Copy

NOTIFY

#52513

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.



SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 98-5534-A

COMMONWEALTH OF MASSACHUSETTS

v.

FIRST ALLIANCE MORTGAGE COMPANY

RULING UPON DEFENDANT FAMCO'S EMERGENCY MOTION TO VACATE PRELIMINARY INJUNCTION

NOTICE SENT 9/23/98
M.D.S.
J.P.H.--B.R.F.G.
P.K.

## RULING

The court has considered the extensive factual materials and argument submitted by defendant First Alliance Mortgage Company ("FAMCO") in support of its motion to vacate the present preliminary injunction (limiting its charge of mortgage origination points to five) (two volumes of exhibits; excerpts from the deposition of David Cotney, Deputy Commissioner of the Division of Banks; affidavits of attorneys Stempler, Hermes, and of FAMCO chief operating officer Jeffrey Smith; and memorandum of law); and the opposition of the Commonwealth including appendices A through G (with affidavits from David Cotney, appendix B; assistant attorney general Kogut, appendix C; and professor Golann, appendix D).

For the following reasons I **DENY** the motion to vacate without prejudice to FAMCO's right to renew it upon the basis of further discovery results.

## REASONING

1. I apply to the updated factual materials the usual preliminary injunction criteria of Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616-22 (1980): (a) applicant's likelihood of success on the merits; (b) the actuality or threat of actionable irreparable harm to the applicant in the absence of injunctive protection; (c) the countervailing harm to the opposing party as a result of an injunction and in light of the probable merits; and (d) the involvement of a public interest, if any.

2. Merits. In the contest upon the present motion, the parties have trained their arguments upon the criterion of the ultimate likely merits as a matter of factual analysis: the question whether FAMCO through late November, 1998 was charging excessive mortgage loan origination points to Massachusetts borrowers in violation of G.L. c. 93A, §2(a) and 940 CMR 8.06(6) by reason of deviation from a measurable pertinent industry-wide standard.

(a) I have weighed carefully FAMCO's reasoning (i) that a relevant market for an industry standard should be the subprime pool of borrowers (those with

grade B credit ratings or less and therefore with greater risk for the lender); (ii) that the Division of Banks did not conduct an adequate survey, or did not report an adequate picture, of the industry-wide data for points charged by all Massachusetts mortgage lenders in the subprime market for calendar 1997; and (iii) that the analogous data now available for calendar 1998 are not natural or trustworthy market behavior because the Attorney General's enforcement of a cap of five origination points has artificially chilled lenders in place at lower point levels.

(b) I assume as accurate FAMCO's analysis of the calendar 1997 data showing (from the source of 207 annual reports of Massachusetts lenders) that 55 of 152 subprime lenders (the hypothetical relevant market or industry sector) originated some loans in excess of five points; and that 24 of those lenders originated more than 10% of these loans with five points or more; that 18 of them originated more than 20% of their loans at or above five points; and that 20 subprime lenders charged 10 points or more for certain loans (occasional loans rising to levels of 12, 13, 15, and 17 points). FAMCO memorandum at 9-10, exhibit volume I, section F. I appreciate also that origination points may work inversely with interest rates in certain loans (higher points are traded for a lower interest rate) (but for subprime borrowers that combination or inducement may prove dangerous. Golann affidavit at par. 8, opposition appendix D).

(c) These data may make the factual issue of an appropriate industry standard a closer contest. However, taken at face value to FAMCO, they do not dislodge the preliminary finding that origination points in excess of five deviate, or

exceed, a pertinent industry norm. They leave 97 of the 152 subprime lenders (or almost 63% of the pertinent industry sector) who have not charged five points or more. In these circumstances, the Commonwealth seems to have the better 1997 calendar year evidence upon the question of excess or deviation from a pertinent standard. [Even if (arguendo) Deputy Commissioner Cotney had not adequately consulted the 1997 statistics for his averments at the beginning of litigation in November, 1998, he could still turn out to be correct in his conclusions by luck, if not by knowledge. The test would be the objective reality, not the faulty perception of it.]

(d) The 1998 data (Commonwealth's pie charts not apportioned for the subprime market, attached hereto as appendices 1 and 2) more strongly favor the Commonwealth's definition of a maximum industry standard of five points. FAMCO reasons that the enforcement efforts have artificially depressed the point levels. That hypothesis may have some validity. If, as a matter of caution and fairness, we replace the 1998 data with the closest annual figures - the 1997 survey - we return to the same conclusion: that more than five origination points in the subprime market exceed the industry norm.

For these reasons, the Commonwealth maintains the probability of success upon the ultimate merits. As always, a preliminary injunction determination is an assessment of probability and not a finding of ultimate fact. See the affidavit of FAMCO consultant James D. Jones, dated November 23, 1998, pars. 2-13.

3. Irreparable harm. The requirement of irreparable harm in public welfare litigation is more relaxed if the government can make out a probability of a violation of a legal standard serving the public interest. If, as here, the Attorney General shows that the challenged conduct would violate a general law and diminish the public welfare, irreparable harm will be presumed for purpose of a preliminary injunction. Commonwealth v. Massachusetts CRINC, 392 Mass. 79, 89-90 (1984).

4. Countervailing harm. FAMCO has discontinued business in the Commonwealth and cannot resume it unless the point cap is permitted to rise to seven (affidavit of Jeffrey Smith at par. 4). That quality and quantity of harm are of course severe. However, I cannot weigh it in isolation from the probabilities of the merits. "What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits." Packaging Industries Group, Inc., supra at 647.

5. Public interest. The presumptive public interest lies in the enforcement of the statute and regulation until and unless FAMCO substantiates that they are functioning irrationally or unfairly in the circumstances of this case.

## CONCLUSION

Therefore, I must **DENY** the motion to vacate the preliminary injunction.

Mitchell J. Sikora, Jr.
Justice of the Superior Court

**DATED:** September 22 1999

C:\courts\sikora\MUS-com-FAMCO-ord.wpd