Issued 8.20.97

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 95-251-E

COMMONWEALTH OF MASSACHUSETTS

vs.

WINDSOR OF DRACUT, INC., JOHN N. MARAGANIS and GEORGE J. SPANEAS

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR JUDGMENT

The Commonwealth of Massachusetts ("Commonwealth"), through the Office of the Massachusetts Attorney General, brought this consumer protection action pursuant to G.L. c. 93A, § 4, against Windsor of Dracut, Inc., John N. Maraganis ("Maraganis") and George J. Spaneas ("Spaneas").

The Commonwealth has alleged in the First Cause of Action in its Complaint that the defendants committed unfair and deceptive practices in connection with the operation of the Windsor Mills Restaurant ("Restaurant") in Dracut, Massachusetts, by accepting advance payments for wedding receptions and other functions without disclosing to customers that the Restaurant was in danger of being sold at foreclosure, and by then failing to make the Restaurant available for the functions or to make refunds of the advance payments to the consumers after the restaurant had been closed, all in violation of G.L. c. 93A, §2. The Commonwealth has sought permanent injunctive relief against the defendants and

restitution for the consumers, together with civil penalties, its costs and reasonable attorneys fees.

The defendants Maraganis and Spaneas each denied the Commonwealth's allegations. After this action was commenced, Spaneas declared bankruptcy and the Commonwealth's claims against him were stayed. On May, 21, 1997, Windsor of Dracut, Inc. was defaulted for failure to appear and answer the Complaint.

This action was tried to the court, sitting without a jury, on May 21, 22, 23 and 27, 1997. The court heard testimony from twelve witnesses and received thirty eight exhibits in evidence. Upon consideration of the credible testimony of the witnesses and the exhibits presented by the parties, together with the oral arguments of counsel and post-trial submissions of counsel, the court makes the following findings of fact, rulings of law, and order for judgment in this action.

FINDINGS OF FACT

1. The defendant, Windsor of Dracut, Inc. ("WODI") was organized as a Massachusetts corporation on or about February 9, 1960. Exhibit 20. WODI did business as the Windsor Mills Restaurant ("the Restaurant") at 810 Merrimac Avenue in Dracut, Massachusetts since at least 1960, and operated the Restaurant as a restaurant, function, lounge and parking lot business.

2. The defendant Maraganis is an individual who resides at 70 Morris Street in Dracut, Massachusetts. Maraganis is a one-third owner, Director, Clerk and the registered agent of WODI. Exhibit 21. He was also the general manager of the Restaurant

and supervised the day-to-day operations of the Restaurant during all times material to this action. Maraganis became a part-owner and Clerk of WODI after his father, Nicholas J. Maraganis, died in 1992. Exhibits 28, 29 and 30.

3. The defendant Spaneas is an individual who resides at 32 Newhill Road, Methuen, Massachusetts. Spaneas is the part-owner and was the President, Treasurer and a Director of WODI. Exhibit 21. He is also the Trustee of the Span-Mara Realty Trust ("the Trust"). Exhibit 22.

4. WODI maintained its only office in the Restaurant and performed its day-to-day operations at the Restaurant.

5. On December 30, 1985, Spaneas, as Trustee, established the Trust. Exhibit 22. Spaneas, Spaneas' brother, Nicholas Spaneas, and Maraganis' father, Nicholas Maraganis, were beneficiaries of the Trust. Maraganis acquired a one-third beneficial interest in the Trust upon the death of his father in 1992. Exhibits 29 and 30. Also on December 30, 1985, WODI conveyed five parcels of land, including the land and buildings on and in which the Restaurant was located, to the Trust. Exhibit 23. WODI thereafter rented from the Trust the land and buildings in and on which the Restaurant was located, and WODI's monthly rental payments were the Trust's only source of income.

6. On July 24, 1987, the Trust granted a mortgage in the amount of one million dollars to the Bank of New England, N.A. with the statutory power of sale, consisting of the five parcels of land, including the land and buildings on and in which the

Restaurant was located, and the machinery, fixtures furniture and equipment at the Restaurant. Exhibit 24. The mortgage secured payment of a loan in the amount of one million dollars given by the Bank to the Trust.

7. In 1987, Maraganis became the General Manager of the Restaurant. He supervised all aspects of the Restaurant's business, hired and trained its managers and employees, set their wages and controlled the Restaurant's payroll. Maraganis paid himself approximately $35,000 per year, which he took out of the available cash in the cash registers at the Restaurant each week.

8. On October 27, 1988, WODI, by its President and Treasurer Spaneas, executed a one hundred thousand dollar promissory note payable to the Bank of New England, N.A. the proceeds of which were to be used by WODI as a line of credit. Exhibit 38.

9. The Federal Deposit Insurance Company ("FDIC") subsequently became the receiver of [New] Bank of New England, N.A., and also became the holder of the Note and mortgage from the Trust. RECOLL Management Corporation ("RECOLL") subsequently became the Attorney-in-Fact for the FDIC. Exhibit 36.

10. Commencing in or about 1991 or early 1992, the Trust failed to make the monthly payments due to the FDIC on its loan, and WODI failed to make the monthly payments due to the FDIC on its loan. WODI also ceased to make its monthly rental payments to the Trust. Maraganis knew of Trust's decision to cease making payments on its loan. He also knew of WODI's decisions to stop

making payments on its loan and on it lease from Trust.

11. After the FDIC began making demands for payment on its loans, the Trust and WODI retained attorney Sumner Darman ("Darman") to represent them in their efforts to secure new financing to purchase or pay off the FDIC loans. From September, 1991 until March, 1994, Darman also advised WODI not to make any rental payments to the Trust pending his efforts to settle the matter with RECOLL. However, all of Darman's settlement offers during that period were rejected by RECOLL as insufficient, or were met with counteroffers which the Trust and WODI rejected. Darman kept the Trust, WODI, Spaneas and Maraganis apprised of his negotiations with RECOLL and the FDIC.

12. On December 9, 1992, RECOLL advised the Trust and WODI that "a release of oil and/or hazardous materials (documented in the form of VOCs in groundwater) has occurred at the site" of the Restaurant, and that "as owner of the property site, you may have certain obligations and liabilities under state, federal and local law about which you should be aware." Exhibit 36. The Trust and WODI were also advised that wastewater effluent was being unlawfully discharged from the Restaurant into the Merrimac River.

13. On or prior to February 4, 1993, WODI, Maraganis and Spaneas were placed on notice that the FDIC had declared the loan to the Trust in default and had accelerated payments due under the loan. On February 4, 1993, the FDIC filed a Complaint to Foreclose the Mortgage in the Land Court by entry, possession and

exercise of the power of sale. Exhibit 27. On March 30, 1993, the Land Court entered judgment in favor of the FDIC and authorized the FDIC to make an entry and sell the property secured by the mortgage. Exhibit 27. On June 20, 1994, the FDIC notified the Trust that on or after July 13, 1994, it would foreclose on the mortgage by sale under its power of sale. Exhibit 37. On July 13, 1994, RECOLL made open, peaceable and unopposed entry on the property secured by the mortgage from the Trust, and on July 26, 1994, the FDIC purchased the property at a foreclosure sale. Exhibits 25 and 26. On that date, the FDIC closed the Restaurant.

14. Beginning at least as early as 1992, WODI and the Trust were experiencing other financial difficulties. WODI fell behind on its obligations to its vendors. The Trust fell behind in payment of its real estate taxes. WODI apparently did not pay required meal and beverage taxes to the Department of Revenue during 1992 and 1993. The Trust and WODI were liable for remediating the environmental problems that had been discovered on the Restaurant property. Although WODI was paying little if any rent to the Trust in 1992 and 1993, it continued to show net operating losses for each of those years. Exhibits 31, 32 and 33.

15. By early 1994, Darman concluded that neither the Trust nor WODI could obtain financing in order to remain in business. None of the owners of WODI, including Maraganis, were willing or had the ability to contribute any funds to pay off the loans or

to keep the business operating. Darman thereafter ceased to represent the Trust and WODI.

16. As General Manager of the Restaurant, Maraganis controlled all aspects of the Restaurant's operations. In connection with the Restaurant's function business, Maraganis and his staff, at his direction, entered into a written contract, known as a "Function Contract", with a consumer ("customer") under which the customer would reserve and rent the Banquet Room and/or other function rooms at the Restaurant for a wedding reception or other function. Exhibits 1, 2, 3, 5, 10, 12, 13 and 17. In the Function Contract WODI was identified as the Windsor of Dracut. It was not identified or described as a corporation.

17. Pursuant to the Function Contract, each customer was required to pay one or more deposits to WODI prior to the date scheduled for the function. Exhibits 4, 6, 7, 8, 9, 11 and 13. Maraganis deposited the deposit checks and cash into WODI's general checking account. That checking account was used to pay the Restaurant's bills and to operate the Restaurant's business.

18. The Function Contract further provided that: "It is agreed by the customer and the Windsor that, in the event of cancellation, all deposits are non-refundable. It is the customer's responsibility to notify the Windsor of cancellation in writing. Failure to do so will result in the Windsor retaining the right to collect any remaining balance in full." Exhibit 1. Under the terms of the Function Contract, all food and beverages for the function had to be purchased from WODI.

The Function Contract was signed by the Customer and by Maraganis or another authorized agent of WODI below the words "Windsor Mills Restaurant" on the contract.

19. After March 1, 1993, when Maraganis had knowledge that the FDIC was beginning the process of foreclosing on the Restaurant property, through July 1994, when the Restaurant closed, Maraganis continued to require payment of deposits by customers for wedding receptions and other function reservations.

20. During the period from early 1993 until the Restaurant closed, Maraganis did not inform the Restaurant's customers of its financial difficulties, including facts concerning the ongoing foreclosure proceedings. Further, all other employees and managers, under Maraganis' direction and supervision, did not inform customers of the dire financial condition of the Restaurant.

21. During the period from March, 1993 until the Restaurant closed, Maraganis also did not place any customer deposits into a separate escrow account, or take steps to otherwise separate or protect those deposits. Further, all other employees and managers, under Maraganis' direction and supervision, did not place any customer deposits in a separate escrow account.

22. Through the execution of a Function Contract and the required payment of a deposit, Maraganis and his staff represented to the customer that the Restaurant would hold the wedding reception or other function at the Restaurant at the date and time scheduled.

23. When the Restaurant closed, more than 70 customers who had paid deposits to WODI for wedding receptions or other functions were unable to hold their wedding receptions at the Restaurant, and the Restaurant failed to refund most of their deposits to its customers. When the Restaurant closed, these 70 customers lost a total of at least $45,000 in unreturned deposit funds. At this time, there were no funds available from WODI or the Trust to refund deposits.

24. Customers Nathalie Oullette, Susan Dunn, Christine Touma-Conway, Brenda Gonzales, Kathleen Victor, and Barbara Niles had each paid a deposit to WODI for her wedding reception. Each paid a deposit after Maraganis was aware that the Restaurant premises were in the process of foreclosure. None of these customers was informed that the Restaurant was facing foreclosure or having financial difficulties or that their deposits would not be refunded if the Restaurant closed. None of these customers was contacted by Maraganis or anyone else from the Restaurant when the Restaurant premises were ultimately closed. Maraganis did not provide any refunds of any deposits to any of these customers voluntarily.

25. Each of the customers would not have entered into a Function Contract with the Restaurant if she had been informed that the Restaurant was facing foreclosure and might close. Each of the customers would not have paid a deposit to the Restaurant if she had been informed that the Restaurant might close, and that she could lose her deposit as a result of the closure.

Nathalie Oullette

26. Nathalie Oullette met with Maraganis in May of 1993 and initially reserved several function rooms at the Restaurant for her wedding reception which was scheduled to take place on August 20, 1994. She signed three contracts related to the use of the function rooms, each different contract reflecting changes Ms. Oullette made for her wedding reception plans. The first contract was signed on May 28, 1993, the second was signed on October 13, 1993, and the third was signed on November 22, 1993. Exhibits 1, 2, and 3. The first contract was signed by Maraganis for WODI, the second and third contracts were signed by Lisa Reeves, an employee of WODI.

27. Ms. Oullette made total deposit payments of $1,900 to the Restaurant. She made payments in cash and by checks from May 28, 1993 until July 8, 1994, when she made a last payment of $400.

28. No one from WODI informed Ms. Oullette at any time that the Restaurant premises might be foreclosed upon, that the business was having financial difficulties, or that the premises might be closed prior to Ms. Oullette's planned wedding reception.

29. During July of 1994, Ms. Oullette learned from her father that the Restaurant premises were scheduled to be sold at a mortgage foreclosure sale later that month. Ms. Oullette went to the Restaurant on or about July 12, 1994, and was told by a woman there not to worry, that she would still be able to hold

her wedding reception at the Restaurant.

30. Ms. Oullette, however, later learned that the Restaurant had been sold at a foreclosure sale. She and her then fiancé went to the Restaurant again. Maraganis was present. Ms. Oullette demanded to know from Maraganis what had occurred. After Maraganis explained that the property had in fact been sold at a foreclosure auction, Ms. Oullette demanded to know why Maraganis had accepted the $400.00 payment she had made on July 8, 1994. In response, Maraganis gave Ms. Oullette a $400 cash refund. Ms. Oullette has not recovered the remaining $1,500 that she had paid to the Restaurant.

31. Ms. Oullette had to locate another place to have her wedding reception which was scheduled less than a month after she learned the Restaurant had closed. She was forced to pay additional sums of money to the new location, Ronnie's Steak House.

Karen Scanlon Dunn

32. Ms. Dunn wanted to use a function room at the Restaurant for her wedding reception which was scheduled to take place on April 22, 1995. She went to the Restaurant with her fiancé, John A. Dunn, on March 1, 1994. They met with Steven Swindells who identified himself as a manager. On that day, Ms. Dunn and Mr. Dunn decided that they would book several banquet halls at the Restaurant. The total cost of the function was approximately $5,000. They were required to sign a Function Contract on that date, and made a deposit of $200. Exhibits 5, 6

and 7.

33. On March 25, 1994, Ms. Dunn made a further deposit of $400. Exhibit 9. When she paid this second deposit, Ms. Dunn met Maraganis. In addition, Ms. Dunn had an additional $400 previously paid to the Restaurant by her sister, Deborah Dunn, credited to her account, for which she wrote a check to Deborah Dunn. Exhibit 8. The total deposit made by Ms. Dunn was $1,000.

34. No one from the Restaurant informed Ms. Dunn at any time that the Restaurant's premises might be foreclosed upon, that the business was having financial difficulties, or that the premises might be closed prior to Ms. Dunn's planned wedding reception.

35. During April of 1994, Ms. Dunn attended a dinner at the Restaurant and she talked briefly with Maraganis. Maraganis gave no indication to Ms. Dunn at that time that his business was in serious difficulty.

36. Ms. Dunn later learned from reading a local newspaper that the Restaurant had closed. No one from the Restaurant contacted her. She was not refunded her $1,000 deposit. Ms. Dunn ultimately held her wedding reception at the Lowell Elks club, and she paid additional sums for the use of that facility.

37. Had Ms. Dunn been informed that the Restaurant was facing foreclosure, that there was a possibility of a foreclosure sale that would result in the restaurant's closing, that the Restaurant was in a financially poor condition, and that she might lose her deposit funds, she would not have signed a

Function Contract with the Restaurant and she would not have given the Restaurant a deposit.

38. Ms. Dunn initiated a small claims action against Maraganis. She was awarded a judgment in the sum of $1019, but she has not recovered any portion of that judgment.

Christine Touma-Conway

39. Christine Touma-Conway decided to use a function room at the Restaurant for her November 6, 1994 wedding reception. On March 5, 1994, she went to the Restaurant with her fiancé, Brian Conway. She met with banquet manager Nancy Michaud, and they discussed Ms. Touma-Conway's planned wedding reception, including the menu she wished to have, the number of people who would be present, and the prices.

40. On March 5, 1994, Ms. Touma-Conway booked the entire banquet hall for the 250 guests she planned to have at her wedding reception. She signed a Function Contract on that date and paid an initial deposit of $400. Exhibits 10 and 11. On April 7, 1994, she made an additional deposit of $300, and on May 27, 1994, she made a final deposit payment of $300. Exhibit 11. Thus, Ms. Touma-Conway made a total deposit payment of $1,000.

41. No one from WODI informed Ms. Touma-Conway at any time that the Restaurant's premises might be foreclosed upon, that the business was having financial difficulties, or that the premises might be closed prior to Ms. Touma-Conway's planned wedding reception.

42. Ms. Touma-Conway learned from her florist in June of

1994 that the Restaurant was having financial problems, and on June 21, 1994, she saw an article in the Lowell Sun which stated that the the Restaurant was facing a foreclosure sale. Because of the florist's statements and the Lowell Sun article, Ms. Touma-Conway called the Restaurant, and spoke with Lisa Reeves. Ms. Touma-Conway sought to cancel her contract with the Restaurant and to obtain a refund of her deposit. Ms. Reeves, however, informed Ms. Touma-Conway that the deposit was non-refundable, and that, in any event, everything was expected to be worked out despite the scheduled foreclosure sale. Ms. Touma-Conway then spoke with Maraganis and demanded the return of her deposit. Maraganis did not provide Ms. Touma-Conway with a refund.

43. Ms. Touma-Conway filed a small claims court action, and received a judgment for $1,000, but she did not obtain payment on the judgment.

44. Had Ms. Touma-Conway been informed that the Restaurant was facing foreclosure, that there was a possibility of a foreclosure sale that would result in the Restaurant's closing, that the Restaurant was in a financially poor condition, and that she might lose her deposit funds, she would not have signed a Function Contract with the Restaurant and she would not have given the Restaurant a deposit.

Brenda Gonzales

45. Brenda Cintron Gonzales was planning to be married on July 8, 1995. On February 19, 1994, she went to the Restaurant

with her fiancé, Angel Gonzales, to see about booking a function room there. They met with Nancy Michaud. On March 4, 1994, they returned to the Restaurant and Ms. Gonzales signed a contract to reserve function rooms for their wedding reception. Exhibit 12. Ms. Gonzales paid a deposit of $200. On May 16, 1994, she paid a second deposit of $800.

46. No one from the Restaurant informed Ms. Gonzales at any time that the Restaurant's premises might be foreclosed upon, that the business was having financial difficulties, or that the Restaurant might be closed prior to Ms. Gonzales' planned wedding reception.

47. In June of 1994, Ms. Gonzales learned from a friend that the the Restaurant was scheduled for a foreclosure sale. In response, she called the Restaurant and asked to speak to the person in charge. Maraganis then spoke with her. He said that the Restaurant was renting the property and that its landlord was being foreclosed upon, that she should not worry, that they were trying to buy the property at the sale, and that she should call back in two weeks.

48. Ms. Gonzales called and spoke with Maraganis about two weeks later. He again told her not to worry, and to call in another two weeks. Ms. Gonzales did so, but this time got no answer at the Restaurant. She went to the Restaurant, which was closed. A note was posted on the door directing persons to contact an attorney. Ms. Gonzales sought to do so, but no one at the attorney's office called her back. Ms. Gonzales never

received a refund of her deposit from the Restaurant.

49. Had Mrs. Gonzales been informed that the Restaurant was facing foreclosure, that there was a possibility of a foreclosure sale that would result in the Restaurant's closing, that the Restaurant was in a financially poor condition, and that she might have lose her deposit funds, she would not have signed a Function Contract with the Restaurant and she would not have given the Restaurant a deposit.

Kathleen Victor

50. Kathleen Victor was planning to be married on November 5, 1994. As a part of her wedding plans, she contacted the Restaurant in December of 1993 about using function rooms at the Restaurant.

51. On February 18, 1994 Ms. Victor called the Restaurant again and spoke with Lisa Reeves. Ms. Victor discussed her wedding reception plans over the telephone with Ms. Reeves. On February 28, 1994, she went to the the Restaurant and met with a woman she knew only as Stephanie. Ms. Victor executed a Function Contract on that date and provided a $1,000 deposit check. The total cost of the contract was expected to be $2,100. (KV.)

52. No one from the Restaurant informed Ms. Victor at any time that the Restaurant's premises might be foreclosed upon, that the business was having financial difficulties, or that the Restaurant might be closed prior to Ms. Victor's planned wedding reception.

53. On July 29, 1994, Ms. Victor learned that the

Restaurant had closed from a news article published in the Lawrence Eagle Tribune. No one from the Restaurant had contacted her to inform her of the closing, and no one from the Restaurant voluntarily refunded her deposit.

54. Ms. Victor filed a small claims action against Maraganis, and sought judgment in the sum of $1,500. The small claims court entered a judgment by default and scheduled follow-up status conferences to determine if the judgment was being paid. Eventually, through his attorney, Maraganis paid Ms. Victor nearly $1,500, required her to sign a release, and then filed a stipulation of dismissal.

55. Had Ms. Victor been informed that the Restaurant was facing foreclosure, that there was a possibility of a foreclosure sale that would result in the Restaurant's closing, that the Restaurant was in a financially poor condition, and that she might have lost her deposit funds, she would not have signed a Function Contract with the Restaurant and she would not have given the Restaurant a deposit.

Barbara Brown Niles

56. Barbara Brown Niles and her fiancé, Scott Niles, went to the Restaurant on March 24, 1994 to reserve a function room for their wedding reception, which was planned for October 7, 1995. They met with Maraganis who identified himself as the general manager and part owner of the business. Maraganis informed them that no space was available on that date, but that October 8, 1995 was available.

57. Ms. Niles had prepared a list of questions, and she asked Maraganis several questions regarding the financial health of the Restaurant. Ms. Niles specifically asked Maraganis whether the Restaurant was financially secure, and he assured her that it was. Ms. Niles, in order to be sure, asked Maraganis that question again, and received from Maraganis the same response. She then asked if there was any reason, barring a fire, why the Restaurant might not be able to host her wedding reception on October 8, 1995. Maraganis answered no.

58. Before signing a contract with Maraganis, Ms. Niles returned to the Restaurant on April 7, 1994 to see how it looked when decorated. She again met with Maraganis and again asked him about the financial security of the Restaurant. Maraganis again assured her that she had nothing to worry about. Ms. Niles trusted Maraganis and relied on his representations.

59. On April 7, 1994 she and Scott Niles signed a Function Contract and paid a deposit of $500. Exhibit 17. On May 14, 1994, she paid an additional $500 deposit, and received a receipt from Steven Swindells, a manager at the Restaurant. Exhibit 18.

60. At the end of June 1994, Ms. Niles learned that the Restaurant was scheduled to be sold at a foreclosure auction. On June 26, 1994, she went to the Restaurant and spoke with Maraganis. She demanded the return of her deposit, but Maraganis assured her that the restaurant would work out the financial problems before the schedlued auction. He then said that in a worst case scenario, other area restaurants would honor the

Function Contract.

61. On July 14, 1994, Ms. Niles learned that the Restaurant had closed. No one from the Restaurant contacted her. No one from the Restaurant offered her a refund, nor did she ever receive a refund. No area restaurant honored Ms. Niles' Function Contract. She was forced to pay an additional $3,000 to have her wedding reception at the Knights of Columbus facility in Tewksbury.

62. Had Ms. Niles been informed that the Restaurant was facing foreclosure, that there was a possibility of a foreclosure sale that would result in the Restaurant's closing, that the Restaurant was in a financially poor condition, and that she might lose her deposit funds, she would not have signed a Function Contract with the Restaurant and she would not have given the Restaurant a deposit.

63. Maraganis currently operates a catering and restaurant business known as Nick's Deli in Salem, New Hampshire, a town that abuts the Massachusetts border. At Nick's Deli, Maraganis currently provides catering services, including catering to Massachusetts residents.

RULINGS OF LAW

An individual is not immunized as an officer and director of a corporation for the acts he is alleged to have committed personally. Nader v. Citron, 372 Mass. 96 (1977). Corporate officers may be held liable for their participation in unfair and

deceptive practices. Id. In the present case, the Commonwealth seeks to hold Maraganis personally liable for certain allegedly unfair or deceptive acts or practices in which he and WODI were engaged relating to the execution of Function Contracts with customers and the receipt of deposits from customers.

The evidence in this case establishes that from at least February 1993, when the FDIC filed its complaint to foreclose the Trust's mortgage, through July 1994, when the FDIC held the mortgage foreclosure sale, Maraganis knew that the Restaurant's premises could be foreclosed on, and that the Trust, WODI and Maraganis could lose control of the Restaurant's premises. See, e.g., G.L. c. 244, §14, and 28 Massachusetts Practice Series, §§ 10.6 - 10.13. Further, Maraganis knew that the Trust and WODI were experiencing progressively more serious financial difficulties, and he knew that the Trust's attempts to avoid foreclosure proceedings were proving unsuccessful. Finally, Maraganis failed to disclose to customers, or to make clear to them on the Function Contracts or on the receipts for their deposits, that they were dealing with a separate corporation, WODI. He also co-mingled the customers' deposits with the operating revenues of the Restaurant, and he even paid himself a salary from cash, including cash deposits given on Function Contracts, that was available in the Restaurant's registers each week.

Since Maraganis was the General Manager of the Restaurant, in charge of all of the Restaurant's operations and its function

business, and since Maraganis was responsible for the Function Contracts and the receipt of customer deposits on those contracts, he may be found personally liable for violations of G.L. c. 93A, §2(a), and, as noted above, he will not be "immunized as an officer and director of a corporation for the acts he is alleged to have committed personally." Nader v. Citron, 372 Mass. 96, 102 (1977). See also, Standard Register Co. v. Bolton-Emerson, Inc., 38 Mass. App. Ct. 545, 550-551 (1995) ("Although acting within the scope of their authority as officers . . . , [the defendants] remain personally liable for their own misrepresentations made to . . . [the plaintiff] in violation of G.L. c. 93A, §11.")

Since Maraganis also personally directed other employees at the Restaurant about the execution of Function Contracts and the taking of deposits, Maraganis may also be found liable for any violations of G.L. c. 93A, §2(a) that arose from Function Contracts executed by those employees or deposits taken by those employees. Id. Further, Maraganis may be found liable for any unfair or deceptive acts or practices of any employees under his supervision under traditional notions of agency and employment law because the employees, in the fulfillment of their duties as to reserving function facilities, were acting within the scope of their employment. See, e.g., Wang Laboratories, Inc. v. Business Incentives, Inc., 398 Mass. 854, 859-60 (1986) ("To determine whether an employee's conduct is within the scope of his employment for purposes of employer liability under G.L. c. 93A,

we may appropriately be guided by a consideration of the factors relevant to scope of employment determinations bearing on the imposition of vicarious liability on employers for the tortious conduct of their employees.")

Maraganis may be held liable under G.L. c. 93A, §2(a) if he failed to disclose to customers, or to direct his employees to disclose to customers, "any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction" in violation of 940 CMR §3.16(2), a regulation adopted by the Attorney General pursuant to G.L. c. 93A, §2(c). The Attorney General's Chapter 93A regulations have the force of law and are accorded the same deference as statutes. Purity Supreme, Inc. v. Attorney General, 380 Mass. 762, 772 (1980).

Customers who had signed Function Contracts with Maraganis or others under his direction and supervision, testified that if they had been informed of any pending mortgage foreclosure sale, of the potential for the Restaurant's premises to close, and/or of the financial precariousness of the Restaurant's business, they would not have entered into those Function Contracts with the Restaurant or paid the Restaurant a deposit. Thus, by failing to make these disclosures to customers, Maraganis violated 940 CMR §3.16(2). See, Sargeant v. Koulisas, 29 Mass. App. Ct. 956 (1990) (rescript) (failure to make a disclosure as to the poor condition of certain restaurant equipment in connection with a sale of a restaurant business was a violation of the regulation); Heller v. Silverbranch Construction Corp.,

376 Mass. 621, 626-7 (1975).

Further, by failing to make such disclosures, Maraganis engaged in conduct that is deceptive under G.L. c. 93A, §2(a). Purity Supreme, Inc. v. Attorney General, 380 Mass. 762, 777 (1980) ("A practice may be 'deceptive' if it 'could reasonably be found to have caused a person to act differently from the way he otherwise would have acted'" [cites omitted]). See also, Bump v. Robbins, 24 Mass. App. Ct. 296, 311 (1987). Moreover, to the extent that Maragnis may have acted without bad intentions or may have relied in good faith on Darman, such actions are not defenses to a determination that Maraganis engaged in deceptive practices pursuant to G.L. c. 93A, §2(a). See, e.g., FTC v. Army Travel Service, Inc., 875 F. 2d 564, 575 (7th Cir. 1989), cert. denied, 493 U.S. 954 (1989) ("the blessing of an attorney did not make the telemarketing scripts truthful. Obtaining the advice of counsel did not change the fact that the business was engaged in deceptive practices. . . . [R]eliance on advice of counsel was not a valid defense on the question of knowledge; counsel could not sanction something that the defendants should have know was wrong.") See also, Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1368 (11th Cir. 1988), cert. denied, 488 U.S. 1041 (1898) ("Orkin's reliance upon legal advice is simply not germane to the question whether Orkin's conduct was unfair within the meaning of section 5 [of the Federal Trade Commission Act]").

Each time Maraganis was asked to respond to specific

questions about the state of his business, including specific questions asked in June and July of 1994 about the scheduled foreclosure sale, Maraganis violated G.L. c. 93A by making statements that constituted at least negligent misrepresentations. See, Glickman v. Brown, 21 Mass. App. Ct. 229, 235 (1985), *review denied*, 396 Mass. 1106. In Glickman, the Appeals Court stated:

> "One purpose of c. 93A is to provide a 'more equitable balance in the relationship of customers to persons conducting business activities.' Commonwealth v. DeCotis, 366 Mass. 234, 238 (1974). Sellers are obviously in a better position to evaluate the truth of their advertising than are customers or other purchasers. While sellers may expound upon the virtues of their products, hoping to de-emphasize their disadvantages, they may not affirmatively misrepresent the truth if they know it. [Citation omitted.] We think it follows that sellers should not be allowed to misrepresent the truth simply because they have not made reasonable efforts to ascertain it. We hold (if there were any doubt about it) that a negligent misrepresentation of fact the truth of which is reasonably capable of ascertainment is an unfair act or practice within the meaning of c. 93A, §2(a)."

By at least March of 1994, when Darman ceased representing the Trust and WODI, Maraganis knew -- or could have easily determined from Darman, Spaneas, or representatives of the FDIC -- that the Restaurant's premises were actually going to be foreclosed on in July of 1994, and he violated G.L. c. 93A when he made representations to the contrary.

From at least March of 1993 until the foreclosure sale of

July 1994, if Maraganis were determined not to make disclosures to customers as to the ongoing foreclosure proceedings or, more generally, as to the poor financial condition of his business, then he could have and should have either placed the customers' deposits into an escrow account, or otherwise found a means of guaranteeing refunds to customers of the deposits that they had made. By failing to disclose to customers that the Restaurant's premises were on the verge of foreclosure, and that the Restaurant might close as a result of a foreclosure sale, Maraganis violated G.L. c. 93A, §2(a) each time that the Restaurant entered into a Function Contract with a customer whose function was scheduled to occur after July 13, 1994.

Similarly, By failing to disclose to customers that the Restaurant's premises were on the verge of foreclosure, and that the Restaurant might close as a result of a foreclosure sale, Maraganis violated G.L. c. 93A, §2(a) each time the Restaurant accepted deposits from customers for functions to be held at the Restaurant after the scheduled foreclosure date.

Moreover, each time Maraganis entered into a Function Contract with a customer, Maraganis misrepresented the ability of the Restaurant to fulfill its obligations under the Function Contract, in violation of Chapter 93A, §2(a). By the same token, each time Maraganis accepted a customer's deposits without placing such deposits into an escrow account, he violated G.L. c. 93A, §2(a).

The court concludes that Maraganis is liable to each

customer from whom he accepted a deposit after March 1, 1993 and through July 26, 1994 with respect to a function that was scheduled to occur after July 13, 1994, and as to which function he or WODI has failed to make a complete refund of the deposit. G.L. c. 93A, §4. Maraganis knew or should have known that entering into Function Contracts with customers and accepting their deposits without either disclosing the financial state of the Restaurant or placing their deposits into a protected escrow account violated G.L. c. 93A.

Finally, since Maraganis is presently operating a restaurant and catering business in New Hampshire that is similar to the business he owned and operated as Windsor of Dracut, Inc., and since at least a portion of his business is likely to involve Massachusetts residents, he will be permanently restrained and enjoined from committing these or similar unfair or deceptive acts or practices in violation of G.L. c. 93A, §2. Maraganis will also be required to pay to the Commonwealth a civil penalty of $2,000. However, upon consideration of all the facts and circumstances of the action, and in the exercise of its discretion, the court will not require Maraganis to pay the Commonwealth its costs of investigation and litigation, including reasonable attorneys' fees, incurred in this action.

ORDER FOR JUDGMENT

Upon consideration of the foregoing findings of fact and rulings of law, it is ORDERED that judgment shall enter in favor of the Commonwealth against John Maraganis on the First Cause of

Action of the Complaint. It is further ORDERED that John Maraganis is permanently restrained and enjoined from:

1. Misrepresenting his ability to honor "function Contracts" or similar agreements regarding restaurant function services between himself and any customer in violation of G.L. c. 93A, §2(a) and 940 CMR §3.05;
2. Failing to disclose to customers or prospective customers of his restaurant function services any facts, the disclosure of which may have influenced the customer or prospective customer not to enter into "Function Contracts" or similar agreements regarding any restaurant function services between himself and the customer; and from
3. Failing to disclose to customers or prospective customers of his restaurant function services and facts, the disclosure of which may have influenced the customer or prospective customer not to pay a deposit or deposits on any restaurant function services between himself and the customer.

It is further ORDERED that John Maraganis shall make full and complete restitution to each and every person who executed a Function Contract with and paid a deposit or deposits to John Maraganis or to Windsor of Dracut, Inc., doing business as the Windsor Mills Restaurant, for a function that was scheduled to be held at the Restaurant on or after July 13, 1994, and as to which the person has not yet received a full refund of that deposit,

provided that the Commonwealth, within 180 days of the date of this order, shall present to John Maraganis and the court, sufficient evidence by which the court may determine each person to whom any such payment is due and the amount of each such payment.

It is further **ORDERED** that John Maraganis shall pay to the Commonwealth a civil penalty in the amount of $2,000, pursuant to G.L. c. 93A, §4.

Peter M. Lauriat
Justice of the Superior Court

Dated: August 20, 1997