order to move forward. As a result, Majestic was at a standstill with the town until November 16th. Tr. of Dec. 13, 2019, pp. 139:21 – 140:5.

90. Despite having submitted the Conservation Commission application to the Defendants for approval "before September 18," Balise testified that he "did not get it back signed until November 16[, 2019]." Tr. Dec. 13, 2019, p. 138:14-18.

91. Defendants' delays and misinformation left Majestic's permitting process at a "standstill," as Majestic had "told [Defendants] that [Majestic] needed the signatures in order to move forward with the Town of North Attleboro, with the Planning Board." Tr. Dec. 13, 2019, p. 138:21-25.

92. Majestic was unable to file the permits due to the uncertainty, misinformation, and delays all created by the Defendants and, ultimately, because they "didn't have an application signed by the owner" to go forward to the Planning Board. *See* Tr. Oct. 4, 2019, pp. 125:7-8, 20-22 and 126:5; *see also* Tr. Dec. 13, 2019, p. 153:19. The permitting process for this proposed development required the signature of the actual on "all permits" involved. Tr. Oct. 4, 2019, pp. 82 and 86:1.

93. All sample applications submitted at trial called for a signature of the owner. *See* 93A Exs. 64-66, 10-108, and 112. Based on testimony at the jury trial, the Defendants were well aware of this requirement as Dos Anjos (their owner, manager and trustee) and their attorney, Manoogian, were experienced in the development of the very parcels in question for this same purpose, which was to build an automobile dealership. Further, Majestic submitted applications to the Defendant LLCs requiring the owners' signatures which were executed and returned to the Majestic without any correction or explanation as to correct entities which owned the Leasehold Premises. *See* 93A Exs. 35, 36 and 41; *see also* 93A Ex. 60, ¶¶ 8, 10. *See* 93A Exs. 69-71.

94. Majestic's access to the Leased Premises during the period February 12 through November 16, 2019, was insufficient without Defendants' full cooperation in the municipal permitting process. Tr. of Dec. 13, 2019, p. 149:11-17. The Defendants' repeated misrepresentations as to the true owner of the leased premises halted meaningful permitting and approval processes pursued by Majestic. *Id.* As I have acknowledged, "title to the premises is core to issues such as the approval of municipal permitting." *See* Order, dated September 23, 2019, p. 3. Therefore, I attribute no weight or merit to Defendants' "partial access" theory. By stalling Majestic's access the Defendants delayed Majestic's ability to build and open its doors and thereby stop losing $175,000 per month in lost profits.

95. I find that after Majestic elected specific performance on the Lease, February 13, 2019, the Defendants knowingly ignored their contractual obligations, including Defendants' failure to "cooperate" with Majestic in its permitting (Lease, ¶ 9); failure to honor the warranty of title (Lease, ¶ 16(a)(ii)); failure to make the warranty of title true and accurate on the Land Delivery Date (Lease, ¶ 34); and, failure to cooperate in defining the Leased Premises (Lease, ¶ 1). The Defendants also violated my orders of January 28, 2019 and August 15, 2019 to "cooperate and approve any necessary paperwork for any permits or other items required for Majestic's full use and enjoyment of the Leased Premises, planned construction, and operation of its business." The Defendants further failed to "give Majestic unfettered access to the Leased Premises." As Balise testified, all of these actions made it impossible for Majestic to go forward to the Town of North Attleborough Planning Board until Majestic obtained the last approved permit on November 16, 2019. Tr. Dec. 13, 2019, p. 149:11-17.

96. I find that the Defendants were dishonest about the issue of ownership from January 29, 2018 until August 15, 2019. Thereafter, the Defendants failed to timely respond to

reasonable requests for permit signatures until November 16, 2019, in order to improve its position.

97. In total, the Defendants caused Majestic 9 months and 3 days of unnecessary and intentional delay from February 13, 2019 through November 16, 2019. *Id*, at p. 146:14.

98. At the jury trial in September of 2018, the jury agreed with Majestic's expert witness Todd Berko in calculating Majestic's delay damages as $175,000 per month. *See* Special Verdict Sheet; Tr. Dec. 13, 2019, p. 147:5-13. I adopted that same $175,000 per month finding in my earlier c. 93A decision of January 28, 2019.

99. The parties agreed to incorporate all evidence offered in the jury trial and prior c. 93A trial to be considered in the re-opened c. 93A trial. As such, I have incorporated and relied upon earlier evidence on this topic. In the re-opened 93A trial, Balise ratified Majestic's monthly damages in the amount of "$175,000 … based on the average month present -- at present value that the dealership in operation would generate for profit." Tr. Dec. 13, 2019, p. 148:20-22.

100. I find that Plaintiff has proved by a preponderance of the evidence that the Defendants caused Majestic to sustain economic delay damages of $175,000 per month for the relevant additional time-period of the re-opened c. 93A trial, which I have found to be February 13, 2019 through November 16, 2019.

101. Applying $175,000 in damages per month to the 9 month 3 day period of delay from February 13, 2019 until November 16, 2019, I find that Majestic has demonstrated by a preponderance of the evidence that Majestic's actual delay damages in this re-opened c. 93A trial amount to an additional total of $1,592,260.

A. Effect of the Privilege Against Self-Incrimination and the Attorney-Client Privilege

Every witness has a right, in any proceeding, to refuse to answer a question unless it is perfectly clear, from a careful consideration of all the circumstances, that the testimony cannot possibly have a tendency to incriminate the witness. *See* Mass. G. Evid., § 511(b). However, "[c]omment may be made and an adverse inference may be drawn against a party when that party, or in certain circumstances a witness, invokes a privilege" in a civil case." *Id.*, § 525; *Frizado v. Frizado*, 420 Mass. 592, 596 (1995) (privilege against self-incrimination); *Phillips v. Chase*, 201 Mass. 444, 450 (1909) (attorney-client privilege).

In *Labor Relations Comm'n v. Fall River Educators' Ass'n,* 382 Mass. 465, 471-472 (1981), the Supreme Judicial Court expanded the rule to allow an adverse inference to be drawn against an organizational party as a result of a claim of the privilege against self-incrimination by its officers who had specific knowledge of actions taken on behalf of the organization in connection with the underlying claim. In *Lentz v. Metropolitan Prop. & Cas. Ins. Co.*, 437 Mass. 23, 26-32 (2002), the Supreme Judicial Court expanded the principle to include circumstances in which the court finds, as a preliminary question of fact, that the witness who invokes the privilege against self-incrimination is acting on behalf of or to further the interests of one of the parties.

When a non-party witness is closely aligned with a party in a civil case, and the non-party witness invokes the privilege against self-incrimination, the factfinder is permitted to draw an inference adverse to the party from the witness's invocation of the privilege against self-incrimination. *Lentz*, 437 Mass. at 26-32. Moreover, counsel has the right to comment on an opposing party's failure to testify in a civil case. *See Kaye v. Newhall*, 356 Mass. 300, 305 (1969); *Silveira v. Kegerreis*, 12 Mass. App Ct. 906, 906-907 (1981).

At trial on October 4, 2019, Dos Anjos, Pariseault and Atty. Manoogian refused to testify to any questions beyond essentially providing their name by asserting the privilege against self-incrimination under the Fifth Amendment of the United States Constitution and Art. 12 of the Mass Declaration of Rights. *See* Tr. Oct. 4, 2019, pp. 40:23, *et seq*., and 64:24, *et seq*.

Each initially asserted through counsel that the basis for the invocation was my earlier taking under advisement the suggestion that their conduct be referred to an appropriate law enforcement agency for potential perjurious behavior, based upon their extended and numerous pattern of misrepresenting the true ownership of the Leased Premises under oath. *Id.*

I instructed Majestic's counsel to commit to writing lists of all questions intended for Dos Anjos, Pariseault, and Atty. Manoogian to be served on their respective counsel in advance of the next day of trial. *See* Order of October 9, 2019; Tr. Oct. 4, 2019, pp. 138:25 – 141:4. I instructed the attorneys for Dos Anjos, Pariseault, and Atty. Manoogian to provide in writing in advance of the next trial whether each witness in response to each question (1) would refuse to answer by invoking the privilege against self-incrimination, (2) maintained some other objection to the question, or (3) would answer the question at trial. *See* Order of October 9, 2019; Tr. Oct. 4, 2019, pp. 138:25 – 141:4. I informed all parties that the written responses would be entered into evidence at trial, and "I may draw an adverse inference against a witness in a civil case if he elects to assert the Fifth Amendment privilege," and "I will feel free to do that." *See* Order of October 9, 2019; Tr. Oct. 4, 2019, pp. 55:23 – 56:3, 138:25 – 141:4; 142:12-25.

In line with my Order of October 9, 2019, at the next day of trial on December 13, 2019, the parties agreed to enter into evidence 93A Ex. 97: Majestic's Questions to Dos Anjos and his Responses; 93A Ex. 98: Majestic's Questions to Pariseault and her Responses; and, 93A Ex. 99: Majestic's Questions to Manoogian and his Responses. Dos Anjos and Pariseault refused to

answer most of Majestic's questions by asserting the privilege against self-incrimination. 93A Exs. 97 and 98. Atty. Manoogian did not assert the privilege against self-incrimination, but did assert the attorney-client privilege in refusing to answer most of Majestic's questions. 93A Ex. 99,

Applying *Lentz* to this case, I find that Dos Anjos, Pariseault and Atty. Manoogian were acting on behalf of Defendants and furthering the interests of the Defendants. As I found in my Order of January 28, 2019, at all relevant times, Dos Anjos acted on behalf of the Defendants and Pariseault served as Dos Anjos's agent on behalf of Dos Anjos and the Defendants. *See* Order of January 28, 2019, p. 3. Further, at all relevant times, Manoogian acted as attorney and agent for Defendants, Dos Anjos, and Pariseault. *Id.*, at 5. No evidence was introduced at the re-opened 93A trial to alter these findings bearing on *Lentz*. As a result, I have drawn adverse inferences against the Defendants based upon these three witnesses' privilege invocations in 93A Exs. 97, 98 and 99.

As their written responses indicated, Dos Anjos, Pariseault and Atty. Manoogian all appeared at the December 13, 2019 day of trial represented by criminal defense attorneys. According to 93A Exs. 97 and 98, Dos Anjos and Pariseault each refused to answer questions by adopting a blanket invocation of the privilege against self-incrimination under the Fifth Amendment to the United States Constitution and pursuant to Art. 12 of the Mass. Declaration of Rights. *See* 93A Exs. 97 and 98.

Atty. Manoogian likewise refused to answer the bulk of Majestic's questions. However, Atty. Manoogian's basis for refusing to answer questions was the attorney-client privilege stating in each invocation that he "does not have the informed consent of his client(s) to [answer]." *See* 93A Ex. 99. Majestic asked Dos Anjos if he instructed Atty. Manoogian not to answer in each

instance in which Atty. Manoogian invoked the attorney-client privilege. *See* 93 Ex. 97, ¶¶ 552-554. In response to this question, Dos Anjos refused to answer and invoked the privilege against self-incrimination. *Id.* Based upon these blanket cross invocations by the Defendants' principal and real estate attorney, I first draw a negative inference against Defendants that Dos Anjos and Atty. Manoogian are using the privilege against self-incrimination and the attorney-client privilege in a manner to conceal the Defendants' intentional, willful and knowing misconduct perpetuated against Majestic.

With respect to specific questions in response to which Dos Anjos and Pariseault invoked the privilege against self-incrimination, and Atty. Manoogian invoked the attorney-client privilege, I have drawn negative inferences against the Defendants in the following areas:

a. Dos Anjos and Pariseault each invoked the privilege against self-incrimination in refusing to reveal information about the Defendant entities in this case, the two Dos Anjos LLCs and the four Dos Anjos Realty Trusts. This included basic information such as the role Dos Anjos and Pariseault each played in organizing each entity; the identity of the attorney that formed each entity; the purpose, function, and use of each entity; the identities of the trustees and beneficiaries of the Dos Anjos Realty Trusts and the manager and owners of the Dos Anjos LLCs; and, with respect to the last four years, each witness refused to reveal what role and duties the witness had fulfilled on behalf of each entity; compensation to the witness from each entity; the business of each entity; whether the witness or the witness's family held a beneficial interest in each entity; the nature of any such beneficial interests; the identity of other individuals who held beneficial interests in each entity and the nature of such interests; the location of the records pertaining to each entity; whether the entity had filed or prepared tax returns, who

filed the returns, and the location of the returns; and, the assets held by each entity. *See* 93A Ex. 97, ¶¶ 8 – 375; *see also* 93A Ex. 98, ¶¶ 9 – 463. Similarly, Atty. Manoogian invoked the attorney-client privilege in a blanket manner to all of these topics. *See* 93A Ex. 99, ¶¶ 7-312. I have drawn an adverse inference against the Defendants on all of these topics.

b. Dos Anjos and Pariseault each invoked the privilege against self-incrimination in refusing to reveal whether they or their family members had contributed funds to purchase the real estate that makes up the Leased Premises. *See* 93A Ex. 97, ¶¶ 377-380; *see also* 93A Ex. 98, ¶¶ 465-468. Atty. Manoogian likewise refused to answer these questions citing the attorney-client privilege. *See* 93A Ex. 99, ¶¶ 313-317. I have drawn an adverse inference against the Defendants on all of these topics.

c. Dos Anjos and Pariseault invoked the privilege against self-incrimination in refusing to answer whether Dos Anjos signed the Lease; whether either witness reviewed the Lease; what land made up the Leased Premises; whether the Leased Premises is accurately depicted by the "red lease line" in page 2 of 93A Ex. 58; whether either witness knew who owned the Leased Premises when the Lease was executed; whether any deeds had been signed conveying title for any parcel making up the Leased Premises; the identity of persons or entities that have owned or controlled the Leased Premises since 2016; whether Dos Anjos or Pariseault had been beneficiaries of the Dos Anjos Realty Trusts; the identity of the drafters of the trust instruments; whether Dos Anjos or Pariseault had reviewed the trust instruments; the identity of the persons that operated or assisted in operating the Dos Anjos Realty Trusts; and, whether the Dos Anjos Realty Trusts required the consent of the beneficiaries as a prerequisite for the

trustee of each Dos Anjos Realty Trust to deal with the Trust assets and what the beneficiaries had directed Dos Anjos to do as Trustee since 2016. *See* 93A Ex. 97, ¶¶ 381-428; *see also* 93A Ex. 98, ¶¶ 469-482. Atty. Manoogian likewise refused to answer similar questions about the Lease and ownership or control of the Leased Premises by invoking the attorney-client privilege. *See* 93A Ex. 99, ¶¶ 318-362. I have drawn an adverse inference against the Defendants on all of these topics.

d. Dos Anjos invoked the privilege against self-incrimination in refusing to reveal whether he was aware that the Lease contained a warranty of title in the LLCs at ¶ 16(a)(ii) and a requirement to make that warranty "true and accurate" by the Land Delivery Date at ¶ 34(d) of the Lease; whether he agreed that the Land Delivery Date was April 1, 2019; and, whether he complied with either the warranty to title or his obligation to make it true and accurate as of April 1, 2019. *See* 93A Ex. 97, ¶¶ 429-435. Atty. Manoogian refused to answer similar questions by invoking the attorney-client privilege. *See* 93A Ex. 99, ¶¶ 364-369. I have drawn an adverse inference against the Defendants on all of these topics.

e. Dos Anjos invoked the privilege against self-incrimination when asked if he refused to transfer the title before or by the Land Delivery date to avoid applying the judgment to the Leased Premises. *See* 93A Ex. 97, ¶ 436. Atty. Manoogian also refused to answer this question by invoking the attorney-client privilege. *See* 93A Ex. 99, ¶ 370. I have drawn an adverse inference against the Defendants on this topic.

f. Dos Anjos invoked the privilege against self-incrimination and refused to answer questions related to his misrepresentations, false testimony and failures to cooperate, including whether he signed an affidavit on February 2, 2018 that represented

that the LLCs owned the Leased Premises (93A Ex. 69); what private business and public records of the LLCs he reviewed before signing the affidavit as represented in the affidavit; who drafted the affidavit; who drew the black marker lines and writings in Exhibit A of the affidavit; who he understood to be the land-owners on the date he signed the affidavit; on what facts he based his understanding that the LLCs owned the land when he signed the affidavit; and, whether, when and how he subsequently learned that the LLCs did not own the Leased Premises as he maintained in the affidavit. *See* 93A Ex. 97, ¶¶ 437-446. I have drawn an adverse inference against the Defendants on all of these topics.

g. Dos Anjos invoked the privilege against self-incrimination and refused to answer questions related to his knowledge of the Defendants' Answer and Counterclaim in March of 2018 admitting and asserting that the LLCs owned the Leased Premises; whether he testified under oath at his deposition in May of 2018 that the LLCs owned the Leased Premises and upon what facts he based that testimony; whether he was aware that his attorneys were repeatedly submitting motions and memoranda representing that the LLCs owned the Leased premises; whether he listened to Atty. Briansky's opening statement and closing argument asserting the LLCs owned the Leased Premises; whether he testified under oath at trial that the LLCs owned the Leased Premises and upon what facts he based that testimony; whether, when and how he learned that all of the above representations were false; and, whether he ever discussed the falsity of the above misrepresentations with Pariseault, Atty. Manoogian, his attorneys and if he took any steps to correct the misrepresentation. *See* 93A Ex. 97, ¶¶ 447-463. I have drawn an adverse inference against the Defendants on all of these topics.

h. Pariseault invoked the privilege against self-incrimination and refused to answer questions related to her misrepresentations, false testimony, and failures to cooperate, including whether she reviewed her father's affidavit of February 2, 2018 or helped draft the affidavit; whether she spoke with her father at that time or discussed private and public records related to the LLCs as her father represented in the affidavit; who drafted the affidavit; who drew the black lines and markings on Exhibit A of the affidavit; who she believed to own the Leased Premises at the time of the affidavit; and, whether, when and how she subsequently learned that the affidavit's representation as to ownership of the Leased Premises was false. *See* 93A Ex. 98, ¶¶ 483-492. I have drawn an adverse inference against the Defendants on all of these topics.

i. Pariseault invoked the privilege against self-incrimination and refused to answer additional questions about her misrepresentations, false testimony, and failures to cooperate, including whether she herself signed documents as or on behalf of the "owner" of the Leased Premises; whether she on February 8, 2017 signed a "Landowners Consent Form" representing that the LLCS owned the Leased Premises and upon what facts she did so; whether she testified at trial that the LLCs owned the Leased Premises and upon what facts she based her testimony; whether she signed an affidavit on October 16, 2018 stating that the LLCs owned the Leased Premises and upon what facts she based this (93A Ex. 71); who drafted the affidavit; whether, when and how she learned that her trial testimony, representations and affidavit were false; what she did to correct her false testimony and affidavit; whether she ever discussed her false testimony and affidavit with Dos Anjos, Atty. Manoogian or her attorneys; whether she discussed with her attorneys the Defendants' pleadings, motions, memoranda, and arguments they had submitted with

false information on ownership as well as the false testimony regarding the same; whether she had done anything to correct the false statements and testimony; whether as a Massachusetts attorney she had considered her obligations under Rule 3.3 of the Massachusetts Rules of Professional Conduct; and, whether she had taken any steps to comply with Rule 3.3 after realizing that she, her father and her attorneys had elicited and given false testimony under oath and submitted false information to the tribunal regarding ownership to the Court in the Defendants' pleadings, motions, memoranda and through the Defendants' witnesses. *See* 93A Ex. 98, ¶¶ 493-516. I have drawn an adverse inference against the Defendants on all of these topics.

j. Dos Anjos invoked the privilege against self-incrimination and refused to answer when he was asked directly if he decided not to correct his misstatements, false affidavit and false testimony in order to gain a litigation advantage or to avoid the judgment being attached to the Leased Premises. *See* 93A Ex. 97, ¶¶ 464-465. I have drawn an adverse inference against the Defendants on this topic.

k. Atty. Manoogian refused to answer questions about assisting the Defendants with their misrepresentations or his actions to correct the Defendants misstatements and false testimony, again invoking the attorney-client privilege. *See* 93A Ex. 99, ¶¶ 372-373, 376-379, 385, 395, 397-400, 402-403, and 405-406. I have drawn an adverse inference against the Defendants on all of these topics.

l. With respect to the Land Delivery Date, Pariseault invoked the privilege against self-incrimination and refused to answer questions about sending and receiving notices with Beckie Bragga on behalf of Majestic; her role in providing notices or assisting her father with permitting; her communications with the Nissan Village vehicle

storage tenant, including instructing the tenant to vacate the Leased Premises within 30 days on March 1, 2019; her understanding that this act would trigger the "Land Delivery Date" under the Lease; the significance of this date to Majestic's planning; whether she recalled that Majestic had repeatedly asked to know when this date would occur; why she failed to tell Majestic about this date on March 1, 2019; whether Dos Anjos intentionally told her to delay removing the Nissan Village Owners; and, whether anyone instructed her to withhold this information from Majestic. *See* 93A Ex. 98 ¶¶ 518-530. I have drawn an adverse inference against the Defendants on all of these topics.

m. Dos Anjos and Pariseault invoked the privilege against self-incrimination and refused to answer questions relating to municipal permitting. For example, Dos Anjos refused to answer whether he had owned and managed commercial real estate for car dealerships for over thirty years. *See* 93A Ex. 97, ¶ 466. Dos Anjos and Pariseault also refused to answer whether they were aware that Majestic would require various permits to build a dealership at the Leased Premises; why it took Defendants 17 days to sign Majestic's Planned Business Development application; why it took Defendants 16 days to sign Majestic's TIF application; why it took until November 16, 2019 for Defendants to sign Majestic's Conservation Commission application; the extent of Pariseault's involvement in obtaining Dos Anjos's signatures; what entities they believed owned the Leased Premises when Dos Anjos signed the Planned Business Development application on April 18, 2019 and when he signed the TIF letter on May 15, 2019; whether municipal permitting applications require the signature of the actual land owner; whether the witnesses took any steps to correct the listing of the true land owner on the applications; whether Majestic's representatives had indicated to the Defendants that

"time was of the essence" when it came to the permits; why it took multiple requests for status updates and second and third requests to obtain a response from the Defendants about each permit; whether the Defendants' permit delays were aimed at frustrating Majestic's progress at the Leased Premises;. *See* 93A Ex. 97, ¶¶ 467-489; *see also* 93A Ex. 98, ¶¶ 517-521, 531-545. Atty. Manoogian refused to answer questions on permitting by invoking the attorney-client privilege. *See* 93A Ex. 99, ¶¶ 412-416, 418-424. I have drawn an adverse inference against the Defendants on all of these topics.

n. On May 31, 2019, Defendants were directly confronted about the ownership discrepancy in a letter from Majestic's counsel. *See* 93A Ex. 43. However, Dos Anjos and Pariseault invoked the privilege against self-incrimination and refused to answer any questions about the Defendants' responses to the letter. The topics on which Dos Anjos and Pariseault refused to answer included whether Dos Anjos and Pariseault had received the letter; whether they were aware that the Lease, ¶ 9, required Defendants to "cooperate with Tenant in obtaining any and all licenses, building permits, certificates … and Landlord shall execute, acknowledge and delivery any documents reasonably required in furtherance of such purposes;" whether the witnesses were aware the Court had required them to "cooperate with and approve any necessary paperwork;" whether the witnesses were ever informed after May 31, 2019 that the Dos Anjos LLCs did *not* own the Leased Premises; whether the witnesses considered correcting their misrepresentations on ownership in light of the contractual and court-ordered obligations to cooperate; whether either witness reviewed a document titled "Dos Anjos – Real Estate Holdings Chart" as it appears they did on June 4, 2019 according to Defendants' privilege log at 93A Ex. 96; whether either witness reviewed beneficiary schedules for

the Dos Anjos Realty Trusts as it appears they did in June of 2019 according to Defendants' privilege log at 93A Ex. 96; who drafted "Dos Anjos – Real Estate Holdings Chart;" who drafted the beneficiary schedules; the purpose of the "Dos Anjos – Real Estate Holdings Chart" and the beneficiary schedules; whether the "Dos Anjos – Real Estate Holdings Chart" and the beneficiary schedules contained information on actual ownership of the Leased Premises; and, whether either witness took any steps to correct their misrepresentations on ownership after reviewing the "Dos Anjos – Real Estate Holdings Chart" and the beneficiary schedules in early June 2019. *See* 93A Ex. 97, ¶¶ 490-510; *see also* 93A Ex. 98, ¶¶ 546-569. I have drawn an adverse inference against the Defendants on all of these topics.

o. Dos Anjos and Pariseault invoked the privilege against self-incrimination and refused to answer whether they believed it was important to Majestic's permitting process for Majestic to know the correct owner of the Leased Premises; whether they would agree that Majestic's permits drafted with the wrong actual owner would be ineffective and cause Majestic delay; how, when and from whom they each first learned that the LLCs did not own the Leased Premises; what steps they each took to cooperate with Majestic once they learned that the LCCs did not own the Leased Premises; whether they ever discussed or considered amending the multitude of misstatements and false testimony with their attorneys pursuant to Massachusetts Rule of Professional Conduct 3.3; whose idea it was to take no steps to correct the deceptions until Atty. Briansky was required to answer truthfully by the Court on August 15, 2019; whether they continued to accept monthly rent checks in 2019 while perpetuating the misrepresentations on ownership; and, whether they agreed that by refusing to clarify ownership Dos Anjos and

Pariseault delayed Majestic's ability to construct a dealership. *See* 93A Ex. 97, ¶ 510-522; *see also* 93A Ex. 98, ¶¶ 573-574, 577-589. Atty. Manoogian refused to answer similar questions by invoking the attorney-client privilege. *See* 93A Ex. 99, ¶¶ 461-462, 466, 467-470. I have drawn an adverse inference against the Defendants on all of these topics.

p. Dos Anjos and Pariseault invoked the privilege against self-incrimination and refused to answer questions about Defendants' extortionate behavior in June of 2019, including why the Defendants never responded to Majestic's letter of May 31, 2019; whether Dos Anjos or Pariseault had reviewed Majestic's counsel's emails of June 10 and 11, 2019, which were forwarded to Pariseault according to Defendants' privilege log at 93A Ex. 96, in which Majestic's counsel reiterates Majestic's concerns about ownership and the witnesses' misrepresentations; why the Defendants would not agree to transfer the parcels to the LLCs as the correct owner under the Lease, ¶¶ 16(a)(ii) and 34(d) or merge the lot under the parties' prior agreement seen at Jury Ex. 31; what Defendants did to investigate Majestic's claims in the May 31, 2019 letter and June 10-11, 2019 emails; whether Dos Anjos or Pariseault authorized Atty. Briansky to try to force Majestic to accept a subordination of the lease signed by only two of the four Dos Anjos Realty Trusts as non-landlord owners rather than the Lease's requirement that the LLCs would own the land as landlords; whether the witness agreed that subordination sent by Defendants' counsel at 93A Ex. 50 represented less than fee simple ownership by the landlord; whether by submitting the subordination the Defendants were attempting to leverage the ownership issue to improve Defendants' rights under the lease; whether by offering the subordination the Defendants were attempting to shield the land that makes

up the Leased Premises from the judgment in this case; and, despite Majestic rejecting this attempt, whether it was Dos Anjos's idea to still withhold confirmation of the true owner of the Premises until August 15, 2019. *See* 93A Ex. 97 ¶¶ 523-536; *see also* 93A Ex. 98 ¶¶ 570-572, 575-576, 590-596. I have drawn an adverse inference against the Defendants on all of these topics.

q. Atty. Manoogian refused to answer questions about the Defendants' responses to Majestic's May 29, 2019 letter and June 10-11, 2019 emails, and the Defendants' actions in June 2019, by invoking the attorney-client privilege. *See* 93A Ex. 99, ¶¶ 426-431, 433-448, 450-453, 455-460. I have drawn an adverse inference against the Defendants on all of these topics.

r. Dos Anjos and Pariseault invoked the privilege against self-incrimination and refused to answer questions about their refusal to cooperate in merging the Dos Anjos lots, including on topic such as their prior agreement to do so by letter from Atty. Manoogian dated May 30, 2017 and in evidence as Jury Ex. 31; their failure to merge the lots or even respond to Majestic's requests to merge the lots from February 13, 2019 through August 27, 2019; whether they agreed that refusing to merge the Dos Anjos lots delayed Majestic's ability to submit plans and begin construction on one lot as required by the Town. *See* 93A Ex. 97 ¶¶ 537-539; *see also* 93A Ex. 98 ¶¶ 597-598. Atty. Manoogian also refused to answer these questions by invoking the attorney-client privilege. *See* 93A Ex. 99, ¶¶ 473-474. I have drawn an adverse inference against the Defendants on all of these topics.

s. Dos Anjos and Pariseault invoked the privilege against self-incrimination and refused to answer questions about their refusal to cooperate with Majestic by refusing

to agree to amend the Lease to add the Dos Anjos Realty Trusts that owned the Leased Premises as a landlords until ordered to do so by the Court on August 27, 2019; refusal to cooperate in signing an ANR permit application with a "red lease line" that defined the Leased Premises pursuant to the Lease's requirement at ¶ 1 until ordered to do so by the Court on September 10, 2019; refusal to cooperate by signing a Notice of Lease until ordered to do so by the Court on September 10, 2019; refusal to cooperate by signing a Lease Amendment until ordered to do so by the Court on September 10, 2019; and, whether the witnesses agreed that the Defendants' refusals to merge the lots, sign the ANR permit application, define the Leased Premises, sign a Notice of Lease, and sign the Lease Amendment did in fact delay Majestic's ability to build its dealership and open its doors. *See* 93A Ex. 97 ¶¶ 540-551; *see also* 93A Ex. 98 ¶¶ 597-608. Atty. Manoogian also refused to answer these questions about Defendants' failures to cooperate by invoking the attorney-client privilege. *See* 93A Ex. 99, ¶¶ 475-484. I have drawn an adverse inference against the Defendants on all of these topics.

t. Dos Anjos and Pariseault invoked the privilege against self-incrimination when asked whether their conduct on behalf of the Defendants delayed Majestic's municipal permitting along with Majestic's ability to build, open and enjoy profits from its intended new and used automobile dealership at the Leased Premises until permits were finally executed in proper form on or about November 16, 2019. *See* 93A Ex. 97 ¶¶ 482-483, 551; *see also* 93A Ex. 98, ¶ 609. Atty. Manoogian likewise refused to answer this question based on his blanket invocation of the attorney-client privilege. *See* 93A Ex. 99, ¶ 489. I have drawn an adverse inference against the Defendants on all of these topics.

I have considered additional objections made by the Defendants to questions that Majestic has posed on the above topics beyond the privileges that were invoked, which objections included that the subject matter sought was "confidential" employment information, the question impinged the witness's right to privacy, the question was beyond the scope of the hearing, and other objections memorialized by Defendants in writing in 93A Exs. 97, 98, 99 and 100. These objections are overruled.

As a result of the above invocations I have drawn the following specific negative inferences against the Defendants: that the Defendants intentionally deceived Majestic as to the true ownership of the Leased Premises to improperly leverage and secure for itself greater rights under the Lease than they had before and to improperly avoid subjecting the real estate to the judgment; that the Defendants knew about the true ownership of the Leased Premises the entire time but did nothing to correct it even when Majestic submitted applications that listed the wrong owner in reliance on Defendants' misrepresentations or when Majestic brought the issue to Defendants' attention in May and June of 2019; that the Defendants purposely stalled, delayed, provided false information and omitted helpful information to sabotage Majestic's municipal permitting in knowing contradiction of Defendants' contractual obligations and court-ordered obligations to cooperate with Majestic in its permitting; that the Defendants did so to gain leverage over Majestic for whom time was of the essence; that Defendants knowingly and willfully continued their breaches of the Lease and the implied covenant of good faith and fair dealing and violated their obligations under the Lease to define the Leased premises (¶ 1), cooperate with all permitting (¶ 9), warranty title (¶ 16(a)(ii)), and to make title true and accurate (¶ 34(d)); that in May and June 2019 the Defendants leveraged the ownership issue to try to extort from Majestic an agreement to new Lease terms that were not bargained in the original

contract, namely a subordination (*see* 93A Ex. 50) that was less than fee simple ownership by the landlord and only represented recognition of Majestic's rights by two of the four land-owning Dos Anjos Trusts; that Defendants impermissibly strung Majestic along with the subordination proposal to try to insulate Defendants' real estate from attachment and remove the land from attachment in this case and any future action upon Landlord's default under the lease, ¶ 28, thereby stripping a contractual right from Majestic; that even after revealing the true ownership on August 15, 2019, the Defendants continued to fail cooperate with and approve Majestic's permits, ANR application, Lease Amendment, Notice of Lease, and "red lease line" until ordered to do so by the Court on September 10, 2019; that the Defendants knowingly, willfully and intentionally failed to heed this Court's Orders of January 28, 2019 and August 15, 2019; and, that the Defendants knowingly, willfully and intentionally failed to cooperate and delayed permit approvals and cooperation until November 16, 2019 when Majestic received the final permit application for the Conservation Commission.

Rulings of Law

G.L. c. 93A, § 2 makes unlawful any "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." This prohibition is "extended to those engaged in trade or commerce in business transactions with others similarly engaged" by G.L. c. 93A, § 11.

The SJC has held that conduct "'in disregard of known contractual arrangements' and intended to secure benefits for the breaching party constitutes an unfair act or practice" under G.L. c. 93A. *Anthony's Pier Four, Inc.,* 411 Mass. at 475 (citing *Wan Laboratories, Inc. v. Business Incentives, Inc.,* 398 Mass. 854, 857 (1986). See *Hannon v. Original Gunite Aquatech Pools Pools, Inc.,* 385 Mass. 813, 825 (1982 (if proved, submission of low bid followed by

demand for more money after award of contract would constitute violations of c. 93A); *Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc.,* 754 F.2d 10, 17-19 (1st Cir. 1985) (commercial extortion giving rise to c. 93A liability, and treble damages, where defendant withheld payment due under contract not because of dispute over liability or inability to pay but, rather, as "'wedge' against [plaintiff] 'to enhance [defendant's] bargaining power for more product'").

A breaching party's "knowing use of a pretext to coerce [the non-breaching party] into paying [the breaching party] more than the contract required establishes willfulness as a matter of law." *Anthony's Pier Four, Inc.,* 411 Mass. at 475 (citing *Pepsi-Cola Metropolitan Bottling Co.,* 754 F.2d at 18 ("[T]he evidence is sufficient to support its determination that [defendants] … were guilty of a willful violation of … c. 93A. The court was entitled to believe that [defendants] … had withheld monies which they legally owed as a form of extortion – to force Pepsi to do what otherwise it could not be legally required to do"); *see also Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 780 (1986) ("Actions involving fraudulent representations in knowing disregard of the truth encompass culpable, 'willful' behavior under the statute")). See *Atkinson v. Roenthal,* 33 Mass.App.Ct. 219, 226 (1992). ("[T]here is in those cases a constant pattern of the use of a breach of contract as a lever to obtain advantage for the party committing the breach in relation to the other party; i.e., the breach of contract has an extortionate quality that gives it the rancid flavor of unfairness.")

Here, Majestic's c. 93A claim is a continuation of the claim that I ruled on in my Order dated January 28, 2019 and is likewise based upon Defendants' misrepresentations and which sounds in tort for similar reasons. As such, Majestic did not contractually waive its ability to seek damages under G.L. c. 93A. *See Exhibit Source, Inc., v. Wells Avenue Business Center,*

LLC, 94 Mass. App. Ct. 497, 502 (2018) (citing *Standard Register Co. v. Volton-Emerson, Inc.*, 38 Mass. App. Ct. 545 (1995)).

Nor does it matter that the Defendants' scheme was unsuccessful in renegotiating the Lease or obscuring the correct land-owning Dos Anjos entities from the judgment. Under Massachusetts law, the "coercive effort" need not succeed. Rather, "the party targeted for pressure may resist, absorb its losses, and pursue its remedies under the statute." *Renovator's Supply, Inc.*, 72 Mass. App. Ct. at 430 (citing *Anthony's Pier Four, Inc.*, 411 Mass. at 462).

I am unpersuaded by the Defendants' argument that the Defendants' repeated misrepresentations and deceptions are absolved by the litigation privilege for the following reasons. At trial, the Defendants decided not to object based upon the litigation privilege when Majestic entered 93A Exs. 67-79, which consist of numerous examples of statements, pleadings, judicial admissions, sworn testimony, and affidavits in which agents of the Defendants assert that the Leased Premises was owned by the Dos Anjos LLCs. Further, the case the Defendants cite with respect to the litigation privilege is *Doe v. Nutter, McClennen & Fish*, 41 Mass. App. Ct. 137 (1996), in which the litigation privilege was applied to bar a defamation claim. In *Nutter*, the court limited the privilege, however, to claims for negligence, defamation, intentional infliction of emotional distress and violation of Massachusetts Civil Rights Act based on communications preliminary to litigation and during pendency of litigation. *Id.*, at 141. The privilege does not apply to the within claims for breach of contract and violations of G.L. c. 93A. Majestic entered into evidence Defendants' misrepresentations, as seen in Dos Anjos's and Pariseault's affidavits, (93A Exs. 69 and 71), in pleadings such as the Answer and Counterclaim (93A Ex. 70) for the purpose of establishing Majestic reasonably relied upon the Defendants'

representations that ownership was not in the record title holders but rather in the Defendant lessor Dos Anjos LLCs.

The Defendants' conduct "more than meets the standard of an 'unfair or deceptive act or practice' – even taking into account that both parties to the transaction were sophisticated business people." *Anthony's Pier Four, Inc.,* 411 Mass. at 475. By refusing to cooperate with Majestic in its permitting (Lease, ¶ 9), definition of the Leased Premises (*id.*, ¶ 1), and warranty of title (*id.*, ¶¶ 16(a)(ii) and 34(d)), the Defendants have violated G.L. c. 93A causing delay damages to Majestic that extend from February 12, 2019 until November 16, 2019, the date of the last permit application approval by Defendants.

In *Motsis v. Ming's Supermarket, Inc*., 96 Mass. App. Ct. 371 (2019), the Appeals Court affirmed a jury's finding, as well as the trial judge's adoption of the same in his separate findings under c. 93A, finding that a commercial landlord's failure to cooperate with its tenant in furtherance of a tenant's permit application process constituted breach of contract, breach of the covenant of good faith and fair dealing, and a violation of c. 93A warranting both specific performance, delay damages, doubling of the damages, and attorneys' fees and costs. In *Motsis*, the lease at issue required the landlord to cooperate with the tenant in effectuating repairs to the leased premises. Similarly, Majestic's expectations in the way of "cooperation," *i.e,* the signature of applications and honest disclosure of ownership, were reasonable.

Here, instead of cooperating, the Defendants either mistakenly or intentionally misled Majestic and the court as to actual ownership. Even once the record established true ownership, Defendants attempted to compel Majestic to take an attornment in lieu of an unencumbered fee simple interest in the Leasehold Premises. *See* Jury Ex. 2, ¶¶ 16(a)(ii) and 34(d). Indeed, the Defendants not only delayed the permitting process from February 2019 to November 16, 2019,

they used that time to attempt to extract additional concessions from Majestic. *See* 93A Exs. 49-50.

The Defendants, through Dos Anjos, willfully and knowingly committed the following unfair methods of competition and unfair and deceptive acts and practices in violation of G.L. c. 93A, §§ 2, 11:

> a. Providing a false warranty of title in the Lease at ¶ 16(a)(ii) and ignoring known contractual obligation to provide such a warranty.
>
> b. Repeatedly deceiving Majestic as to ownership of the Leased Premises, as described more fully above, including in sworn testimony in depositions, trial, and affidavits, as well as in pleadings and motions submitted not only to Majestic but also to the jury, the Superior Court in Hampden County, the Superior Court in Bristol County and the Appeals Court.
>
> c. Failing to correct incorrect filings the Defendant submitted to the Court as to ownership of the Leased Premises.
>
> d. Failing to correct incorrect findings made by the Court relying on the Defendants' misstatements, false pleadings, and false testimony as to ownership of the Leased Premises.
>
> e. Failing to correct the issue of ownership when Majestic relied upon the Defendants' misstatements as to ownership and listed the LLCs as owners in Majestic's municipal permitting applications. In this regard, the Defendants clearly violated known contractual obligation to "cooperate" with Majestic in its permitting as required by the Lease, ¶ 9, the covenant of good faith and fair dealing, and my Orders of January 28, 2019 and August 15, 2019
>
> f. Refusing to make its warranty of title "true and accurate" on the Land Delivery Date of April 1, 2019 as required under the lease, ¶ 34(d), by simply conveying the land to the Dos Anjos LLCs. In this regard, Defendants clearly ignored their known contractual obligation in an effort to avoid the judgment reaching the true Dos Anjos entity that owned the land.
>
> g. Failing to cooperate with Majestic to resolve the ownership problem when Majestic learned of and brought the issue to Defendants' attention in May and June of 2019, necessitating the Rule 60 litigation that was not resolved until the hearing on August 15, 2019. *See* 93A Exs. 80, 82.
>
> h. Instead of cooperating with Plaintiff by stipulating as to the correct ownership as later ordered by the Court, the Defendants used the ownership discrepancy "as a lever to obtain advantage for [Defendants] in relation to the [Plaintiff]" of an "extortionate

quality that gives it the rancid flavor of unfairness." *Atkinson*, 33 Mass. App. Ct. at 226.

i. In the first week of June, the Defendants possessed a chart of actual ownership and a list of beneficiaries of the Dos Anjos Realty Trusts. Rather than providing this information to Majestic so that it could correct its permits and rather than confirming that Majestic was listing the wrong owner, the Defendants attempted to negotiate with Majestic to improve the Lease from the Defendants' perspective. The Defendants submitted an attornment proposal to Majestic on behalf of only two of the Dos Anjos Realty Trusts. *See* 93A Ex. 50. An attornment or subordination is less than "fee simple" in the landlord as guaranteed by the Lease at ¶¶ 16(a)(ii) and 34(d). This would have negatively affected Plaintiff's other rights in the lease without consideration. For example, under the Lease, Majestic has the right upon "Landlord's Default" to assert "liens against Landlord's interest in the Premises." *See* Jury Ex. 2, ¶ 28. By converting the landlord from a landowner to an entity with no ownership interest in the land, the Defendants were improperly securing for themselves an undue benefit (protection from any liens) for the 23-40 year life of the Lease. *Id.* Accordingly, Majestic would be unduly deprived of its mechanism for redressing the Landlord's defaults. By offering the attornment or subordination (*see* 93A Ex. 50) the Defendants improperly attempted to shield the land from the jury's verdict and Court's judgment. Tr. Dec. 13, 2019, p. 136.

The actions by Dos Anjos and his agents on behalf of the Defendants constituted the "pattern of a breach of contract as a lever to obtain advantage" for the Defendants when the Defendants should have simply fixed the problem in line with fee simple ownership as promised by the Lease at ¶¶ 16(a)(ii) and 34(d). As set forth in my findings above, the Defendants used "time" against Majestic in an unfair and deceptive manner to excise the above contractual concessions.

The evidence supports a finding that the Defendants willfully and knowingly strung along Majestic to see what unwarranted benefits the Defendants could extract from Plaintiff such as contract improvements. Such conduct violates G.L. c. 93A as a matter of law. *See Full Spectrum Software, Inc. v. Forte Automation, Sys.,* 858 F.3d 666, 674 (1st Cir. 2017) ("one business's stringing along of another to the other's detriment" can violate G.L. c. 93A, § 11) (citing *Greenstein v. Flatley,* 19 Mass. App. Ct. 351, 358 (1985); and *Mass. Eye and Ear Infirmary v. QLT Phototherapeutics, Inc.,* 552 f.3d 47, 69-70 (1st Cir. 2009)). As it did so in

negotiating the Lease, the Defendants were fishing for a deal and leveraging the ownership issue to renegotiate the Lease or secure better terms for the Defendants. The Defendants' disingenuous offers went "beyond the toleration even of persons inured to the rough and tumble of the world of commerce," and so constituted a "stringing along" bargaining style that is, as a matter of law, in violation of M.G.L. c. 93A. *See Full Spectrum Software, Inc. v. Forte Automation Sys.*, 858 F.3d at 674; *Greenstein,* 19 Mass. App. Ct. at 358. Further evidence of the Defendants' unlawful intent is that after their stringing along failed and Plaintiff rejected the attornment, the Defendants refused to even discuss stipulating to what the Lease provided until the Court suggested such an outcome at the August 15, 2019 hearing. *See* 93A Exs. 54-57.

The overwhelming mass of the Defendants' misrepresentations far outweighs their argument that Majestic's confusion as to the true ownership served to either mitigate its damages or release the Defendants of liability. The Defendants' contemptuous rejection of Majestic's legitimate repeated requests for signatures necessary for permitting, standing alone, supports Majestic's claim for violations of G.L. c. 93A.

General Laws c. 93A provides for recovery of actual damages and attorney's fees. "Actual" damages under 93A are similar to compensatory damages in tort in that an injured party can recover all such damages proximately caused by the defendant's unfair or deceptive conduct. A 93A claim analogous to a tort-based recovery, as here, overrides any contractual defenses. *See Exhibit Source, Inc., v. Wells Avenue Business Center, LLC,* 94 Mass. App. Ct. 497, 502 (2018) (citing *Standard Register Co. v. Volton-Emerson, Inc.*, 38 Mass. App. Ct. 545 (1995)).

I am not persuaded by the Defendants' argument that there is no legal basis for an award of specific performance in addition to delay damages. I rejected this position each time that it has been advanced in the Defendants' motions. Recently, in the case of *Motsis v. Ming's*

Supermarket, Inc., 96 Mass. App. Ct. 371, 372 (2019), the Appeals Court of Massachusetts came to the same conclusion on similar facts in another commercial lease dispute between landlord and tenant. There, the Appeals Court held that the trial judge "reasonably could have concluded that [the breaching landlord] should be required both to perform the relevant obligations of the lease in the future and to pay damages caused by his previous failure to do so and for any period of delay in completing specific performance." *Ming's Supermarket, Inc.*, 96 Mass. App. Ct. at 379. The Court noted that a "party who seeks specific performance or an injunction may … be entitled to damages to compensate him for delay in performance.'" *Id.* at 378 (citing *Perroncello v. Donahue*, 448 Mass. 199, 205-206 (2007); Restatement (Second) of Contracts, § 378 comment d, at 230 (1981)).

Further, in *Ming's Supermarket, Inc.,* the Appeals Court had "no difficulty affirming the judge's conclusion that [the breaching landlord] violated G.L. c. 93A." *Id.*, at 380. The Appeals Court agreed with the trial judge that "conduct in disregard of known contractual arrangements and intended to secure benefits for the reaching party constitutes an unfair act or practice for c. 93A purposes" and decline[d] to disturb the judge's conclusion that [the breaching landlord] violated G.L. c. 93A." *Id.*, at 380-81 (citing *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 474 (1991); *Exhibit Source, Inc. v. Wells Ave. Business Ctr., LLC*, 94 Mass. App. Ct. 497, 501, 114 N.E.3d 993 (2018)).

Based on the Defendants' violations of G.L. c. 93A, Majestic "is entitled to multiple (not more than treble and not less than double) damages if [the breaching party] acted 'knowingly' or 'willfully' in violation of § 2." *Anthony's Pier Four, Inc.,* 411 Mass. at 475. A factor in my decision is that the Defendants ignored my Order of January 28, 2019, which included a recitation of the prohibition on knowingly violating contractual obligations, using a breach of

contract as a lever, and stringing along a party on the other side of a contract in search of extortionate advantages. Moreover, the Defendants ignored my cautionary reminder that:

> Should Majestic elect specific performance, …Majestic's delay damages of $175,000 per month will continue until such time as Defendants have complied with my orders relating to specific performance below.

Order, dated January 28, 2019, p. 23.

The Defendants argued that title is a matter of public record and Majestic was on record notice that title was in the name of the four Dos Anjos Realty Trusts not the LLCs so there is no harm resulting from Defendants' continued misrepresentation. The Defendants' argument lacks merit because it conflates record title with actual ownership. *See Davidson v. Stafford*, 210 Mass. 145, 146 (1911) (differentiating the concepts of the "record title" holder and the "real owner"). As discussed above, record title can be superseded by a private or unrecorded deed. Here, I note that the Defendants' reliance on *Lafata v. Lafata*, 65 Fed. R.D.3d, 260 (2006) is misplaced.

It was reasonable for Majestic to set aside the record title based upon the over two dozen examples, many of which in sworn testimony, affidavits, and pleadings to the Court, in which the Defendants notified Majestic that title was not in the record title holder but in the Dos Anjos LLCs and because the Lease stated in ¶ 34(d) that notwithstanding the current state of the record title, the Lease's warranty of title at ¶ 16(a)(ii) would be made true and accurate upon the Land Delivery Date of April 1, 2019 in any event.

My findings and rulings relative to 93A and damages are only bolstered by the Defendants' witnesses' (Dos Anjos, Pariseault and Atty. Manoogian) invocations of the privilege against self-incrimination and the attorney-client privilege, described in greater detail above, and upon which I am entitled and I have elected to draw adverse inferences against the Defendants. I

arrived at my Findings of Fact and Rulings of Law on Plaintiff's re-opened c. 93A claim and damages, as stated herein, independent of these adverse inferences. However, the existence of the adverse inferences adds tremendous and overwhelming weight to support my independent findings, rulings of law, and damages awards as described herein.

Having been warned by my previous Order of January 28, 2019, the Defendants improperly attempted to deceive Majestic as to the proper owners of the Leased Premises and, when exposed, refused to abide by known contractual obligations opting instead to attempt to renegotiate and extract from Majestic more favorable terms for the Defendants that were not in the original contract. See *Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc.*, 754 F.2d at 17-19. In a case of commercial extortion, such as herein, double damages are appropriate. See *Pepsi-Cola Metropolitan Bottling Co.* v. *Checkers, Inc.*, 754 F.2d at 17-19 (commercial extortion giving rise to c. 93A liability, and treble damages, where defendant withheld payment due under contract not because of dispute over liability or inability to pay but, rather, as "'wedge' against [plaintiff] 'to enhance [defendant's] bargaining power for more product.'").

ORDER

Judgment is to be amended on Count 5 of the Complaint to include additional delay damages for the period of February 12, 2019 until November 16, 2019, in the amount of $1,592,250 doubled to the amount of $3,184,500. Interest on such amount of $3,184,500 will run from the date of the Amended Judgment. Interest on the initial amount of $8,925,000 under my Order of January 28, 2019, will continue to run, separately, and as has been previously ordered.

Based upon Defendants' willful and knowing violations of G.L. c. 93A, Defendants are ordered to pay Plaintiff's attorneys' fees and costs, including amounts I have already ordered

pursuant to the jury's verdict in favor of Plaintiff on Count 3 of its Complaint, together with the amounts I have already ordered pursuant to my Order of January 28, 2019 as to costs associated with Count 5.

Plaintiff is to file and serve its Affidavit of Attorney's Fees and Costs within 15 days of the docketing of my Findings and Order. Defendants are to file their opposition thereto within 15 days of service of Plaintiff's Affidavit of Attorney's Fees and Costs.

April 30, 2020

/s/
MARK D MASON
Justice of the Superior Court